

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

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Elizabeth A. Brown
Clerk of Supreme Court

OMNI FINANCIAL, LLC, a foreign limited
liability company Appellant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company;

Respondent.

No.: 82028

Eighth Judicial District Court
Case No: A-17-757061-C
(Honorable Richard Scotti)

**JOINT APPENDIX
Volume VI
(JA001251 – JA001500)**

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Dated this 8th day of April 2021.

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By: /s/ Brian J. Pezzillo

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2021, a true and correct copy of the foregoing **JOINT APPENDIX (Volume VI)** was served by the following method(s):

XXX BY ELECTRONIC MEANS: by electronically filing and serving with the court's vendor pursuant to NRAP 14(f).

/s/ Anya Ruiz

An employee of Howard & Howard Attorneys PLLC

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4828-9358-1540, V. 1
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1 Nevada.

2 5. Christopher Morgando is an individual that at all times relevant resided in Clark
3 County, Nevada.

4 6. Matthew Farkas is an individual that at all times relevant resided in Clark County,
5 Nevada.

6 7. Doe Defendants II through X are presently identified as individuals, corporations,
7 or other business entities whose which upon information and belief are associated with,
8 employed by, controlled by and/or affiliated with one or more of the Defendants and/or other
9 Doe Defendants. Defendant Doe I is the borrower, but cannot be named as a party at this time
10 until Omni pursues and exhausts all real property pledged as security by borrower as provided in
11 NRS 40.430. As such, the one action rule prohibits naming said borrower as a defendant in this
12 action at this time. Upon exhaustion of the real property collateral, Omni will seek leave to
13 amend to name the true borrower.

14 **GENERAL ALLEGATIONS**

15 8. On May 27, 2014, First 100 and Omni entered into a Loan Agreement (as
16 amended and supplemented, the "Loan Agreement"), under which Omni would loan First 100 a
17 maximum of \$5,000,000 (the "Loan") to finance purchases of HOA receivables.

18 9. As of today, the current Loan balance (including principal, interest, and fees) is
19 approximately \$4.1 million.

20 10. The Loan Agreement was amended and supplemented by the parties on several
21 occasions.

22 11. As part of that Loan, First 100 (as obligor) executed a Promissory Note dated
23 May 27, 2014 in favor of Omni (as payee) (the "Promissory Note").

24 12. The Omni Loan is secured by a Security Agreement dated May 27, 2014 (the
25 "Security Agreement"), wherein First 100 (as pledgor) pledged as collateral all of its personal
26 property to Omni (as pledgee), "whether such property is now existing or hereafter created,
27 acquired or arising," and including accessions and proceeds.

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1 13. The Loan is further secured by deeds of trust and mortgages executed by First 100
2 (as trustor or mortgagor) in favor of Omni (as beneficiary or mortgagee), encumbering various
3 parcels in Nevada and other states (the "Deeds of Trust").

4 14. The Loan was guaranteed by 1st One Hundred Holdings LLC, Jay Bloom,
5 Matthew Farkas, Christopher Morgando, and Carlos Cardenas, as joint and several guarantors
6 (the "Guarantors"), with each of them executing a separate Payment Guaranty dated May 27,
7 2014 for Omni, guaranteeing all of First 100's obligations under the Loan, including repayment
8 (collectively, the "Payment Guaranties").

9 15. In the Payment Guaranties, each of the Guarantors unconditionally guaranteed
10 and promised to pay Omni, on demand, all amounts due on the Loan Agreement, Promissory
11 Note, and Deeds of Trust.

12 16. First 100 has defaulted on its obligations under the Loan and has failed to repay
13 the Loan as agreed.

14 17. Despite their obligations under the Payment Guaranties, the Guarantors have not
15 repaid the Loan as agreed.

16 **FIRST CAUSE OF ACTION**

17 **(Breach of Contract)**

18 18. Omni realleges and incorporates by reference the allegations of Paragraphs 1
19 through 17 of the Counterclaim and Third Party Complaint as if fully set forth herein.

20 19. The Payment Guaranties are valid and enforceable contracts.

21 20. Omni fully performed or was excused from performing all of its obligations under
22 the Loan Agreement, Promissory Note, Security Agreement, Payment Guaranties, and Deeds of
23 Trust (collectively the "Contracts").

24 21. 1st One Hundred Holdings LLC, Jay Bloom, Matthew Farkas, Christopher
25 Morgando, and Carlos Cardenas breached the Contracts by failing and refusing to perform their
26 obligations as Guarantors, including without limitation failing to repay the Loan as agreed.

27 22. Omni has been damaged as a result of the Guarantors' breaches in an amount in
28

excess of \$75,000.00.

23. Pursuant to the Contracts, Omni is entitled to recover reasonable attorneys' fees and costs incurred.

SECOND CAUSE OF ACTION

(Declaratory Relief)

24. Omni realleges and incorporates by reference the allegations of Paragraphs 1 through 23 of the Counterclaim and Third Party Complaint as if fully set forth herein.

25. The Security Agreement executed by First 100 and Omni defines the collateral pledged to Omni as security for the Loan as "all of Borrower's present and future right, title and interest in and to any and all of the personal property of Borrower, whether such property is now existing or hereafter created, acquired or arising and wherever located from time to time."

26. Pursuant to the Security Agreement, Omni took a valid, perfected, first-priority security interest in all of First 100's personalty acquired in the future, including without limitation all HOA receivables acquired by First 100 after May 27, 2014.

27. On May 29, 2014, Omni filed UCC-1 financing statements with both the Florida Secretary of State and Nevada Secretary of State to evidence its security interest in all of First 100's personal property.

28. Like the Security Agreement, those UCC-1s describe the secured collateral broadly:

"COLLATERAL" SHALL MEAN ALL OF BORROWER'S ***PRESENT AND FUTURE RIGHT***, TITLE AND INTEREST IN AND TO ***ANY AND ALL OF THE PERSONAL PROPERTY OF BORROWER***, WHETHER SUCH PROPERTY IS ***NOW EXISTING OR HEREAFTER CREATED, ACQUIRED OR ARISING*** AND WHEREVER LOCATED FROM TIME TO TIME, INCLUDING WITHOUT LIMITATION: (I) ACCOUNTS; CHATTEL PAPER, INCLUDING ELECTRONIC CHATTEL PAPER; (II) THE COMMERCIAL TORT CLAIMS IDENTIFIED ON "SCHEDULE A" HERETO; (IV) DEPOSIT ACCOUNTS; (V) DOCUMENTS; (VI) EQUIPMENT; (VII) FIXTURES; (VIII) FARM PRODUCTS; (IX) GENERAL INTANGIBLES; (X) GOODS; (XI) INSTRUMENTS; (XII) INVENTORY; (XIII) INVESTMENT PROPERTY; (XIV) LETTER-OF-CREDIT RIGHTS; (XV) PAYMENT INTANGIBLES; (XVI) SUPPORTING OBLIGATIONS; (XVII) ***PROCEEDS FROM THE***

COLLECTION OF HOMEOWNER ASSOCIATION RECEIVABLES/ INCLUDING/ BUT NOT LIMITED TO THE RECEIVABLE OF POINCIANA HOMEOWNERS ASSOCIATION; AND (XVII) TO THE EXTENT NOT OTHERWISE INCLUDED/ ALL ACCESSIONS TO AND PROCEEDS AND PRODUCTS OF THE FOREGOING.

(Emphasis added). Importantly, the express language of that UCC-1 also includes after-acquired personal property and expressly references the Poinciana HIOA receivables.

29. On April 1, 2016, as required by the UCC, Omni issued a Notification of Disposition of Collateral of Personal Property of First 100 (the "UCC Sale Notice").

30. Omni sent out the UCC Sale Notice on April 1, 2016.

31. The notice was intended to give First 100 eleven (11) days' advance notice of the sale, but because the Court postponed the sale, First 100 wound up with fifty-four (54) days' advance notice of the sale.

32. The UCC says 10 days' advance notice is presumptively reasonable. NRS 104.9612.

33. Omni sent out the UCC Sale Notice by certified mail, though NRS 104.9611 contemplates any delivery method, including regular mail.

34. Omni sent the UCC Sale Notice to First 100, the Guarantors, all junior creditors of record, current and potential First 100 judgment creditors, the IRS, one or more former First 100 executives, and the Association of Poinciana Villages ("APV").

35. The UCC only requires a creditor to deliver notification to the debtor, guarantors, and creditors who filed a financing statement. NRS 104.9611.

36. The UCC Sale Notice divided the collateral into eight specified auction lots.

37. To further ensure commercial reasonableness, the UCC Sale Notice was advertised in the: (a) *Las Vegas Review-Journal*; (b) *Nevada Legal News*; (c) *Orlando Sentinel*; and (d) *Poinciana Pioneer* (i.e., APV newsletter).

38. On May 25, 2016, Omni conducted a UCC foreclosure sale of the personal property pledged by First 100 as collateral securing the Loan, as described in the UCC Sale Notice.

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1 39. The UCC foreclosure sale was attended by (i) Omni (Mr. Boone) and its counsel
2 (Mr. Gardberg); (ii) PrenPoinciana (Mr. Zimmerman) and its counsel (Mr. Miltenberger); (iii)
3 First 100 (Mr. Bloom) and its counsel (Mr. Gutierrez); (iv) Kal-Mor and GFY (Mr. Darroch) and
4 their counsel (Mr. Nahabedian); and (v) Chris Hardin, a principal in SFR Investments, one of
5 First 100's chief competitors in processing HOA lien portfolios.

6 40. The auctioneer (Mr. Gardberg) stated that as of the sale, no person or entity had
7 "alleged any legal defect in the contents, timeliness, or delivery method" of the UCC Sale
8 Notice.

9 41. The auctioneer asked everyone in attendance if they knew if any creditor had been
10 incorrectly omitted from the notification process. No one responded.

11 42. At the May 25th sale, the auctioneer gave the floor to First 100 to "provide bidders
12 with a short statement containing additional information regarding the collateral that might be
13 helpful and relevant to ensure a commercially reasonable sale," such as information regarding
14 the type of assets, quantity of assets, recent appraisal information, and so on. First 100 refused to
15 provide information.

16 43. At the May 25th sale, the auctioneer asked First 100 if it would consent to the
17 disclosure of the sworn balance sheet which First 100 filed with the Court under seal on January
18 26, 2016, and which gave approximate values for each auction lot. First 100's counsel
19 responded, "absolutely not."

20 44. None of the persons and entities present at the auction (other than Omni)
21 submitted a bid on any lots.

22 45. Omni was therefore the prevailing bidder in all eight sales.

23 46. Pursuant to the UCC, Omni is now the owner of all personal property sold at the
24 May 25, 2016 UCC foreclosure sale, and Omni is entitled to absolute possession and control
25 over all such assets.

26 47. A justifiable controversy now exists between Omni, on the one hand, and First
27 100 and GFY, on the other hand, pursuant to NRS 30.010 et seq. Such controversy exists where
28

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1 a claim of right is asserted against one who has an interest in contesting the claim of right.

2 48. Omni has a legally protectable interest in prosecuting this claim, and Omni's
3 interest is adverse to the interests of First 100 and GFY.

4 49. The issues involved in this controversy are ripe for judicial determination.

5 50. The Court has the power to declare the rights, status and other legal relationships
6 between Omni, on the one hand, and First 100 and GFY, on the other hand, relating to the May
7 25, 2016 UCC foreclosure sale.

8 51. Omni seeks a declaratory judgment pursuant to NRS 30.010 *et seq.* and NRS
9 104.9627(3)(a) that all aspects of the May 25, 2016 UCC foreclosure sale and disposition of the
10 subject collateral were performed in a commercially reasonable manner.

11 52. Omni also seeks a declaratory judgment pursuant to NRS 30.010 *et seq.* that as a
12 result of the May 25, 2016 UCC foreclosure sale, Omni is now the sole owner and entitled to
13 sole dominion and control over all assets identified in the UCC Sale Notice, including but not
14 limited to those assets identified in the UCC Sale Notice as "Lot #2" (which consist of the
15 Homeowner Association liens, receivables, lien/receivable proceeds, and related assets relating
16 to APV for the calendar years 2014 and 2015).

17 53. It has been necessary for Omni to obtain the services of an attorney in order to
18 seek relief in this matter, and pursuant to the Contracts, Omni is entitled to recover reasonable
19 attorneys' fees and costs incurred.

20 WHEREFORE, Omni prays for judgment against the Guarantors as follows:
21

- 22 A. For money damages in an amount in excess of \$75,000.00;
23 B. For a declaratory judgment that all aspects of the May 25, 2016 UCC foreclosure
24 sale were commercially reasonable;
25 C. For a declaratory judgment that Omni is now the sole owner and entitled to sole
26 dominion and control over all assets identified in the UCC Sale Notice, including
27 but not limited to those assets identified in the UCC Sale Notice as "Lot #2"

which consist of the APV receivables for calendar years 2014 and 2015;

D. For pre-judgment interest at the applicable legal rate;

E. For attorneys' fees and costs incurred in this action; and

F. For such other and further relief as the Court may deem just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 15th day of June, 2016, I caused to be served a true and correct copy of the foregoing *Omni Financial, LLC's Answer To First 100, LLC's Complaint And Counterclaim And Third-Party Complaint* in the following manner:

(ELECTRONIC SERVICE) Pursuant to Fed. R. Civ. P. 5(b)(3) and LR 5-4, the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system:

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EXHIBIT “J”

EXHIBIT “J”

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9
10

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13 * * *

14 KAL-MOR-USA, LLC, a Nevada limited
liability company; GFY MANAGEMENT,
15 LLC, a Nevada limited liability company,

16 Plaintiffs,

17 vs.

18 OMNI FINANCIAL, LLC, a foreign limited
liability company; PRENPOINCIANA, LLC,
19 a foreign limited liability company; DOES I
through X; and ROE ENTITIES I through X,
20 inclusive,

21 Defendants.

22 AND ALL RELATED CLAIMS
23

CASE NO. 2:16-cv-000109-RFB-CWH

Related Case No. 2:16-cv-00099-RFB-CWH

(Jointly Administered Cases)

24
25 **STIPULATION AND ORDER FOR ENTRY OF FINAL JUDGMENT**

26 Plaintiffs KAL-MOR-USA, LLC ("Kal-Mor") and GFY MANAGEMENT LLC ("GFY")
27 and together with Kal-Mor, ("Plaintiffs"), by and through their undersigned attorneys of record of
28 the law firm of Kolesar and Leatham, Defendant OMNI FINANCIAL, LLC ("Omni"), by and

1 through its undersigned attorneys of record of the law firm of Howard & Howard PLLC, and
2 Defendants PrenPoinciana, LLC ("PrenPoinciana") and Prentice Lending II, LLC ("Prentice"),
3 by and through their undersigned attorneys of record of the law firm of Greenberg Traurig, LLP,
4 hereby stipulate and agree as follows:

5 **RECITALS**

6 1. On January 19, 2016, Plaintiff Kal-Mor filed its Complaint against Defendants
7 Omni and PrenPoinciana in the Eighth Judicial District Court in Clark County, Nevada.¹

8 2. On January 20, 2016, Defendant Omni filed a Petition for Removal [ECF No. 1]²
9 in the above-captioned case no. 2:16-cv-00109-RFB-CWH by which Kal-Mor's Complaint was
10 removed from the Eighth Judicial District Court to the United States District Court for the
11 District of Nevada.

12 3. On February 9, 2016, this Court entered a Minute Order in Chambers [ECF No. 9]
13 reassigning this case to Judge Richard F. Boulware to be jointly administered with case no. 2:16-
14 cv-00099-RFB-CWH.

15 4. On May 31, 2016, Plaintiffs Kal-Mor and GFY filed their First Amended
16 Complaint [ECF No. 27] (the "Complaint") in which they asserted various claims for relief
17 against Defendants Omni, PrenPoinciana, and Prentice.³

18 5. On July 12, 2016, Defendant Omni filed its Counterclaim [ECF No. 49] (the
19 "Counterclaim") in which it asserted various claims for relief against Plaintiffs Kal-Mor and
20 GFY.

21 6. As set forth in detail in the Complaint and Counterclaim, a dispute exists between
22 Plaintiffs Kal-Mor and GFY, on the one hand, and Defendants Omni, PrenPoinciana, and
23 Prentice, on the other hand (collectively, the "Parties"), as to:

24
25
26 ¹ Eighth Judicial District Court, case no. A-16-730447-C.

27 ² Unless otherwise stated, all references herein to ECF Nos. shall refer to case no. 2:16-cv-00109-RFB-CWH.

28 ³ Plaintiffs later voluntarily dismissed, without prejudice, the second, third, fourth, fifth, sixth, seventh, and eighth
claims for relief set forth in their Complaint by stipulation [ECF Nos. 51 and 54].

1 a. Ownership of certain homeowner association ("HOA") receivables (the
2 "2013 Receivables") that accrued during 2013 and were purchased from the Association of
3 Poinciana Villages ("APV") by First 100, LLC ("First 100") pursuant to a contract (the "APV
4 "Contract") dated July 3, 2013;

5 b. Ownership of certain HOA receivables accruing during 2014 and 2015
6 (the "2014-2015 Receivables")⁴ that were the subject of a first addendum to the APV Contract;
7 and

8 c. Ownership of certain HOA receivables (the "ACR Receivables")⁵ that
9 were the subject of a second addendum to the APV Contract.

10 7. After negotiating in good faith, the Parties have reached an agreement to fully
11 resolve the Complaint and Counterclaim on the terms set forth below.

12 STIPULATION

13 NOW, THEREFORE, the Parties hereby stipulate and agree to the immediate entry of a
14 Stipulated Judgment⁶ by the Court fully resolving the Parties' disputes as to the 2013
15 Receivables, the 2014-2015 Receivables, and the ACR Receivables upon the following terms
16 and conditions:

17 1. Omni shall be determined to be the absolute owner of all right, title, and interest
18 in the 2013 Receivables and the 2014-2015 Receivables, including, without limitation, (a) all
19 future proceeds arising therefrom, and (b) all undisbursed proceeds thereof being held by any
20 third party regardless of how such proceeds may have previously been allocated among the
21 Parties.

22
23
24 ⁴ The account numbers that identify the 2013 and the 2014-2015 Receivables are set forth in the UCC-1 financing
25 statement filed by GFY in the state of Florida on August 5, 2016 as document no. 201608390754, a copy of which
was filed in case no. 2:16-cv-00099-RFB-CWH as ECF No. 182-3, pp. 6-12.

26 ⁵ The account numbers that identify the ACR Receivables are set forth in the UCC-1 financing statement filed by
27 GFY in the state of Florida on August 5, 2016 as document no. 201608394156, a copy of which was filed in case no.
2:16-cv-00099-RFB-CWH as ECF No. 182-3, pp. 2-5.

28 ⁶ A proposed Stipulated Judgment that has been approved as to form and content by the Parties is attached hereto as
Exhibit 1.

2. GFY shall be determined to absolute owner of all right, title, and interest in the ACR Receivables, including, without limitation, (a) all future proceeds arising therefrom, and (b) all undisbursed proceeds thereof being held by any third party regardless of how such proceeds may have previously been allocated among the Parties.

3. Any claim for relief set forth in the Complaint or the Counterclaim that is not expressly resolved through this Stipulation shall be hereby dismissed with prejudice.

4. The entry final judgment by the Court pursuant to this Stipulation shall not preclude or otherwise impair any claim or defense that may exist between the Parties other than those expressly stated in the Complaint or the Counterclaim.

5. The Parties shall each bear responsibility for their own fees and costs incurred in connection with this matter.

Dated this 1st day of December, 2016.

KOLESAR & LEATHAM

/s/ Bart K. Larsen, Esq.

BART K. LARSEN, ESQ.

Nevada Bar No. 08538

ERIC D. WALTHER, ESQ.

Nevada Bar No. 13611

400 South Rampart Blvd., Suite 400

Las Vegas, Nevada 89145

*Attorneys for KAL-MOR-USA LLC and
GFY Management LLC*

Dated this 1st day of December, 2016.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Robert Hernquist, Esq.

ROBERT HERNQUIST, ESQ.

Nevada Bar No. 10616

MARK GARDBERG, ESQ.

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Las Vegas, NV 89169

*Attorneys for Defendant
Omni Financial, LLC*

KOLESAR & LEATHAM
400 S. Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145
TEL: (702) 362-7800 / FAX: (702) 362-9472

1 DATED this 1st day of December, 2016.

2 **GREENBERG TRAURIG LLP**

3

4 /s/ Christopher R. Miltenberger

5 Mark E. Ferrario, Esq.

6 Nevada Bar No. 01625

7 Christopher Miltenberger, Esq.

8 Nevada Bar No. 10153

9 3773 Howard Hughes Pkwy., Suite 400 North

10 Las Vegas, Nevada 89169

11 *Attorneys for Defendants PrenPoinciana, LLC*

12 *and Prentice Lending II, LLC*

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IT IS SO ORDERED

UNITED STATES DISTRICT JUDGE

DATED: _____

KOLEŠAR & LEATHAM
400 S. Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145
TEL: (702) 362-7800 / FAX: (702) 362-9472

EXHIBIT 1

1 JOINTLY SUBMITTED

2
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4
5 UNITED STATES DISTRICT COURT
6 DISTRICT OF NEVADA

7 * * *

8 KAL-MOR-USA, LLC, a Nevada limited
9 liability company; GFY MANAGEMENT,
10 LLC, a Nevada limited liability company,

11 Plaintiffs,

12 vs.

13 OMNI FINANCIAL, LLC, a foreign limited
14 liability company; PRENPOINCIANA, LLC,
15 a foreign limited liability company;
16 PRENTICE LENDING II, L.L.C., a foreign
17 limited liability company; DOES I through X;
18 and ROE ENTITIES I through X, inclusive,

19 Defendants.

Case No. 2:16-cv-000109-RFB-CWH

Related Case No. 2:16-cv-00099-RFB-CWH

(Jointly Administered Cases)

20 AND ALL RELATED CLAIMS

21 **STIPULATED JUDGMENT**

22 Plaintiff Kal-Mor-USA, LLC ("Kal-Mor") filed its Complaint against Defendants Omni
23 and PrenPoinciana, L.L.C. ("PrenPoinciana") on January 19, 2016 in the Eighth Judicial District
24 Court in Clark County, Nevada.¹ Defendant Omni Financial, LLC ("Omni") filed a Petition for
25 Removal [ECF No. 1]² in the above-captioned case no. 2:16-cv-00109-RFB-CWH by which Kal-
26 Mor's Complaint was removed from the Eighth Judicial District Court to the United States
27 District Court for the District of Nevada.

28 ¹ Eighth Judicial District Court, case no. A-16-730447-C.

² Unless otherwise stated, all references herein to ECF Nos. shall refer to case no. 2:16-cv-00109-RFB-CWH.

1 On February 9, 2016, this Court entered a Minute Order in Chambers [ECF No. 9]
2 reassigning this case to Judge Richard F. Boulware to be jointly administered with case no. 2:16-
3 cv-00099-RFB-CWH.

4 On May 31, 2016, Plaintiffs Kal-Mor and GFY Management, LLC ("GFY") filed their
5 First Amended Complaint [ECF No. 27] (the "Complaint") in which they asserted various claims
6 for relief against Defendants Omni, PrenPoinciana, and Prentice Lending, LLC ("Prentice").³
7 On July 12, 2016, Defendant Omni filed its Counterclaim [ECF No. 49] (the "Counterclaim") in
8 which it asserted various claims for relief against Plaintiffs Kal-Mor and GFY.

9 As set forth in detail in the Complaint and Counterclaim, a dispute exists between
10 Plaintiffs Kal-Mor and GFY, on the one hand, and Defendants Omni, PrenPoinciana, and
11 Prentice, on the other hand, (collectively, the "Parties") as to, among other things, the following:

12 a. Ownership of certain homeowner association ("HIOA") receivables (the
13 "2013 Receivables") that accrued during 2013 and were purchased from the Association of
14 Poinciana Villages ("APV") by First 100, LLC ("First 100") pursuant to a contract (the "APV
15 Contract") dated July 3, 2013;

16 b. Ownership of certain HIOA receivables accruing during 2014 and 2015
17 (the "2014-2015 Receivables")⁴ that were the subject of a first addendum to the APV Contract;
18 and

19 c. Ownership of certain HOA receivables (the "ACR Receivables")⁵ that
20 were the subject of a second addendum to the APV Contract.

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24 ³ Plaintiffs later voluntarily dismissed, without prejudice, the second, third, fourth, fifth, sixth, seventh, and eighth
claims for relief set forth in their Complaint by stipulation [ECF Nos. 51 and 54].

25 ⁴ The account numbers that identify the 2013 Receivables and the 2014-2015 Receivables are set forth in the UCC-1
26 financing statement filed by GFY in the state of Florida on August 5, 2016 as document no. 201608390754, a copy
of which was filed in case no. 2:16-cv-00099-RFB-CWH as ECF No. 182-3, pp. 6-12.

27 ⁵ The account numbers that identify the ACR Receivables are set forth in the UCC-1 financing statement filed by
28 GFY in the state of Florida on August 5, 2016 as document no. 201608394156, a copy of which was filed in case no.
2:16-cv-00099-RFB-CWH as ECF No. 182-3, pp. 2-5.

1 Without admitting liability, the Parties waive the entry of findings of fact and conclusions
2 of law by the Court and voluntarily consent to the entry of this Stipulated Judgment fully
3 resolving the Complaint and Counterclaim.

4 NOW, THEREFORE, it is accordingly ORDERED, ADJUDGED, and DECREED that:

5 1. Omni is the absolute owner of all right, title, and interest in the 2013 Receivables
6 and the 2014-2015 Receivables, including, without limitation, (a) all future proceeds arising
7 therefrom, and (b) all undisbursed proceeds thereof being held by any third party regardless of
8 how such proceeds may have previously been allocated among the Parties.

9 2. GFY is the absolute owner of all right, title, and interest in the ACR Receivables,
10 including, without limitation, (a) all future proceeds arising therefrom, and (b) all undisbursed
11 proceeds thereof being held by any third party regardless of how such proceeds may have
12 previously been allocated among the Parties.

13 3. Any claim for relief set forth in the Complaint or the Counterclaim that is not
14 expressly resolved herein is hereby dismissed with prejudice.

15 4. This Stipulated Judgment shall not preclude or otherwise impair any claim or
16 defense that may exist between the Parties other than those expressly stated in the Complaint or
17 the Counterclaim.

18 5. The Parties shall each bear responsibility for their own fees and costs incurred in
19 connection with this action.

20 Dated this ____ day of _____, 2016.

21 IT IS SO ORDERED

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23 _____
24 UNITED STATES DISTRICT JUDGE
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Approved as to form and content by:

Dated this 1st day of December, 2016.

KOLESAR & LEATHAM

/s/ Bart K. Larsen, Esq.

BART K. LARSEN, ESQ.

Nevada Bar No. 08538

ERIC D. WALTHER, ESQ.

Nevada Bar No. 13611

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Las Vegas, Nevada 89145

*Attorneys for KAL-MOR-USA LLC and
GFY Management LLC*

Dated this 1st day of December, 2016.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Robert Hernquist, Esq.

ROBERT HERNQUIST, ESQ.

Nevada Bar No. 10616

MARK GARDBERG, ESQ.

Nevada Bar No. 10879

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Las Vegas, NV 89169

*Attorneys for Defendant
Omni Financial, LLC*

DATED this 1st day of December, 2016.

GREENBERG TRAURIG LLP

/s/ Christopher R. Miltenberger

Mark E. Ferrario, Esq.

Nevada Bar No. 01625

Christopher Miltenberger, Esq.

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Las Vegas, Nevada 89169

*Attorneys for Defendants PrenPoinciana, LLC
and Prentice Lending II, LLC*

EXHIBIT “K”

EXHIBIT “K”

2:00 PM
07/16/14
Accrual Basis

First 100, LLC
Balance Sheet
As of June 30, 2014

Jun 30, 14

ASSETS

Current Assets

Checking/Savings

10100 - BofA Operating Account
10200 - BofA Tenant Deposit Account
10300 - Petty Cash

Total Checking/Savings

Accounts Receivable

11000 - Accounts Receivable

Total Accounts Receivable

Other Current Assets

12050 - Investment in HOA Liens
12055 - Liens to be Funded
12100 - HOA Liens Rec Incremental Value
12200 - Employee Advance
12220 - Receivable Due from Judgement
12221 - Doubtful Collection Reserve
12220 - Receivable Due from Judgement - Other

Total 12220 - Receivable Due from Judgement

12225 - Rent Receivable

12500 - Note Receivable - Lynch
12550 - Note Receivable - Toms
12635 - Note Receivable - Bloom
12640 - Note Receivable - Gordon
12645 - Note Receivable - Farkas
12648 - Note Receivable - Lehrs
12650 - Note Receivable - Tyrone & Inching

13000 - Prepaid Expenses

13100 - Prepaid Rent
13300 - Prepaid Legal
13000 - Prepaid Expenses - Other

Total 13000 - Prepaid Expenses

Total Other Current Assets

Total Current Assets

Fixed Assets

14000 - Fixed Assets

14300 - Computers
14500 - Office Equipment
14600 - Furniture and Equipment
14999 - Accumulated Depreciation

Total 14000 - Fixed Assets

Total Fixed Assets

Other Assets

15100 - Deposits

16000 - Real Property (Book Value)

16005 - 6800 E Lake Mead Blvd #1033
16006 - 601 Cabrillo Circle #644 (NV)
16007 - 601 Cabrillo Circle #1076 (NV)
16008 - 601 Cabrillo Circle #1291 (NV)
16010 - 210 E Flamingo Rd #209
16016 - 230 E Flamingo Rd #330
16021 - 30 Strada Di Villaggio #321
16022 - 30 Strada Di Villaggio #323
16023 - 2615 W Gary Ave #1055
16038 - 17745 Sapphire Canyon
16041 - 7533 Lintwhite Street
16046 - 1217 Nova Ranch
16051 - 5520 Hidden Rainbow Street NV

2:00 PM

07/16/14

Accrual Basis

First 100, LLC
Balance Sheet
 As of June 30, 2014

	Jun 30, 14
16052 - 6575 Shining Sand Avenue	
16057 - 7708 Himalayas Avenue #204 <i>Ally K. K. K.</i>	
16062 - 101 Luna Way #145 (NV)	
16063 - 2085 Keren Avenue #93 (NV)	
16064 - 665 Monument Point Street (NV)	
16501 - 10878 NW 78th Terrace (FL)	
18503 - 3149 Oak Brook Lane (FL)	
18701 - 9707 Richmond Ave #82 (TX)	
16702 - 2205 Windy Drive TX	
16801 - 2143 E Wildhorse Drive (AZ)	
Total 16000 - Real Property (Book Value)	
Total Other Assets	
TOTAL ASSETS	
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Accounts Payable	
21000 - Accounts Payable	
21100 - Accounts Payable - Deal Funding	
Total Accounts Payable	
Other Current Liabilities	
22100 - Due to Premier One Holdings	
22215 - Due to Rephina Louie	
22406 - Note Payable - Laurito	
22410 - Note Payable - Absolute Force	
22420 - Note Payable - Qualrate	
22425 - Note Payable - Darroch Investme	
22435 - Note Payable - Wiley	
22440 - Note Payable - Clifant	
22450 - Note Payable - Morgando	
22455 - Note Payable - Peck	
22460 - Note Payable - Omni Financial	
23050 - Payroll Liabilities	
23100 - Interest Payable	
23105 - Accrued Interest	
23120 - Bonus & Commissions Payable	
23200 - Quiet Title Accrual	
23225 - Wrongful Foreclosure Accrual	
23250 - Property Replacement Reserve	
24050 - Sale Deposit	
Total Other Current Liabilities	
Total Current Liabilities	
Long Term Liabilities	
24100 - Tenant Security Deposits	
Total Long Term Liabilities	
Total Liabilities	
Equity	
31000 - Class A Units	
30400 - Class A - SJC Ventures Holding	
31010 - Class A - Brown, Wendell	
31020 - Class A - CBWE, LLC	
31025 - Class A - Darroch, Greg & Laine	
31030 - Class A - Gordon, Jethro	
31035 - Class A - Harvey, Hannah	
31050 - Class A - Member Ventures, LLC	
31080 - Class A - Paledin Ventures, LLC	
31085 - Class A - Plantano, Glenn	
31070 - Class A - Quatrone, Erin	

Page 2

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2:00 PM

07/16/14

Accrual Basis

First 100, LLC
Balance Sheet
 As of June 30, 2014

	Jun 30, 14
31075 - Class A - Rendel, Bert	10,000.00
31080 - Class A - Wiley, Dennis	10,000.00
31085 - Class A - Wiley, Marilyn	10,000.00
31090 - Class A - Zalberg, Izzy	10,000.00
31100 - Class A - TGC/Farkas Funding LLC	10,000.00
31105 - Class A - Grandot Investments	10,000.00
31110 - Class A - Gregg Hale	10,000.00
31120 - Class A - Van Holland	10,000.00
31125 - Class A - Pat & Sandy OLaughlin	10,000.00
31130 - Class A - Amy & Armond Fart	10,000.00
31135 - Class A - Dr Natchez Maurice	10,000.00
31140 - Class A - Adamson, Kent	10,000.00
31145 - Class A - Basia Investments	10,000.00
31150 - Class A - Cope, Catheryn	10,000.00
31155 - Class A - Darroch, Laurie	10,000.00
31160 - Class A - JWL Management	10,000.00
31165 - Class A - Lehrs, Alan & Theresa	10,000.00
Total 31000 - Class A Units	1,000,000.00
31800 - Class B Units	
31805 - Class B - Adamson, Kent	10,000.00
31810 - Class B - Basia Investments	10,000.00
31815 - Class B - Plantone, Glenn	10,000.00
Total 31800 - Class B Units	30,000.00
31900 - Class C Units	
31905 - Class C - Cope, Catheryn	10,000.00
31910 - Class C - Darroch, Greg & Laurie	10,000.00
31915 - Class C - Darroch, Laurie	10,000.00
31920 - Class C - JWL Management	10,000.00
31930 - Class C - Plantone, Glenn	10,000.00
Total 31900 - Class C Units	50,000.00
32000 - Member Contribution	1,000,000.00
33000 - Unrealized Gain Purchased Rec	1,000,000.00
34000 - Retained Earnings	1,000,000.00
Net Income	1,000,000.00
Total Equity	4,000,000.00
TOTAL LIABILITIES & EQUITY	4,000,000.00

EXHIBIT “L”

EXHIBIT “L”

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KAL-MOR-USA, LLC,

Plaintiff,

v.

OMNI FINANCIAL LLC; FIRST 100 LLC,

Defendants.

Case No. 2:17-cv-02280-RFB-CWH

ORDER

I. INTRODUCTION

Before this Court comes Plaintiff Kal-Mor-USA, LLC ("Plaintiff" or "Kal-Mor")'s Motion to Remand to State Court, (ECF No. 11) and Plaintiff's Motion for Partial Summary Judgment (ECF No. 14). For the reasons stated below, the Court defers judgment on Plaintiff's Motion to Remand and denies without prejudice Plaintiff's Partial Motion for Summary Judgment.

II. BACKGROUND

Plaintiff filed its Complaint in state court on June 19, 2017. (ECF No. 1-1). Plaintiff alleges the following causes of action: (1) breach of contract, against Defendant First 100 LLC ("First 100"); (2) breach of implied covenant of good faith and fair dealing, against First 100; (3) negligent misrepresentation, against First 100; (4) declaratory relief, against all Defendants; (5) quiet title, against all Defendants; (6) unjust enrichment, against Defendant Omni Financial LLC ("Omni"); (7) conversion, against Omni; (8) slander of title, against Omni; (9) intentional interference with contractual relations, against Omni; and (10) injunctive relief, against Omni. Omni filed a Petition for Removal before this Court on August 28, 2017. (ECF No. 1). Omni contends that the Court has subject matter jurisdiction "because this Court retained jurisdiction to hear any further proceedings between these parties when a prior action [First 100 LLC v. Omni Financial et al.,"

Case No. 2:16-cv-00099] involving these same parties was dismissed pursuant to stipulation.” (ECF No. 1 at 2). Omni also contends that the Court had diversity jurisdiction over the prior action, and that the Court has original jurisdiction under 28 U.S.C. § § 1332(a), 1441(a), and 1446. On September 13, 2017, Omni filed its Statement of Removal. (ECF No. 7). Omni asserted the same bases for jurisdiction. On September 27, 2017, Plaintiff filed the instant Motion to Remand. (ECF No. 11). Attached to the Motion to Remand are several exhibits, including an Acceptance of Service on behalf of First 100, dated July 6, 2017 (ECF No. 11 at 16) and an Acceptance of Service on behalf of Omni, dated August 6, 2017 (ECF No. 11 at 18). Omni filed a Response on October 12, 2017. (ECF No. 17). Plaintiff filed its Reply on October 20, 2017. (ECF No. 18). Plaintiff filed the instant Motion for Partial Summary Judgment on October 1, 2017. (ECF No. 14). Omni filed its Response on October 25, 2017. (ECF No. 20). On November 13, 2017, Plaintiff filed its Reply. (ECF No. 21).

This case was transferred to this Court on September 25, 2017, as the transferring judge and the undersigned judge found that there existed common questions of law or fact shared with the instant matter and a prior case, First 100 LLC v. Omni Financial et al., Case No. 2:16-cv-0099-RFB-CWH (“First 100”). A third related action, Kal-Mor-USA, LLC v. Omni Financial, LLC et al., Case No. 2:16-cv-00109-RFB-GWF (“Kal-Mor”) was also previously before this Court. In Kal-Mor, the Court entered an Order granting a Stipulated Judgment, the content of which is not before the Court in this matter. (2:16-cv-00109-RFB-GWF, ECF No. 58). The Court also entered an Order granting a Stipulated Judgment in First 100, which referred to the Kal-Mor action and addressed Plaintiff as a party to the Stipulated Judgment. (2:16-cv-0099-RFB-CWH, ECF No. 240). The Court held a hearing on these motions on July 2, 2018, and took the matter under submission.

III. LEGAL STANDARDS

A. Motion to Remand

28 U.S.C. § 1332(a) grants district courts original jurisdiction over actions where the matter in controversy is greater than \$75,000, provided there is complete diversity. A defendant may

1 remove to federal court a case initially filed in state court if the federal court would have original
 2 jurisdiction. 28 U.S.C. § 1441(a). When a case is removed solely pursuant to 28 U.S.C. § 1441(a),
 3 all defendants that have been properly joined and served must either join in, or consent to, removal.
 4 28 U.S.C. § 1446(b)(2).

5 “Removal and subject matter jurisdiction statutes are strictly construed, and a defendant
 6 seeking removal has the burden to establish that removal is proper and any doubt is resolved
 7 against removability.” Hawaii ex rel. Louie v. HSBC Bank Nev., N.A., 761 F.3d 1027, 1034 (9th
 8 Cir. 2014) (citation and quotation marks omitted). A federal court should remand a case to state
 9 court if any doubt exists as to the right to removal. Matheson v. Progressive Specialty Ins. Co.,
 10 319 F.3d 1089, 1090 (9th Cir. 2003) (footnote omitted).

11 **B. Motion for Summary Judgment**

12 Summary judgment is appropriate when the pleadings, depositions, answers to
 13 interrogatories, and admissions on file, together with the affidavits, show “that there is no genuine
 14 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
 15 Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When considering the
 16 propriety of summary judgment, the court views all facts and draws all inferences in the light most
 17 favorable to the nonmoving party. Gonzalez v. City of Anaheim, 747 F.3d 789, 793 (9th Cir. 2014).
 18 If the movant has carried its burden, the non-moving party “must do more than simply show that
 19 there is some metaphysical doubt as to the material facts Where the record taken as a whole
 20 could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for
 21 trial.” Scott v. Harris, 550 U.S. 372, 380 (2007).

22 **IV. DISCUSSION**

23 **A. Defective Removal**

24 Plaintiff first argues that the Court should remand because First 100 has not consented to
 25 removal, as required by 28 U.S.C. § 1441. Plaintiff contends that the failure to follow this
 26 “unanimity rule” renders removal under § 1441 procedurally defective, and relies on Proctor v.
 27 Vishay Intertechnologies Incorporated, 584 F.3d 1208 (9th Cir. 2009). Omni argues that First 100,
 28

1 by signing the Stipulated Judgment in the prior action, consented to the Court retaining jurisdiction
2 over future disputes and therefore consented to removal of any future disputes.

3 The Court finds that there is a procedural defect in the removal – namely, First 100's lack
4 of consent. The Court finds that, pursuant to Proctor, the Ninth Circuit requires either an inclusion
5 in the Notice of Removal that all defendants consent to the removal, or some other indicia in a
6 non-removing defendant's filings that she consents to removal. The Court does not agree with
7 Omni that First 100's signature on the Stipulated Judgment in the prior case is sufficient for consent
8 in this case. The Court finds that the consent must be explicit as to removal since such a strict
9 requirement is consistent with the "strict" construction applied to removal. HSBC Bank Nev.,
10 N.A., 761 F.3d at 1034.

11 However, the Court does not necessarily have to remand the case in light of a defect. Even
12 if all properly served defendants have not joined in a petition for removal, "the district court may
13 allow the removing defendants to cure the defect by obtaining joinder of all defendants prior to the
14 entry of judgment." Destfino v. Reiswig, 630 F.3d 952, 957 (9th Cir. 2011) (citation omitted); see
15 also Soliman v. Philip Morris Inc., 311 F.3d 966, 970 (9th Cir. 2002) ("[A] procedural defect
16 existing at the time of removal but cured prior to entry of judgment does not warrant reversal and
17 remand of the matter to state court."), Pursuant to 28 U.S.C. § 1653, allegations of jurisdiction
18 that suffer from defect may be amended.

19 The Court now orders First 100 to file a notice of consent or non-consent to removal, within
20 *one week* of the date of entry of this Order. Failure to cure this defect will result in the case being
21 remanded to state court.

22 B. Subject Matter Jurisdiction

23 Assuming that the procedural defect discussed above is cured, the Court finds that it has
24 the obligation to ensure that it has subject matter jurisdiction. In Kal-Mor's view, the Court cannot
25 use the Stipulated Judgment entered in First 100 as a basis for jurisdiction in the instant case. Kal-
26 Mor argues that it was not a party to the Settlement Agreement reached in that case, and that the
27 subject matter of the instant case was expressly carved out of the settlement and also was not
28 included in the Stipulated Judgment. In response, Omni contends that the language of the

1 Stipulated Judgment entered in First 100 was intended to cover the dispute at issue in this case.

2 The Court first finds that parties can neither stipulate to nor waive subject matter
3 jurisdiction. Chavez v. JPMorgan Chase & Co., 888 F.3d 413, 416 (9th Cir. 2018) (citing Janakes
4 v. U.S. Postal Serv., 768 F.2d 1091, 1095 (9th Cir. 1985)). However, in its Petition for Removal
5 and Statement Regarding Removal, Omni pleads complete diversity, which Plaintiff does not
6 contest. While the Complaint, Petition for Removal, and Statement of Removal are not clear as to
7 the citizenship as to each party, the Court recognizes that Kal-Mor represented at the hearing that
8 it does not dispute diversity and believes that it is diverse from both Defendants. The Court has a
9 *sua sponte* obligation to ensure that it has subject matter jurisdiction. Kwai Fun Wong v. Beebe,
10 732 F.3d 1030, 1036 (9th Cir. 2013) (citations omitted). Therefore, the Court orders Omni to file
11 a submission on the issue of the Court's diversity jurisdiction *one week* after First 100 files its
12 consent to removal. If First 100 does not consent to removal, then this requirement would be
13 unnecessary as the case would be remanded.

14 If diversity jurisdiction is properly established, the case may remain before this Court. The
15 Court's entry of Stipulated Judgment in First 100 is insufficient to establish jurisdiction. The Court
16 does not interpret its prior Order to do so, and did not intend to do so when it indicated that it
17 would retain jurisdiction over future disputes. However, given this Court's familiarity with issues
18 in this case, the Court will retain jurisdiction over this case if the parties can establish diversity
19 jurisdiction.

20 For these reasons, the Court defers ruling on the Motion to Remand until First 100's filing
21 regarding consent to removal.

22 **C. Plaintiff's Partial Motion for Summary Judgment**

23 The Court notes that no discovery has taken place in this case, and a Scheduling Order has
24 not yet been entered. The Court does not find it appropriate to consider Plaintiff's Partial Motion
25 for Summary Judgment at this stage of the proceedings, as other issues may arise in the course of
26 discovery which would properly be the subjects of future motions for summary judgment. The
27 Court does not ordinarily permit multiple rounds of dispositive motion practice. Therefore, the
28 Partial Motion for Summary Judgment is denied without prejudice.

V. CONCLUSION

IT IS ORDERED that Defendant First 100 is directed to submit a notice of consent or non-consent to removal **within one week** of the date of entry of this Order.

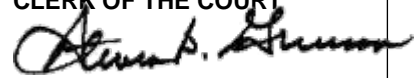
IT IS FURTHER ORDERED that Defendant Omni is directed to file a submission establishing diversity jurisdiction **one week** after First 100 files its consent to removal. If First 100 does not consent to removal, then this case will be remanded and Omni will not be required to file a submission on diversity jurisdiction.

IT IS FURTHER ORDERED that a ruling on Plaintiff's Motion to Remand (ECF No. 11) is **DEFERRED**.

IT IS FURTHER ORDERED that Plaintiff's Partial Motion for Summary Judgment (ECF No. 14) is **DENIED WITHOUT PREJUDICE**.

DATED July 3, 2018.


RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE



BART K. LARSEN, ESQ.
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ERIC D. WALTHER, ESQ.
Nevada Bar No. 13611
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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X;
and ROE ENTITIES I through X, inclusive,

Defendants.

CASE NO. A-17-757061-C

DEPT. NO. 2

**REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Date: August 27, 2018

Time: 10:30 a.m.

Plaintiff Kal-Mor-USA, LLC ("Kal-Mor"), by and through its undersigned attorneys of record, the law firm of Kolesar & Leatham, hereby submits this Reply in Support of Plaintiff's Motion for Partial Summary Judgment (the "Motion") against Defendant Omni Financial, LLC ("Omni") as to Kal-Mor's fourth cause of action for declaratory relief and Kal-Mor's fifth cause of action for quiet title.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In its Opposition to the Motion, Omni resorts to misdirection and outright
4 misrepresentation as it attempts to manufacture material questions of fact where none exists.
5 Fortunately, Omni's sham arguments are easily refuted.

6 Roughly half of the legal arguments section of Omni's Opposition is devoted to rebutting
7 arguments that Kal-Mor has never raised. Neither Kal-Mor's claims against Omni nor the
8 Motion rely in any way whatsoever on Omni's sale of First 100's¹ personal property under the
9 UCC or Omni's collection of rents under its Deeds of Trust. In fact, Kal-Mor agrees with Omni
10 that the UCC sale and the collection of rents both fall within specific exceptions to the one-action
11 rule set forth at NRS 40.430. Both exceptions, however, are entirely irrelevant – as is Omni's
12 argument that Kal-Mor had “legal notice” of its Deeds of Trust. Kal-Mor does not argue in the
13 Motion that it is entitled to summary judgment against Omni due to lack of notice. Kal-Mor's
14 arguments are sound regardless of whether it had “legal notice” of the Deeds of Trust.

15 Similarly, Kal-Mor's claims against Omni do not rely in any way whatsoever on Kal-
16 Mor's separate settlement with Omni (the “Kal-Mor Settlement”)². Omni's suggestion that the
17 disclaimers concerning unresolved claims set forth in the Kal-Mor Settlement were intended to
18 somehow encompass the First 100 Settlement, *which did not exist at the time the Kal-Mor*
19 *Settlement was signed*³, is an obvious misrepresentation.

20 Even more blatant, however, is Omni's disingenuous claim that the \$4.8 million “Final
21 Judgment” it obtained against its borrower First 100 for the unpaid balance of the Omni Loan is
22 something other than a final judgment. The First 100 Settlement, the First 100 Stipulation, and
23 the First 100 Judgment itself all refer to the First 100 Judgment as a “final judgment.” Omni's
24 obtuse arguments to the contrary defy logic and demonstrate the absurd lengths to which Omni is

25 _____
26 ¹ Undefined capitalized terms shall have the same meanings ascribed to such terms as in the Motion.

27 ² A copy of the Kal-Mor Settlement is attached to Omni's Opposition as “Exhibit A-3.”

28 ³ The Kal-Mor Settlement was signed on November 23, 2016. The First 100 Settlement was signed nearly two months later on January 16, 2017.

1 willing to go to delay the inevitable.

2 What is relevant and beyond any credible dispute is the fact that Omni obtained a final
3 judgment in the amount of \$4.8 million against its borrower First 100 for the unpaid balance of
4 the Omni Loan (and at least a portion of the indebtedness First 100 owed to Omni in connection
5 with the PPSA and the Prentice Loan). That is the very definition of an action under the
6 Nevada's one-action rule. As a result, Omni's Deeds of Trust were discharged as a matter of
7 law.

8 Moreover, in taking the \$4.8 million First 100 Judgment and entering into the First 100
9 Settlement, Omni completely replaced the terms of the Omni Loan and materially increased the
10 indebtedness owed by First 100 under the Loan by including additional amounts First 100 owed
11 under the PPSA and the Prentice Loan in the final First 100 Judgment. In fact, Omni's stated
12 intent in doing so (as plainly set forth First 100 Settlement, the First 100 Stipulation, and the
13 First 100 Judgment) is unequivocal. The wholesale replacement of the parties' prior agreements
14 concerning the Omni Loan with the First 100 Settlement was undoubtedly a novation, which
15 discharged the Deeds of Trust as a matter of law.

16 The law is clear, and the relevant facts are beyond credible dispute. Kal-Mor's Motion
17 for Partial Summary Judgment against Omni must be granted.

18 II. LEGAL ARGUMENTS

19 A. THE FACTS ON WHICH THE MOTION IS ACTUALLY BASED ARE 20 UNDISPUTED.

21 Omni complains both that Kal-Mor's Motion is premature because no discovery has
22 occurred and the Motion is improper because many of the facts set forth in the Darroch
23 Declaration are stated upon information and belief.⁴ Neither complaint is warranted.

24 1. There Is No Need for Discovery.

25 Omni's claim that it needs more time for discovery rings hollow. More than a year has
26 passed since Kal-Mor filed its Complaint. Additionally, Omni has been on notice for more than
27

28 ⁴ Omni Opposition, pp. 15-16.

1 a year that Kal-Mor intended to seek summary judgment on the issues set forth in the Motion.⁵
2 Yet, Omni has made no effort whatsoever to conduct any discovery. In fact, Omni has yet to
3 even answer the Complaint. Omni has already delayed the resolution of this action for over a
4 year through its wrongful removal to federal court. Omni should not be allowed to further delay
5 this matter with its disingenuous request for discovery.

6 Additionally, Omni fails to identify any disputed, material question of fact on which
7 discovery is needed. Omni suggests through the declaration of its counsel, Robert Hernquist⁶,
8 that discovery is needed to determine when the Kal-Mor Settlement and First 100 Settlement
9 were reached. That is hardly a matter of dispute. Omni acknowledges in its Opposition that the
10 Kal-Mor Settlement was reached on November 23, 2016 and that the First 100 Settlement was
11 reached “several weeks later.”⁷ Kal-Mor does not dispute this timeline. Any lingering doubt as
12 to this timeline can be easily resolved by looking to the district court’s docket in the First 100
13 Action. No discovery is needed.

14 Mr. Hernquist also states that discovery is necessary to determine whether Kal-Mor had
15 actual knowledge of Omni’s Deeds of Trust before purchasing the Kal-Mor Properties.
16 However, no aspect of the Motion depends in any way on Kal-Mor’s knowledge of the Deeds of
17 Trust or lack thereof. Kal-Mor’s arguments regarding the one-action rule and novation apply
18 regardless of whether Kal-Mor had actual, constructive, or no knowledge of Omni’s Deeds of
19 Trust. No discovery is needed.

20 Finally, Mr. Hernquist claims that discovery is needed to ascertain the intents of the
21 parties in entering into the Kal-Mor Settlement and the First 100 Settlement. However, Mr.
22 Hernquist does not identify any material dispute as to intent. Whether Omni intended to
23 foreclose on the Kal-Mor Properties after entering into the Kal-Mor Settlement or the First 100
24 Settlement is completely irrelevant. Kal-Mor has never doubted Omni’s greed or questioned its
25

26 ⁵ The Court may recall that Kal-Mor filed a similar motion for partial summary judgment approximately a year ago.
27 Omni prevented the Court from considering that motion by filing a defective notice of removal to federal court.

28 ⁶ Mr. Hernquist’s declaration is attached to Omni’s Opposition as “Exhibit C.”

⁷ Omni Opposition, pp. 11-12. The First 100 Settlement is dated January 17, 2017.

1 intent to foreclose.⁸ Likewise, Kal-Mor has never argued that Omni knowingly violated the one-
2 action rule or that Omni's discharge of its Deeds of Trust through novation of the Omni Loan
3 was intentional. Both the one-action rule and Kal-Mor's theory of novation apply regardless of
4 Omni's intent to foreclose.⁹ Moreover, the parties' intentions are plainly spelled out in the
5 documents themselves, which are not in any way ambiguous.¹⁰ No discovery is needed.

6 **2. Kal-Mor's Motion Is Supported by Admissible Evidence.**

7 Omni's complaints concerning the Darroch Declaration are nothing more than
8 misdirection designed to call the Court's attention away from Omni's glaring failure to dispute
9 even a single material fact on which the Motion is actually based. Neither Kal-Mor nor Mr.
10 Darroch was involved in the First 100's acquisition of the Kal-Mor Properties, the Omni Loan
11 transaction, or the negotiation of the First 100 Settlement. As such, the facts set forth in the
12 Darroch Declaration concerning those matters are appropriately stated upon information and
13 belief.¹¹ However, none of the facts alleged in the Darroch Declaration as to those matters is
14 actually disputed by Omni. To the contrary, Omni's own statement of facts¹² supported by the
15 Declaration of Martin Boone¹³ actually substantiates and confirm many of the facts stated upon
16 information and belief in the Darroch Declaration, including the basic facts of the Omni Loan,
17 First 100's breaches of the Omni Loan, an Omni's efforts to enforce its security interests under
18 the UCC, among other things. The material facts on which the Motion is actually based are
19 beyond any credible dispute.

20
21 ⁸ First 100's understanding as to Omni's intent to foreclose is also irrelevant. At the time the First 100 Settlement
22 was signed, First 100 held no interest in any of the Kal-Mor Properties and had no standing to consent to any
23 continuation of Omni's claimed security interest under its Deeds of Trust.

24 ⁹ By definition, both of these defenses result in the nonconsensual discharge of the creditor's lien. Indeed, if
25 evidence of a creditor's intent to waive and release its lien was required to establish either a violation of the one-
26 action rule or a novation, neither defense could ever be asserted successfully.

27 ¹⁰ Omni's request for discovery concerning inadmissible parol evidence is obviously not proper grounds for
28 deferring consideration of the Motion under Rule 56(d).

¹¹ Most, if not all, of the facts stated upon information and belief in the Darroch Declaration are supported with
references to the appropriate court records and other public records through which the facts can be easily verified.

¹² Omni Opposition, pp. 4-14.

¹³ Mr. Boone's declaration is attached to Omni's Opposition as "Exhibit A."

B. THERE WAS NO AGREEMENT TO ALLOW OMNI TO FORECLOSE.

Omni attempts to conflate the Kal-Mor Settlement with the later First 100 Settlement to which Kal-Mor was not a party to create the illusion that Kal-Mor is somehow bound by an unwritten understanding between Omni and First 100 concerning Omni's intent to foreclose. Setting aside the fact that the First 100 Settlement specifically bars Omni from enforcing any security interest it retained¹⁴, the absurdity of Omni's argument is obvious when placed in proper context.

By the time the Kal-Mor Settlement was signed on November 23, 2016, the lawsuit between Omni and Kal-Mor (the "Kal-Mor Action")¹⁵ had been distilled down to a priority dispute between Kal-Mor's affiliate GFY and Omni, who each claimed a first-position security interest in certain accounts receivable of First 100.¹⁶ The Kal-Mor Action had nothing whatsoever to do with the Kal-Mor Properties, which is why all disputes relating to the Kal-Mor Properties were expressly carved out of the Kal-Mor Settlement.¹⁷ The Kal-Mor Settlement further provided that following the submission of the stipulated Kal-Mor Judgment, Kal-Mor would have no further involvement in the ongoing First 100 Action.¹⁸

¹⁴ See First 100 Settlement, § 10(a) ("Except as set forth in the following sentence, Omni neither waives nor relinquishes its existing, first-priority security interest in all of First 100's current and future assets as security for any Debt, and the subordinate security interest originally granted to PrenPoinciana. Effective as of the Effective Date, Omni hereby agrees to forebear any collection actions under those security interests not agreed to be transferred hereunder, so long as First 100 is not in breach of this Agreement."). Again, whether or not Omni intended to foreclose after entering into the First 100 Settlement is irrelevant to the Motion. Kal-Mor calls attention to the above language only to show the inconsistent and misleading nature of Omni's arguments.

¹⁵ United States District Court of the District of Nevada, Case No. 2:16-cv-00109.

¹⁶ Omni filed a counterclaim against Kal-Mor and GFY on July 12, 2016 in the Kal-Mor Action asserting claims for declaratory relief (as to the priority dispute) as well as conversion, intentional interference with prospective economic advantage, and fraudulent transfer based on GFY's purchase of the disputed accounts receivable from First 100.

¹⁷ See Kal-Mor Settlement, § W ("This Agreement, however, is not intended to address or resolve any dispute between the Parties as to the Kal-Mor Real Properties."), 4.

¹⁸ See Kal-Mor Settlement, § 5 ("Following the submission of the Stipulated Judgment, GFY [and Kal-Mor] shall no longer participate in the Lawsuit proceedings, except as required by applicable law or an order of the District Court.").

On December 1, 2016, Kal-Mor and Omni executed and filed the Stipulation and Order for Entry of Final Judgment¹⁹ (the “Kal-Mor Stipulation”) in the Kal-Mor Action, which resolved the parties’ conflicting claims as to their respective security interests in the First 100 accounts receivable but, again, expressly provided that the resolution and dismissal of the Kal-Mor Action “shall not preclude or otherwise impair any claim or defense that may exist between the Parties other than those expressly stated in the Complaint or the Counterclaim.” That same day, a proposed judgment (the “Kal-Mor Judgment”)²⁰ was submitted to the Court for entry.²¹

Nothing in the Kal-Mor Settlement, the Kal-Mor Stipulation, or the Kal-Mor Judgment provides that Omni’s Deeds of Trust would remain effective notwithstanding the First 100 Settlement. In fact, the First 100 Settlement didn’t exist when the Kal-Mor Settlement was signed on November 23, 2016 or when the Kal-Mor Stipulation and Kal-Mor Judgment were filed with the Court on December 1, 2016. To prove this fact, the Court need look no further than the district court’s docket in the First 100 Action. On December 12, 2016, Omni and First 100 filed a Stipulation and Order²² in the First 100 Action in which they advised the Court that they were “in the process of finalizing the terms of a proposed settlement agreement that would result in the dismissal of all remaining claims for all remaining parties.” On January 6, 2017, Omni and First 100 filed a Status Report²³ in the First 100 Action in which they advised the Court that they had “agreed to the terms of a compromise” and were “in the process of finalizing the associated documentation.” The First 100 Settlement was finally signed on January 16, 2017 – nearly two months after the execution of the Kal-Mor Settlement.

The suggestion that Kal-Mor somehow agreed to the terms of the yet-to-be negotiated First100 Settlement when it signed the Kal-Mor Settlement is ridiculous. The Kal-Mor Settlement and the First 100 Settlement are two separate agreements that related to separate

¹⁹ A copy of the Kal-Mor Stipulation is attached to Omni’s Opposition as “Exhibit E.”

²⁰ A copy of the Kal-Mor Judgment is attached to Omni’s Opposition as “Exhibit D.”

²¹ See Case No. 2:16-cv-00109-RFB-GWF, ECF No. 57. The Court later signed and entered the Kal-Mor Judgment on January 2, 2017 [ECF No. 58].

²² See Exhibit 31 attached hereto.

²³ See Exhibit 32 attached hereto.

claims and separate parties. In fact, Kal-Mor did not even receive a copy of the First 100 Settlement until March 20, 2017 – more than two months after it was signed.

Kal-Mor was not a party to the First 100 Settlement or involved in its negotiation, and Kal-Mor is in no way bound to any understanding that may have developed between Omni and First 100 as to Omni's intent to subsequently foreclose on the Kal-Mor Properties. Moreover, no such understanding changes the fact that Omni took a final judgment against First 100 for \$4.8 million.²⁴ The entry of that final judgment expressly disposed of all claims between Omni and First 100 concerning any alleged default under the Omni Loan and triggered the sanctions aspect of the one-action rule. As a result, Omni cannot add to its recovery by foreclosing on the Kal-Mor Properties.

C. BOTH THE UCC SALE AND OMNI'S COLLECTION OF RENTS ARE IRRELEVANT.

Omni is correct in arguing that the UCC sale it conducted on May 25, 2016 and its demands for and collection of rents from Kal-Mor's tenants (at least prior to the entry of the First 100 Judgment)²⁵ fall within the specific exceptions to the one-action rule set forth at NRS 40.430(6)(b) and (f). Kal-Mor did not address either exception in its Motion because they are not relevant. Kal-Mor has never argued that the one-action rule discharged the Deeds of Trust due to either the UCC sale or Omni's collection of rents. Again, Omni attempts to obscure the issues actually raised in the Motion.

As plainly set forth in the Motion, the one-action rule discharged the Deeds of Trust due to the entry of the \$4.8 million First 100 Judgment in Omni's favor for the unpaid balance of the Omni Loan (and a portion of the indebtedness First 100 owed under the PPSA and the Prentice Loan) for which there is no exception to the one-action rule. Rather than address the arguments actually made in the Motion, Omni attempts to refute a straw man argument of its own creation.

²⁴ Pursuant to Rule 41(a)(1)(ii), Kal-Mor, GFY, PrenPoinciana, LLC and Prentice Lending II, LLC each signed the First 100 Stipulation even though they were no longer actively involved in the First 100 Action.

²⁵ Omni had no basis to demand or collect rent from any Kal-Mor's tenants after the Deeds of Trust were discharged as a result of the First 100 Settlement and the First 100 Judgment.

Omni's reference to the case of *McDonald v. D.P. Alexander & Las Vegas Blvd., LLC*, 123 P.3d 748 (2005) similarly misses the mark. In *McDonald*, the court held that a junior lienholder whose deed of trust had been voided by a bankruptcy court as a preferential transfer under 11 U.S.C. 547(b) qualified for the exception to the one-action rule set forth at NRS 40.430(6)(j) as a "sold-out" junior lienholder. *Id.* at 814-15. There is no similarity between the facts of the *McDonald* case and the matter at hand. In fact, the *McDonald* case explains precisely why the one-action rule is triggered by the First 100 Judgment. As the McDonald court explained "the purpose behind the one-action rule in Nevada is to prevent harassment of debtors by creditors attempting double recovery by seeking a fully money judgment against the debtor and by seeking to recover the real property securing the debt." *Id.* at 816. Ironically, Omni quotes this very language in its Opposition.²⁶

Enforcement of the one-action rule is not against public policy, and it will not deprive Omni of recovery. In fact, Omni has already taken final judgment against First 100 for the \$4.8 million unpaid balance of the Omni Loan (and a portion of the indebtedness First 100 owed under the PPSA and the Prentice Loan) and is now seeking to add to that recovery by also foreclosing against the Kal-Mor Properties. This is the very scenario the one-action rule is intended to prevent. Omni's oblivious attempt to cast itself as the victim in this case does not change the simple fact that Omni has already taken a final judgment against its borrower.

D. THE FIRST 100 JUDGMENT IS A FINAL JUDGMENT.

The notion that the First 100 Judgment is anything other than a final judgment contradicts the plain language of the First 100 Settlement, the First 100 Stipulation, and the First 100 Judgment. First, § 15(e) of the First 100 Settlement specifically states, "[t]he Stipulated Judgment ... shall serve as a final judgment between Omni, First 100, Holdings, and all Guarantors as to all claims asserted in the Lawsuit." Obviously, Omni and First 100 both intended that the First 100 Judgment be a final judgment. Second, the First 100 Stipulation was specifically titled *Stipulation and Order for Entry of Final Judgment* and went on to refer to the

²⁶ Omni Opposition, p. 19.

1 \$4.8 million stipulated judgment to be entered pursuant thereto as a “final judgment.”²⁷ Finally,
2 the First 100 Judgment itself plainly enters judgment against First 100 in the amount of \$4.8
3 million and dismisses with prejudice all other claims in the First 100 Action. It is obviously a
4 final judgment. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (A final
5 judgment “is one that disposes of all the issues presented in the case, and leaves nothing for the
6 future consideration of the court, except for post-judgment issues such as attorney’s fees and
7 costs.”).

8 Omni’s reference to the uncertainty of the amount to actually be paid to Omni under the
9 First 100 Settlement does not change the fact that it took an actual and final judgment against
10 First 100 for \$4.8 million. The First 100 Judgment was not conditional as Omni suggests, nor is
11 there any similarity between the First 100 Judgment and the order at issue in *Nevada First Nat’l*
12 *Bank v. Lamb*, 271 P. 691 (Nev. 1928).

13 The plaintiff’s complaint in *Nevada First Nat’l Bank* sought damages on two promissory
14 notes in the total amount of \$2,993.63. *Id.* at 691. After the complaint was served on the
15 defendant in 1919, “certain money on deposit was attached.” *Id.* When the defendant later
16 failed to appear, the court entered judgment “in the amount attached” but “without prejudice” to
17 the plaintiff’s right to recover the full amount claimed due under the complaint. *Id.* Two years
18 later, in 1921, the defendant appeared and stipulated with the plaintiff as to the application of the
19 attached amount to the indebtedness owed and to a temporary forbearance on further collection.
20 *Id.* After that forbearance expired, the court entered a final judgment against the defendant for
21 the full remaining balance due to the plaintiff in 1922. *Id.* In 1927, the defendant appeared
22 through counsel and moved to set aside the 1922 judgment on the grounds that the court lacked
23 jurisdiction. *Id.* The court denied the defendant’s motion. *Id.* On appeal, the defendant argued
24 that the court lacked jurisdiction to enter the 1922 judgment because it had previously entered a
25 final judgment for the amount attached in 1919. *Id.* On these facts, the Nevada Supreme Court
26

27 ²⁷ *See* First 100 Stipulation, ¶ 8 (“Notwithstanding the foregoing, the entry of a final judgment by this Court
28 pursuant to this Stipulation and Order shall not preclude or otherwise impair any claim or defense that may exist or
arise between or among the Parties with respect to a breach of the Settlement Agreement.”).

found that the partial judgment entered for the amount attached in 1919 was not a final judgment and that the trial court had jurisdiction to enter final judgment for the full balance due in 1922 after the defendant had appeared in the case. *Id.*

The case at hand is easily distinguished from the facts of *Nevada First Nat'l Bank*. The First 100 Judgment was not entered without prejudice to Omni's rights to collect remaining amounts owed under the Omni Loan. To the contrary, the First 100 Judgment was specifically entered with prejudice as to all claims and disputes involving the Omni Loan and other matters at issue in the First 100 Action. The fact that Omni and First 100 each retained the right to enforce the First 100 Settlement does not change the final nature of the First 100 Judgment. Likewise, the fact that First 100's total liability to Omni under the First 100 Settlement may exceed the \$4.8 judgment does not alter the final nature of the First 100 Judgment, which already exceeds the balance Omni claimed due under the Omni Loan.

E. THE FIRST 100 SETTLEMENT WAS A NOVATION OF THE OMNI LOAN.

1. The First 100 Settlement Completely Replaced the Omni Loan.

In entering into the First 100 Settlement, Omni and First 100 completely replaced the disputed obligations and duties previously owed in connection with the Omni Loan with the new obligations and duties set forth therein. To confirm this fact, the Court need look no further than the releases set forth in Section 15 of the First 100 Settlement. Those releases provide in part as follows:

Omni Release. Except for the rights and obligations of the Parties under this Agreement, and effective immediately upon the exchange of fully executed counterparts of this Agreement ... Omni hereby unconditionally relieves, releases, acquits and forever discharges First 100 ... of and from any and all Liabilities and Claims arising out of, concerning, or in any manner relating to ... the Parties' prior settlement efforts and negotiations, and Enforcement Actions²⁸ undertaken by Omni with respect to the Omni Loan (including without limitation the UCC Sale and exercise of the assignment of rents).

²⁸ Section 1 of the First 100 Settlement defines the term "Enforcement Actions" as "Omni letters dated April 8, 2015 and November 2, 2015 claiming First 100 to be in default of the Omni Loan; Omni asserting that it had accelerated that Loan; Omni commencing foreclosure actions which are the subject of this dispute; and Omni's response to the filing of lawsuits related to its claims."

...

Intent. It is the intention of the Parties under this Section 15 that under no circumstances will any Party commence any action or assert any claim as against any other Party (and in the express case of Omni, the Omni Parties such as Martin Boone or Genesis), other than with respect to (i) the enforcement of the terms of this Settlement Agreement, or (ii) for fraud, gross negligence or willful misconduct as discussed herein.²⁹

2. The First 100 Settlement Fundamentally Changed the Rights of the Parties.

Beyond the above releases, the First 100 Settlement fundamentally altered First 100 and Omni's respective positions and rights with respect the remaining balance of the Omni Loan. First and foremost, the indebtedness First 100 agreed to pay to Omni under the First 100 Settlement includes far more than just the unpaid balance of the Omni Loan, which Omni claimed was just \$4.1 million as of June 15, 2016.³⁰ The \$4.8 million First 100 Judgment includes at least a portion of the \$1.68 million in junior secured indebtedness³¹ that Omni acquired from PrenPoinciana, LLC and its affiliates during the pendency of the First 100 Action.³² Moreover, in addition to the \$4.8 million First 100 Judgment, Omni also stands to collect an additional \$1.2 million or more under the First 100 Settlement before its claimed liens would be released.³³ Additionally, funds advanced by Omni to manage the collateral that is the subject of the First 100 Settlement are also recoverable in full prior to the release of Omni's claimed liens.³⁴ Finally, the First 100 Settlement replaced the lender-borrower relationship that existed under the Omni Loan with a type of joint venture agreement under which First 100 stands to recover much of the collateral it pledged to Omni depending on the Omni and First 100's

²⁹ See First 100 Settlement, § 15.

³⁰ See Omni Counterclaim [ECF No. 99] filed in the First 100 Action on June 15, 2016, ¶ 9. A copy of the Counterclaim is attached to Omni's Opposition as "Exhibit I."

³¹ See Order [ECF No. 82] entered in the First 100 Action on May 23, 2016 at ¶ 46. A copy of this Order is attached to Omni's Opposition as "Exhibit B." The indebted Omni acquired from PrenPoinciana, LLC and its affiliates was secured only by First 100's personal property, not the Kal-Mor Properties.

³² See First 100 Settlement, § 3.

³³ See First 100 Settlement, §§ 3, 11.

³⁴ See First 100 Settlement, § 6.

success in managing that collateral.³⁵

3. **The First 100 Judgment Dismissed with Prejudice All Claims Related to the Omni Loan and the Deeds of Trust.**

The First 100 Judgment states in unequivocal terms that both Omni and First 100 dismissed with prejudice all disputed claims related to the Omni Loan and the Deeds of Trust, reserving only the right to enforcement of the First 100 Settlement. Specifically, paragraphs 5 and 6 of the First 100 Judgment state: “The Lawsuit and any and all Disputes, Claims, Counterclaims, and Third-Party Claims are hereby dismissed with prejudice. This judgment shall not preclude or otherwise impair any claim or defense that may exist or arise between or among the Parties with respect to a breach of the Settlement Agreement.”³⁶ The term “Disputes” as used in the First 100 Judgment is defined expansively to include “numerous disputes” between the Omni and First 100 regarding, among other things: “(a) First 100’s default on a line of credit loan extended by Omni pursuant to a loan agreement and other transaction documents dated May 27, 2014; ... and (f) Omni’s first-priority security interest, as beneficiary, under deeds of trust in various real properties previously or currently owned by First 100.”³⁷

The end result of the First 100 Settlement and the First 100 Judgment is inescapable. Omni expressly waived, released, *and dismissed with prejudice* any and all claims it could have asserted based on First 100’s default under the Omni Loan or the Deeds of Trusts. Omni’s only remaining rights and remedies against First 100 are those set forth in the First 100 Settlement Agreement and First 100 Judgment.

4. **The First 100 Settlement Is a Novation of the Omni Loan.**

The intentional and unmistakable substitution of the First 100 Settlement for the Omni Loan was a novation. “A novation, or substituted contract, ‘is a contract that is itself accepted ... in satisfaction of [an] existing duty’ which ‘discharges the original duty.’” *Granite Construction Company v. Remote Energy Solutions, LLC*, 2017 WL 2334516 (Nev. May 25, 2017) (citing

³⁵ See First 100 Settlement, § 11.

³⁶ First 100 Judgment, p. 4 of 5.

³⁷ First 100 Judgment, p. 3 of 5.

Restatement (Second) of Contracts § 279 (Am. Law Inst. 1981)).

All novations are substituted contracts, and the converse is also true that all substituted contracts are novations. An existing claim can be instantly discharged by the substitution of a new executory agreement in its place. This is true whether the prior claim is not yet matured at the time of the substitution, or is a claim to reparation for some prior breach of duty.

Lazovich & Lazovich v. Harding, 86 Nev. 434, 437, 470 P.2d 125, 128 (1970) (citing 6 Corbin on Contracts, s 147 (1951)). “A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid.” *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989). “If all four elements exist, a novation occurred.” *Id.* “An intention to discharge the former debtor in the course of the novation need not be shown by express words to that effect but may be implied from the facts and circumstances.” *Id.*, at 438.

The terms of the First 100 Settlement and the language of the First 100 Judgment provide clear and convincing proof of Omni and First 100’s intent to substitute the First 100 Settlement for the Omni Loan. In fact, Omni has dismissed with prejudice any claim it could assert against First 100 based on either its default under the Omni Loan or the Deeds of Trust.³⁸ In other words, Omni no longer has any right to enforce the note First 100 executed in entering into the Omni Loan; it can only enforce the First 100 Settlement and, by extension thereof, the First 100 Judgment.

There is absolutely no need to infer intent in this case. Omni’s intent to trade its rights under the Omni Loan for those rights spelled out in the First 100 Settlement is unmistakable. Accordingly, the Court must determine as a matter of law that a novation occurred. *Id.*, at 437 (novation can be determined as a matter of law “when the agreement and consent of the parties are unequivocal”).

...

...

³⁸ First 100 Judgment, p. 3 of 5.

1 **5. The Novation of the Omni Loan Discharged the Deeds of Trust.**

2 The law is clear. All obligations owed by First 100 in connection with the Omni Loan
3 were extinguished by novation when First 100 and Omni entered into the First 100 Settlement.
4 The Deeds of Trust secured only the note that First 100 executed in entering into the Omni
5 Loan.³⁹ That note is no longer enforceable as a result of the First 100 Settlement and the First
6 100 Judgment under which Omni expressly waived, released, ***and dismissed with prejudice*** any
7 claim based on First 100's default under the Omni Loan or the Deeds of Trust.⁴⁰

8 The discharge of a security interest through novation of the underlying debt is illustrated
9 in the Nevada Supreme Court case of *Walker v. Shrake*, 75 Nev. 214, 339 P.2d 124 (1959) in
10 which a lender obtained a money judgment against a defaulting borrower. In exchange for the
11 borrower's execution of a new note for double the amount of the judgment, the lender agreed it
12 would not execute on the judgment. *Id.*, at 246-47. When the borrower later defaulted in
13 payment of the second note, the lender foreclosed upon its judgment lien against the borrower's
14 real property. *Id.*, at 247. The Nevada Supreme Court found that the foreclosure sale was void
15 on the basis that the lender's judgment lien was extinguished by novation based upon the second
16 note. *Id.*, 247-48. Specifically, the Court held that the execution of the second note was
17 "intended by the parties to and did substitute the new obligation for the judgment debt, thereby
18 satisfying the judgment in fact if not of record." *Id.*, at 246 (citing *Williams v. Crusader*
19 *Discount Corp.*, 75 Nev. 67, 334 P.2d 843 (1959)). Therefore, no judgment lien existed upon
20 which the lender could have foreclosed. *Id.*, 247-48 ("A sale under a judgment that has been
21 satisfied is void and conveys no title ..."). The Nevada Supreme Court reached similar decisions
22 in *Williams v. Crusader Discount Corp.*, 75 Nev. 67, 334 P.2d 843 (1959) and *Nevada Bank of*
23 *Commerce v. Esquire Real Estate, Inc.*, 86 Nev. 238 (1970). In both cases, the Court determined
24 that guarantors had been released from their respective obligations due to novations of the
25 original loan agreements.

26 _____
27 ³⁹ The Deeds of Trust do not stand as security for any obligation owed in connection with the First 100 Settlement.
28 Kal-Mor is not a party to the First 100 Settlement, and First 100 held no interest whatsoever in the Kal-Mor
properties when it executed the First 100 Settlement.

⁴⁰ First 100 Judgment, p. 3 of 5.

The novation of the Omni Loan through the First 100 Settlement released and replaced all obligations owed in connection with the Omni Loan, including the Deeds of Trust. The enforcement of the power of sale under a deed of trust is contingent upon, among other things, the existence of an actual default in payment of the secured indebtedness. *See* NRS 107.080(1) (“... a power of sale is hereby conferred upon the trustee to be exercised *after a breach* of the obligation for which the transfer is security.”) (Emphasis added). Omni has waived, released, and dismissed with prejudice all claims based on First 100’s default under the Omni Loan.⁴¹ Moreover, there can be no possible default under the Omni Loan at this time because it has been completely replaced with the First 100 Settlement. Without any underlying note nor any breach related thereto, the Deeds of Trust cannot be enforced.

III. CONCLUSION

Based on the foregoing and the arguments and evidence set forth in the Motion, Kal-Mor respectfully requests that this Court enter an order granting partial summary judgment in its favor and against Omni as to Kal-Mor’s fourth cause of action for declaratory relief and fifth cause of action for quiet title, declaring that any security interest or lien Omni could claim against the Kal-Mor Properties as collateral for the Omni Loan was discharged and released (i) under Nevada’s one-action rule as a result of the entry of the First 100 Judgment and (ii) also as a matter of law due to the novation of the Omni Loan through the First 100 Settlement Agreement.

DATED this 22nd day of August, 2018.

KOLESAR & LEATHAM

/s/ Bart K. Larsen, Esq.

BART K. LARSEN, ESQ.

Nevada Bar No. 8538

ERIC D. WALTHER, ESQ.

Nevada Bar No. 13611

400 South Rampart Boulevard, Suite 400

Las Vegas, Nevada 89145

Attorneys for Plaintiff

Kal-Mor-USA, LLC

⁴¹ First 100 Judgment, p. 3 of 5.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 22nd day of August, 2018, I caused to be served a true and correct copy of foregoing REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereon and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List:

Robert Hernquist, Esq.
Mark Gardberg, Esq.
HOWARD & HOWARD ATTORNEYS PLLC
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, NV 89169
Attorneys for Defendant Omni Financial LLC

Joseph A. Gutierrez
MAIER GUTIERREZ AYON
8816 Spanish Ridge Avenue
Las Vegas, NV 89148
Attorneys for Defendant First 100 LLC

/s/ Mary A. Barnes
An Employee of KOLESAR & LEATHAM

EXHIBIT 31

1 JOSEPH A. GUTIERREZ, ESQ.

Nevada Bar No. 9046

2 JASON R. MAIER, ESQ.

Nevada Bar No. 8557

3 MAIER GUTIERREZ AYON

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4 Las Vegas, Nevada 89148

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E-mail: jag@mgalaw.com

6 jrm@mgalaw.com

7 *Attorneys for Plaintiffs First 100, LLC and*

8 *1st One Hundred Holdings, LLC*

9
10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF NEVADA**

12 FIRST 100, LLC, a Nevada limited liability
13 company; 1st ONE HUNDRED HOLDINGS,
LLC, a Nevada limited liability company,

14 Plaintiff,

15 vs.

16 OMNI FINANCIAL, LLC, a foreign limited
liability company; PRENPOINCIANA, LLC, a
17 foreign limited liability company; DOES I
through X; and ROE ENTITIES I through X,
18 inclusive,

19 Defendants.

20 OMNI FINANCIAL, LLC, a California limited
liability company,

21 Counter-Claimant and Third-Party Plaintiff,

22 vs.

23 1st ONE HUNDRED HOLDINGS, LLC, a
24 Nevada limited liability company; JAY
BLOOM, an individual; CARLOS
25 CARDENAS, an individual; CHRISTOPHER
MORGANDO, an individual; MATTHEW
26 FARKAS, an individual; DOES I through X,

27 Counter-Defendant and Third-Party
28 Defendants.

Case No.: 2:16-cv-00099-RFB-CWH

Related Case No. 2:16-cv-00109-RFB-CWH
(Jointly Administered Cases)

**STIPULATION AND ORDER TO
VACATE DECEMBER 19, 2016
HEARINGS**

COME NOW Plaintiffs First 100, LLC and 1st One Hundred Holdings LLC, (collectively "Plaintiffs") by and through their attorneys of record, the law firm MAIER GUTIERREZ AYON and Omni Financial, LLC ("Defendant"), by and through its attorney of record, HOWARD & HOWARD ATTORNEYS PLLC and hereby stipulates and agrees as follows:

On November 23, 2016, Omni Financial reached a settlement with GFY Management, LLC and Kal-Mor-USA, LLC. Those parties submitted a stipulated judgment on December 1, 2016 [ECF No. 57] in related case no. 2:16-cv-00109-RFB-CWH, which will resolve their respective claim.

Omni Financial and First 100 are in the process of finalizing the terms of a proposed settlement agreement that would result in the dismissal of all remaining claims for all remaining parties.

Therefore, the parties stipulate to vacate the hearings currently scheduled for December 19, 2016.

DATED this 12th day of December, 2016

MAIER GUTIERREZ AYON

/s/ Joseph A. Gutierrez

JOSEPH A. GUTIERREZ, ESQ.

Nevada Bar No. 9046

JASON R. MAIER, ESQ.

Nevada Bar No. 8557

8816 Spanish Ridge Avenue

Las Vegas, Nevada 89148

*Attorneys for Plaintiffs First 100, LLC and
1st One Hundred Holdings, LLC*

DATED this 12th day of December, 2016

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Robert Hernquist

GWEN RUTAR MULLINS, ESQ.

Nevada Bar No. 3146

ROBERT HERNQUIST, ESQ.

Nevada Bar No. 10616

MARK GARDBERG, ESQ.

Nevada Bar No. 10879

3800 Howard Hughes Parkway

Las Vegas, Nevada 89169

Attorneys for Defendant Omni Financial, LLC

ORDER

IT IS SO ORDERED.

DATED this ____ day of December, 2016.

U.S. MAGISTRATE JUDGE

EXHIBIT 32

JOINTLY SUBMITTED

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FIRST 100, LLC, a Nevada limited liability
company; 1st ONE HUNDRED HOLDINGS,
LLC, a Nevada limited liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; PRENPOINCIANA, LLC, a
foreign limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

AND ALL RELATED CLAIMS

Case No. 2:16-cv-00099-RFB-(CWH)

Related Case No. 2:16-cv-00109-RFB-
CWH
(Jointly Administered Cases)

STATUS REPORT

Pursuant to the Court's December 12, 2016 Minute Order (ECF 232) First 100, LLC and
Omni Financial, LLC (collectively the "Parties"), by and through their respective counsel of
record, submit the following Status Report:

///

///

///

1 The Parties have agreed upon terms of a compromise, and are in the process of finalizing
2 the associated documentation. The Parties anticipate submitting documents to the Court within
3 fourteen days which will resolve this case in its entirety.
4

5
6 DATED this 6th day of January, 2017.

7 MAIER GUTIERREZ AYON

DATED this 6th day of January, 2017.

HOWARD & HOWARD ATTORNEYS, PLLC

8
9 /s/ Joseph Gutierrez

10 Joseph A. Gutierrez, Nevada Bar No. 9046
11 Luis A. Ayon, Nevada Bar No. 9752
400 South Seventh Street, Suite 400
Las Vegas, Nevada 89101

/s/ Robert Hernquist

Robert Hernquist, Nevada Bar No. 10616
Mark Gardberg, Nevada Bar No. 10879
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Las Vegas, Nevada 89169

12 *Attorneys for Plaintiffs First 100, LLC and*
13 *1st One Hundred Holdings, LLC*

Attorneys for Defendant Omni Financial, LLC

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(702) 257-1483 FAX: (702) 567-1568

Other Title to Property

COURT MINUTES

August 27, 2018

A-17-757061-C Kal-Mor-USA, Inc., Plaintiff(s)
vs.
Omni Financial, LLC, Defendant(s)

August 27, 2018 10:30 AM Plaintiff's Motion for Partial Summary Judgment

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Jacobson, Alice

RECORDER: Pruchnic, Sandra

REPORTER:

PARTIES PRESENT:

Bart K. Larsen Attorney for Plaintiff

Brian J. Pezzillo Attorney for Defendant

Robert Hernquist, ESQ Attorney for Defendant

JOURNAL ENTRIES

Following argument by counsel regarding the stipulated judgment, rights of the Deed of Trust, one action rule, and the 2016 settlement agreement. COURT ORDERED, matter UNDER ADVISEMENT and will issue a written order from Chambers.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Title to Property**COURT MINUTES****August 31, 2018**

A-17-757061-C Kal-Mor-USA, Inc., Plaintiff(s)
vs.
Omni Financial, LLC, Defendant(s)

August 31, 2018 3:00 AM Minute Order

HEARD BY: Scotti, Richard F. **COURTROOM:** Chambers

COURT CLERK: Lauren Kidd

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- The Court GRANTS Plaintiff Kal-Mor-USA, LLC's Motion for Partial Summary Judgment, as to the 4th and 5th causes of action.

It is undisputed that Omni and First 100 entered into a Settlement and Mutual General Release Agreement, dated January 16, 2017 (the so-called First 100 Settlement) (Exh. 30 to Declaration of Greg Darroch, submitted in support of Plaintiff's Motion for Summary Judgment). The First 100 Settlement expressly and unambiguously extinguished the Omni Loan (as defined in the Recitals, para. B) and substituted in the place of such Loan First 100's new obligations under the First 100 Settlement. Id at para. 15(a). As a matter of law, this substitution of the one agreement for another constituted a novation. See United Fire Ins. Co. v. McClelland, 105 Nev. 504 (1989).

The Omni Loan originated from that certain Loan Agreement which was comprised of a Promissory Note and Security Agreement. Id. The extinguishment of the Omni Loan, logically extinguished the security for such loan that no longer existed. See, e.g., Walker v. Shrake, 75 Nev. 2241, 247 (1959) (holding that the satisfaction of the judgment destroyed the security incidental to said obligation).

Further, in Paragraph 15(a) of the First 100 Settlement Omni expressly released all Liabilities and

PRINT DATE: 08/31/2018

Page 1 of 2

Minutes Date: August 31, 2018

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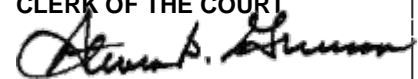
Claims arising out of, concerning, or in any manner relating to, the Omni Loan. The term Claims was defined to include all remedies to enforce repayment of the Omni Loan. Id. at para. 1(b) and 14(a). One such remedy was the right to foreclose on the security. Waiver and release of such remedies necessarily meant waiver and release of the security.

The terms of the First 100 Settlement are clear and unambiguous. The court cannot consider extrinsic evidence to construe the unambiguous terms of a contract. The subjective intent of the parties is not relevant. The prior dealings of the parties are not relevant. In fact, the First 100 Settlement contained a standard merger clause that prohibited this Court from looking to any prior dealings and communications between the parties in construing its meaning. Id. at para. 20(b).

The Court makes no ruling as to the applicability of the one-action rule.

The Court directs Kal-Mor to prepare the proposed Order in this matter, consistent herewith, adding appropriate context and authorities, and correcting for any scrivener errors.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folders of the following: Joseph Gutierrez, Esq., Bart Larson, Esq. and Robert Hernquist, Esq.// 8/31/18 lk



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Attorneys for Plaintiff
Kal-Mor-USA, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X;
and ROE ENTITIES I through X, inclusive,

Defendants.

CASE NO. A-17-757061-C

DEPT. NO. 2

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: August 27, 2018

Time: 10:30 a.m.

Plaintiff Kal-Mor-USA, LLC's ("Kal-Mor") Motion for Partial Summary Judgment (the "Motion") against Defendant Omni Financial, LLC ("Omni") as to Kal-Mor's fourth cause of action for declaratory relief and Kal-Mor's fifth cause of action for quiet title came on for hearing before the Court on August 27, 2018 (the "Hearing"). Kal-Mor appeared through its counsel of record, Bart K. Larsen, Esq. of the law firm of Kolesar & Leatham. Omni appeared through its counsel of record, Robert W. Hernquist, Esq. and Brian J. Pezzillo, Esq. of the law firm of Howard & Howard.

KOLESAR & LEATHAM
400 S. Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145
Tel: (702) 362-7800 / Fax: (702) 362-9472

1 Having duly considered all arguments and evidence presented by both Kal-Mor and
2 Omni, including the arguments made by counsel at the Hearing, and finding good cause for the
3 relief requested in the Motion, the Court makes the following Findings of Fact and Conclusions
4 of Law:

5 **FINDINGS OF FACT**

6 **A. The Omni Loan Transaction**

7 1. On May 27, 2014, First 100 and Omni entered into a Loan Agreement under
8 which Omni agreed to loan up to \$5,000,000 to First 100 (the "Omni Loan Agreement"). In
9 connection therewith, First 100 executed a Promissory Note dated May 27, 2014 in favor of
10 Omni (the "Omni Note"). First 100 and Omni also entered into a Security Agreement dated May
11 27, 2014 (the "Security Agreement" and together with the Omni Loan Agreement, the Omni
12 Note, and other loan documents, the "Omni Loan") under which First 100 pledged certain real
13 and personal property as collateral for the Omni Note.

14 2. Among other things, the collateral purportedly pledged pursuant to the Security
15 Agreement was evidenced by (i) a Deed of Trust dated May 27, 2014 (the "May 2014 Deed of
16 Trust"), (ii) a Deed of Trust dated June 17, 2014 (the "June 2014 Deed of Trust"), and a Deed of
17 Trust dated August 21, 2014 (the "August 2014 Deed of Trust" and together with the May 2014
18 Deed of Trust and June 2014 Deed of Trust, including any subsequent amendments thereto, the
19 "Omni Deeds of Trust").

20 3. The May 2014 Deed of Trust was recorded in the official records of the Clark
21 County, Nevada Recorder (the "Official Records") as instrument number 20140529-0001342 on
22 May 29, 2014. Under the May 2014 Deed of Trust, First 100 purported to pledge various real
23 properties as collateral for the Omni Note, including, but not limited to:

24 a. The property commonly known as 1217 Neva Ranch Avenue, North Las
25 Vegas, Nevada 89081, also designated as Clark County Assessor Parcel
26 Number ("APN") 124-26-311-029 (the "Neva Ranch Property");

27 b. The property commonly known as 230 East Flamingo Road #330, Las Vegas,
28 Nevada 89169, also designated as APN 162-16-810-355 (the "East Flamingo");

Property”);

c. The property commonly known as 2615 West Gary Avenue #1065, Las Vegas, Nevada 89123, also designated as APN 177-20-813-127 (the “West Gary Property”); and

d. The property commonly known as 6575 Shining Sand Avenue, Las Vegas, Nevada 89142, also designated as APN 161-10-511-072 (the “Shining Sand Property”).

4. The June 2014 Deed of Trust was recorded in the Official Records as instrument number 20140718-0001253 on July 18, 2014. Under the June 2014 Deed of Trust, First 100 purported to pledge certain additional real properties as collateral for the Omni Note, including, but not limited to:

a. The property commonly known as 4921 Indian River Drive #112, Las Vegas, Nevada 89103, also designated as APN 163-24-612-588 (the (“4921 Indian River Property”);

b. The property commonly known as 5009 Indian River Drive #155, Las Vegas, Nevada 89103, also designated as APN 163-24-612-639 (the “5009 Indian River Property”);

c. The property commonly known as 5295 Indian River Drive #314, Las Vegas, Nevada 89103, also designated as APN 163-24-612-798 (the “5295 Indian River Property”); and

d. The property commonly known as 4400 Sandy River Drive #16, Las Vegas, Nevada 89103, also designated as APN 163-24-612-500 (the “Sandy River Property”).

5. The August 2014 Deed of Trust was recorded in the Official Records as instrument number 20140826-0001916 on August 26, 2014. Under the August 2014 Deed of Trust, First 100 purported to pledge as collateral for the Omni Note the real property commonly known as 5782 Camino Ramon Avenue, Las Vegas, Nevada 89156, also designated as APN 140-21-611-018 (the “Camino Ramon Property” and together with the Neva Ranch Property, the

1 East Flamingo Property, the West Gary Property, the Shining Sand Property, the 4921 Indian
2 River Property, the 5009 Indian River Property, the 5295 Indian River Property, and the Sandy
3 River Property, the "Kal-Mor Properties").

4 6. On October 5, 2016, Omni re-recorded the August 2014 Deed of Trust in the
5 Official Records as instrument number 20161005-0002287.

6 7. On April 24, 2017, Omni re-recorded the May 2014 Deed of Trust in the Official
7 Records as instrument number 20170424-0000178.

8 8. On April 24, 2017, Omni re-recorded the June 2014 Deed of Trust in the Official
9 Records as instrument number 20170424-0000179.

10 **B. The PrenPoinciana Transactions**

11 9. On or around February 2, 2015 and with Omni's consent, First 100 entered into a
12 Proceeds Purchase Sharing Agreement ("PPSA") with PrenPoinciana, LLC ("PrenPoinciana")
13 under which PrenPoinciana purchased certain rights to share in the proceeds of certain
14 receivables, and First 100 granted PrenPoinciana a junior security interest in such receivables,
15 which had previously been pledged as collateral for the Omni Note.

16 10. On or around April 20, 2015, PrenPoinciana affiliate, Prentice Lending II, LLC
17 ("Prentice"), loaned \$150,000 (the "Prentice Loan") to First 100 and also received a junior
18 security interest in certain receivables that had previously been pledged as collateral for the
19 Omni Note.

20 **C. Kal-Mor's Purchase of the Kal-Mor Properties**

21 11. First 100's business operations include, among other things, the purchase and sale
22 of residential real properties in Clark County, Nevada that are acquired by First 100 as a result of
23 homeowner association ("HOA") assessment lien foreclosure sales conducted pursuant to the
24 provisions of Chapter 116 of Nevada Revised Statutes. During 2014 and 2015, Kal-Mor
25 purchased several such real properties from First 100, including the nine (9) Kal-Mor Properties
26 that First 100 had previously pledged as collateral for the Omni Note under the Omni Deeds of
27 Trust.

D. The First 100 Action

12. During 2015, First 100 failed to pay amounts due and owing under the Omni Note and failed to perform other obligations required of it in connection with the Omni Loan. First 100 similarly failed to perform as agreed in connection with the PPSA. As a result, Omni and PrenPoinciana issued a joint Notification of Disposition of Collateral on January 8, 2016 in which they identified certain personal property subject to their security interests and scheduled a sale of such collateral to take place in accordance with NRS Chapter 104 on January 21, 2016 (the "UCC Sale").

13. On January 15, 2016, First 100 filed a complaint in the Eighth Judicial District Court in Clark County, Nevada (Case No. A-16-730374-C) (the "First 100 Action") in which it asserted various claims against Omni and PrenPoinciana, and sought an injunction to prevent Omni and PrenPoinciana from proceeding with the UCC Sale. On January 18, 2016, Omni removed the First 100 Action to the United States District Court for the District of Nevada (the "District Court") (Case No. 2:16-cv-00099).

14. After several months of litigation in the First 100 Action, Omni completed the UCC Sale on May 25, 2016 and purchased certain First 100 personal property that had been pledged as collateral for the Omni Note under the Security Agreement through a successful credit bid.

15. On or about May 31, 2016, Omni paid \$800,000 to PrenPoinciana and Prentice to purchase their respective interests under the PPSA and the Prentice Loan.

16. Various disputes subsequently arose between First 100 and Omni as to, among other things, the outstanding balance of the Omni Note, the reasonableness of the UCC Sale, the value of the personal property purchase by Omni through the UCC Sale, possession and control of the personal property purchase by Omni through the UCC Sale, First 100's liability for the remaining balance of the Omni Note, First 100's liability to Omni for amounts owed in connection with the PPSA and the Prentice Loan, and Omni's rights and interests under the Omni Deeds of Trust.

1 17. Omni filed a counterclaim against First 100 and others in the First 100 Action in
2 which it alleged, among other things, that the unpaid balance of the Omni Note was \$4.1 million
3 as of June 15, 2016.

4 **E. The First 100 Settlement**

5 18. After several additional months of litigation in the First 100 Action, Omni and
6 First 100 reached an agreement to resolve their various disputes and entered into a written
7 settlement agreement (the "First 100 Settlement") on January 16, 2017.¹

8 19. Section 15(a) of the First 100 Settlement provides in part:

9 Omni Release. Except for the rights and obligations of the Parties under this
10 Agreement, and effective immediately upon the exchange of fully executed
11 counterparts of this Agreement ... Omni hereby unconditionally relieves, releases,
12 acquits and forever discharges First 100 ... of and from any and all Liabilities²
13 and Claims³ arising out of, concerning, or in any manner relating to ... the
14 Parties' prior settlement efforts and negotiations, and Enforcement Actions⁴
15 undertaken by Omni with respect to the Omni Loan (including without limitation
16 the UCC Sale and exercise of the assignment of rents).

17 20. At the time the First 100 Settlement was executed, First 100 held no legal or
18 equitable interest of any kind in any of the Kal-Mor Properties.

19 21. Pursuant to § 15(e) the First 100 Settlement, the District Court entered a
20 Stipulated Judgment on February 16, 2017 (the "First 100 Judgment") in the First 100 Action
21 through which it entered judgment in favor of Omni and against First 100 in the amount of \$4.8

22 ¹ A copy of the First 100 Settlement is attached to Omni's Opposition to Plaintiff's Motion for Partial Summary
23 Judgment as "Exhibit A-4."

24 ² Section 14(a) of the First 100 Settlement defines "Liabilities" as "any and all liabilities, losses, promises,
25 obligations, agreements, compensation, damages, accounts, liens, fines, assessments, indebtedness, costs, charges, or
26 other expenses, including, but not limited to, reasonable attorney fees and costs, including but not limited to any
27 claims that may be brought by Prentice Lending or PrenPoinciana or their respective positions, and whether of any
28 kind or nature, liquidated or unliquidated, suspected or unsuspected, or fixed or contingent."

³ Section 14(a) of the First 100 Settlement defines and defines "Claims" as "claims, controversies, causes of action,
lawsuits, choses in action, arbitrations, administrative actions or proceedings, judgments, order, and remedies."

⁴ Section 1(b) of the First 100 Settlement defines "Enforcement Actions" as "Omni letters dated April 8, 2015 and
November 2, 2015 claiming First 100 to be in default of the Omni Loan; Omni asserting that it had accelerated that
Loan; Omni commencing foreclosure actions which are the subject of this dispute; and Omni's response to the filing
of lawsuits related to its claims."

1 million, but which amount could increase by a specific sum if certain conditions subsequent are
2 not met.⁵

3 22. Among other things, the First 100 Judgment provides that the First 100 Action
4 "and any and all Disputes, Claims, Counterclaims, and Third-Party Claims are hereby dismissed
5 with prejudice. This judgment shall not preclude or otherwise impair any claim or defense that
6 may exist or arise between or among the Parties with respect to a breach of the Settlement
7 Agreement."⁶

8 23. The term "Disputes" as used in the First 100 Judgment is defined in the recitals to
9 the First 100 Judgment to include "numerous disputes ... between Plaintiffs, Defendants, and
10 Guarantors⁷" regarding, among other things: "(a) First 100's default on a line of credit loan
11 extended by Omni pursuant to a loan agreement and other transaction documents dated May 27,
12 2014; ... and (f) Omni's first-priority security interest, as beneficiary, under deeds of trust in
13 various real properties previously or currently owned by First 100."

14 CONCLUSIONS OF LAW

15 1. Summary judgment is proper under Nev. R. Civ. P. 56(c) when there is no
16 genuine issue of material fact and the moving party is entitled to judgment as to all or some part
17 of its claims as a matter of law. *See Cuzze v. Univ. and Comm. College Sys. of Nev.*, 123 Nev.
18 598, 172 P.3d 131, 134 (2007). To defeat a motion for summary judgment, the non-moving
19 party must introduce specific evidence, through affidavit or otherwise, that demonstrates the
20 existence of a genuine issue of material fact. *Id.*

21 2. "The substantive law controls which factual disputes are material and will
22 preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine
23 when the evidence is such that a rational trier of fact could return a verdict for the nonmoving
24 party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

25
26 ⁵ A copy of the First 100 Judgment is attached to Omni's Opposition to Plaintiff's Motion for Partial Summary
Judgment as "Exhibit D."

27 ⁶ First 100 Judgment, ¶¶ 5 and 6.

28 ⁷ Kal-Mor is not identified as either a Plaintiff, a Guarantor, or a Defendant in the First 100 Judgment.

3. In considering a motion for summary judgment, the court must view the evidence presented in a light most favorable to the non-moving party. *Fire Ins. Exchange v. Cornwell*, 120 Nev. 303, 305 (2004).

4. "A novation, or substituted contract, 'is a contract that is itself accepted ... in satisfaction of [an] existing duty' which 'discharges the original duty.'" *Granite Construction Company v. Remote Energy Solutions, LLC*, 2017 WL 2334516 (Nev. May 25, 2017) (citing Restatement (Second) of Contracts § 279 (Am. Law Inst. 1981)).

5. "A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989). "If all four elements exist, a novation occurred." *Id.*

6. A novation must be established by clear and convincing evidence. *Id.* at 509.

7. "Whether a novation occurred is a question of fact if the evidence is such that reasonable persons can draw more than one conclusion." *Id.* at 508.

8. Novation can be determined as a matter of law "when the agreement and consent of the parties are unequivocal." *Lazovich & Lazovich v. Harding*, 86 Nev. 434, 470 P.2d 125 (1970).

9. The proper interpretation of a contract is a question of law. *Dickenson v. State, Dept. of Wildlife*, 110 Nev. 934, 877 P.2d 1059 (1994). If no ambiguity exists, the words of the contract must be taken in their usual and ordinary significance. *Parsons Drilling, Inc. v Polar Resources*, 98 Nev. 374, 376, 649 P.2d 1360, 1362 (1982).

10. It is undisputed that the Omni Note constituted a valid contract between First 100 and Omni. Likewise, it is undisputed that the First 100 Settlement constitutes a valid, new contract between First 100 and Omni. Accordingly, to determine whether a novation occurred, the Court must determine whether the First 100 Settlement extinguished the Omni Note.

11. The undisputed facts set forth in the record unequivocally demonstrate that the First 100 Settlement expressly and unambiguously extinguished and discharged the Omni Note and substituted in place of the Omni Note the new and materially different obligations owed by

1 First 100 under the First 100 Settlement. As a matter of law, the substitution of one agreement
2 for another constitutes a novation. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 780 P.2d
3 193 (1989).

4 12. The extinguishment and discharge of the Omni Note logically extinguished and
5 discharged the Omni Deeds of Trust, which stood as the security for the Omni Note. *See, e.g.*
6 *Walker v. Shrake*, 75 Nev. 241, 247 (1959) (holding that the satisfaction of a judgment destroyed
7 the security incidental to the judgment obligation).

8 13. Furthermore, the plain and unambiguous language of sections 1(b), 14(a), and
9 15(a) of the First 100 Settlement clearly provides that, upon execution of the First 100
10 Settlement, Omni unconditionally waived, released, and discharged all liabilities, claims, and
11 remedies arising out of, concerning, or in any manner relating to First 100's default under the
12 Omni Loan. Thus, the claims and remedies expressly discharged and released under the First
13 100 Settlement included Omni's rights to enforce payment of the Omni Note through foreclose
14 under the Omni Deeds of Trust.

15 14. The terms of the First 100 Settlement are clear and unambiguous. The subjective
16 intent of Omni and First 100 and their prior dealings are irrelevant. The Court cannot consider
17 extrinsic evidence to construe the unambiguous terms of a contract. "[W]hen a contract is clear
18 on its face, it will be construed from the written language and enforced as written." *Canfora v.*
19 *Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776 (2005) (internal quotation marks and citation
20 omitted).

21 15. Furthermore, § 20(b) of the First 100 Settlement contains a standard merger
22 clause that provides that the First 100 Settlement is the entire agreement of the parties and
23 replaces all prior agreements. The parol evidence rule precludes the admission of extrinsic
24 "evidence that would change the contract terms when the terms of a written agreement are clear,
25 definite, and unambiguous." *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004).

26 16. Through its Motion and the evidence and arguments presented in support thereof,
27 Kal-Mor has demonstrated by clear and convincing evidence that the First 100 Settlement was a
28 novation of the Omni Loan. As such, Kal-Mor is entitled, as a matter of law, to the relief

1 requested in connection with its fourth cause of action for declaratory relief and fifth cause of
2 action for quiet title.

3 17. Omni has failed to demonstrate the existence of any genuine issue of material fact
4 that would prevent this Court from granting partial summary judgment in favor of Kal-Mor as to
5 Kal-Mor's fourth cause of action for declaratory relief and fifth cause of action for quiet title.

6 18. The Court makes no determination concerning Kal-Mor's alternative argument
7 that the Omni Deeds of Trust were discharged and released under Nevada's one action rule⁸ as a
8 result of the entry of the First 100 Judgment.

9 19. If any Conclusion of Law set forth herein is determined to properly constitute a
10 Finding of Fact (or vice versa), such shall be treated as if appropriately identified and designated.

11 **ORDER**

12 Based on the foregoing Findings of Fact and Conclusions of Law, THE COURT
13 HEREBY ORDERS AS FOLLOWS:

14 1. Kal-Mor's Motion for Partial Summary Judgment against Omni as to Kal-Mor's
15 fourth cause of action for declaratory relief and Kal-Mor's fifth cause of action for quiet title is
16 GRANTED;

17 2. Omni's request for relief pursuant to Nev. R. Civ. P. 56(f) is DENIED as Omni
18 has failed to demonstrate the existence of or need for discovery concerning any genuine issue of
19 material fact that would prevent this Court from granting partial summary judgment as requested
20 in Kal-Mor's Motion;

21 3. The execution of the First 100 Settlement on or about January 16, 2017 satisfied
22 and discharged the Omni Note;

23 4. The satisfaction and discharge of the Omni Note pursuant to the First 100
24 Settlement satisfied and discharged the Omni Deeds of Trust as to the Kal-Mor Properties;


25
26
27
28 ⁸ Nev. Rev. Stat. §§ 40.430 and 435.

5. Kal-Mor's rights, title, and interests in each of the Kal-Mor Properties exist free and clear of any lien, mortgage, security interest, or other encumbrance that might be claimed under the Omni Deeds of Trust; and

6. A certified copy of this Order may be recorded in the Official Records as proof and confirmation that any lien, mortgage, security interest, or other encumbrance that might be claimed against any of the Kal-Mor Properties under any of the Omni Deeds of Trust has been fully released and discharged.


IT IS SO ORDERED.

DATED this 26 day of September, 2018.


DISTRICT JUDGE

Submitted by:

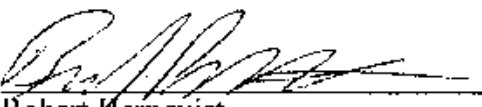
KOLESAR & LEATHAM


Bart K. Larsen, Esq.
Nevada Bar No. 8538
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Las Vegas, Nevada 89145

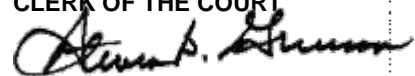
*Attorneys for Plaintiff
Kal-Mor-USA, LLC*

Approved as to form by:

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Attorneys for Plaintiff
Kal-Mor-USA, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES 1 through X;
and ROE ENTITIES 1 through X,

Defendants.

CASE NO. A-17-757061-C

DEPT NO. 2


**NOTICE OF ENTRY OF FINDINGS
OF FACT, CONCLUSIONS OF LAW,
AND ORDER GRANTING
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Please take notice that Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Partial Summary Judgment was entered with the above court on the 2nd day of October, 2018, a copy of which is attached hereto.

DATED this 3rd day of October, 2018.

KOLESAR & LEATHAM

By


BART K. LARSEN, ESQ.
Nevada Bar No. 008538
400 South Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145

Attorneys for Plaintiff
Kal-Mor-USA, LLC

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Kolesar & Leatham, and that on the 3rd day of October, 2018, I caused to be served a true and correct copy of foregoing NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities to those parties listed on the Court's Master Service List.


An Employee of KOLESAR & LEATHAM

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Attorneys for Plaintiff
Kal-Mor-USA, LLC

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X;
and ROE ENTITIES I through X, inclusive,

Defendants.

CASE NO. A-17-757061-C

DEPT. NO. 2

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: August 27, 2018

Time: 10:30 a.m.

Plaintiff Kal-Mor-USA, LLC's ("Kal-Mor") Motion for Partial Summary Judgment (the "Motion") against Defendant Omni Financial, LLC ("Omni") as to Kal-Mor's fourth cause of action for declaratory relief and Kal-Mor's fifth cause of action for quiet title came on for hearing before the Court on August 27, 2018 (the "Hearing"). Kal-Mor appeared through its counsel of record, Bart K. Larsen, Esq. of the law firm of Kolesar & Leatham. Omni appeared through its counsel of record, Robert W. Hernquist, Esq. and Brian J. Pezzillo, Esq. of the law firm of Howard & Howard.

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1 Having duly considered all arguments and evidence presented by both Kal-Mor and
2 Omni, including the arguments made by counsel at the Hearing, and finding good cause for the
3 relief requested in the Motion, the Court makes the following Findings of Fact and Conclusions
4 of Law:

5 **FINDINGS OF FACT**

6 **A. The Omni Loan Transaction**

7 1. On May 27, 2014, First 100 and Omni entered into a Loan Agreement under
8 which Omni agreed to loan up to \$5,000,000 to First 100 (the "Omni Loan Agreement"). In
9 connection therewith, First 100 executed a Promissory Note dated May 27, 2014 in favor of
10 Omni (the "Omni Note"). First 100 and Omni also entered into a Security Agreement dated May
11 27, 2014 (the "Security Agreement") and together with the Omni Loan Agreement, the Omni
12 Note, and other loan documents, the "Omni Loan") under which First 100 pledged certain real
13 and personal property as collateral for the Omni Note.

14 2. Among other things, the collateral purportedly pledged pursuant to the Security
15 Agreement was evidenced by (i) a Deed of Trust dated May 27, 2014 (the "May 2014 Deed of
16 Trust"), (ii) a Deed of Trust dated June 17, 2014 (the "June 2014 Deed of Trust"), and a Deed of
17 Trust dated August 21, 2014 (the "August 2014 Deed of Trust" and together with the May 2014
18 Deed of Trust and June 2014 Deed of Trust, including any subsequent amendments thereto, the
19 "Omni Deeds of Trust").

20 3. The May 2014 Deed of Trust was recorded in the official records of the Clark
21 County, Nevada Recorder (the "Official Records") as instrument number 20140529-0001342 on
22 May 29, 2014. Under the May 2014 Deed of Trust, First 100 purported to pledge various real
23 properties as collateral for the Omni Note, including, but not limited to:

- 24 a. The property commonly known as 1217 Neva Ranch Avenue, North Las
25 Vegas, Nevada 89081, also designated as Clark County Assessor Parcel
26 Number ("APN") 124-26-311-029 (the "Neva Ranch Property");
27 b. The property commonly known as 230 East Flamingo Road #330, Las Vegas,
28 Nevada 89169, also designated as APN 162-16-810-355 (the "East Flamingo");

1 Property");

- 2 c. The property commonly known as 2615 West Gary Avenue #1065, Las
3 Vegas, Nevada 89123, also designated as APN 177-20-813-127 (the "West
4 Gary Property"); and
5 d. The property commonly known as 6575 Shining Sand Avenue, Las Vegas,
6 Nevada 89142, also designated as APN 161-10-511-072 (the "Shining Sand
7 Property").

8 4. The June 2014 Deed of Trust was recorded in the Official Records as instrument
9 number 20140718-0001253 on July 18, 2014. Under the June 2014 Deed of Trust, First 100
10 purported to pledge certain additional real properties as collateral for the Omni Note, including,
11 but not limited to:

- 12 a. The property commonly known as 4921 Indian River Drive #112, Las Vegas,
13 Nevada 89103, also designated as APN 163-24-612-588 (the ("4921 Indian
14 River Property");
15 b. The property commonly known as 5009 Indian River Drive #155, Las Vegas,
16 Nevada 89103, also designated as APN 163-24-612-639 (the "5009 Indian
17 River Property");
18 c. The property commonly known as 5295 Indian River Drive #314, Las Vegas,
19 Nevada 89103, also designated as APN 163-24-612-798 (the "5295 Indian
20 River Property"); and
21 d. The property commonly known as 4400 Sandy River Drive #16, Las Vegas,
22 Nevada 89103, also designated as APN 163-24-612-500 (the "Sandy River
23 Property").

24 5. The August 2014 Deed of Trust was recorded in the Official Records as
25 instrument number 20140826-0001916 on August 26, 2014. Under the August 2014 Deed of
26 Trust, First 100 purported to pledge as collateral for the Omni Note the real property commonly
27 known as 5782 Camino Ramon Avenue, Las Vegas, Nevada 89156, also designated as APN
28 140-21-611-018 (the "Camino Ramon Property" and together with the Neva Ranch Property, the

1 East Flamingo Property, the West Gary Property, the Shining Sand Property, the 4921 Indian
2 River Property, the 5009 Indian River Property, the 5295 Indian River Property, and the Sandy
3 River Property, the "Kal-Mor Properties").

4 6. On October 5, 2016, Omni re-recorded the August 2014 Deed of Trust in the
5 Official Records as instrument number 20161005-0002287.

6 7. On April 24, 2017, Omni re-recorded the May 2014 Deed of Trust in the Official
7 Records as instrument number 20170424-0000178.

8 8. On April 24, 2017, Omni re-recorded the June 2014 Deed of Trust in the Official
9 Records as instrument number 20170424-0000179.

10 **B. The PrenPoinciana Transactions**

11 9. On or around February 2, 2015 and with Omni's consent, First 100 entered into a
12 Proceeds Purchase Sharing Agreement ("PPSA") with PrenPoinciana, LLC ("PrenPoinciana")
13 under which PrenPoinciana purchased certain rights to share in the proceeds of certain
14 receivables, and First 100 granted PrenPoinciana a junior security interest in such receivables,
15 which had previously been pledged as collateral for the Omni Note.

16 10. On or around April 20, 2015, PrenPoinciana affiliate, Prentice Lending II, LLC
17 ("Prentice"), loaned \$150,000 (the "Prentice Loan") to First 100 and also received a junior
18 security interest in certain receivables that had previously been pledged as collateral for the
19 Omni Note.

20 **C. Kal-Mor's Purchase of the Kal-Mor Properties**

21 11. First 100's business operations include, among other things, the purchase and sale
22 of residential real properties in Clark County, Nevada that are acquired by First 100 as a result of
23 homeowner association ("HOA") assessment lien foreclosure sales conducted pursuant to the
24 provisions of Chapter 116 of Nevada Revised Statutes. During 2014 and 2015, Kal-Mor
25 purchased several such real properties from First 100, including the nine (9) Kal-Mor Properties
26 that First 100 had previously pledged as collateral for the Omni Note under the Omni Deeds of
27 Trust.

D. The First 100 Action

12. During 2015, First 100 failed to pay amounts due and owing under the Omni Note and failed to perform other obligations required of it in connection with the Omni Loan. First 100 similarly failed to perform as agreed in connection with the PPSA. As a result, Omni and PrenPoinciana issued a joint Notification of Disposition of Collateral on January 8, 2016 in which they identified certain personal property subject to their security interests and scheduled a sale of such collateral to take place in accordance with NRS Chapter 104 on January 21, 2016 (the "UCC Sale").

13. On January 15, 2016, First 100 filed a complaint in the Eighth Judicial District Court in Clark County, Nevada (Case No. A-16-730374-C) (the "First 100 Action") in which it asserted various claims against Omni and PrenPoinciana, and sought an injunction to prevent Omni and PrenPoinciana from proceeding with the UCC Sale. On January 18, 2016, Omni removed the First 100 Action to the United States District Court for the District of Nevada (the "District Court") (Case No. 2:16-cv-00099).

14. After several months of litigation in the First 100 Action, Omni completed the UCC Sale on May 25, 2016 and purchased certain First 100 personal property that had been pledged as collateral for the Omni Note under the Security Agreement through a successful credit bid.

15. On or about May 31, 2016, Omni paid \$800,000 to PrenPoinciana and Prentice to purchase their respective interests under the PPSA and the Prentice Loan.

16. Various disputes subsequently arose between First 100 and Omni as to, among other things, the outstanding balance of the Omni Note, the reasonableness of the UCC Sale, the value of the personal property purchase by Omni through the UCC Sale, possession and control of the personal property purchase by Omni through the UCC Sale, First 100's liability for the remaining balance of the Omni Note, First 100's liability to Omni for amounts owed in connection with the PPSA and the Prentice Loan, and Omni's rights and interests under the Omni Deeds of Trust.

1 17. Omni filed a counterclaim against First 100 and others in the First 100 Action in
2 which it alleged, among other things, that the unpaid balance of the Omni Note was \$4.1 million
3 as of June 15, 2016.

4 **E. The First 100 Settlement**

5 18. After several additional months of litigation in the First 100 Action, Omni and
6 First 100 reached an agreement to resolve their various disputes and entered into a written
7 settlement agreement (the "First 100 Settlement") on January 16, 2017.¹

8 19. Section 15(a) of the First 100 Settlement provides in part:

9 Omni Release. Except for the rights and obligations of the Parties under this
10 Agreement, and effective immediately upon the exchange of fully executed
11 counterparts of this Agreement ... Omni hereby unconditionally relieves, releases,
12 acquits and forever discharges First 100 ... of and from any and all Liabilities²
13 and Claims³ arising out of, concerning, or in any manner relating to ... the
14 Parties' prior settlement efforts and negotiations, and Enforcement Actions⁴
15 undertaken by Omni with respect to the Omni Loan (including without limitation
16 the UCC Sale and exercise of the assignment of rents).

17 20. At the time the First 100 Settlement was executed, First 100 held no legal or
18 equitable interest of any kind in any of the Kal-Mor Properties.

19 21. Pursuant to § 15(e) the First 100 Settlement, the District Court entered a
20 Stipulated Judgment on February 16, 2017 (the "First 100 Judgment") in the First 100 Action
21 through which it entered judgment in favor of Omni and against First 100 in the amount of \$4.8

22 ¹ A copy of the First 100 Settlement is attached to Omni's Opposition to Plaintiff's Motion for Partial Summary
23 Judgment as "Exhibit A-4."

24 ² Section 14(a) of the First 100 Settlement defines "Liabilities" as "any and all liabilities, losses, promises,
25 obligations, agreements, compensation, damages, accounts, liens, fines, assessments, indebtedness, costs, charges, or
26 other expenses, including, but not limited to, reasonable attorney fees and costs, including but not limited to any
27 claims that may be brought by Prentice Lending or PrenPoinciana or their respective positions, and whether of any
28 kind or nature, liquidated or unliquidated, suspected or unsuspected, or fixed or contingent."

³ Section 14(a) of the First 100 Settlement defines and defines "Claims" as "claims, controversies, causes of action,
lawsuits, choses in action, arbitrations, administrative actions or proceedings, judgments, order, and remedies."

⁴ Section 1(b) of the First 100 Settlement defines "Enforcement Actions" as "Omni letters dated April 8, 2015 and
November 2, 2015 claiming First 100 to be in default of the Omni Loan; Omni asserting that it had accelerated that
Loan; Omni commencing foreclosure actions which are the subject of this dispute; and Omni's response to the filing
of lawsuits related to its claims."

1 million, but which amount could increase by a specific sum if certain conditions subsequent are
2 not met.⁵

3 22. Among other things, the First 100 Judgment provides that the First 100 Action
4 "and any and all Disputes, Claims, Counterclaims, and Third-Party Claims are hereby dismissed
5 with prejudice. This judgment shall not preclude or otherwise impair any claim or defense that
6 may exist or arise between or among the Parties with respect to a breach of the Settlement
7 Agreement."⁶

8 23. The term "Disputes" as used in the First 100 Judgment is defined in the recitals to
9 the First 100 Judgment to include "numerous disputes ... between Plaintiffs, Defendants, and
10 Guarantors⁷" regarding, among other things: "(a) First 100's default on a line of credit loan
11 extended by Omni pursuant to a loan agreement and other transaction documents dated May 27,
12 2014; ... and (f) Omni's first-priority security interest, as beneficiary, under deeds of trust in
13 various real properties previously or currently owned by First 100."

14 CONCLUSIONS OF LAW

15 1. Summary judgment is proper under Nev. R. Civ. P. 56(c) when there is no
16 genuine issue of material fact and the moving party is entitled to judgment as to all or some part
17 of its claims as a matter of law. *See Cuzze v. Univ. and Comm. College Sys. of Nev.*, 123 Nev.
18 598, 172 P.3d 131, 134 (2007). To defeat a motion for summary judgment, the non-moving
19 party must introduce specific evidence, through affidavit or otherwise, that demonstrates the
20 existence of a genuine issue of material fact. *Id.*

21 2. "The substantive law controls which factual disputes are material and will
22 preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine
23 when the evidence is such that a rational trier of fact could return a verdict for the nonmoving
24 party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

25
26 ⁵ A copy of the First 100 Judgment is attached to Omni's Opposition to Plaintiff's Motion for Partial Summary
Judgment as "Exhibit D."

27 ⁶ First 100 Judgment, ¶¶ 5 and 6.

28 ⁷ Kal-Mor is not identified as either a Plaintiff, a Guarantor, or a Defendant in the First 100 Judgment.

3. In considering a motion for summary judgment, the court must view the evidence presented in a light most favorable to the non-moving party. *Fire Ins. Exchange v. Cornwell*, 120 Nev. 303, 305 (2004).

4. "A novation, or substituted contract, 'is a contract that is itself accepted ... in satisfaction of [an] existing duty' which 'discharges the original duty.'" *Granite Construction Company v. Remote Energy Solutions, LLC*, 2017 WL 2334516 (Nev. May 25, 2017) (citing Restatement (Second) of Contracts § 279 (Am. Law Inst. 1981)).

5. "A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989). "If all four elements exist, a novation occurred." *Id.*

6. A novation must be established by clear and convincing evidence. *Id.* at 509.

7. "Whether a novation occurred is a question of fact if the evidence is such that reasonable persons can draw more than one conclusion." *Id.* at 508.

8. Novation can be determined as a matter of law "when the agreement and consent of the parties are unequivocal." *Lazovich & Lazovich v. Harding*, 86 Nev. 434, 470 P.2d 125 (1970).

9. The proper interpretation of a contract is a question of law. *Dickenson v. State, Dept. of Wildlife*, 110 Nev. 934, 877 P.2d 1059 (1994). If no ambiguity exists, the words of the contract must be taken in their usual and ordinary significance. *Parsons Drilling, Inc. v Polar Resources*, 98 Nev. 374, 376, 649 P.2d 1360, 1362 (1982).

10. It is undisputed that the Omni Note constituted a valid contract between First 100 and Omni. Likewise, it is undisputed that the First 100 Settlement constitutes a valid, new contract between First 100 and Omni. Accordingly, to determine whether a novation occurred, the Court must determine whether the First 100 Settlement extinguished the Omni Note.

11. The undisputed facts set forth in the record unequivocally demonstrate that the First 100 Settlement expressly and unambiguously extinguished and discharged the Omni Note and substituted in place of the Omni Note the new and materially different obligations owed by

1 First 100 under the First 100 Settlement. As a matter of law, the substitution of one agreement
2 for another constitutes a novation. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 780 P.2d
3 193 (1989).

4 12. The extinguishment and discharge of the Omni Note logically extinguished and
5 discharged the Omni Deeds of Trust, which stood as the security for the Omni Note. *See, e.g.*
6 *Walker v. Shrake*, 75 Nev. 241, 247 (1959) (holding that the satisfaction of a judgment destroyed
7 the security incidental to the judgment obligation).

8 13. Furthermore, the plain and unambiguous language of sections 1(b), 14(a), and
9 15(a) of the First 100 Settlement clearly provides that, upon execution of the First 100
10 Settlement, Omni unconditionally waived, released, and discharged all liabilities, claims, and
11 remedies arising out of, concerning, or in any manner relating to First 100's default under the
12 Omni Loan. Thus, the claims and remedies expressly discharged and released under the First
13 100 Settlement included Omni's rights to enforce payment of the Omni Note through foreclose
14 under the Omni Deeds of Trust.

15 14. The terms of the First 100 Settlement are clear and unambiguous. The subjective
16 intent of Omni and First 100 and their prior dealings are irrelevant. The Court cannot consider
17 extrinsic evidence to construe the unambiguous terms of a contract. "[W]hen a contract is clear
18 on its face, it will be construed from the written language and enforced as written." *Canfora v.*
19 *Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776 (2005) (internal quotation marks and citation
20 omitted).

21 15. Furthermore, § 20(b) of the First 100 Settlement contains a standard merger
22 clause that provides that the First 100 Settlement is the entire agreement of the parties and
23 replaces all prior agreements. The parol evidence rule precludes the admission of extrinsic
24 "evidence that would change the contract terms when the terms of a written agreement are clear,
25 definite, and unambiguous." *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004).

26 16. Through its Motion and the evidence and arguments presented in support thereof,
27 Kal-Mor has demonstrated by clear and convincing evidence that the First 100 Settlement was a
28 novation of the Omni Loan. As such, Kal-Mor is entitled, as a matter of law, to the relief

1 requested in connection with its fourth cause of action for declaratory relief and fifth cause of
2 action for quiet title.

3 17. Omni has failed to demonstrate the existence of any genuine issue of material fact
4 that would prevent this Court from granting partial summary judgment in favor of Kal-Mor as to
5 Kal-Mor's fourth cause of action for declaratory relief and fifth cause of action for quiet title.

6 18. The Court makes no determination concerning Kal-Mor's alternative argument
7 that the Omni Deeds of Trust were discharged and released under Nevada's one action rule⁸ as a
8 result of the entry of the First 100 Judgment.

9 19. If any Conclusion of Law set forth herein is determined to properly constitute a
10 Finding of Fact (or vice versa), such shall be treated as if appropriately identified and designated.

11 **ORDER**

12 Based on the foregoing Findings of Fact and Conclusions of Law, THE COURT
13 HEREBY ORDERS AS FOLLOWS:

14 1. Kal-Mor's Motion for Partial Summary Judgment against Omni as to Kal-Mor's
15 fourth cause of action for declaratory relief and Kal-Mor's fifth cause of action for quiet title is
16 GRANTED;

17 2. Omni's request for relief pursuant to Nev. R. Civ. P. 56(f) is DENIED as Omni
18 has failed to demonstrate the existence of or need for discovery concerning any genuine issue of
19 material fact that would prevent this Court from granting partial summary judgment as requested
20 in Kal-Mor's Motion;

21 3. The execution of the First 100 Settlement on or about January 16, 2017 satisfied
22 and discharged the Omni Note;

23 4. The satisfaction and discharge of the Omni Note pursuant to the First 100
24 Settlement satisfied and discharged the Omni Deeds of Trust as to the Kal-Mor Properties;

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28 ⁸ Nev. Rev. Stat. §§ 40.430 and 435.


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Las Vegas, Nevada 89145
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5. Kal-Mor's rights, title, and interests in each of the Kal-Mor Properties exist free and clear of any lien, mortgage, security interest, or other encumbrance that might be claimed under the Omni Deeds of Trust; and

6. A certified copy of this Order may be recorded in the Official Records as proof and confirmation that any lien, mortgage, security interest, or other encumbrance that might be claimed against any of the Kal-Mor Properties under any of the Omni Deeds of Trust has been fully released and discharged.

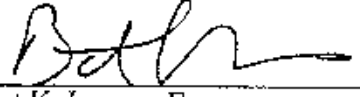
IT IS SO ORDERED.

DATED this 26 day of September, 2018.


DISTRICT JUDGE

Submitted by:

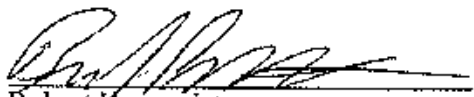
KOLESAR & LEATHAM


Bart K. Larsen, Esq.
Nevada Bar No. 8538
400 South Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145

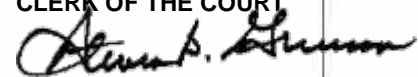
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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**MOTION FOR RECONSIDERATION
OF ORDER GRANTING PARTIAL
SUMMARY JUDGMENT**

Date:

Time:

Defendant Omni Financial, LLC ("Omni") submits the following Motion for
Reconsideration of the Order Granting Partial Summary entered on October 3, 2018.

NOTICE OF HEARING

Please take notice that on the 26 day of Nov., 2018, the above Motion for Reconsideration of Order Granting Partial Summary Judgment shall be heard in Department 2 of the Eighth Judicial District Court at the hour of _____ am/pm.

HOWARD & HOWARD ATTORNEYS PLLC

By: 

Robert Hernquist, Nevada Bar No. 10616

Mark Gardberg; Nevada Bar No. 10879

Brian J. Pezzillo; Nevada Bar No. 7136

Attorneys for Defendant Omni Financial, LLC

MEMORANDUM OF POINTS AND AUTHORITIES**I. PRELIMINARY STATEMENT**

Kal-Mor sought, and was awarded, partial summary judgment on its claim that the Settlement Agreement entered into on January 16, 2017¹ entered into between Omni and First 100, LLC ("First 100"), constituted a novation of the prior agreement entered into between the parties on May 27, 2014.² Kal-Mor ignored the fact that it is a third-party to both the Original Agreement as well as the Settlement Agreement between Omni and First 100. In fact, at the oral argument held on August 24, 2018, counsel for Kal-Mor emphatically argued that Kal-Mor had nothing to do with the negotiation or execution of the Settlement Agreement, therefore, it could not possess any admissible evidence upon which the Court could legitimately base its granting of the partial summary judgment. This fact is underscored by Kal-Mor's reliance upon an affidavit of Greg Darroch, filed concurrently with the Motion. Critically, Mr. Darroch qualified many of his factual allegations—i.e., *over one-quarter of his paragraphs*—as made upon "information and belief." As discussed below, for summary judgment purposes, all factual allegations *must* be

¹ A copy of the settlement agreement was previously attached to Omni's Opposition to Motion for Partial Summary Judgment ("Opposition") as Exhibit A-4.

² A copy of the original agreement was attached as Exhibit A-1.

1 made upon personally known information and be admissible pursuant to NRCP 56(e).
2 Conversely, all matters stated as a naked, unverified "belief" must be disregarded as a matter of
3 law. This is particularly true when a third party to an agreement seeks to collaterally attack the
4 agreement for its own benefit. Kal-Mor was expressly excluded as a third-party beneficiary of
5 the Settlement Agreement and therefore may derive no benefit from it, nevertheless, Kal-Mor
6 seeks to interpose itself into the Settlement Agreement despite the clear intent of Omni and First
7 100.

8 The undisputed evidence in this matter demonstrates that, as is known to all parties, the
9 intent of Omni and First 100 was that Omni would be not be waiving its right to enforce its Deeds
10 of Trust which secured the debt owed by First 100, and upon which First 100 defaulted. This is
11 clearly evidenced by the fact that First 100 has never objected to Omni enforcing its rights under
12 the pertinent Deeds of Trust and by affirmatively assisting Omni in the foreclosure of the pertinent
13 Deeds of Trust. Although this was raised by Omni in its Opposition, Kal-Mor ignored this fact
14 in its Motion for Partial Summary Judgment ("Motion"). Instead of offering evidence which is
15 indicative of the intent of Omni and First 100, Kal-Mor, a third party based its Motion on its own
16 subjective desire for the Settlement Agreement to be interpreted as a novation. In reality, the
17 language of the Settlement Agreement, language which is not included in Settlement Agreement,
18 such as a requirement to release the Deeds of Trust, and conduct of the parties demonstrates that
19 the Settlement Agreement was meant to act as an executory accord, not a novation.

20 Additionally, Kal-Mor failed to carry its burden in proving novation in its Motion by clear
21 and convincing evidence. At most, Kal-Mor raised a question of fact as to the intent of Omni and
22 First 100, which is not sufficient to support the Court's finding of novation. Kal-Mor failed to
23 address all of the required elements of novation, namely, that a valid and enforceable agreement
24 existed which was subject to novation. In fact, no such agreement could exist given the fact that
25 that First 100 was in breach of its obligations under the original agreement and therefore no valid
26 agreement existed which could be novated.

Likewise, even if a valid agreement did exist which was subject of novation, the intent of Omni and First 100 was the establishment of an executory accord, not a novation. The original lending agreement between Omni and First 100 could only have been discharged upon the satisfaction of the terms and conditions of the Settlement Agreement. A condition precedent which has not been fulfilled, as admitted by Kal-Mor.

STATEMENT OF FACTS

Many “facts” pertinent to the prior Motion were the subject of findings *already* made by the U.S. District Court in Case Nos. 16-cv-00099 and 16-cv-00109 (“Prior Litigation”), and thus are *not* subject to re-litigation.

A. OMNI/FIRST 100 LOAN

1. Omni Financial LLC, Orbis Financial LLC and Firmus Financial LLC (collectively, “Omni”) are California entities that extend real estate-backed loans. ((Opposition, Ex. A, Decl. of Martin Boone), ¶3).

2. In 2014, Omni agreed to loan up to \$5 million to Defendant First 100, LLC (“First 100”) to finance the purchase and enforcement of homeowner association (“HOA”) receivables (the “Loan”). (Opposition, Ex. A, ¶4; Ex. B, Court Order, Case No. 2:16-cv-00099, 3:23-4:9).

3. On May 27, 2014, (i) the two entered into a Loan Agreement; (ii) First 100 executed a Promissory Note, Security Agreement, and multiple Deeds of Trust in Omni’s favor; and (iii) certain First 100 principals issued Guarantees in Omni’s favor. (*Id.*, at 3:23-4:9)).

4. Unbeknownst to Omni when it extended that Loan, First 100 and Kal-Mor were *not* independent parties. Greg Darroch—Kal-Mor’s principal, and author of the affidavit offered in support of Kal-Mor’s Motion — owned equity in First 100. (Opposition, Ex. A, ¶5). Omni presumes Mr. Darroch still owns equity in First 100. (*Id.*). This fact was not disputed by Kal-Mor.

5. The Security Agreement granted Omni a security interest in all of First 100’s present and future-acquired personal property, ranging from HOA Receivables to cash accounts

1 to equipment and so forth. (Opposition, Ex. B, 3:25-4:5; 16:26-17:5). Not a single type or item
2 of personalty was excluded. (*Id.*)

3 6. Omni recorded UCC-1 financing statements in Nevada and Florida evidencing its
4 security interest in First 100's personalty. (Opposition, Ex. A; Ex. A-2).

5 7. That was the first UCC filing on record, pre-dating UCC-1s and tax liens filed by;
6 (i) PrenPoinciana, LLC, an unrelated third party; (ii) Mr. Darroch, Kal-Mor's principal and
7 affiant, and (iii) the I.R.S. (Opposition, Ex. A-8, A-9 and A-10).

8 8. As Kal-Mor conceded, First 100 also executed multiple deeds of trust in Omni's
9 favor (the "Deeds of Trust"). (Motion, p. 4, ¶3; Opposition, Ex. A, ¶7). Those Deeds of Trust
10 encumbered, as security for the Loan, approximately thirty properties in the State of Nevada.
11 (Opposition, Ex. A, ¶7).

12 9. Kal-Mor contended it subsequently purchased and owns nine of those thirty
13 parcels (the "Kal-Mor Real Properties"). (Motion, p. 7, ¶15).

14 10. Kal-Mor alleged that despite its close links with First 100, and despite the fact that
15 a title report would have mentioned Omni's Deeds of Trusts, its principal, Mr. Darroch,
16 purportedly knew nothing about them. (Darroch Decl., ¶¶13, 15 and 20).

17 11. Kal-Mor alleges that:

18 First 100 did not disclose to Kal-Mor that it had previously pledged any interest in
19 any of the Kal-Mor Properties as collateral for the Omni Loan or that any of the
20 Kal-Mor Properties was subject to any of the Omni Deeds of Trust.

21 Kal-Mor had no actual knowledge or notice of any of the Omni Deeds of Trust
22 when it purchased the Kal-Mor Properties from First 100 in 2014 and 2015.

(Motion, p. 8, ¶¶19, 20).

23 12. First 100, in contrast, represented to Omni that it "in transferring the Real
24 Properties...to third parties, [First 100] provided all of those third parties, prior to closing the
25 transfer transaction, with actual notice of the existence of Omni's first-priority security interest in
26 those Real Properties." (Opposition, Exhibit A-4, Omni / First 100 Settlement Agreement at
27 §8(e)).

B. KAL-MOR LOAN AND PROPERTY ACQUISITIONS

13. In 2013, 2014 and 2015, Kal-Mor purchased several properties from First 100, including the Kal-Mor Properties at issue here. (Opposition, Ex. A, ¶10; Motion, p. 7, ¶15).

14. On May 13, 2015, Mr. Darroch filed a UCC-1 financing statement against First 100, claiming he loaned money to First 100 and was granted a security interest in certain HOA receivables. (Opposition, Ex. A, ¶11; Ex. A-9). Based on his filing date, Mr. Darroch's interest was at best fourth in priority, behind the interests of Omni, the IRS, and PrenPoinciana, respectively. (*Id.*)

C. FIRST 100'S LOAN DEFAULTS

15. Prior to Kal-Mor's purchases and loan, First 100 committed the first of its numerous breaches of the Omni Loan. (Opposition, Ex. B, 4:10-14).

16. Among other things, it failed to: (i) pay principal and interest when due; (ii) cure the defects in Omni's Deeds of Trust; (iii) properly prosecute and enforce the HOA receivables; and (iv) provide Omni with required monthly, quarterly, and annual financial statements. (Opposition, Ex. A, ¶12).

17. Kal-Mor acknowledged that First 100 was in breach of its agreement with Omni prior to entering into the Settlement Agreement. (Motion, p. 8, ¶21).

18. Omni issued a notice of default on April 8, 2015. (Opposition, Ex. A-11).

19. First 100 failed to respond, forcing Omni to hire legal counsel. (Opposition, Ex. A, ¶13).

20. On November 2, 2015, Omni sent First 100 a second notice of default, categorizing First 100's breaches in more detail. (Opposition, Ex. A-12). That notice accelerated the Loan and demanded payment in full. (*Id.*)

21. Throughout November 2015, First 100 and Kal-Mor repeatedly promised Omni that Kal-Mor would buy out the Omni Loan at full face value. (Opposition, Ex. A, ¶14). At times, First 100 and Kal-Mor promised Omni that a \$4 million pay-off would be wired within hours. (*Id.*)

22. Kal-Mor's counsel delivered a draft loan assignment agreement to Omni on November 20, 2015, and Omni responded with a revised draft a few days later. (*Id.*)

23. Negotiations continued into early December, until Kal-Mor's counsel simply "went dark"—declining to respond to any email or phone messages. (*Id.*) Omni believes Kal-Mor's entire loan payoff proposals were a ruse to buy First 100 more time. (*Id.*)

24. Omni and First 100 entered into a Forbearance Agreement dated December 18, 2015, and a related Addendum three days later. (Opposition, Ex. B, 4:8-27; Opposition, Ex. A-13).

25. Omni agreed to forego foreclosure over First 100's personalty in exchange for various First 100 promises, including (i) delivery of financial statements by December 18th and (ii) a \$270,500 payment by December 28th. (*Id.*)

26. Both deadlines came and went with no performance: First 100 eventually violated virtually every single forbearance term. (Opposition, Ex. B, 13:11-22).

27. Given those immediate defaults, Omni suspected the forbearance was another delay tactic, the aim of First 100 and Kal-Mor—acting in concert—being to delay foreclosure and further stifle Omni. (Opposition, Ex. A, ¶15).

D. LAWSUITS; WRONGFUL TRO

28. Given First 100's then year-old payment default, Omni noticed a UCC sale pursuant to NRS Chapter 104, by issuing a "Notification of Disposition of Collateral" in January 2016 (the "1st UCC Notice"). (Opposition, Ex. A-14).

29. In response, First 100 filed suit and sought an emergency, *ex parte* TRO to stop the sale. (Case No. 2:16-cv-00099, ECF 1-1 (Complaint)).

30. Kal-Mor acknowledges that First 100 suit (Motion, p. 8, ¶22), yet oddly ignores Kal-Mor's virtually identical suit and emergency, *ex parte* TRO request—the aim of which was for those parties to have two bites at the apple. (Case No. A-16-730447-C).

31. Kal-Mor often omits the fact that for the next year of proceedings, First 100 and Kal-Mor's positions were 100% in alignment as Kal-Mor, on many occasions, filed one- to two-

paragraph joinders to lengthy First 100 filings. (*See, e.g.* Case No. 2:16-cv-00099, ECF 20, 65, 91).

32. Omni removed the two cases to federal court, and they were consolidated into one case.

33. Giving First 100 and Kal-Mor the benefit of the doubt, the U.S. District Court granted a TRO and postponed Omni's foreclosure sale. (Case No. 2:16-cv-00099, ECF 21).

34. However, several months later, after three days of evidentiary hearings and extensive briefings and oral arguments, the U.S. District Court held that: (i) the original TRO was wholly unwarranted; (ii) Omni could proceed with the foreclosure sale; and (iii) Omni was entitled to Kal-Mor's TRO bond. (Ex. B).³

E. OMNI'S SEPARATE SETTLEMENTS WITH KAL-MOR AND FIRST 100

35. Not only was Kal-Mor a party to the federal proceedings, but its disputes with Omni were resolved in an agreement specifically addressing the Kal-Mor Real Properties and anticipating Omni's future real-property foreclosure actions. In documents dated November 23, 2016, Omni and Kal-Mor agreed to a (i) "Settlement and Mutual General Release Agreement" (the "Kal-Mor Settlement") (Opposition, Ex. A-3); and (ii) "Stipulation and Order for Entry of Final Judgment" (the "Kal-Mor SAO") (Opposition, Ex. J). Critically, the former states:

W. The Parties now desire to resolve all differences, disputes and disagreements between them relating to the 2014-2015 Receivables and the ACR Receivables. *This Agreement, however, is not intended to address or resolve any dispute between the Parties as to the Kal-Mor Real Properties.*

Notwithstanding the terms provided herein, *Omni reserves all rights to assert claims and conduct Enforcement Actions relating to any asset or property* other than the 2013 Receivables, 2014-2015 Receivables, and/or ACR Receivables, whether owned (previously, currently, or in the future) by GFY or a third party, including but not limited to the Kal-Mor Real Properties, associated proceeds, rents, and/or other assets.

(Opposition, Ex. A-3, p. 4, Recital W); §4(a)) (emphasis added). This language was included

³ The U.S. District Court also expressed grave concerns regarding Kal-Mor's withholding of critical evidence, which was exposed during the cross-examination of Mr. Darroch, Kal-Mor's principal. (Opposition, Ex. B, 25:23-28.)

1 because during settlement negotiations, both Omni and Kal-Mor recognized and agreed that they
 2 would not be able to resolve their competing claimed interests in real property that had been
 3 granted to both of them by First 100. (Opposition, Ex. A).

4 36. The Kal-Mor SAO states:

5 The entry final judgment by the Court pursuant to this Stipulation shall not preclude
 6 or otherwise impair any claim or defense that may exist between the Parties other
 than those expressly stated in the Complaint or the Counterclaim.

7 (Opposition, Ex. J, ¶4).

8 37. Several weeks later, Omni and First 100 entered into a similar agreement (defined
 9 in the Motion and herein as the "First 100 Settlement"). (Opposition, Ex. A-4).

10 38. That latter contract did not include the carve-out language above, but only because
 11 that issue—i.e., Omni's foreclosure on Kal-Mor Real Properties —was irrelevant to First 100, as
 12 Kal-Mor (and not First 100) had title to those parcels. (Opposition, Ex. A, ¶21). However, First
 13 100 actively assisted Omni with the foreclosure of its Deeds of Trust.

14 39. First 100 knew Omni would proceed with real property foreclosures. Expressly
 15 including that in the First 100 Settlement would have been a non-sequitur, because First 100 no
 16 longer had any real property for Omni to foreclose upon (other than the four properties First 100
 17 still held title to, and agreed to transfer to Omni as part of the settlement). (*Id.*)

18 40. Other than those four parcels, only approximately twenty-four third-party-owned
 19 properties remained. (*Id.*) Omni was in constant discussions with First 100 and Kal-Mor during
 20 that time, and Omni consistently and unequivocally told both of them it would be foreclosing on
 21 the Kal-Mor Properties. (Ex. A, ¶¶18, 19 and 20).

22 41. In fact, while negotiating the First 100 settlement, Jay Bloom of First 100
 23 repeatedly told Martin Boone of Omni that Omni was still secured by the Deeds of Trust.
 24 (Opposition, Ex. A, ¶¶19-22). They also discussed the fact that any proceeds from foreclosures
 25 on those real properties would be credited to First 100. (*Id.*) Kal-Mor has never contested this
 26 fact. The granting of Kal-Mor's Motion serves to harm the interest of First 100, a party herein,
 27
 28

as First 100 will now be denied potential recovery from the sale of the Properties. This ramification was not considered in the prior ruling of the Court.

42. As noted above, Omni required First 100 to confirm that “in transferring the Real Properties...to third parties, [First 100] provided all of those third parties, prior to closing the transfer transaction, with actual notice of the existence of Omni’s first-priority security interest in those Real Properties.” (Opposition, Ex. A-4 at §8(e)).

43. Omni included that language because it would foreclose on the 24 properties at issue and anticipated baseless motions like the one here. (Opposition, Ex. A, ¶22). Had Omni intended to obtain a judgment on its debt and forfeit its Deeds of Trust, none of the language above from the Kal-Mor or First 100 Settlements would have had any purpose. (Opposition, Ex. A, ¶23).

44. The First 100 Settlement specifically stated no third parties were being granted any rights by virtue of the settlement Agreement (Opposition, Ex. A-4, p. 20, ¶20(f)). Kal-Mor was specifically identified as not being afforded any rights and under the Settlement Agreement.

45. Shortly after settling, Omni’s counsel notified First 100 that Omni would be foreclosing on the encumbered real property, but could not locate the original 2014 Promissory Note, which its trustees (under the Deeds of Trust) were requesting. (Opposition, Ex. A, ¶24).

46. In lieu of the original, Omni’s title company requested that First 100 provide a “Lost Note Affidavit.” (*Id.*) First 100 signed and returned a Lost Note Affidavit on January 30, 2017, and signed and returned another version on April 21, 2017. (*Id.*; Ex. A-5; Ex. A-6).

47. In neither instance did First 100 challenge Omni’s course of action or claim that the parties had intended in their settlement that Omni forfeited its real property liens. (Opposition, Ex. A, ¶24).

F. OMNI’S FORECLOSURE ACTION

48. Following settlement of the federal case regarding First 100’s *personalty*, Omni turned to foreclosing on the 24 real properties lien in its Deeds of Trust. On May 15, 2017, Omni caused a Notice of Breach and Election to Sell under Deeds of Trust (the “Notice of

Default”) to be recorded with the Clark County Recorder’s Office. (Opposition, Ex. A, ¶26).

49. After the mandatory three-month waiting period required by statute, Omni caused the Trustee to record a “Notice of Sale.” (*Id.*)

50. The Notice of Sale scheduled the foreclosure sale for September 12, 2017. (*Id.*) At this time, however, the sales have been voluntarily postponed by Omni until January 12, 2018, so as to permit this Court to adjudicate the underlying issues. (*Id.*)

51. There are no actions filed by First 100 which seek to stop Omni from foreclosing.

II. LEGAL STANDARD

EDCR 2.24(b) provides that a party may seek reconsideration of a ruling within ten (10) days after service of a written order. Reconsideration is appropriate when a court misapprehended or overlooked important facts when making its decision. *Matter of Ross*, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983), when new evidence is presented, or when the decision is “clearly erroneous”. *Masonry and Tile Contractors Ass’n. of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). This standard must be viewed in light of the underlying standard which was applicable to Kal-Mor’s Motion for Partial Summary Judgment.

The standard for granting summary judgment is well established. See NRCP 56(c)(summary judgment appropriate only if no material issues of fact exist); see also *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). When reviewing a motion for summary judgment, the evidence, and all reasonable inferences drawn from the evidence, must be viewed in a light most favorable to the non-moving party. See *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 137, 206 P.3d 572, 575 (2009); *Waldman v. Maini*, 124 Nev. 1121, 1136, 195 P.3d 850, 860 (2008); *Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 61, 128 P.3d 452, 458 (2006); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *Kahn v. Morse & Mowbray*, 121 Nev. 464, 473-74, 117 P.3d 227, 234 (2005); *Weiner v. Beatty*, 121 Nev. 243, 246, 116 P.3d 829, 830 (2005).

Moreover, a motion for summary judgment must be supported by facts which would be admissible in evidence. NRCP 56(e); see also *Henry Products v. Tarmu*, 114 Nev. 1017, 967

P.2d 444 (1998)(evidence introduced in support of motion for summary judgment must be admissible evidence). A party opposing summary judgment does not need to prove that an issue of material fact will be resolved conclusively in its favor; rather, the nonmoving party must simply present "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Thus, the judge reviewing a summary judgment motion does not weigh conflicting evidence of a disputed material fact or make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions. *Id.* at 255-56. Rather, at the summary judgment stage, the judge is asked to review whether direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party. If a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Inferences must be drawn in the light most favorable to the nonmoving party and may be drawn from underlying facts that are not in dispute, such as background or contextual facts, and from underlying facts on which there is conflicting direct evidence but which the judge must assume may be resolved at trial in favor of the nonmoving party. *See Anderson*, 477 U.S. at 253-55; *Matsushita*, 475 U.S. at 587. As set forth herein, contrary to the FFCL the evidence adduced at the time of Kal-Mor's Motion was that both Omni and First 100 intended the Settlement Agreement to act as an accord which would have not have any effect upon Omni's right to maintain and execute upon its Deeds of Trust.

III. LAW AND ARGUMENT

A. KAL-MOR FAILED TO ESTABLISH NOVATION BY CLEAR AND CONVINCING EVIDENCE

The Court granted partial summary judgment on the issue of novation, finding that the Settlement Agreement entered into between Omni and First 100 constituted a novation of the earlier lending agreement. Plaintiff's claim, and the Court's Order that a novation of contract has occurred is erroneous. In order to demonstrate that a novation has occurred four elements must

1 be shown: (1) there must be an existing valid contract; (2) all parties must agree to a new contract;
 2 (3) the new contract must extinguish the old contract; and (4) the new contract must be valid.
 3 *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193 (Nev. 1989). "Whether
 4 a novation occurred is a question of fact if the evidence is such that reasonable persons can draw
 5 more than one conclusion." *Id.* "Moreover, the party asserting novation has the burden of proving
 6 all the essentials of novation by *clear and convincing evidence*." *Id.* at 509 (emphasis added).
 7 Novation is a question of law only when the agreement and consent of the parties are unequivocal.
 8 *Id.* at 508. Critically, it is the intent of the parties to the agreement that is relevant, not that of a
 9 third party. The intent of the parties is controlling and it must be shown that the parties to the
 10 purported novation had a clear intent to enter into a novation. *Id.* at 508. Moreover, a "novation
 11 may be defined as a mutual agreement between the parties concerned for the discharge of a
 12 valid existing obligation . . ." 58 Am. Jur.2d *Novation* §1. "Whether a novation exists in any
 13 situation depends on factual allegations and proof, not on legal conclusions." *Capital Nat'l Bank*
 14 *of Tampa v. Hutchinson*, 435 F.2d 46, 50 (5th Cir. 1970). To this end if anything remains of the
 15 original obligation, the no novation exists. *Moffet County State Bank v. Told*, 800 P.2d 1320,
 16 1323 (Colo. 1990)("A mere modification will not suffice; anything remaining of the original
 17 obligation prevents a novation.").

18 As set forth herein, the intent of the parties was to enter into a settlement agreement, not a
 19 novation. It must be remembered that the only competent evidence presented in relation to Kal-
 20 Mor's Motion for Partial Summary Judgment was that of Omni. Kal-Mor is not, and never was
 21 a party to any agreements entered into between Omni and First 100, thus the only evidence which
 22 should rightfully have been considered by the Court Omni's interpretation of the Settlement
 23 Agreement. Kal-Mor's interpretation of an agreement it is not a party to is irrelevant. More
 24 importantly, it is inadmissible. As set forth herein, there is no dispute that Omni had the right to
 25 enforce its rights under the relevant Deeds of Trust as First 100 actively assisted in that endeavor,
 26 thus, not all provisions of the original agreement were replaced.

27 Kal-Mor focused upon select language of the Settlement Agreement. Assuming that such
 28

1 an approach was proper, such an analysis could still not overcome the undisputed intent of the
2 parties to the actual agreement. As noted by the Ninth Circuit Court of Appeals:

3 The conduct of the parties subsequent to the execution of a contract and before any
4 controversy had arisen as to its effect, is persuasive evidence in determining the
5 meaning of the agreement. "This rule of practical construction is predicated on the
6 common sense concept that actions speak louder than words." Words are
7 frequently but an imperfect medium to convey thought and intention. When
8 the parties to a contract perform under it and demonstrate by their conduct that they
9 know what they were talking about, *the courts should enforce that intent.*

10 *Fanucchi & Limi Farms*, 2003 WL 22670509, *32 – 33 (9th Cir. 2003) (emphasis added) *citing*
11 *Davies Machinery Co. v. Pine Mountain Club, Inc.* 39 Cal.App.3d 18, 26-27 (1974)(emphasis in
12 original); *Sans Souci v. Div. of Florida Land Sales & Condos.*, 448 So. 2d 1116, 1121 (Fla. 1st
13 DCA 1984)("Consent, however, need not be shown by express words, but may be implied from
14 the circumstances of the transaction and by the conduct of the parties thereafter."), *citing* 58 Am.
15 Jur.2d *Novation* §16 (1971).

16 It was raised in Omni's Opposition, and was uncontested by Kal-Mor, that subsequent to
17 execution of the Settlement Agreement, Omni was in need of a Lost Note Affidavit as it could not
18 locate the original 2014 Promissory Note which its trustees (under the Deeds of Trust) were
19 requesting. (Opposition, Ex. A, ¶24). First 100 signed and returned a Lost Note Affidavit on
20 January 30, 2017 and another version on April 21, 2017. (*Id.*; Ex. A-5; Ex. A-6). Had a novation
21 been intended, as argued by Kal-Mor, the providing of the Lost Note Affidavit would have been
22 unnecessary and would have been a futile act. Indeed, if it had been the intention of Omni and
23 First 100 for the Settlement Agreement to constitute a novation, the Settlement Agreement would
24 have contained a provision requiring the release of Omni's Deeds of Trust, however, no such
25 requirement exists in the Settlement Agreement. The lack of any requirement that Omni's Deeds
26 of Trust be released, coupled with the fact that First 100 actually took affirmative steps to assist
27 Omni with the foreclosure of its Deeds of Trust, demonstrates that the parties never intended for
28 the Settlement Agreement to act as a novation of its earlier agreement. Even if one were assume
that the express language of the Settlement Agreement was not as clear as it theoretically could

have been, it was not foreseeable that a third party [Kal-Mor] would collaterally attack the two-party agreement long after it was executed. See *Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824-25 (1977) (noting that an individual obtains third-party-beneficiary status when contracting parties demonstrate a clear intent to benefit the individual, a third party, by their contract and only then do they have standing); *Barron v. Bank of N.Y. Mellon*, No. 2:15-cv-00242-APG-GWF (D. Nev. Feb. 15, 2017), p. 2 (one must be a party or third party beneficiary to challenge validity of a contractual assignment).

1. THE SETTLEMENT AGREEMENT UPON WHICH KAL-MOR BASED ITS MOTION CONSTITUTES AN EXECUTORY ACCORD, NOT A NOVATION

Novation is often confused with executory accords. See *Cohen v. Treuhold Capital Group, LLC*, 422 B.R. 350, 373 (E.D.N.Y. 2010). The difference, however, is critical as an executory accord does not result in the replacement of the original agreement, but rather, provides two avenues of recovery – either the breached accord agreement or the original agreement. The critical distinction lies in the difference between an “accord” and an “accord and satisfaction”. Under Nevada law, to establish an accord and satisfaction, it must be clearly shown “. . . there was a meeting of the minds of the parties, accompanied by sufficient consideration.” *Mountain Shadows of Incline v. Kopsho*, 555 P.2d 841, 842 (1976). In the context of novation, a subsequent agreement may itself be accepted as immediate satisfaction and discharge of a prior contractual obligation (accord and satisfaction) or the performance of the subsequent agreement may form the discharge (accord). See *Rivard-Crook v. Accelerated Payment Techs.*, 2:10-cv-02215-MMD-GWF (D. Nev. Jan 8, 2014). In discussing the distinctions between novation and executory accords the court in *Cohen* stated:

It is often difficult to determine whether a new agreement is a novation or an executory accord. See *Stahl Mgmt. Corp. v. Conceptions Unlimited*, 554 F. Supp. 890, 894 (S.D.N.Y. 1983). **The difference between the two turns upon whether the parties intended the new agreement to discharge their previously existing obligations.** See *Sudul*, 917 F. Supp. at 1047 (citing *May Dep't Stores Co.*, [**15] 1 F.3d at 140). Under New York law, when parties agree to a “novation,” the existing obligation is extinguished immediately by acceptance of new agreement; however, if parties intend that under the new agreement, the existing claim would

1 be discharged in the future by rendition of substituted performance, the new
 2 agreement is an executory accord. *See id.* at 1047-48. "At times, the matter of
 3 intention may be discerned as a matter of law from documents exclusively, and, in
 4 other situations, a court must look to any extrinsic proof that may exist." *Koenig*
 5 *Iron Works, Inc. v. Sterling Factories, Inc.*, No. 89 Civ. 4257, 1999 WL 178785, at
 6 *8 (S.D.N.Y. Mar. 30, 1999) (citing *Mallad Constr. Corp. v. County Fed. Sav. &*
Loan Ass'n, 32 N.Y.2d 285, 292-93 (1973)). If the intent of the parties can be found
 7 in the unequivocal language of the contract, the court may grant summary
 8 judgment. *Nat'l Am. Corp.*, 448 F.Supp. at 643.

9 The characterization of the subsequent agreement — as a novation or an executory
 10 accord — is determinative of the remedy to which the non-breaching party is
 11 entitled. **Because a novation has the effect of extinguishing the prior contract**
 12 **between the parties, the existence of a novation "must never be presumed,"**
 13 *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 736 F. Supp. 1281,
 14 1284 (S.D.N.Y. 1990), and the party asserting the novation's existence has the
 15 burden of proving that the subsequent agreement was intended as a complete
 16 substitute for the parties' prior agreements. *LPV Corp. v. Aetna Cas. & Sur. Co. (In*
 17 *re Chateaugay Corp.)*, 116 B.R. 887, 907 (Bankr. S.D.N.Y. 1990) (citation
 18 omitted); *see also Ventricelli v. DeGennaro*, 633 N.Y.S.2d 315, 316 (App. Div.
 19 1995) ("The trial record reveals that the defendant failed to sustain his burden of
 20 proof of establishing that it was the intent of the parties to effect a novation
 21 substituting a new obligor or another contract for the original obligation.");
 22 *Goldbard v. Empire State Mut. Life Ins. Co.*, 171 N.Y.S.2d 194, 202 (App. Div.
 23 1958) ("It is generally more reasonable to suppose that he bound himself to
 24 surrender his old rights only when the new contract of accord was performed."
 25 (citation omitted)); *Beck v. Mfrs. Hanover Trust Co.*, 481 N.Y.S.2d 211, 214 (Sup.
 26 Ct. 1984) ("In order to prove a novation, there must be a 'clear and definite intention
 27 on the part of all concerned that such is the purpose of the agreement. Not only
 28 must the intention to effect a novation be clearly shown, but a novation [must] never
 . . . be presumed." (quoting 22 N.Y. Jur. 2d, Contracts, § 406)).

422 B.R. at 374 (emphasis added).

20 The *Cohen* matter is instructive in the context of alleged novation involving settlement
 21 agreements. In *Cohen*, two parties, Metropolitan and Treuhold entered into an agreement where
 22 they would purchase, refurbish and sell homes and property. *Id.* at 361. Metropolitan would
 23 locate properties and then approach Treuhold regarding purchasing the properties. *Id.* If Treuhold
 24 was interested, it would purchase the property either using its own funds or through use of
 25 financing through a third party, Medallion Business Credit LLC. *Id.* Once the properties were
 26 refurbished a buyer would be sought. *Id.* Once the property was sold, Treuhold would receive
 27 back funds it had expended, Metropolitan would receive back funds expended in

1 repairing/refurbishing the properties and then any profits would be split between the two parties.
 2 *Id.* Ultimately Metropolitan and its principals failed to make payments as required to Treuhold.
 3 As a result, the parties entered into a January 2007 Letter Agreement which set forth repayment
 4 terms to Treuhold. *Id.* at 362. Metropolitan then requested an extension of the terms of the
 5 January 7 letter agreement and the parties entered into an April 2007 settlement agreement. *Id.*
 6 As in this matter, the April 2007 Agreement contained a merger clause which stated that all prior
 7 agreements "are superseded by this Agreement, which fully and completely expresses the
 8 agreement between the parties hereto with respect to the subject matter hereof." *Id.* at 364.

9 After having breached the April 2007 Agreement, Cohen, a principal of Metropolitan,
 10 filed bankruptcy and asserted that Treuhold's only remedy was to assert a breach of the April
 11 2007 Agreement as that agreement constituted a novation of any prior agreements. The Court
 12 rejected the argument that the April 2007 Agreement constituted a novation of the earlier,
 13 breached agreement, in part, because the evidence did not indicate that a novation was what was
 14 intended. As here, it was the intention of the parties that only the performance of the settlement
 15 agreement would discharge the obligations between the parties under the prior agreements. As
 16 the court noted it is generally more reasonable to assume that a party intends to surrender its old
 17 rights only upon performance of the new contract. *Id.* at 373 citing *Goldbard v. Empire State*
 18 *Mut. Life Ins. Co.*, 171 N.Y.S.2d 194, 202 (App. Div. 1958).

19 Plaintiff does nothing more than substitute its own subjective desire for that of Omni and First
 20 100. As set forth above, the facts of the case demonstrate that neither Omni nor First 100 ever
 21 intended for the settlement agreement reached to create a situation in which Omni was waiving
 22 any rights with regard to the real property at issue. (Opposition, Ex. A). The settlement documents
 23 reflect a mutual understanding that Omni was not relinquishing any rights to the real properties.
 24 However, if this Court has any doubt, it can and must consider the negotiations and conduct of
 25 the parties if it determines the settlement agreements are ambiguous. The fundamental objective
 26 of contract construction is to ascertain the intention of the parties. *Whiteside v. Tenet Healthcare*
 27 *Corp.*, 124 Cal. Rptr. 2d 580, 585 (Cal. App. Ct. 2002). When the terms of a contract are clearly
 28

expressed, the intention of the parties is to be determined from the language of the contract. *Ringle v. Bruton*, 86 P.3d 1032, 1039 (Nev. 2004). However, when a contract's terms are ambiguous, extrinsic evidence may be considered to determine the parties' intent. *Id.* See also *Lowden Inv. Co. v. Gen. Elec. Credit Co.*, 741 P.2d 806, 809 (Nev. 1987) (stating that parol evidence "is not admissible to vary or contradict the terms of a written agreement" but "is admissible to resolve ambiguities in a written instrument"). Finally, where there is doubt concerning the construction of contractual covenants, the terms should "be construed against the person seeking enforcement." *Caughlin Homeowners Ass'n v. Caughlin Club*, 849 P.2d 310, 312 (Nev. 1993).

The best approach for interpreting an ambiguous contract is to delve beyond its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties." *Hilton Hotels v. Butch Lewis Prod.*, 808 P.2d 919, 921 (Nev. 1991). This inquiry includes not only the circumstances surrounding the contract execution, but also the subsequent acts and declarations of the parties. *Trans Western Leasing v. Corrao Constr. Co.*, 652 P.2d 1181, 1183 (Nev. 1982). Here, the only way this can happen is for the Court to admit extrinsic evidence and allow the case to proceed through discovery and trial.

The conduct of the parties reflects a mutual understanding and intent that Omni would pursue foreclosure actions against the real properties. (Exhibit A). The provisions in the Kal-Mor settlement documents recognizing Omni's claims to the Kal-Mor Properties are consistent with the negotiations and discussions that occurred between Martin Boone and Greg Darroch (the principals of Omni and Kal-Mor, respectively) preceding the settlement. During those discussions, Omni repeatedly informed Kal-Mor that it intended to pursue foreclosures against the Kal-Mor Properties. (Ex. A, ¶20). Although they tried to reach a resolution that included the real properties, they were unable to do so and instead agreed on the language that appears in the settlement agreement and stipulation. (*Id.*)

This issue was also discussed many times between Martin Boone and Jay Bloom (First 100's principal) during negotiation of Omni's separate settlement with First 100. (Ex. A, ¶20). After the Omni/First 100 Settlement Agreement was executed, First 100 took affirmative steps to assist

Omni with the foreclosures. For instance, on two separate occasions, First 100 executed a lost note affidavit to allow Omni to pursue the foreclosures. (Opposition, Ex. A, ¶ 24; Ex. A-5; Ex. A-6).

2. THE SETTLEMENT AGREEMENT CANNOT CONSTITUTE A NOVATION AS THE ORIGINAL AGREEMENT HAD BEEN BREACHED BY FIRST 100

As noted above, the “party asserting novation has the burden of proving all the essential elements” by clear and convincing evidence. *United Fire Insurance*, 105 Nev. at 509, 780 P.2d at 196. Here, Kal-Mor failed to address, let alone prove by clear and convincing evidence, that a valid contract existed at the time of the alleged novation. There “cannot be a novation in a case where the original contract has already been breached since a previously valid obligation does not exist at the time the new contract is made.” 58 Am. Jur.2d Novation §7, *citing In re Cohen* 422 B.R. 350 (E.D.N.Y. 2010). In rejecting the argument that the April 2007 Agreement constituted a novation the court in *Cohen* stated:

The underlying principle is that “novation requires the consent of all parties to substitute one obligation or agreement for another.” *Raymond v. Marks*, 116 F.3d 466, 466 (2nd Cir. 1997). Where the original contract has already been reached, there cannot be a novation, because a previously valid obligation did not exist at the time the new contract was made.

Id. at 372. As admitted by Kal-Mor in its Motion, the original lending agreement between Omni and First 100 had been breached by First 100. See FFCL, p. 5, ¶12. Thus, Kal-Mor, as a matter of law, could not prevail upon its motion as it failed to establish the first element of novation the existence of an existing, valid agreement. See *United Fire Insurance*, 105 Nev. at 508; 58 Am. Jur.2d Novation, §7. It must be remembered that the burden is squarely upon Kal-Mor to prove each and every element of novation by clear and convincing evidence. Kal-Mor failed to address this threshold element in its Motion, although it admitted that the prior agreement had been breach by First 100. Given this admission it was error to grant summary judgment in favor of Kal-Mor.

1 **3. Kal-Mor is Not an Intended Beneficiary of the Settlement Agreement Between Omni**
 2 **and First 100 and Kal-Mor's Interpretation of the Settlement Agreement is**
 3 **Irrelevant**

4 It was error to give any credence to Kal-Mor's purported interpretation of the Settlement
 5 Agreement entered into between Omni and First 100. The entire basis of Kal-Mor's novation
 6 argument in its Motion, was its own, subjective interpretation of the meaning of the words used
 7 by and between Omni and First 100. It was plain error to attribute any weight to such an
 8 interpretation. First, the Settlement Agreement plainly states that there are no intended third party
 9 beneficiaries of the Settlement Agreement, to wit:

10 This Agreement shall inure to the benefit of and be binding upon the Parties and
 11 their respective heirs, successors and assigns. Except as expressly set forth
 12 herein, (i) nothing in this Agreement shall be construed to give any
 13 person/entity (c.g., GFY, Kal-Mor, or APV) other than the Parties (and their
 14 permitted successors and assigns) any legal or equitable right, remedy, or
 15 claim under or with respect to this Agreement or any provision of this
 16 Agreement, and (ii) this Agreement is for the sole and exclusive benefit of the
 17 Parties (and their permitted successors and assigns, as well as the principals and
 18 agents thereof if expressly referenced herein).

19 Exhibit "A-4", p. 20, §20(f)(emphasis added). As seen, Kal-Mor was expressly excluded as a
 20 party with any interest in the Settlement Agreement. Nevertheless, the entire basis of its prior
 21 motion was that it is somehow entitled to enforce its interpretation of a private agreement between
 22 Omni and First 100.

23 As noted, Kal-Mor lacks standing to have asserted its prior motion. Additionally, the
 24 Nevada Supreme Court has stated that "This court has a 'long history of requiring an actual
 25 justiciable controversy as a predicate to judicial relief.'" *Stockmeier v. State, Dep't of Corrections*,
 26 122 Nev. 385, 393, 135 P.3d 220, 225 (2006) (*quoting Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d
 27 443, 444 (1986)), abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124
 28 Nev. 224, 228 n. 6, 181 P.3d 670, 672 n. 6 (2008). In the present matter there was no justiciable
 controversy for the Court to rule upon. The only parties with rights under the Settlement

Agreement are Omni and First 100. The undisputed evidence indicates that there is no dispute between these two parties with regard to the interpretation of the Settlement Agreement. The absolute most Kal-Mor can establish is that the language used between Omni and First 100 could have been more precise, nevertheless, there has been no showing that either Omni or First 100 did not fully understand the meaning of their own agreement. Omni treated the Settlement Agreement as an executory accord which could only result in its rights under the original agreement being discharged only through satisfaction of all conditions of the Settlement Agreement. First 100, the only other party to the Settlement Agreement, has offered no evidence to the contrary. Indeed, First 100 has been a party to numerous court actions involving Omni enforcing its secured rights under the Deed of Trust and First 100 has never raised any objection to Omni's enforcement actions. Moreover, as set forth above, First 100 assisted Omni in pursuing its rights under the original agreement and its Deeds of Trust on more than one occasion by voluntarily providing Lost Note Affidavits which would allow Omni to foreclose upon the Deeds of Trust. It would constitute reversible error to allow a third-party, with no standing to attack the nature and meaning of an agreement which is not in dispute between the two contracting parties.

4. KAL-MOR'S MOTION IS PREMATURE AND IMPROPER

Courts routinely deny motions for summary judgment when they are made before any opportunity for discovery has been afforded:

Though Rule 56 allows a party to move for summary judgment 'at any time,' the granting of summary judgment is limited until after adequate time for discovery. A grant of summary judgment is premature and improper when basic discovery has not been completed, particularly when the moving party has exclusive access to the evidence necessary to support the nonmoving party's claims.

Ferm v. Crown Equity Holdings, Inc., 2011 U.S. Dist. LEXIS 84433 at *8 (D. Nev. 2011)(quoting *Phongsavane v. Potter*, 2005 U.S. Dist. LEXIS 12439, 2005 WL 1514091, at *5 (W.D. Tex. 2005) (internal citation omitted)). Kal-Mor's Motion is similarly premature here. When Kal-Mor filed

its Motion, the parties had not even discussed discovery and discovery deadlines under NRCP 16.1 and thus no discovery had occurred in this matter. No attempt to ascertain the intent of First 100 was made by Kal-Mor, a glaring example of Kal-Mor's attempt to race to the courthouse before evidence could be submitted demonstrating the fact that no novation was ever intended by Omni or First 100. As set forth above, discovery is required in order to establish the intent of the parties to the Settlement Agreement. At this time only one party's intent, that of Omni, has been established. Kal-Mor's interpretation of an agreement to which it is not a party and not an intended beneficiary is irrelevant for purposes of purposes of its Motion for Partial Summary Judgment. The Court must, at a minimum, determine if any controversy exists between Omni and First 100 with regard to the meaning of the Settlement Agreement to determine whether there is a controversy upon which it can rule.

5. KAL-MOR'S MOTION IS PROCEDURALLY DEFECTIVE

It is well settled that only *admissible* evidence may be relied upon by the Court in ruling upon a summary judgment demand. NRCP(c); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, (9th Cir. 2002). As previously noted, Mr. Darroch's Declaration is riddled with statements based upon his "information and belief." (Darroch Decl. at ¶¶ 3, 4, 5, 7, 10, 17, 24, 31, 32, 38, 45, 46, 52, 53, 59, 60, 66, 67, 72, 75, 84, 87). Over 25% of his paragraphs consist solely of his conjecture. A declarant's naked, unsupported beliefs are not "evidence" for summary judgment purposes. His beliefs are not admissible and fail to meet the requirements of NRCP 56(c), as such testimony would not be permitted at trial.⁴ Compare *Collins v. Union Fed. Savings & Loan*, 662 P.2d 610, 621 (Nev. 1983) (summary judgment cannot be built "on the gossamer threads of whimsy, speculation and conjecture"); *State v. Eighth Judicial Dist. Court*, 42 P.3d 233, 241 n.26 (Nev. 2002).

⁴ This is separate and apart from the fact that in previous litigation the U.S. District Court found Mr. Darroch's and Kal-Mor's actions before the Court to lack the requisite candor, given their "intentional withholding of crucial documents during [prior] preliminary injunction proceeding[s]." (Ex. B at 25:23-28.)

As set forth above, and as admitted by Kal-Mor, Kal-Mor is not a party to the Settlement Agreement and has no personal, admissible knowledge of the meaning of the terms used in the Settlement Agreement upon which it based its Motion. There is no controversy regarding the meaning of the Settlement Agreement as between Omni and First 100, the only parties to the agreement. Kal-Mor has offered no evidence, other than its own, unsupported opinion that the Settlement Agreement means something other than how Omni and First 100 treated it. Having failed to offer anything other than its own opinion, no relevant, admissible evidence was before the Court which would support the Order.

6. OMNI IS ENTITLED TO DISCOVERY PURSUANT TO RULE 56(F)

NRCP 56(f) gives the court reviewing a motion for summary judgment broad discretion to deny or continue the motion if the nonmoving party needs time to discover essential facts. *California Union Ins. Co. v. American Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990). Although a party may move for summary judgment at any time district courts should grant a Rule 56(d) motion when the nonmoving party has not had a “realistic opportunity to pursue discovery relating to its theory of the case.” *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003). In fact, where the nonmoving party has not had the opportunity to discover any information essential to its theory of the case, the Supreme Court has “restated the rule as requiring, rather than merely permitting, discovery.” *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). To be entitled to Rule 56(d) discovery, the nonmoving party must identify facts showing there is a genuine issue for trial. *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986).

Omni is entitled to take discovery under Rule 56(f) to support its defenses. The Declarations of Martin Boone and Robert Hernquist demonstrate ample facts that would require discovery. (Exhibits A & C). Somewhat amazingly, despite the protracted prior litigation among the parties, relatively little discovery took place. More to the point, *none* of that discovery focused on the parties’ actions, thoughts, and intentions regarding the subject of the current proceedings—

1 i.e., the nine Kal-Mor Real Properties, whether or to what extent the parties adjudicated and settled
2 their rights and interests in those properties, and the validity of Omni's foreclosure proceedings
3 over those parcels. In light of that lack of discovery, summary judgment should be denied
4 pursuant to Rule 56(f), with appropriate discovery ordered.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the Court should reconsider .

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8 By: 

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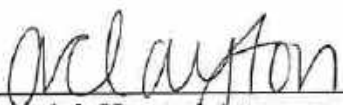
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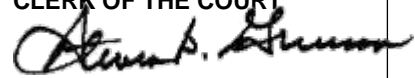
I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 22nd day of October 2018, a true and correct copy of foregoing *Motion for Reconsideration of the Order Granting Plaintiff's Motion For Partial Summary Judgment* was served in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X;
and ROE ENTITIES I through X, inclusive,

Defendants.

CASE NO. A-17-757061-C

DEPT. NO. 2

**PLAINTIFF'S OPPOSITION TO
MOTION FOR
RECONSIDERATION OF ORDER
GRANTING PARTIAL SUMMARY
JUDGMENT**

Date: November 26, 2018

Time: In Chambers

Plaintiff Kal-Mor-USA, LLC ("Kal-Mor"), by and through its undersigned attorneys of record of the law firm of Kolesar & Leatham, hereby submits this Opposition to the *Motion for Reconsideration of Order Granting Partial Summary Judgment* filed by Defendant Omni Financial, LLC ("Omni"). There is no legitimate basis for this Court to reconsider its October 2, 2018 *Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Partial Summary Judgment* (the "Order"). For the reasons set forth below, Kal-Mor respectfully requests that the Court deny Omni's motion in its entirety.

///

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Much like its original opposition to Kal-Mor's motion for partial summary judgment, Omni's motion for reconsideration again resorts to misdirection and absurd arguments in a poorly conceived effort to reframe this Court's Order to suit Omni's obtuse view of the undisputed facts at issue. The irrelevant facts and inappropriate arguments on which Omni relies are no more persuasive when rehashed through the instant motion than when first presented. Omni voluntarily entered into the First 100 Settlement¹ under which Omni immediately and "unconditionally waived, released, and discharged all liabilities, claims, and remedies arising out of, concerning, or in any manner relating to First 100's default under the Omni Loan."²

The plain and unambiguous language of the First 100 Settlement³ is not open to interpretation. Omni unconditionally released its rights to enforce the original Omni Note and substituted in place of the Omni Note the new obligations and remedies set forth in the First 100 Settlement. This is the very definition of a novation.

Omni's motion offers no new evidence, no new case law, and no compelling reason for the Court to reconsider its decision to grant Kal-Mor's motion for partial summary judgment. Omni's motion must be denied.

II. RESPONSE TO OMNI'S STATEMENT OF FACTS

While several paragraphs have been omitted, the statement of facts set forth in Omni's motion for reconsideration repeats nearly *verbatim* the same facts Omni presented in its opposition to Kal-Mor's motion for partial summary judgment. Omni does not present any newly discovered evidence or even any new facts that it could have but did not previously offer. The facts as offered by Omni largely confirm the facts that Kal-Mor offered in support of its motion for partial

¹ Capitalized terms that are not expressly defined shall have the same meanings ascribed to such terms as in Kal-Mor's motion for partial summary judgment filed on July 26, 2018 and Kal-Mor's reply in support thereof filed on August 22, 2018.

² See Order, p. 9, ¶ 13.

³ A copy of the First 100 Settlement is attached to Omni's Opposition to Kal-Mor's Motion for Partial Summary Judgment as "Exhibit A-4."

summary judgment. To the extent that there is any dispute between the parties as to such facts, it is not relevant to the issues before the Court.

III. LEGAL ARGUMENT

A. Reconsideration of the Court's Order Is Not Warranted.

Motions for reconsideration are not "the proper vehicles for rehashing old arguments," *Resolution Trust Corp. v. Holmes*, 846 F.Supp. 1310, 1316 (S.D. Tex. 1994) (footnotes omitted), and are not "intended to give an unhappy litigant one additional chance to sway the judge." *Durkin v. Taylor*, 444 F.Supp. 879, 889 (E.D. Va. 1977). Motions to reconsider are appropriate only in "very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached." *Thomas v. Hardwick*, 2319 P.3d 1111, 1121 (Nev. 2010); *see also, Moore v. City of Las Vegas*, 92 Nev. 402, 405 (1976) (holding that motion for rehearing was "superfluous" because it "raised no new issues of law and made reference to no new or additional facts").

In order to succeed on a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *See Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds* 828 F.2d 514 (9th Cir. 1987). A motion to reconsider "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir. 2001), *quoting McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999).

While Omni states that its motion for reconsideration is brought pursuant to EDCR 2.24(b), Omni fails to identify any specific reason why the Court should reconsider its Order. Omni's motion does not offer the Court any newly discovered evidence or any intervening change in the controlling law. Omni does not argue that the Court committed clear error in granting Kal-Mor's motion for partial summary judgment. Instead, Omni simply rehashes and repeats, in many cases *verbatim*, several of the same misplaced arguments that Omni first presented to the Court in its opposition to Kal-Mor's motion for partial summary judgment. To the limited extent that Omni

1 attempts to expand its arguments, it falls far short of establishing cause for reconsideration or
2 rehearing. Omni's motion for reconsideration should be denied.

3 **B. Novation of the Omni Note Was Established by Clear and Convincing**
4 **Evidence.**

5 The plain and unequivocal language of the First 100 Settlement and the First 100 Judgment
6 are clear and convincing evidence of novation. In entering into the First 100 Settlement, Omni and
7 First 100 completely replaced the disputed obligations and duties previously owed in connection
8 with the Omni Note with the new obligations and duties set forth therein. To confirm this fact, the
9 Court need look no further than the releases set forth in Section 15 of the First 100 Settlement.
10 Those releases provide in part as follows:

11 Omni Release. Except for the rights and obligations of the Parties under this
12 Agreement, and effective immediately upon the exchange of fully executed
13 counterparts of this Agreement ... Omni hereby unconditionally relieves, releases,
14 acquits and forever discharges First 100 ... of and from any and all Liabilities and
15 Claims arising out of, concerning, or in any manner relating to ... the Parties'
16 prior settlement efforts and negotiations, and Enforcement Actions⁴ undertaken by
17 Omni with respect to the Omni Loan (including without limitation the UCC Sale
18 and exercise of the assignment of rents).

19 ...

20 Intent. It is the intention of the Parties under this Section 15 that under no
21 circumstances will any Party commence any action or assert any claim as against
22 any other Party (and in the express case of Omni, the Omni Parties such as Martin
23 Boone or Genesis), other than with respect to (i) the enforcement of the terms of
24 this Settlement Agreement, or (ii) for fraud, gross negligence or willful
25 misconduct as discussed herein.⁵

26 Omni's immediate and unconditional release of claims under the First 100 Settlement is further
27 confirmed by the First 100 Judgment⁶, which states in unequivocal terms that both Omni and First
28 100 dismissed with prejudice all disputed claims related to the Omni Note and the Deeds of Trust,
reserving only the right to enforcement of the First 100 Settlement. Specifically, paragraphs 5 and

⁴ Section 1 of the First 100 Settlement defines the term "Enforcement Actions" as "Omni letters dated April 8, 2015 and November 2, 2015 claiming First 100 to be in default of the Omni Loan; Omni asserting that it had accelerated that Loan; Omni commencing foreclosure actions which are the subject of this dispute; and Omni's response to the filing of lawsuits related to its claims."

⁵ See First 100 Settlement, p. 16.

⁶ A copy of the First 100 Judgment is attached to Kal-Mor's Motion for Partial Summary Judgment as "Exhibit 24."

6 of the First 100 Judgment state: “The Lawsuit and any and all Disputes, Claims, Counterclaims, and Third-Party Claims are hereby dismissed with prejudice. This judgment shall not preclude or otherwise impair any claim or defense that may exist or arise between or among the Parties with respect to a breach of the Settlement Agreement.”⁷ The term “Disputes” as used in the First 100 Judgment is defined expansively to include “numerous disputes” between the Omni and First 100 regarding, among other things: “(a) First 100’s default on a line of credit loan extended by Omni pursuant to a loan agreement and other transaction documents dated May 27, 2014; ... and (f) Omni’s first-priority security interest, as beneficiary, under deeds of trust in various real properties previously or currently owned by First 100.”⁸

The result of the First 100 Settlement is inescapable. Omni immediately and unconditionally waived and released (and subsequently dismissed with prejudice) any and all claims it could have asserted based on First 100’s default under the Omni Note or the Deeds of Trusts. Omni’s only remaining rights and remedies against First 100 are those set forth in the First 100 Settlement Agreement. “A novation, or substituted contract, ‘is a contract that is itself accepted ... in satisfaction of [an] existing duty’ which ‘discharges the original duty.’” *Granite Construction Company v. Remote Energy Solutions, LLC*, 2017 WL 2334516 (Nev. May 25, 2017) (citing Restatement (Second) of Contracts § 279 (Am. Law Inst. 1981)). The plain language and manifest intent of the First 100 Settlement are unequivocal. The obvious and wholesale replacement of the Omni Note with the First 100 Settlement is a novation.

C. The Lost Note Affidavit Confirms the Novation of the Omni Note.

The “Lost Note Affidavit” that Omni references in its motion for reconsideration actually supports the Court’s finding that the First 100 Settlement is a novation.⁹ In fact, the Lost Note Affidavit expressly incorporates material terms from the First 100 Settlement that are vastly different from the terms of the original Omni Note. Paragraph 5 of the Lost Note Affidavit

⁷ First 100 Judgment, p. 4 of 5.

⁸ First 100 Judgment, p. 3 of 5.

⁹ A copy of the Lost Note Affidavit is attached to Omni’s Opposition to Kal-Mor’s Motion for Partial Summary Judgment as “Exhibit A-5.”

expressly states:

Under a Settlement and Mutual General Release Agreement by Omni and First 100 dated on or about the date hereof, those parties agreed to a “stipulated judgment debt” owed by First 100 to Omni with respect to the Omni Loan, in the amount of Four Million Eight Hundred Thousand Dollars (USD \$4,800,000), as well as an additional amount of One Million Two Hundred Thousand Dollars (USD \$1,200,000) due and owing, with respect to the Omni Loan, if certain conditions subsequent were to occur.”

The Lost Note Affidavit, which was signed two weeks after the First 100 Settlement, does not revive any of the claims that Omni unconditionally released upon its execution of the First 100 Settlement. To the contrary, the Lost Note Affidavit explicitly confirms that the original agreement that existed between Omni and First 100 under the Omni Note was replaced through the First 100 Settlement.

D. The First 100 Settlement Is Not an Executory Accord.

Selectively citing to portions of a 2010 bankruptcy court case from the Eastern District of New York¹⁰, Omni attempts to argue that the First 100 Settlement is an executory accord, not a novation.¹¹ Again, Omni misses the mark. Even under New York law, the First 100 Settlement clearly is not an executory accord. The bankruptcy court in *Cohen* described the distinguishing feature of an executory accord as follows:

Under New York law, an accord is “an agreement by one party to offer and the other to agree to accept in settlement of an existing or matured unpaid claim an amount of money or some performance other than that to which the second party believes it is entitled.” *Sudul v. Computer Outsourcing Servs., Inc.*, 917 F.Supp. 1033, 1047 (S.D.N.Y.1996) (citing *May Dep’t Stores Co. v. Int’l Leasing Corp.*, 1 F.3d 138, 140 (2d Cir.1993)). ***If the accord is not satisfied, the obligee may sue under the original claim or may sue for breach of the accord. Id.***

Cohen, 422 B.R. at 373 (emphasis added). In other words, the parties to an executory accord maintain their rights to assert claims for breach of the original agreement as an alternative to their rights to bring claims under the new agreement. The Nevada Supreme Court has similarly explained, “an agreement that operates as a satisfaction of an antecedent claim only when performed is an executory accord, and an agreement that operates as an immediate substitution for

¹⁰ *Cohen v. Treuhold Capital Group, LLC*, 422 B.R. 350, 373 (E.D.N.Y. 2010).

¹¹ A motion for reconsideration “may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in litigation.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

1 and extinguishment of an antecedent claim is a substituted contract.” *Johnson v. Utile*, 86 Nev.
2 593, 596, 472 P.2d 335, 337 (1970).¹² “If an executory accord is breached, the nonbreaching party
3 may sue either upon the original obligation or upon the compromise agreement.” *Id.*

4 The bankruptcy court in *Cohen* held that the agreement at issue was an executory accord
5 precisely because that agreement conditioned the release of claims against the debtors’ upon the
6 debtors’ future performance and expressly preserved the creditor’s rights to bring claims under the
7 parties’ original agreement in the event that the debtors’ failed to perform. The bankruptcy court
8 explained:

9 The April 2007 Agreement is labeled a “Settlement and Forbearance Agreement,”
10 and the language of the Agreement itself contemplates an executory accord. The
11 Agreement provides that “[i]n the event of any default ... all sums due and owing
12 from Cohen and/or Wissak ... shall be deemed accelerated and immediately due
13 and owing ... and Treuhold’s Forbearance shall terminate and expire.” The
14 Agreement further provides that “[u]pon the due, timely and complete
15 performance by each of Metropolitan, Cohen and Wissak of his and its respective
16 payment obligations ..., Treuhold shall deliver to each of them, respectively, a
17 general release” ***Only performance under the terms of the April 2007
Settlement Agreement would operate to discharge the debts owed by Cohen,
Wissak, and Metropolitan. (Citation Omitted). Indeed, if the performance due
by those parties was not performed according to the terms of the Agreement,
Treuhold would be “entitled to either assert [its] rights under the claim, cause
of action, contract or obligation which is the subject” of the Agreement.***

17 *Cohen*, 422 B.R. at 373 (emphasis added).

18 The First 100 Settlement is a fundamentally different type of agreement. Unlike the
19 agreement at issue in *Cohen*, Omni’s release of claims under the First 100 Settlement was
20 “effective immediately” and was given “unconditionally.” The release was not conditioned on any
21 future performance by First 100. Furthermore, Omni explicitly agreed that it would not assert any
22 claim against First 100 except with respect to the enforcement of the First 100 Settlement. Omni’s
23 absurd suggestion that it somehow retained the right to bring claims against First 100 to enforce

24 ///

25
26 ¹² Interestingly, Omni’s motion for reconsideration makes no mention whatsoever of *Johnson v. Utile*, 86 Nev. 593,
27 596, 472 P.2d 335, 337 (1970), which is the only Nevada Supreme Court decision that offers any substantive
28 discussion of executive accords. Instead, Omni cites to carefully selected language from the New York bankruptcy
court’s 33-page opinion in *Cohen v. Treuhold Capital Group, LLC*, 422 B.R. 350, 373 (E.D.N.Y. 2010) to support
its argument.

the original Omni Note directly contradicts the plain language and manifest intent of the First 100 Settlement Agreement.

E. Omni's Subjective Intent to Foreclose on the Kal-Mor Properties Is Irrelevant.

Omni obtusely insists that the First 100 Settlement cannot be a novation because Omni intended to foreclose on the Kal-Mor Properties notwithstanding Omni's immediate and unconditional release and waiver of all claims and remedies arising from First 100's breach of the Omni Note. Omni, however, cannot escape the plain and unmistakable language of the First 100 Settlement. In determining whether a novation occurred, "courts look to the parties' manifest intent, not their subjective intent." *Granite Construction Company v. Remote Energy Solutions, LLC*, 2017 WL 2334516 (Nev. May 25, 2017) (citing *Ford v. Am. Express Fin. Advisors, Inc.*, 98 P.3d 15, 22 (Utah 2004); *Vacura v. Haars Equip, Inc.*, 364 N.W.2d 387, 392 (Minn. 1985)). Here, the manifest intent of Omni and First 100 to replace the original obligations owed under the Omni Note with the new obligations set forth in the First 100 Settlement is unequivocal. Both the First 100 Settlement and the First 100 Judgment explicitly confirm that intent through the language cited above. Omni's subjective intent to increase its recovery by also foreclosing on the Kal-Mor Properties is irrelevant.

Kal-Mor was not a party to the Omni Loan transaction and is not otherwise indebted to Omni in any way. Kal-Mor became an involuntary guarantor of the Omni Note (to the extent of its interests in the Kal-Mor Properties) only through its purchase the Kal-Mor Properties from First 100.¹³ The novation of the Omni Note through the First 100 Settlement released Kal-Mor from this involuntary guaranty regardless of Omni's intent. "[A] surety is discharged by the novation of a debt; for he can no longer be bound for the first debt for which he was surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt, into which the first has been converted, since this new debt was not the debt to which he acceded." *Williams v. Crusader Discount Corp.*, 75 Nev. 67, 70, 334 P.2d 843, 846 (1959) (citation omitted).

¹³ Kal-Mor does not concede that the Omni Deeds of Trust constituted valid or effective liens against the Kal-Mor Properties at the time of purchase.

1 “Any change in the contract between the creditor and principal which creates a different duty of
2 performance on the part of the principal than that which the surety guaranteed, discharges the
3 surety.” *Id.* It is not necessary that Omni intended to release any lien it may have held against the
4 Kal-Mor Properties.

5 The fact that Kal-Mor was expressly excluded as a third-party beneficiary of the First 100
6 Settlement is similarly irrelevant. Kal-Mor has never claimed standing to enforce the First 100
7 Settlement. Kal-Mor admits it had no involvement in the negotiation of the First 100 Settlement.
8 In fact, Kal-Mor didn’t even receive a copy of the First 100 Settlement until several months after it
9 was executed. Nonetheless, the novation of the Omni Note through the First 100 Settlement still
10 released Kal-Mor from its involuntary guaranty of First 100’s obligations under the Omni Note.
11 The First 100 Settlement released the obligations originally owed under the Omni Note (including
12 Kal-Mor’s involuntary guaranty) and replaced those obligations with the new terms set forth in the
13 First 100 Settlement to which Kal-Mor has never agreed to be bound. *See Walker v. Shrake*, 75
14 Nev. 214, 339 P.2d 124 (1959).

15 Likewise, the fact that First 100 granted Omni a continuing lien against other real
16 properties in which First 100 still held an interest (in addition to liens against litigation claims and
17 other personal property) as security for First 100’s performance under the First 100 Settlement¹⁴, is
18 irrelevant. First 100 held no interest whatsoever in any of the Kal-Mor Properties at the time the
19 First 100 Settlement was signed and had no right or ability to pledge any of the Kal-Mor Properties
20 as security for the entirely new obligations that First 100 owes under the First 100 Settlement.

21 Finally, Omni still has not identified any ambiguity in the First 100 Settlement that could
22 justify looking beyond the plain language of the agreement to examine the parties’ intent. “A
23 contract is ambiguous if it is reasonably susceptible to more than one interpretation.” *Margrave v.*
24 *Dermody Props., Inc.*, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994). Here, the First 100
25 Settlement simply is not open to interpretation as to the points at issue. The plain language of the
26 First 100 Settlement as cited above unequivocally establishes (i) that Omni immediately and

27 ¹⁴ Section 10(a) of the First 100 Settlement Agreement provides, in part, “Omni hereby agrees to forbear collection
28 action under those security interests ... so long as First 100 is not in breach of this Agreement.”

1 unconditionally released all claims and remedies arising from First 100's breach of the Omni Note
2 and (ii) that Omni accept the new obligations set forth in the First 100 Settlement in replacement of
3 the prior obligations owed under the Omni Note.

4 The terms of the First 100 Settlement are clear and unambiguous. The Court cannot
5 consider extrinsic evidence to construe or rewrite the unambiguous terms of a contract. "[W]hen a
6 contract is clear on its face, it will be construed from the written language and enforced as
7 written." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776 (2005) (internal quotation
8 marks and citation omitted). Furthermore, the parol evidence rule precludes the admission of
9 extrinsic "evidence that would change the contract terms when the terms of a written agreement
10 are clear, definite, and unambiguous." *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037
11 (2004). The plain language of the First 100 Settlement and the First 100 Judgment constitute clear
12 and convincing evidence that a novation occurred.

13 **F. First 100's Default under the Omni Note Is Irrelevant.**

14 "A novation consists of four elements: (1) there must be an existing valid contract; (2) all
15 parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4)
16 the new contract must be valid." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d
17 193, 195 (1989). In opposing Kal-Mor's motion for partial summary judgment, Omni
18 acknowledged that that the Omni Note constituted a valid contract between Omni and First 100.¹⁵
19 Now, Omni frivolously argues that no valid contract existed because First 100 was in default of the
20 Omni Note. Omni's argument is nonsense.¹⁶

21 Moreover, Omni's position is easily refuted. In *Williams v. Crusader Discount Corp.*, 75
22 Nev. 67, 71, 334 P.2d 843, 846 (1959), the Nevada Supreme Court explained the effects of a
23 novation as follows:

24
25
26 ¹⁵ See Order, p. 8, ¶ 10 ("It is undisputed that the Omni Note constituted a valid contract between First 100 and
27 Omni. Likewise, it is undisputed that the First 100 Settlement constitutes a valid, new contract between First 100
28 and Omni.").

¹⁶ If Omni is correct in arguing that the Omni Loan was not a valid contract, Omni would have no basis to foreclose
on the Kal-Mor Properties as the original obligation secured by the Omni Deeds of Trust would not exist. Without
that obligation, the Omni Deeds of Trust are meaningless.

Guarantors and sureties are exonerated if the creditor, by any act done without their consent, alters the obligation of the principal in any respect, or impairs or suspends the remedy for its enforcement. Where, *after breach of contract*, the performance of which is guaranteed, the creditor and principal debtor enter into a new contract, by which the amount of damages then due is made payable on a future day, and upon terms different from those imposed by the original agreement, such new contract presumptively merges the old. In such a case, the new obligation becomes the exclusive medium by which the rights of the parties in respect to the payment of damages are to be ascertained. Such a contract is not collateral to the original, but, in respect to the subject to which it appertains, it merges and supersedes the other.

Williams v. Crusader Discount Corp., 75 Nev. 67, 71, 334 P.2d 843, 846 (1959) (emphasis added). Nevada law clearly does not preclude a novation simply because a party breached the original agreement before substituting a new agreement in its place.

The Nevada Supreme Court case of *Walker v. Shrake*, 75 Nev. 214, 339 P.2d 124 (1959) provides another excellent example of a novation occurring after an obvious breach of the parties' original agreement. In *Walker*, a lender obtained a money judgment against a defaulting borrower. In exchange for the borrower's execution of a new note for double the amount of the judgment, the lender agreed it would not execute on the judgment. *Id.*, at 246-47. When the borrower later defaulted in payment of the second note, the lender foreclosed upon its judgment lien against the borrower's real property. *Id.*, at 247. The Nevada Supreme Court found that the foreclosure sale was void on the basis that the lender's judgment lien had been extinguished by novation based upon the second note. *Id.*, 247-48.

Obviously, a novation can occur after a breach of the parties' original agreement. Any suggestion to the contrary by Omni ignores longstanding Nevada law. Omni's prior default under the Omni Note is irrelevant. The First 100 Settlement is a novation.

G. Kal-Mor's Motion Is Supported by Admissible Evidence.

Omni's complaints concerning the Darroch Declaration are nothing more than misdirection designed to call the Court's attention away from Omni's glaring failure to dispute even a single material fact on which Kal-Mor's motion for partial summary judgment was actually based. Neither Kal-Mor nor Mr. Darroch was involved in the First 100's acquisition of the Kal-Mor Properties, the Omni Loan transaction, or the negotiation of the First 100 Settlement. As such, the facts set forth in the Darroch Declaration concerning those matters are appropriately stated upon

information and belief.¹⁷ However, none of the facts alleged in the Darroch Declaration as to those matters is actually disputed by Omni. To the contrary, Omni's own statement of facts¹⁸ supported by the Declaration of Martin Boone¹⁹ actually substantiated and confirmed many of the facts stated upon information and belief in the Darroch Declaration, including the basic facts of the Omni Note, First 100's breaches of the Omni Note, an Omni's efforts to enforce its security interests under the UCC, among other things. The material facts on which the Motion is actually based are beyond any credible dispute.

H. There Is No Need for Discovery.

Omni's claim that it needs more time for discovery rings hollow. More than a year has passed since Kal-Mor filed its Complaint. Additionally, Omni has been on notice for more than a year that Kal-Mor intended to seek summary judgment on the issues set forth in the Motion.²⁰ Yet, Omni has made no effort whatsoever to conduct any discovery. In fact, Omni has yet to even answer the Complaint. Omni has already delayed the resolution of this action for over a year through its wrongful removal to federal court. Omni should not be allowed to further delay this matter with its disingenuous request for discovery.

Additionally, Omni fails to identify any disputed, material question of fact on which discovery is needed. Omni suggests through the declaration of its counsel, Robert Hernquist²¹, that discovery is needed to determine when the Kal-Mor Settlement and First 100 Settlement were reached. That is hardly a matter of dispute. Omni acknowledges in its Opposition that the Kal-Mor Settlement was reached on November 23, 2016 and that the First 100 Settlement was

¹⁷ Most, if not all, of the facts stated upon information and belief in the Darroch Declaration are supported with references to the appropriate court records and other public records through which the facts can be easily verified.

¹⁸ Omni Opposition to Kal-Mor's Motion for Partial Summary Judgment, pp. 4-14.

¹⁹ Mr. Boone's declaration is attached to Omni's Opposition to Kal-Mor's Motion for Partial Summary Judgment as "Exhibit A."

²⁰ The Court may recall that Kal-Mor filed a similar motion for partial summary judgment approximately a year ago. Omni prevented the Court from considering that motion by filing a defective notice of removal to federal court.

²¹ Mr. Hernquist's declaration is attached to Omni's Opposition to Kal-Mor's Motion for Partial Summary Judgment as "Exhibit C."

1 reached “several weeks later.”²² Kal-Mor does not dispute this timeline. Any lingering doubt as
2 to this timeline can be easily resolved by looking to the district court’s docket in the First 100
3 Action. No discovery is needed.

4 Mr. Hernquist also states that discovery is necessary to determine whether Kal-Mor had
5 actual knowledge of Omni’s Deeds of Trust before purchasing the Kal-Mor Properties.
6 However, no aspect of the Kal-Mor’s motion for partial summary judgment was dependent in
7 any way on Kal-Mor’s knowledge of the Deeds of Trust or lack thereof. Kal-Mor’s arguments
8 regarding the one-action rule and novation apply regardless of whether Kal-Mor had actual,
9 constructive, or no knowledge of Omni’s Deeds of Trust. No discovery is needed.

10 Finally, Mr. Hernquist claims that discovery is needed to ascertain the intents of the
11 parties in entering into the Kal-Mor Settlement and the First 100 Settlement. However, Mr.
12 Hernquist does not identify any material dispute as to intent. Whether Omni intended to
13 foreclose on the Kal-Mor Properties after entering into the Kal-Mor Settlement or the First 100
14 Settlement is completely irrelevant for the reasons set forth above. Kal-Mor has never doubted
15 Omni’s greed or questioned its intent to foreclose.²³ Likewise, Kal-Mor has never argued that
16 Omni knowingly violated the one-action rule or that Omni’s discharge of its Deeds of Trust
17 through novation of the Omni Note was intentional. Both the one-action rule and Kal-Mor’s
18 theory of novation apply regardless of Omni’s intent to foreclose.²⁴ Moreover, the parties’
19 intentions are plainly spelled out in the documents themselves, which are not in any way
20 ambiguous.²⁵ No discovery is needed.

21
22
23 ²² Omni Opposition, pp. 11-12. The First 100 Settlement is dated January 17, 2017.

24 ²³ First 100’s understanding as to Omni’s intent to foreclose is also irrelevant. At the time the First 100 Settlement
25 was signed, First 100 held no interest in any of the Kal-Mor Properties and had no standing to consent to any
26 continuation of Omni’s claimed security interest under its Deeds of Trust.

26 ²⁴ By definition, both of these defenses result in the nonconsensual discharge of the creditor’s lien. Indeed, if
27 evidence of a creditor’s intent to waive and release its lien was required to establish either a violation of the one-
28 action rule or a novation, neither defense could ever be asserted successfully.

²⁵ Omni’s request for discovery concerning inadmissible parol evidence is obviously not proper grounds for
deferring consideration of the Motion under Rule 56(d).

Regardless of whether the First 100 Settlement is a novation of the Omni Note, Kal-Mor is entitled to partial summary judgment against Omni under its alternative arguments based on Nevada's one action rule as set forth in Kal-Mor's motion for partial summary judgment and reply in support thereof.

Based on the foregoing, Kal-Mor respectfully requests that this Court enter an order denying Omni's motion for reconsideration in its entirety.

KOLESAR & LEATHAM

*Attorneys for Plaintiff
Kal-Mor-USA, LLC*

CERTIFICATE OF SERVICE

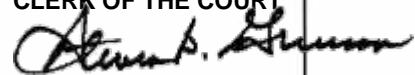
I hereby certify that I am an employee of Kolesar & Leatham, and that on the 9th day of November, 2018, I caused to be served a true and correct copy of foregoing **PLAINTIFF'S OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER GRANTING PARTIAL SUMMARY JUDGMENT** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereon and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List:

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**REPLY IN SUPPORT OF MOTION
FOR RECONSIDERATION OF ORDER
GRANTING PARTIAL SUMMARY
JUDGMENT**

Date: 12/3/2018

Time: Chambers

Defendant Omni Financial, LLC ("Omni") submits the following Reply in Support of its
Motion for Reconsideration of the Order Granting Partial Summary entered on October 3, 2018.

MEMORANDUM OF POINTS AND AUTHORITIES**I. PRELIMINARY STATEMENT**

In Opposition to Omni's Motion for Reconsideration ("Motion"), Kal-Mor fails to address the key aspects upon which Omni bases its Motion, instead, raising a new and irrelevant argument. While recognizing that it has no rights under the Settlement Agreement entered into between Omni and First 100 ("Settlement Agreement") as a third party, Kal-Mor seeks to introduce an argument not previously raised in that it has rights conferred upon it as an "involuntary guarantor" of Omni's Deed of Trust. *See* Opposition, p. 5. In other words, Kal-Mor seeks the benefits of an intended third-party beneficiary without calling itself such. This argument flies in the face of the plain language of the Settlement Agreement entered into by Omni and First 100 that clearly states that there are no intended third-party beneficiaries to the Agreement. Even more to the point, Kal-Mor is specifically identified as a party that is expressly exempted from receiving any rights under the Agreement. This argument represents another attempt by Kal-Mor to interject itself into an agreement it is not a party to in an attempt to secure rights to which it is not entitled. Further, as set forth herein, Kal-Mor was fully aware of the fact that its purchase of the properties at issue was done subject to the interests of Omni as Omni's interests were duly recorded and gave notice of its Deeds of Trust.

Other than raising the new argument related to being an involuntary guarantor, Kal-Mor focuses solely upon its own subjective interpretation of the Settlement Agreement entered into by Omni and First 100 and ignores the unambiguous actions taken by Omni and First 100 in furtherance of the Settlement Agreement. Kal-Mor's argument is based on nothing more than the fact that it wishes to be able to attack the meaning of an agreement that is not in dispute as between the parties which entered into the Agreement. Kal-Mor ignores the uncontroverted actions of Omni and First 100 taken in furtherance of the Settlement Agreement which evidenced a clear intent that the Settlement Agreement not act as a novation of the original, underlying lending agreement.

1 Additionally, Kal-Mor pays little attention to the fact that it has failed to carry its burden
2 in proving novation in its Motion by clear and convincing evidence. Kal-Mor has done no more
3 than raise a question of fact as to the intent of Omni and First 100, which is not sufficient to
4 support the Court's finding of novation. Kal-Mor failed to address all of the required elements of
5 novation, namely, that a valid and enforceable agreement existed which was subject to novation.
6 This fact was glossed over in the Opposition. A novation could not exist given the fact that First
7 100 was in breach of its obligations under the original agreement and therefore no valid agreement
8 existed which could be subject of novation.

9 Likewise, even if a valid agreement did exist which was subject of novation, the intent of
10 Omni and First 100 was the establishment of an executory accord, not a novation. Kal-Mor, again,
11 fails to present any admissible facts to counter this fact. Kal-Mor has no direct knowledge of the
12 intent of either Omni or First 100. Even if one were to accept every assertion of Kal-Mor, a
13 finding of novation would still not be proper. Under Kal-Mor's theory, if two parties enter into a
14 written agreement that contained an error or an apparent ambiguity, upon the challenge of an
15 unrelated third party, the agreeing parties are bound by the error/ambiguity despite there being no
16 dispute as to their intent. In other words, a non-beneficiary, third party could force its will on two
17 contracting parties simply because the contract used words which might not have completely or
18 fully expressed the intent of the parties. Such an argument finds no legal support and is illogical
19 on its face. Accordingly, the Court should grant relief from its original ruling and enter an order
20 denying Kal-Mor's Motion for Partial Summary Judgment.

21 **II. LEGAL STANDARD**

22 Kal-Mor selectively cites to authorities which support its contention that motions for
23 reconsideration are not to be liberally granted. Kal-Mor argues that the only time that a motion
24 for reconsideration is appropriate is if new facts or law are presented. The Nevada Supreme Court,
25 however, has stated that reconsideration is appropriate when a court misapprehended or
26 overlooked important facts when making its decision, *Matter of Ross*, 99 Nev. 657, 659, 668 P.2d
27 1089, 1091 (1983), when new evidence is presented, or when the decision is "clearly erroneous".

1 *Masonry and Tile Contractors Ass'n. of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev.
 2 737, 741, 941 P.2d 486, 489 (1997). Here, certain facts and law were overlooked. A review of
 3 the facts and pertinent law demonstrate that the initial ruling of the Court should be reconsidered
 4 so the matter may be heard upon its merits.

5 **III. LAW AND ARGUMENT**

6 **A. KAL-MOR FAILED TO ESTABLISH NOVATION BY CLEAR AND CONVINCING 7 EVIDENCE**

8 As set forth in the Motion, in order to demonstrate that a novation has occurred four elements
 9 must be shown: (1) there must be an existing valid contract; (2) all parties must agree to a new
 10 contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be
 11 valid. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193 (Nev. 1989).
 12 "Whether a novation occurred is a question of fact if the evidence is such that reasonable persons
 13 can draw more than one conclusion." *Id.* "Moreover, the party asserting novation has the burden
 14 of proving all the essentials of novation by *clear and convincing evidence*." *Id.* at 509 (emphasis
 15 added). As set forth in the Motion, the key to determining whether or not a novation has occurred
 16 is the intent of the parties to the subject agreement, not that of a third party. As noted in the
 17 Motion a "novation may be defined as a mutual agreement between the parties concerned for
 18 the discharge of a valid existing obligation . . ." 58 Am. Jur.2d *Novation* §1. To this end if
 19 anything remains of the original obligation, the no novation exists. *Moffet County State Bank v.*
 20 *Told*, 800 P.2d 1320, 1323 (Colo. 1990)("A mere modification will not suffice; anything
 21 remaining of the original obligation prevents a novation.").

22 There is no dispute as to the fact that the only competent evidence presented in relation to
 23 Kal-Mor's Motion for Partial Summary Judgment was that of Omni. Kal-Mor cannot offer any
 24 admissible evidence as to the intent of either Omni or First 100 as it was not a party to any
 25 agreements entered into between Omni and First 100, thus the only evidence which should
 26 rightfully have been considered by the Court was Omni's interpretation of the Settlement
 27 Agreement. Even accepting all of Kal-Mor's arguments, summary judgment was not appropriate
 28

1 in the current matter as Kal-Mor's entire argument is based upon an assumption which does not
 2 represent the intent of Omni and First 100. The Ninth Circuit Court of Appeals has aptly observed
 3 that words are often an imperfect medium to express parties' intent. Thus, it is often more
 4 appropriate to look to the action of the parties, giving rise to the adage, action speak louder than
 5 words. See *Fanucchi & Limi Farms*, 2003 WL 22670509, *32 – 33 (9th Cir. 2003) (emphasis
 6 added) citing *Davies Machinery Co. v. Pine Mountain Club, Inc.* 39 Cal.App.3d 18, 26-27
 7 (1974)(emphasis in original); *Sans Souci v. Div. of Florida Land Sales & Condos.*, 448 So. 2d
 8 1116, 1121 (Fla. 1st DCA 1984)("Consent, however, need not be shown by express words, but
 9 may be implied from the circumstances of the transaction and by the conduct of the parties
 10 thereafter."), citing 58 Am. Jur.2d *Novation* §16 (1971).

11 The actions of the parties demonstrated that there was a clear intent by both Omni and First
 12 100 to preserve Omni's right to foreclose upon the subject Deeds of Trust. It is not contested that
 13 subsequent to execution of the Settlement Agreement, Omni was in need of a Lost Note Affidavit
 14 as it could not locate the original 2014 Promissory Note which its trustees (under the Deeds of
 15 Trust) were requesting. (Opposition to Motion for Partial Summary Judgment, Ex. A, ¶24). First
 16 100 signed and returned a Lost Note Affidavit on January 30, 2017 and another version on April
 17 21, 2017. (*Id.*; Ex. A-5; Ex. A-6). Had a novation been intended, as argued by Kal-Mor, the
 18 providing of the Lost Note Affidavit would have been unnecessary and would have been a futile
 19 act. Rather than acknowledge this fact, Kal-Mor attempts to portray this act as being consistent
 20 with its theory of novation. See Opposition, p. 5. This argument is based upon the belief that the
 21 Settlement Agreement (and lost note affidavit) is so different that the original agreement that it
 22 constitutes an abandonment of the original lending agreement. While the terms of the two
 23 agreements are certainly different, no such abandonment is evidenced. Indeed, different terms
 24 are insufficient to demonstrate a novation was intended. There must be a complete abandonment
 25 of the original agreement. As previously noted, if anything remains of the original agreement
 26 then a novation does not exist. *Moffett County State Bank, supra*. Kal-Mor does not dispute the
 27 fact that the right to enforce the Deeds of Trust remained even after the Settlement Agreement
 28

1 was entered into. Omni's Deeds of Trust, were not only not abandoned in the Agreement, but as
2 seen by the clear actions of the Omni and First 100, the two parties acted in conjunction to take
3 steps to ensure the enforceability of the Deeds of Trust remained intact.

4 It should also be noted that First 100 has a vested interest in seeing Omni recover funds from
5 the properties. Pursuant to the terms of the Settlement Agreement, First 100 has certain rights to
6 receive a portion of funds received by Omni as part of its efforts to recover funds due and owing
7 under the Deeds of Trust. *See* Settlement Agreement, ¶¶7, 11. Thus, it would be contrary to think
8 that First 100 would have taken an action resulting in a novation when doing so would only be
9 detrimental to its own position. To this end, it should not be lost on the Court that any ruling
10 made as to the meaning or validity of the Settlement Agreement will affect the rights and duties
11 of First 100, a party to this action which has not been defaulted or otherwise had any final rulings
12 made as to its rights.

13 The lack of any requirement that Omni's Deeds of Trust be released, coupled with the fact
14 that First 100 took affirmative steps to assist Omni with the foreclosure of its Deeds of Trust,
15 demonstrates that the parties never intended for the Settlement Agreement to act as a novation of
16 its earlier agreement, but rather, was a resolution of a dispute that was mutually beneficial to the
17 only two parties to the original lending agreement. Even if one were assume that the express
18 language of the Settlement Agreement was not as clear as it theoretically could have been, it was
19 not foreseeable that a third party [Kal-Mor] would collaterally attack the two-party agreement
20 long after it was executed. *See Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 379, 566 P.2d 819,
21 824-25 (1977) (noting that an individual obtains third-party-beneficiary status when contracting
22 parties demonstrate a clear intent to benefit the individual, a third party, by their contract and only
23 then do they have standing); *Barron v. Bank of N.Y. Mellon*, No. 2:15-cv-00242-APG-GWF (D.
24 Nev. Feb. 15, 2017), p. 2 (one must be a party or third party beneficiary to challenge validity of a
25 contractual assignment).

26 Kal-Mor's claim that it is somehow an "involuntary guarantor" of the debt owed Omni is
27 absurd. Kal-Mor voluntarily chose to purchase properties from First 100. *See* Declaration of
28

1 Greg Darroch in Support Motion for Partial Summary Judgment, pp 2 - 12. There is no dispute
 2 that at the time of Kal-Mor's purchase it was aware of Omni's interest in the various properties
 3 by virtue of the fact that Omni's Deed of Trust had been recorded. The fact that Kal-Mor is
 4 charged with notice of Omni's interests was briefed by Omni on pages 29 – 30 of its Opposition
 5 to Motion for Partial Summary Judgment. In short, Omni's interest were a matter of public record
 6 at the time Kal-Mor purchased the subject properties and therefore Kal-Mor is charged with
 7 knowledge of the fact that when it purchased the properties at issue it did so subject to Omni's
 8 Deed of Trust. Thus, Kal-Mor *voluntarily* assumed its ownership interest subject to that of Omni.

9 Additionally, as was also briefed in Omni's Opposition to Kal-Mor's Motion for Partial
 10 Summary Judgment [p. 30 – 31], Greg Darroch and First 100 were not independent parties. Mr.
 11 Darroch owned an equity stake in First 100, thus he had the right to review the books and records
 12 of First 100 which would have further disclosed the fact that Kal-Mor would be purchasing the
 13 properties subject to Omni's interests. See NRS 86.241(2). The only manner in which Kal-Mor
 14 could claim to have been "involuntarily" subjected to anything is if it had failed to conduct any
 15 due diligence prior to purchasing the properties. This, however, would still not entitle Kal-Mor
 16 to attack the meaning of the Settlement Agreement entered into between Omni and First 100.

17 **1. THE SETTLEMENT AGREEMENT UPON WHICH KAL-MOR BASED ITS MOTION**
 18 **CONSTITUTES AN EXECUTORY ACCORD, NOT A NOVATION**

19 Novation is often confused with executory accords. See *Cohen v. Treuhold Capital*
 20 *Group, LLC*, 422 B.R. 350, 373 (E.D.N.Y. 2010). The difference, however, is critical as an
 21 executory accord does not result in the replacement of the original agreement, but rather, provides
 22 two avenues of recovery – either the breached accord agreement or the original agreement. The
 23 critical distinction lies in the difference between an "accord" and an "accord and satisfaction".
 24 This is a distinction which Kal-Mor does not address in any depth, instead, it simply assumes that
 25 any settlement agreement must necessarily constitute a novation of the original agreement. Under
 26 Nevada law, to establish an accord and satisfaction, it must be clearly shown " . . . there was a
 27 meeting of the minds of the parties, accompanied by sufficient consideration." *Mountain*
 28

1 *Shadows of Incline v. Kopsho*, 555 P.2d 841, 842 (1976). In the context of novation, a subsequent
 2 agreement may itself be accepted as immediate satisfaction and discharge of a prior contractual
 3 obligation (accord and satisfaction) or the performance of the subsequent agreement may form
 4 the discharge (accord). See *Rivard-Crook v. Accelerated Payment Techs.*, 2:10-cv-02215-MMD-
 5 GWF (D. Nev. Jan 8, 2014). This fact does not appear to be disputed by Kal-Mor, but rather,
 6 Kal-Mor simply dismisses this fact by pointing to certain portions of the Agreement in isolation
 7 and ignoring the intent of Omni and First 100. In discussing the distinctions between novation
 8 and executory accords the court in *Cohen* stated:

9 It is often difficult to determine whether a new agreement is a novation or an
 10 executory accord. See *Stahl Mgmt. Corp. v. Conceptions Unlimited*, 554 F. Supp.
 11 890, 894 (S.D.N.Y. 1983). The difference between the two turns upon whether
 12 the parties intended the new agreement to discharge their previously existing
 13 obligations. See *Sudul*, 917 F. Supp. at 1047 (citing *May Dep't Stores Co.*, [**15]
 14 1 F.3d at 140). Under New York law, when parties agree to a "novation," the
 15 existing obligation is extinguished immediately by acceptance of new agreement;
 16 however, if parties intend that under the new agreement, the existing claim would
 17 be discharged in the future by rendition of substituted performance, the new
 18 agreement is an executory accord. See *id.* at 1047-48. "At times, the matter of
 19 intention may be discerned as a matter of law from documents exclusively, and, in
 20 other situations, a court must look to any extrinsic proof that may exist." *Koenig*
 21 *Iron Works, Inc. v. Sterling Factories, Inc.*, No. 89 Civ. 4257, 1999 WL 178785, at
 22 *8 (S.D.N.Y. Mar. 30, 1999) (citing *Mallad Constr. Corp. v. County Fed. Sav. &*
 23 *Loan Ass'n*, 32 N.Y.2d 285, 292-93 (1973)). If the intent of the parties can be found
 24 in the unequivocal language of the contract, the court may grant summary
 25 judgment. *Nat'l Am. Corp.*, 448 F.Supp. at 643.

26 The characterization of the subsequent agreement — as a novation or an executory
 27 accord — is determinative of the remedy to which the non-breaching party is
 28 entitled. Because a novation has the effect of extinguishing the prior contract
 29 between the parties, the existence of a novation "must never be presumed."
 30 *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 736 F. Supp. 1281,
 31 1284 (S.D.N.Y. 1990), and the party asserting the novation's existence has the
 32 burden of proving that the subsequent agreement was intended as a complete
 33 substitute for the parties' prior agreements. *LTV Corp. v. Aetna Cas. & Sur. Co. (In*
 34 *re Chateaugay Corp.)*, 116 B.R. 887, 907 (Bankr. S.D.N.Y. 1990) (citation
 35 omitted); see also *Ventricelli v. DeGennaro*, 633 N.Y.S.2d 315, 316 (App. Div.
 36 1995) ("The trial record reveals that the defendant failed to sustain his burden of
 37 proof of establishing that it was the intent of the parties to effect a novation
 38 substituting a new obligor or another contract for the original obligation.");
 39 *Goldbard v. Empire State Mut. Life Ins. Co.*, 171 N.Y.S.2d 194, 202 (App. Div.

1 1958) ("It is generally more reasonable to suppose that he bound himself to
 2 surrender his old rights only when the new contract of accord was performed."
 3 (citation omitted)); *Beck v. Mfrs. Hanover Trust Co.*, 481 N.Y.S.2d 211, 214 (Sup.
 4 Ct. 1984) ("In order to prove a novation, there must be a 'clear and definite intention
 on the part of all concerned that such is the purpose of the agreement. Not only
 must the intention to effect a novation be clearly shown, but a novation [must] never
 . . . be presumed." (quoting 22 N.Y. Jur. 2d, Contracts, § 406)).

5 422 B.R. at 374 (emphasis added).

6 As set forth in the Motion, the *Cohen* matter is instructive in the context of alleged
 7 novations involving settlement agreements. As noted, it is generally more reasonable to assume
 8 that a party would only be willing to forfeit its rights under an agreement as part of a settlement
 9 if and when the settlement agreement is actually performed. Here, the undisputed facts support
 10 this general conclusion. First 100 actively assisted Omni in attempting to enforce its rights under
 11 the Deeds of Trust. The logical question to ask would be why would First 100 be willing to
 12 engage in such an act if no right to enforce the Deeds of Trust existed? The answer is clear – it
 13 wouldn't. Omni did not forfeit all of its rights under the original lending agreement because it
 14 knew that it had its Deeds of Trust to rely upon, a fact confirmed by First 100 through its
 15 unambiguous actions under the Settlement Agreement. The fact that Kal-Mor does not agree
 16 with, or like, the agreement entered into between Omni and First 100 is irrelevant. The facts of
 17 the case demonstrate that neither Omni nor First 100 ever intended for the settlement agreement
 18 reached to create a situation in which Omni was waiving any rights with regard to the real property
 19 at issue.

20 Kal-Mor, argues only that the language of the Settlement Agreement is unambiguous and
 21 that its interpretation of that language must be accepted as the correct interpretation. It could be
 22 argued that in a sense, Kal-Mor is correct as far as the language of the Settlement Agreement is
 23 not ambiguous as between Omni and First 100. Each party fully understood the meaning
 24 attributed to the words used in the Settlement Agreement as evidenced by their actions after the
 25 Settlement Agreement was entered into. This is where the inquiry must stop however. Whether
 26 or not the Agreement is ambiguous or not is only relevant as it pertains to Omni and First 100, it
 27 is irrelevant whether a third party finds the language to be ambiguous or unambiguous or what its
 28

1 meaning is. It is not uncommon for different parties to use identical words but attribute different
 2 meanings to those words. Likely, the wording of the Settlement Agreement would have been
 3 different if Kal-Mor had been a party to the Settlement Agreement, but it was not. Kal-Mor's
 4 interpretation of the Agreement is therefore irrelevant in this matter and cannot form the basis of
 5 its previously granted Motion for Partial Summary Judgment.

6 **2. THE SETTLEMENT AGREEMENT CANNOT CONSTITUTE A NOVATION AS THE**
 7 **ORIGINAL AGREEMENT HAD BEEN BREACHED BY FIRST 100**

8 As noted above, the "party asserting novation has the burden of proving all the essential
 9 elements" by clear and convincing evidence. *United Fire Insurance*, 105 Nev. at 509, 780 P.2d
 10 at 196. Kal-Mor failed to address, let alone prove by clear and convincing evidence, that a valid
 11 contract existed at the time of the alleged novation. Kal-Mor's Opposition does not change this
 12 fact. It is clear that there "cannot be a novation in a case where the original contract has already
 13 been breached since a previously valid obligation does not exist at the time the new contract is
 14 made." 58 Am. Jur.2d Novation §7, citing *In re Cohen* 422 B.R. 350 (E.D.N.Y. 2010):

15 The underlying principle is that "novation requires the consent of all parties to
 16 substitute one obligation or agreement for another." *Raymond v. Marks*, 116 F.3d
 17 466, 466 (2nd Cir. 1997). ***Where the original contract has already been breached,***
there cannot be a novation, because a previously valid obligation did not exist at
the time the new contract was made.

18 *Id.* at 372 (emphasis added). As admitted by Kal-Mor in its Motion, the original lending
 19 agreement between Omni and First 100 had been breached by First 100. See FFCL, p. 5, ¶12.
 20 Thus, Kal-Mor, as a matter of law, could not prevail upon its motion as it failed to establish the
 21 first element of novation – the existence of an existing, valid agreement. See *United Fire*
 22 *Insurance*, 105 Nev. at 508; 58 Am. Jur.2d Novation, §7. It must be remembered that the burden
 23 is squarely upon Kal-Mor to prove each and every element of novation by clear and convincing
 24 evidence. Kal-Mor failed to address this threshold element in its Motion, although it admitted
 25 that the prior agreement had been breach by First 100. Given this admission it was error to grant
 26 summary judgment in favor of Kal-Mor.

1 **3. Kal-Mor is Not an Intended Beneficiary of the Settlement Agreement**
 2 **Between Omni and First 100 and Kal-Mor's Interpretation of the Settlement**
 3 **Agreement is Irrelevant**

4 It was error to give any credence to Kal-Mor's purported interpretation of the Settlement
 5 Agreement entered into between Omni and First 100 as Kal-Mor derives no benefit under the
 6 Agreement. Acknowledging this fact, Kal-Mor adopts a new position – that it was an involuntary
 7 guarantor. See Opposition, 5. Again, the language of the Settlement Agreement is clear as it
 8 pertains to Kal-Mor:

9 This Agreement shall inure to the benefit of and be binding upon the Parties and
 10 their respective heirs, successors and assigns. Except as expressly set forth
 11 herein, (i) nothing in this Agreement shall be construed to give any
 12 person/entity (e.g., GFY, Kal-Mor, or APV) other than the Parties (and their
 13 permitted successors and assigns) any legal or equitable right, remedy, or
 14 claim under or with respect to this Agreement or any provision of this
 15 Agreement, and (ii) this Agreement is for the sole and exclusive benefit of the
 16 Parties (and their permitted successors and assigns, as well as the principals and
 17 agents thereof if expressly referenced herein).

18 Omni's Opposition to Motion for Partial Summary Judgment, Exhibit "A-4", p. 20,
 19 §20(f)(emphasis added). As seen, Kal-Mor was expressly excluded as a party with any interest
 20 in the Settlement Agreement. Nevertheless, the entire basis of its prior motion, and its current
 21 Opposition, was that it is somehow entitled to enforce its interpretation of a private agreement
 22 between Omni and First 100.

23 Kal-Mor does not dispute the fact it is not an intended beneficiary under the Agreement
 24 between Omni and First 100. Interestingly, Kal-Mor claims that it has standing to have brought
 25 its Motion for Partial Summary Judgment because it holds the status of an "involuntary
 26 guarantor". This argument fails as Kal-Mor has already admitted that it was on notice of Omni's
 27 interest as Omni had recorded its Deeds of Trust. See Motion for Partial Summary Judgment, p.
 28 5. As stated above, Greg Darroch, principal of Kal-Mor, held an equity interest in First 100 and
 thus would have had every opportunity to know about Omni's interests in the subject properties.

Thus, there was nothing involuntary about Kal-Mor's actions or the burdens which it accepted by purchasing encumbered properties. Accordingly, the argument must be rejected.

4. KAL-MOR'S MOTION IS PROCEDURALLY DEFECTIVE

As set forth above, and as admitted by Kal-Mor, Kal-Mor is not a party to the Settlement Agreement and has no personal, admissible knowledge of the meaning of the terms used in the Settlement Agreement upon which it based its Motion. The Agreement was not ambiguous as to the parties to the agreement. Omni and First 100's understanding of the Agreement they entered into should not be subject of a third party's attack. There is no controversy regarding the meaning of the Settlement Agreement as between Omni and First 100, the only parties to the agreement. Kal-Mor has offered no evidence, other than its own, unsupported opinion that the Settlement Agreement means something other than how Omni and First 100 treated it. Having failed to offer anything other than its own opinion, no relevant, admissible evidence was before the Court which would support the Order.

5. OMNI IS ENTITLED TO DISCOVERY PURSUANT TO RULE 56(F)

NRCP 56(f) gives the court reviewing a motion for summary judgment broad discretion to deny or continue the motion if the nonmoving party needs time to discover essential facts. *California Union Ins. Co. v. American Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990). Although a party may move for summary judgment at any time district courts should grant a Rule 56(d) motion when the nonmoving party has not had a "realistic opportunity to pursue discovery relating to its theory of the case." *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003). In fact, where the nonmoving party has not had the opportunity to discover any information essential to its theory of the case, the Supreme Court has "restated the rule as requiring, rather than merely permitting, discovery." *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). To be entitled to Rule 56(d) discovery, the nonmoving party must identify facts showing there is a genuine issue for trial. *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986).

1 Omni is entitled to take discovery under Rule 56(f) to support its defenses and to
2 demonstrate the meaning of the words used in the Settlement Agreement. In order to render a
3 meaningful ruling the Court must be apprised of all facts and circumstances surround the
4 formation and enforcement of the Settlement Agreement by the parties who actually entered into
5 the Settlement Agreement.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court should reconsider its prior granting of Kal-Mor's
8 Motion for Partial Summary Judgment.

9 HOWARD & HOWARD ATTORNEYS PLLC

10 By: 

11 Robert Hornquist, Nevada Bar No. 10616

12 Mark Gardberg; Nevada Bar No. 10879

13 Brian J. Pezzillo; Nevada Bar No. 7136

14 *Attorneys for Defendant Omni Financial, LLC*

HOWARD & HOWARD ATTORNEYS PLLC

CERTIFICATE OF SERVICE

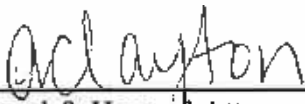
I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 27th day of November 2018, a true and correct copy of foregoing *Reply in Support of Motion for Reconsideration of the Order Granting Plaintiff's Motion For Partial Summary Judgment* was served in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

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Other Title to Property

COURT MINUTES

February 27, 2019

A-17-757061-C Kal-Mor-USA, Inc., Plaintiff(s)
vs.
Omni Financial, LLC, Defendant(s)

February 27, 2019 03:00 AM Motion For Reconsideration

HEARD BY: Scotti, Richard F. COURTROOM: Chambers

COURT CLERK: Garcia, Louisa

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

The Court will issue a Minute Order resolving this matter.

Other Title to Property

COURT MINUTES

March 20, 2019

A-17-757061-C Kal-Mor-USA, Inc., Plaintiff(s)
vs.
Omni Financial, LLC, Defendant(s)

March 20, 2019 09:00 AM Motion For Reconsideration of Order Granting Partial Summary Judgment

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Vargas, Elizabeth

RECORDER: Easley, Dalayne

REPORTER:

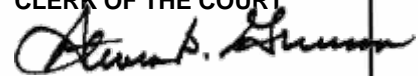
PARTIES PRESENT:

Bart K. Larsen Attorney for Plaintiff

Brian J. Pezzillo Attorney for Defendant

JOURNAL ENTRIES

Mr. Pezzillo argued reasons the Motion for Summary Judgment should be reconsidered based on claim of breach, standing, and an invalid settlement agreement, and reviewed applicable case law. Mr. Larsen argued the settlement agreement was drafted by competent law firms, there was no ambiguity, and the contract is valid and enforceable, notwithstanding breach. Court noted there was case law stating that the contract was not valid if there was breach. Mr. Pezzillo argued and reviewed the contents of the settlement agreement and stated it lacked waiver; stated the intent of counsel was clear, and there was an issue of ambiguity. COURT ORDERED, matter TAKEN UNDER ADVISEMENT.



1 ORDR

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 KAL-MOR USA, INC.,

7 Plaintiff,

8 vs.

9 OMNI FINANCIAL, LLC, et al.,

10 Defendants.

Case No.: A-17-757061-C

Dept. No.: II

Date: March 20, 2019

Time: 9:00 a.m.

**ORDER DENYING DEFENDANT
OMNI FINANCIAL, LLC'S MOTION
FOR RECONSIDERATION**

11
12 The Court DENIES Defendant Omni Financial, LLC's ("Omni") Motion for
13 Reconsideration.

14 As the essential basis for its motion, Omni contends that the Settlement and Mutual
15 Release Agreement ("Release Agreement") between Omni and First 100, LLC ("First 100") is
16 not a Novation. Instead of a Novation, Omni characterizes the Release Agreement as an
17 Accord. As an Accord, Omni suggests that First 100's obligations under the original Omni
18 Loan, as memorialized by the Omni Loan Agreement, continue to exist. Under Omni's
19 analysis, Omni's Deeds of Trust granted by First 100 as security for the Omni Loan, survive
20 the execution of the Release Agreement.

21 The Court finds that there is no genuine issue of material fact - and "clear and
22 convincing evidence" - that the Release Agreement is indeed a Novation; that the Release
23 Agreement, to which Kal-Mor-USA, LLC ("Kal-Mor") did not consent, extinguished the
24 Omni Loan; and thus, by operation of law, released the Kal-Mor properties from the Omni
25 Deeds of Trust.

26 The Release Agreement is not ambiguous in the extinguishment of the Omni Loan
27 Agreement. "[W]hen a contract is clear on its face, it will be construed from the written
28 language and enforced as written." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771,

1 776 (2005). Omni is not allowed to introduce “evidence that would change the contract terms
2 when the terms of a written agreement are clear, definite, and unambiguous.” *Ringle v.*
3 *Bruton*, 120 Nev. 82, 91 (2004). There remains no genuine issue of material fact that the Kal-
4 Mor properties are no longer subject to the Omni Deeds of Trust.

5 Omni seems to understand the distinction between an Accord and a Novation, but
6 applies the law incorrectly. As stated by Omni, “[t]he difference between the two turns upon
7 whether the parties intended the new agreement to discharge their previously existing
8 obligations.” (Motion, p.15) (citation omitted). The point of disagreement between Omni and
9 Kal-Mor is whether the Release Agreement extinguished First 100’s obligations under the
10 Omni Loan Agreement. The undisputed evidence is that it did.

11 Omni strongly but wrongly contends that a novation cannot exist if one party to the
12 purported novation had already breached the underlying agreement. The Nevada Supreme
13 Court explained that parties may enter into a Novation to extinguish a prior agreement
14 whether or not a party had breached the prior agreement:

15 All novations are substituted contracts, and the converse is also
16 true that all substituted contracts are novations. An existing claim
17 can be instantly discharged by the substitution of a new executory
18 agreement in its place. This is true whether the prior claim is not
19 yet matured at the time of the substitution, or is a claim to
20 reparation for some prior breach of duty. 6 Corbin on Contracts
21 sec. 147 (1951). In *Williams v. Crusader Disc. Corp.*, 75 Nev 67,
334 P.2d 843 (1959), this Court held that: ‘This substitution of a
new obligation for an existing one, effects a novation, which
thereby discharges the parties from all of their obligations under
the former agreement inasmuch as such obligations are
extinguished by the novation.’ *Nevada Bank of Commerce v.*
Esquire Real Estate, Inc., 86 Nev. 238, 468 P.2d 22 (1970).

22 *Harding v. Lazovich and Lazovich, Inc.*, 86 Nev. 434, 437 (1970).

23 Many other Courts outside Nevada agree that a settlement of a disputed claim may
24 constitute a Novation. *Accord Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462 (2003)
25 (affirming the Court of Appeals for the Fourth Circuit, holding: “The majority reasoned that
26 the settlement agreement, releases, and promissory note had worked a kind of ‘novation’”);
27 *Ogden v. Digital Intelligence Systems LLC*, 2018 WL 6565360 at *2 (Ariz. Ct. App.
28 December 13, 2018) (“The Settlement Agreement in effect constituted a novation of all prior

1 agreements"); *Bennet v. Bennett*, 25 P.2d 426 (Cal. 1993) (holding that the compromise
2 of a disputed claim is enforceable as a novation); *Bank of New York v. Murphy*, 230 A.D.2d
3 607 (N.Y.A.D. 1996) (holding that an agreement may be a novation if it "discharge[s] with
4 finality an unliquidated disputed claim"); *Ostrander v. Ostrander*, 199 A.D. 437, 439
5 (N.Y.A.D. 1921) (holding that a settlement of a disputed claim could be a novation); *Brooks*
6 *Trucking Co. v. Bull Rodgers, Inc.*, 128 P.3d 1076, 1078 (N.M. 2006) ("The settlement
7 agreement was a new contract and constituted a novation"); *Kingsborough v. Edwards*,
8 1994 WL 286075 at *1 (Ohio Ct. App. June 29, 1994) ("As applied to contracts, the doctrines
9 of accord and satisfaction, compromise and settlement, and novation generally arise in cases
10 involving a disputed claim between parties"); *The Philip Carey Manufacturing Co. v.*
11 *General Products Co.*, 151 A.2d 487, 490 (R.I. 1959) (holding that the settlement of a
12 disputed claim was a novation).

13 Omni recognizes that it released First 100 from the original Omni Loan, and First 100
14 agreed to a new debt under the Release Agreement. Omni argues that the parties did not
15 intend to release the Omni Deeds of Trust, so the Deeds of Trust remained an encumbrance on
16 the Kal-Mor property. Omni's argument is flawed for a very simple reason. The significance
17 of First 100's complete release from the original Omni Loan meant that the original Omni
18 Loan ceased to exist. By express written agreement of Omni and First 100, the debt under the
19 Omni Loan was gone. If the Omni Loan ceased to exist, then, a fortiori, the security for the
20 Omni Loan ceased to exist.

21 There cannot be security to pay a debt where there is no debt. *See Williams v.*
22 *Crusader Discount Corp.*, 75 Nev. 67, 70 (1959) ("[A] surety is discharged by the novation of
23 a debt; for he can no longer be bound for the first debt for which he was surety, since it no
24 longer exists, having been extinguished by the novation; neither can he be bound for the new
25 debt, into which the first has been converted, since the new debt was not the debt to which he
26 acceded.").

27 It bears noting that Kal-Mor has not admitted that: (1) It knew about the Deeds of
28 Trust at certain relevant periods of time; (2) First 100 fraudulently concealed crucial

1 information about its relationship with Omni; and (3) Kal-Mor never admitted that its property
2 was bound by the Omni Deeds of Trust. It appears that these are all matters that involve
3 disputed issues of material fact. The Court does not resolve these issues. The Court's
4 analysis herein is not dependent upon the resolution of these issues.

5 Omni next suggests that First 100 agreed to a new debt under a new debt instrument
6 (the Release Agreement), so the Omni Deeds of Trust on the Kal-Mor property somehow
7 transferred over to the brand new debt instrument. Omni argues that the Kal-Mor property
8 ceased serving as security for the Omni Loan, and began serving as security for First 100's
9 debt under the Release Agreement. Omni failed to identify any law that permits a secured
10 creditor from using its security interest to secure any debt that it chooses.

11 Even if the Release Agreement could be construed as a mere modification of the
12 original Omni Loan – which the Court rejects, the law of suretyship prohibited the result that
13 Omni says it wanted to achieve. “Any change in the contract between the creditor and
14 principal which creates a different duty of performance on the part of the principal that that
15 which the surety guaranteed, discharges the surety.” *Williams v. Crusader Discount Corp.*, 75
16 Nev. 67, 70 (1959). It is undisputed that the Release Agreement materially changed First
17 100's original duty of performance, so Kal-Mor's position as surety was discharged by
18 operation of law.

19 Omni implicitly argues that Kal-Mor was not a surety for the First 100 debt, so the law
20 of suretyship does not apply. Assuming for the sake of argument that the Omni Loan was not
21 extinguished, and Kal-Mor could not avail itself of any other defense, Kal-Mor was indeed a
22 surety or guarantor of the First 100 debt. With the assumptions made, at the time Kal-Mor
23 purchased the subject property from First 100, the property was encumbered by the Deeds of
24 Trust. The property stood as security for the Omni loan. The property could be foreclosed
25 upon if First 100 failed to pay off the Omni Loan in accordance with its terms. Omni could
26 never exercise its rights under the Deeds of Trust if First 100 met its obligations. The value of
27 Kal-Mor's property was vastly different depending on whether First 100 paid or did not pay
28 its debt to Omni. As Kal-Mor's financial interest stood as protection for Omni, the reality is

1 that Kal-Mor was the true guarantor of the First 100 debt - to the extent of the value of its
2 property.

3 Omni next argues that First 100 and itself had settlement discussions before the
4 execution of the Release Agreement in which they expressed their intent that the Omni Deeds
5 of Trust would remain against the Kal-Mor properties. But these pre-agreement discussions
6 cannot modify the clear and unambiguous terms of the Release Agreement. *See Ringle, supra*
7 at 91. As stated, a clear and unambiguous term of the Release Agreement is that the Omni
8 Loan was extinguished. This meant that the Deeds of Trusts for the Omni Loan were gone.

9 Omni next argues that First 100 assisted Omni in efforts to foreclose against the Kal-
10 Mor property. Of course First 100 would want Omni to foreclose – because that would
11 relieve First 100 of its debt to Omni to the extent of the monies recovered. But that does not
12 matter one way or another. First 100’s self-serving post-Novation conduct and position
13 cannot alter the legal effect of the Novation.

14 Omni mentions that First 100 signed a Lost Note Affidavit to enable Omni to
15 foreclose. Omni argues that this would have been a “futile act” if the Release Agreement was
16 a Novation. Maybe so. But, First 100’s post-Novation “futile act” cannot convert a Novation
17 into an Accord. Once the prior Agreement was extinguished, it could not be revived to the
18 detriment of Kal-Mor by First 100’s unilateral action. Omni did not cite to any law that
19 permits such result.

20 Omni argues that the Release Agreement contained “carve-out” language that
21 permitted Omni to foreclose on the Deeds of Trust. To be more precise, the parties agreed
22 that the Release Agreement would not impair Omni’s rights “that may exist.” Release
23 Agreement para. 4. No right to foreclose existed because the underlying debt was
24 extinguished. So the “carve-out” language is meaningless in this context.

25 Omni next cites to a provision in the Release Agreement in which First 100
26 represented that it notified Kal-Mor about Omni’s security interest. Release Agreement, ¶ 8E.
27 This brings us back to the original point – the undisputed evidence that First 100’s debt under
28 the Omni Loan Agreement was gone. First 100 represented to Omni that it gave notice to

1 Kal-Mor about a Deed of Trust that was extinguished by operation of law. The Notice
2 provision does not create any doubt about the existence of a Novation.

3 Omni contends Kal-Mor lacks standing because the Release Agreement precluded
4 Third-Party Beneficiaries. Kal-Mor does not purport to be a Third-Party Beneficiary. Kal-
5 Mor is not seeking to enforce any term of the Release Agreement. Rather, Kal-Mor contends
6 that the legal effect of the Novation is to extinguish the Deeds of Trust. Standing is presumed.
7 *See Williams v. Crusader Discount Corp.*, 75 Nev. 67, 70 (1959) (holding surety may assert
8 absolution upon novation).

9 Omni next argues that there is no Novation because First 100 is still required to do
10 some of the things that it was required to do under the Omni Loan Agreement. Any
11 obligations that remain were merged into the new Release Agreement because the original
12 Omni Loan Agreement was extinguished. That is the definition of a Novation. *See Harding*,
13 *supra* at 437 (“[A]ll substituted contracts are novations.”).

14 Omni next argues that it did not foresee that the Release Agreement would discharge
15 its Deeds of Trust. As stated several times herein, the law is clear that a substituted contract
16 operates as a novation, and any debt created by the original contract would be gone. Omni’s
17 unilateral mistake of law is no excuse. Even if the mistake of law was shared by both Omni
18 and First 100, these parties have not sought to undo their transaction.

19 Finally, Omni seems to invoke equity by emphasis of prejudice it will suffer. But,
20 principles of equity here cannot override the law.

21 No basis exists for the Court to change its prior position granting partial summary
22 judgment in favor of Plaintiff Kal-Mor.

23 IT IS SO ORDERED.

24 Dated this 19th day of April, 2019.

25
26 
27 RICHARD F. SCOTTI
28 DISTRICT COURT JUDGE

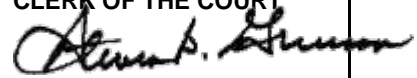
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CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey EFileNV system.

/s/ Melody Howard

Melody Howard
Judicial Executive Assistant



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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. No.: 2

NOTICE OF ENTRY ORDER

PLEASE TAKE NOTICE that on the 1st day of May, 2019, an Order Denying Chersus Holdings, LLC's Motion to Intervene was filed in the above-referenced action. A copy of which is attached hereto and incorporated herein by reference.

DATED this 1st day of May, 2019.

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ Brian Pezzillo

Robert Hernquist, Nevada Bar No. 10616

Brian J. Pezzillo; Nevada Bar No. 7136

Attorneys for Defendant Omni Financial, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, the undersigned hereby certifies a true and correct copy of the foregoing *NOTICE OF ENTRY ORDER* was served electronically using the Odyssey E-file and Serve system on the 1st day of May, 2019, to the following:

Vernon A. Nelson, Jr., Esq.
Steven H. Burke, Esq.
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Attorneys for Chersus

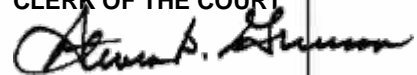
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KAL-MOR-USA, LLC, a Nevada limited
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Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X
and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**ORDER DENYING CHERSUS
HOLDINGS, LLC's MOTION TO
INTERVENE**

This matter came before the Court on March 12, 2019 on the Motion to Intervene ("Motion") filed by Chersus Holdings, LLC ("Chersus"). The Court having reviewed the Motion, the Opposition filed by Omni Financial, LLC, and the joinder in the Opposition filed by Kal-Mor-USA, LLC and having accepted oral argument of the parties and otherwise being fully advised in the premises finds as follows:

1. The proper procedural mechanism for Chersus to follow if it wishes to have its claims heard in the above-captioned matter is to file a motion for consolidation;

2. The Court finds no good cause to grant permissive intervention under NRCP 24(b);

a. Chersus' Motion is untimely;

b. Chersus has not convinced the Court there are common questions of law or fact because the Court has already resolved all issues between Omni and Kal-Mor.

3. The Court finds that Chersus is not entitled to intervention pursuant to NRC 24(a)(2) because:

- a. Chersus' Motion is untimely;
- b. The subject matter of Chersus' claims are in properties 665 Mountain Point and 7533 Lintwhite – which are not the subject of this case;
- c. Chersus would not suffer an impairment in its ability to protect its interests in its properties if not granted intervention; and,
- d. Chersus' intervention here would either prejudicially interfere with Kal-Mor conclusion of this action – despite having been granted summary judgment, or interfere with Omni's rights to commence an appeal from the Order Granting Summary Judgment.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Chersus Holding, LLC's Motion to Intervene is DENIED.


Dated: 26th day of April 2019

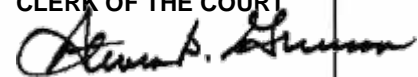

District Court Judge

RESPECTFULLY SUBMITTED:

TM

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
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Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**MOTION TO CERTIFY ORDER
GRANTING PARTIAL SUMMARY
JUDGMENT AS FINAL PURSUANT
TO NRCP 54(B)**

[Hearing Date Requested]

Defendant Omni Financial, LLC ("Omni") submits the following Motion to Certify as Final the Court's Order Granting Kal-Mor-USA, LLC ("Kal-Mor") Motion for Partial Summary Judgment ("Order") filed on October 2, 2018¹ as well as the Court's Order Denying Omni's Request for Reconsideration of the Order that was entered on April 19, 2019. This Motion is supported by the following Memorandum of Points and Authorities, the Court's file herein and any argument accepted by the Court at oral argument.

¹ Notice of Entry of the Order was entered on October 3, 2019.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

As the Court is aware, the pending dispute has been the subject of multiple court proceedings. On June 19, 2017, Kal-Mor commenced this action. On July 26, 2018, Kal-Mor filed a Motion for Partial Summary Judgment ("Motion"). The Court granted the Motion for Partial Summary Judgment on October 2, 2018 based on the argument that a novation had occurred. Omni subsequently filed a motion for reconsideration of the Court's Order. After briefing and oral argument, the Court issued an Order on April 19, 2019 denying the Motion for Reconsideration.

As the Court is aware from the various pleadings, Omni extended real estate-backed loans. [Opposition to Motion for Summary Judgment ("Opposition") filed on August 15, 2018, Ex. A, (Decl. of Martin Boone), ¶3]. In 2014, Omni agreed to loan up to \$5 million to Defendant First 100, LLC ("First 100") to finance the purchase and enforcement of homeowner association ("HOA") receivables (the "Loan"). (Opposition, Ex. A, ¶4; Ex. B, Court Order, Case No. 2:16-cv-00099, 3:23-4:9). On May 27, 2014, (i) the two entered into a Loan Agreement; (ii) First 100 executed a Promissory Note, Security Agreement, and multiple Deeds of Trust in Omni's favor; and (iii) certain First 100 principals issued Guarantees in Omni's favor. (*Id.*, at 3:23-4:9)).

The Security Agreement granted Omni a security interest in all of First 100's present and future-acquired personal property, ranging from HOA Receivables to cash accounts to equipment and so forth. (Opposition, Ex. B, 3:25-4:5; 16:26-17:5). Not a single type or item of personalty was excluded. (*Id.*). Omni recorded UCC-1 financing statements in Nevada and Florida evidencing its security interest in First 100's personalty. (Opposition, Ex. A; Ex. A-2). That was the first UCC filing on record, pre-dating UCC-1s and tax liens filed by; (i) PrenPoinciana, LLC, an unrelated third party; (ii) Mr. Darroch, Kal-Mor's principal and affiant, and (iii) the I.R.S. (Opposition, Ex. A-8, A-9 and A-10). Kal-Mor acknowledges that, First 100 also executed multiple deeds of trust in Omni's favor (the "Deeds of Trust"). (Motion for Partial Summary Judgment ("Motion"), p. 4, ¶3; Ex. A, ¶7); Order, ¶(A)(2). Those Deeds of Trust encumbered, as

1 security for the Loan, approximately thirty properties in the State of Nevada. (Opposition, Ex. A,
 2 ¶7). This action arises from Kal-Mor's contention it subsequently purchased and owns nine of
 3 those thirty parcels (the "Kal-Mor Real Properties"). (Motion, p. 7, ¶15).

4 Kal-Mor alleges that:

5 First 100 did not disclose to Kal-Mor that it had previously pledged any interest in
 6 any of the Kal-Mor Properties as collateral for the Omni Loan or that any of the
 7 Kal-Mor Properties was subject to any of the Omni Deeds of Trust.

8 Kal-Mor had no actual knowledge or notice of any of the Omni Deeds of Trust
 9 when it purchased the Kal-Mor Properties from First 100 in 2014 and 2015.

10 (Motion, p. 8, ¶¶19, 20). First 100, in contrast, represented to Omni that it "in transferring the
 11 Real Properties...to third parties, [First 100] provided all of those third parties, prior to closing
 12 the transfer transaction, with actual notice of the existence of Omni's first-priority security interest
 13 in those Real Properties." (Opposition, Exhibit A-4, Omni / First 100 Settlement Agreement at
 14 §8(e)).

15 In 2013, 2014 and 2015, Kal-Mor purchased several properties from First 100, including
 16 the Kal-Mor Properties at issue here. (Opposition, Ex. A, ¶10; Motion, p. 7, ¶15). On May 13,
 17 2015, Mr. Darroch filed a UCC-1 financing statement against First 100, claiming he loaned money
 18 to First 100 and was granted a security interest in certain HOA receivables. (Opposition, Ex. A,
 19 ¶11; Ex. A-9). Based on his filing date, Mr. Darroch's interest was at best fourth in priority,
 20 behind the interests of Omni, the IRS, and PrenPoinciana, respectively. (*Id.*)

21 Prior to Kal-Mor's purchases and loan, First 100 committed the first of its numerous
 22 breaches of the Omni Loan. (Opposition, Ex. B, 4:10-14). Among other things, it failed to: (i)
 23 pay principal and interest when due; (ii) cure the defects in Omni's Deeds of Trust; (iii) properly
 24 prosecute and enforce the HOA receivables; and (iv) provide Omni with required monthly,
 25 quarterly, and annual financial statements. (Opposition, Ex. A, ¶12); Order, ¶(D)(12). Omni
 26 issued a notice of default on April 8, 2015. (Ex. A-11). It is unclear if Kal-Mor knew or did not
 27 know about that default, given Mr. Darroch's equity interest in First 100.

28 On November 2, 2015, Omni sent First 100 a second notice of default, categorizing First

1 100's breaches in more detail. (Opposition, Ex. A-12). That notice accelerated the Loan and
2 demanded payment in full. (*Id.*). Throughout November 2015, First 100 and Kal-Mor repeatedly
3 promised Omni that Kal-Mor would buy out the Omni Loan at full face value. (Ex. A, ¶14). At
4 times, First 100 and Kal-Mor promised Omni that a \$4 million pay-off would be wired within
5 hours. (*Id.*) Kal-Mor's counsel delivered a draft loan assignment agreement to Omni on
6 November 20, 2015, and Omni responded with a revised draft a few days later. (*Id.*) Negotiations
7 continued into early December, until Kal-Mor's counsel simply "went dark"— declining to
8 respond to any email or phone messages. (*Id.*) Omni believes Kal-Mor's entire loan payoff
9 proposals were a ruse to buy First 100 more time. (*Id.*)

10 Omni and First 100 entered into a Forbearance Agreement dated December 18, 2015, and
11 a related Addendum three days later. (Opposition, Ex. B, 4:8-27; Ex. A-13). Omni agreed to
12 forego foreclosure over First 100's personalty in exchange for various First 100 promises,
13 including (i) delivery of financial statements by December 18th and (ii) a \$270,500 payment by
14 December 28th. (*Id.*) Both deadlines came and went with no performance: First 100 eventually
15 violated virtually every single forbearance term. (Opposition, Ex. B, 13:11-22). Given First 100's
16 then year-old payment default, Omni noticed a UCC sale pursuant to NRS Chapter 104, by issuing
17 a "Notification of Disposition of Collateral" in January 2016 (the "1st UCC Notice"). (Opposition,
18 Ex. A-14).

19 In response, First 100 filed suit and sought an emergency, *ex parte* TRO to stop the sale.
20 (Case No. 2:16-cv-00099, ECF 1-1 (Complaint)). Kal-Mor filed a virtually identical suit and
21 emergency, *ex parte* TRO request (Case No. A-16-730447-C). Omni removed the two cases to
22 federal court, and they were consolidated into one case. Giving First 100 and Kal-Mor the benefit
23 of the doubt, the U.S. District Court granted a TRO and postponed Omni's foreclosure sale. (Case
24 No. 2:16-cv-00099, ECF 21). However, several months later, after three days of evidentiary
25 hearings and extensive briefings and oral arguments, the U.S. District Court held that: (i) the
26 original TRO was wholly unwarranted; (ii) Omni could proceed with the foreclosure sale; and
27

(iii) Omni was entitled to Kal-Mor's TRO bond. (Opposition, Ex. B).²

Kal-Mor based its Motion, in part, on Nevada's One Action Rule. The Court denied the Motion with regard to this issue. See Order dated October 2, 2018. Not only was Kal-Mor a party to the federal proceedings, but its disputes with Omni were resolved in an agreement specifically addressing the Kal-Mor Real Properties and anticipating Omni's future real-property foreclosure actions. In documents dated November 23, 2016, Omni and Kal-Mor agreed to a (i) "Settlement and Mutual General Release Agreement" (the "Kal-Mor Settlement") (Ex. A-3); and (ii) "Stipulation and Order for Entry of Final Judgment" (the "Kal-Mor SAO") (Ex. J). Critically, the former states:

W. The Parties now desire to resolve all differences, disputes and disagreements between them relating to the 2014-2015 Receivables and the ACR Receivables. *This Agreement, however, is not intended to address or resolve any dispute between the Parties as to the Kal-Mor Real Properties.*

Notwithstanding the terms provided herein, *Omni reserves all rights to assert claims and conduct Enforcement Actions relating to any asset or property* other than the 2013 Receivables, 2014-2015 Receivables, and/or ACR Receivables, whether owned (previously, currently, or in the future) by GFY or a third party, including but not limited to the Kal-Mor Real Properties, associated proceeds, rents, and/or other assets.

(Ex. A-3, p. 4, Recital W); §4(a)) (emphasis added). This language was included because during settlement negotiations, both Omni and Kal-Mor recognized and agreed that they would not be able to resolve their competing claimed interests in real property that had been granted to both of them by First 100. (Opposition, Ex. A).

1. The Kal-Mor SAO states:

The entry final judgment by the Court pursuant to this Stipulation shall not preclude or otherwise impair any claim or defense that may exist between the Parties other than those expressly stated in the Complaint or the Counterclaim.

(Ex. J, ¶4).

2. Several weeks later, Omni and First 100 entered into a similar agreement (defined

² This U.S. District Court also expressed grave concerns regarding Kal-Mor's withholding of critical evidence, which was exposed during the cross-examination of Mr. Darroch, Kal-Mor's principal. (Opposition, Ex. B, 25:23-28.)

in the Motion and herein as the “First 100 Settlement”). (Opposition, Ex. A-4). The Court has ruled that the settlement agreement that was entered into between Omni and First 100 constituted a novation of the original agreement.

As this issue is essentially dispositive of the underlying case there is no just reason not to certify the Court’s Order as final and to allow an appeal to be taken from that Order. The Court anticipated that an appeal would arise from its ruling as discussed below. Additionally, given the fact that no answer has yet been filed by any party, delaying the appeal from the Order would unnecessarily delay the ultimate resolution of this matter.

II. LEGAL STANDARD

NRCP 54 was amended, effective March 1, 2019, and now expressly allows the Court to certify a judgment to allow for an interlocutory appeal if the judgment does not dispose of all claims raised in the case. The Rule now states as follows:

When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, *the court may direct entry of a final judgment as to one or more, but fewer than all, claims* or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.

(Emphasis added). The following Advisory Committee Note explains the amendments made to NRCP 54(b):

Subsection (b). From 2004 to 2019, NRCP 54(b) departed from FRCP 54(b), only permitting certification of a judgment to allow an interlocutory appeal if it eliminated one or more parties, not one or more claims. The 2019 amendments add the reference to claims back into the rule, restoring the district court’s authority to direct entry of final judgment when one or more, but fewer than all, claims are resolved. The court has discretion in deciding whether to grant Rule 54(b) certification; given the strong policy against piecemeal review, an order granting Rule 54(b) certification should detail the facts and reasoning that make interlocutory review appropriate. An appellate court may review whether a judgment was properly certified under this rule.

As set forth herein, good cause exists to certify the Court's Order granting partial summary judgment as the Order essentially renders moot the remaining causes of action asserted by Kal-Mor.

III. LAW AND ARGUMENT

A. The Court Should Certify as final The Order Granting partial Summary Judgment Pursuant to NRCP 54(b)

The Court is aware of Omni's intent to appeal from the Order as indicated in its May 1, 2019 Order denying the request to intervene filed by Chersus Holdings, LLC:

Chersus' intervention here would either prejudicially interfere with Kal-Mor conclusion of this action – despite having been granted summary judgment, or interfere with Omni's rights to commence an appeal from the Order Granting Summary Judgment.

Certifying the Court's Order as final and allowing for an interlocutory appeal will allow for the most efficient resolution to the pending disputes. Failure to allow for an interlocutory appeal will unduly delay the matter, as the underlying issue of title to the Kal-Mor Properties was determined by virtue of the Order. While the proceedings have, thus far, focused solely on limited issues between Omni and Kal-Mor, Kal-Mor has also named First 100 as a Defendant. The Court's docket reflects the fact that First 100 has not appeared in the matter, however, no default or default judgment proceedings have been commenced. In the absence of a default judgment being entered against First 100 a final judgment cannot be entered and thus Omni will be denied an opportunity to appeal until Kal-Mor takes action against First 100.

In addition, it will be far more economical and efficient to certify the matter for an interlocutory appeal at this early stage before resources have been spent engaging in discovery regarding the remaining causes of action that include Conversion, Slander of Title, Unjust Enrichment and Intentional Interference with Contractual Relations. See Complaint filed June 19, 2017. The Court has issued a dispositive ruling on a motion at a time that no answer has been filed by any party. Thus, it would serve the purposes of NRCP 1 to allow that dispositive

1 ruling to be reviewed prior to expensive and time consuming litigation being engaged in.

2 Additionally, it is submitted that the issue of novation in the context of the facts of this
3 case represents a significant issue of public policy as well as being a case of first impression. No
4 case in Nevada squarely addresses the issue of whether or not novation can occur when it is
5 undisputed that the underlying agreement had been breached prior to the alleged novation.
6 Likewise, there is no controlling authority in Nevada regarding the situation presented here, in
7 which a third party seeks to collaterally attack the intent of the parties to the agreement that is
8 subject of the alleged novation. Thus, public policy favors having this matter heard.

9 **IV. CONCLUSION**

10 For the foregoing reasons, Omni requests that the Court certify its Order Granting Partial
11 Summary Judgment and its Order Denying Reconsideration of that Order as final for appeal
12 purposes pursuant to NRCP 54(b).

13 HOWARD & HOWARD ATTORNEYS PLLC

14 Dated: May 29, 2019

By: /s/ Brian J. Pezzillo

15 Robert Hernquist, Nevada Bar No. 10616

16 Brian J. Pezzillo; Nevada Bar No. 7136

17 *Attorneys for Defendant Omni Financial, LLC*
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CERTIFICATE OF SERVICE

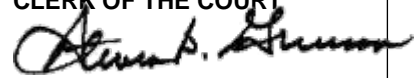
I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 29th day of May 2019, I caused to be served a copy of foregoing Motion to Certify Order Granting Partial Summary Judgment as Final in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

Bart K. Larsen
KOLESAR & LEATHAM
400 South Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145

*Attorney for Plaintiff Kal-Mor-USA,
LLC*


An employee of Howard & Howard Attorneys PLLC



BART K. LARSEN, ESQ.
Nevada Bar No. 8538
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Las Vegas, Nevada 89145
Telephone: (702) 362-7800
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E-Mail: blarsen@klnevada.com

Attorneys for Plaintiff
Kal-Mor-USA, LLC

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X;
and ROE ENTITIES I through X, inclusive,

Defendants.

CASE NO. A-17-757061-C

DEPT. NO. 2

**PLAINTIFF'S OPPOSITION TO
MOTION TO CERTIFY ORDER
GRANTING PARTIAL SUMMARY
JUDGMENT AS FINAL PURSUANT
TO NRCP 54(b)**

Date: July 1, 2019

Time: In Chambers

Plaintiff Kal-Mor-USA, LLC ("Kal-Mor"), by and through its undersigned attorneys of record of the law firm of Kolesar & Leatham, hereby submits this Opposition to the *Motion to Certify Order Granting Partial Summary Judgment as Final pursuant to NRCP 54(b)* (the "Motion") filed by Defendant Omni Financial, LLC ("Omni"). For the reasons set forth below, Kal-Mor respectfully requests that the Court deny the Motion.

...

...

...

MEMORANDUM OF POINTS AND AUTHORITIES

The *Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Partial Summary Judgment* (the "Summary Judgment Order") is clearly not a final judgment. The Summary Judgment Order pertained only to Kal-Mor's fourth cause of action for declaratory relief and its fifth cause of action for quiet title; it did not address Kal-Mor's remaining claims against Omni for unjust enrichment, conversion, slander of title, or intentional interference with contractual relations. Moreover, the Summary Judgment Order did not resolve any of Kal-Mor's claims against First 100, LLC ("First 100").

Notwithstanding the recent amendments to NRCP 54, the certification of the Summary Judgment Order as final for purposes of appeal would be improper. "NRCP 54(b) provides that a judgment or order of the district court which completely removes a party or a claim from a pending action may be certified as final 'only upon an express determination that there is *no just reason for delay ...*'" *Hallicrafters Co. v. Moore*, 102 Nev. 526, 528, 728 P.2d 441, 443 (1986) (emphasis in original). The certification of an interlocutory order as final under NRCP 54(b) must be considered carefully and should not be granted routinely or as an accommodation to counsel. *See Knox v. Dick*, 99 Nev. 541, 665 P.2d 267 (1983).

Omni's Motion offers no compelling reason why the natural progression of this case should be further interrupted¹ by an appeal of an interlocutory order. Omni's presumption that certification of the Summary Judgment Order would stay or somehow delay the adjudication of Kal-Mor's remaining claims is incorrect. Even if the Summary Judgment Order is certified as final, there would be no basis to stay this action or to otherwise deny Kal-Mor the opportunity to pursue its remaining claims against Omni pending the appeal. Thus, the only justification Omni offers for its request to certify the Summary Judgment Order as final is inapplicable.

Furthermore, Kal-Mor's various claims against Omni are all based on the same underlying facts. "If the claims asserted in an action, albeit separate, are so closely related that this court must necessarily decide important issues pending below in order to decide the issues appealed, there can

¹ Omni already delayed the adjudication of this action by almost a year through its wrongful attempt to remove the action to federal court.

1 be no finding that there is no just reason for delay, and certification of an order deciding some but
2 not all of those claims as final is an abuse of the district court's discretion." *Hallicrafters*, 102
3 Nev. at 528 (citing *Mid-Century Ins. Co. v. Cherubini*, 95 Nev. 293, 593 P.2d 1068 (1979); *Las*
4 *Vegas Hacienda v. G.L.M.M. Corp.*, 93 Nev. 177, 561 P.2d 1334 (1977)). Certification under
5 NRCP 54(b) is inappropriate where it would require that the appellate court "decide the law of the
6 case on the claims still pending in the district court in the course of deciding the appeal." *Id.*
7 Allowing an appeal under such circumstances "would result in piecemeal litigation, and would
8 defeat the purpose of NRCP 54(b)." *Id.*

9 Now that Omni's *Motion for Reconsideration of Order Granting Partial Summary*
10 *Judgment* has been denied under this Court's Order dated April 19, 2019, Kal-Mor intends to
11 pursue its remaining claims against Omni. Certifying the Summary Judgment Order as final under
12 NRCP 54(b) would serve no purpose but to interfere in Kal-Mor's efforts to bring this action to a
13 conclusion. Omni's Motion should be denied.

14 DATED this 10th day of June, 2019.

15 **KOLESAR & LEATHAM**

16
17 /s/ Bart K. Larsen, Esq.

18 BART K. LARSEN, ESQ.

19 Nevada Bar No. 8538

400 South Rampart Boulevard, Suite 400

Las Vegas, Nevada 89145

20 *Attorneys for Plaintiff*

21 *Kal-Mor-USA, LLC*
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CERTIFICATE OF SERVICE

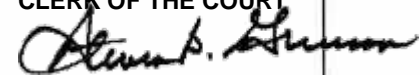
I hereby certify that I am an employee of Kolesar & Leatham, and that on the 10th day of June, 2019, I caused to be served a true and correct copy of foregoing **PLAINTIFF'S OPPOSITION TO MOTION TO CERTIFY ORDER GRANTING PARTIAL SUMMARY JUDGMENT AS FINAL PURSUANT TO NRCP 54(b)** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities to those parties listed on the Court's Master Service List.

Robert Hernquist, Esq.
Mark Gardberg, Esq.
HOWARD & HOWARD ATTORNEYS PLLC
Attorneys for Defendant Omni Financial LLC

Joseph A. Gutierrez
MAIER GUTIERREZ AYON
Attorneys for Defendant First 100 LLC

/s/ Mary A. Barnes
An Employee of KOLESAR & LEATHAM



RPLY

Robert W. Hernquist; Nevada Bar No. 10616
Brian J. Pezzillo; Nevada Bar No. 7136
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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**REPLY IN SUPPORT OF MOTION TO
CERTIFY ORDER GRANTING
PARTIAL SUMMARY JUDGMENT AS
FINAL PURSUANT TO NRCP 54(B)**

Date: July 1, 2019

Time: Chambers

Defendant Omni Financial, LLC ("Omni") submits the following Reply in Support of its Motion to Certify as Final the Court's Order Granting Kal-Mor-USA, LLC ("Kal-Mor") Motion for Partial Summary Judgment ("Order") filed on October 2, 2018¹ as well as the Court's Order Denying Omni's Request for Reconsideration of the Order that was entered on April 19, 2019. This Reply is supported by the following Memorandum of Points and Authorities, the Court's file herein and any argument accepted by the Court at oral argument.

¹ Notice of Entry of the Order was entered on October 3, 2019.

MEMORANDUM OF POINTS AND AUTHORITIES**I. PRELIMINARY STATEMENT**

The Opposition filed by Kal-Mor identifies no reason the Court's prior rulings should not be certified as final for purposes of appeal other than an unsubstantiated claim that doing so will delay the ultimate resolution of the matter. In fact, the ultimate resolution to the pending claims will be reached significantly faster if the Court grants the requested relief and allows for an interlocutory appeal related to the issues presented by Kal-Mor's Motion for Partial Summary Judgment. Procedurally this matter is at its infancy. To date, no answers have been filed, no early case conference has been held, no joint case conference report submitted and discovery has yet to begin. Despite these facts, a judgment has been entered. As noted in the moving papers, the Court has previously acknowledged that it was aware that regardless what decision it made, either Omni or Kal-Mor was likely going to appeal the Court's decision related to Kal-Mor's Motion for Partial Summary Judgment. As the Court's partial summary judgment essentially ruled upon the main issue in the case, there is no logical reason not have that matter immediately heard on appeal.

Kal-Mor does not dispute the fact that the partial summary judgment is essentially dispositive on the issue of liability of the underlying case. Instead, Kal-Mor makes a passing reference to the matter potentially being stayed and therefore delaying the matter. This argument is a red herring as Omni has not asked for a stay of the current proceedings. Thus, such an argument need not be addressed. Contrary to Kal-Mor's argument, delay will be incurred if the Court does not grant the requested relief as the appeal from the Court's prior decisions will unnecessarily be delayed until the completion of the action, which could be months or years away.

II. LEGAL STANDARD

Kal-Mor acknowledges that NRCP 54(b) was amended, effective March 1, 2019, and now expressly allows the district courts to certify a judgment to allow for an interlocutory appeal if the judgment does not dispose of all claims raised in the case. Kal-Mor ignores the fact that the rule was amended to be more liberal in allowing the Court discretion to certify orders as final.

Previously all claims involving a party had to be resolved prior to an order being certified as final. After the March 1, 2019 amendments, an order which disposes of a single claim may be certified. This change is in keeping with the federal rules of civil procedure which have now been adopted and which, as set forth below, would allow for a more expeditious resolution to the pending action than if Omni is required to await the outcome of all issues as raised against all parties to be resolved.

III. LAW AND ARGUMENT

A. The Court Should Certify as final The Order Granting partial Summary Judgment Pursuant to NRCP 54(b)

In addressing Fed. R. Civ. P. 54(b) the U.S. Supreme has established a two-step process for district courts to determine whether certification of a claim in a multiple claims action is warranted. *Bank of N.Y. Mellon v. Christopher Cmtys. at S. Highlands Golf Club Homeowners Ass'n*, 2019 BL 87180, 4 (D. Nev. Mar. 14, 2019) citing *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8, 100 S. Ct. 1460 (1980). First, the Court must determine if the ruling is final as to one or more claims, which in this case the Court's order granting partial summary judgment is. *Id.* Here, the Court's order with regard to the Motion for Partial Summary Judgment was dispositive of Kal-Mor's claim as related to the title of the real properties subject of Kal-Mor's Complaint.

Second, district courts conduct a two-step analysis "to determine whether there is any just reason for delay." *Curtiss-Wright*, 446 U.S. at 8. In the first step, courts consider administrative factors such as "the interrelationship of the claims so as to prevent piecemeal appeals." *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 954 (9th Cir. 2006)(citation omitted). In the second step, courts assess the equities involved in the case. *Curtiss-Wright*, 446 U.S. at 8. Rule 54(b) "is intended to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple claim situations at a time that best serves the need of the litigation." *Good v. Ohio Edison*, 104

1 F.3d 93, 95 (6th Cir. 1997) (quoting *Day v. NLO, Inc.*, 153, 155 (6th Cir. 1993). As set forth in
2 the Motion and herein, there is no just reason for delaying entry of a final judgment and the
3 equities support Omni's Motion.

4 Despite Kal-Mor's argument to the contrary, the granting of the requested relief will serve
5 to expedite the ultimate resolution of the matter. Kal-Mor is fully aware of Omni's desire to
6 appeal the Court's decision regarding its motion for partial summary judgment. It would serve
7 Kal-Mor's interests as well as Omni's to have the issue of novation previously ruled on by the
8 Court resolved on appeal sooner rather than later. If the Court's ruling is upheld then this would
9 certainly benefit Kal-Mor to not have to await an appeal potentially years away. If the Court's
10 decision is reversed on appeal then this will likewise benefit the parties by not having to await
11 such a decision far in the future and then having the matter remanded to the Court for further
12 proceedings, again, delaying the ultimate resolution. It should be noted that Kal-Mor's claim of
13 wanting to avoid delay is at odds with its own actions in this matter. By way of example, Kal-
14 Mor has asserted causes of action against Defendant First 100, LLC and yet, despite the fact that
15 First 100, LLC has failed to make any appearance in the matter, Kal-Mor has taken no steps to
16 enter a default. If Kal-Mor were truly concerned about reaching a resolution of all issues in the
17 litigation it would have pursued its claims against First 100, however, it did not.

18 Kal-Mor does not deny the fact that this Court previously anticipated Omni's intent to
19 appeal from the order granting partial summary judgment. As noted, the Court stated:

20 Chersus' intervention here would either prejudicially interfere with Kal-Mor
21 conclusion of this action – despite having been granted summary judgment, or
22 interfere with *Omni's rights to commence an appeal from the Order Granting
Summary Judgment.*

23 See May 1, 2019 Order Denying Motion to Intervene (emphasis added). Certifying the Court's
24 Order as final and allowing for an interlocutory appeal will allow for the most efficient resolution
25 to the pending disputes. Although Kal-Mor claims that certifying the Court's prior Partial
26 Summary Judgment would delay the proceedings, Kal-Mor fails to identify even one fact which
27 would support such a claim. The reality is that certifying the Partial Summary Judgment Order
28

1 will expedite a final resolution to this matter as opposed to waiting months or even years to wait
2 to file an appeal after all other claims and parties have been addressed. This is particularly true
3 in a matter in which a dispositive ruling has been made at a time prior to an answer by any party
4 having been filed.

5 Kal-Mor likewise does not dispute the fact that the issue of novation in the context of the
6 facts of this case represents a significant issue of public policy as well as being a case of first
7 impression. No case in Nevada squarely addresses the issue of whether or not novation can
8 occur when it is undisputed that the underlying agreement had been breached prior to the alleged
9 novation. Likewise, there is no controlling authority in Nevada regarding the situation presented
10 here, in which a third party seeks to collaterally attack the intent of the parties to the agreement
11 that is subject of the alleged novation. Thus, public policy favors having this matter heard and
12 thus the equities favor Omni.

13 Finally, Kal-Mor relies on authorities that hold that a court should not certify a judgment
14 as final if the claims asserted are so closely related that an appellate court would have to decide
15 important issues pending below in order to decide the issues appealed. See Opposition, p. 2, lns.
16 25 – 26. Kal-Mor fails to identify a single issue before this Court that would have to be decided
17 in order for an appellate court to decide the appeal. The reason for this is obvious – there are
18 none. The Court based its prior ruling on Kal-Mor's Motion for Partial Summary Judgment on
19 the discrete issue of novation of contract. This is unrelated to the remaining causes of action
20 contained in Kal-Mor's Complaint and there are no issues pending before this Court which an
21 appellate court would have to decide. Having failed to identify even one such issue, the Court
22 should certify as final its Orders related to Kal-Mor's Motion for Partial Summary Judgment.

IV. CONCLUSION

For the foregoing reasons, Omni requests that the Court certify its Order Granting Partial Summary Judgment and its Order Denying Reconsideration of that Order as final for appeal purposes pursuant to NRCP 54(b).

HOWARD & HOWARD ATTORNEYS PLLC

Dated: June 21, 2019

By: /s/ Brian J. Pezzillo

Robert Hernquist, Nevada Bar No. 10616

Brian J. Pezzillo; Nevada Bar No. 7136

Attorneys for Defendant Omni Financial, LLC

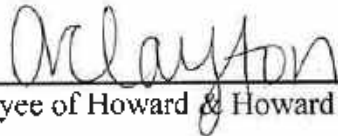
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 21st day of May 2019, I caused to be served a copy of foregoing Reply in Support of Motion to Certify Order Granting Partial Summary Judgment as Final in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

Bart K. Larsen
KOLESAR & LEATHAM
400 South Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145

*Attorney for Plaintiff Kal-Mor-USA,
LLC*


An employee of Howard & Howard Attorneys PLLC

Other Title to Property

COURT MINUTES

July 01, 2019

A-17-757061-C Kal-Mor-USA, Inc., Plaintiff(s)
vs.
Omni Financial, LLC, Defendant(s)

July 01, 2019 03:00 AM Motion to Certify Order Granting Partial Summary Judgment as
Final Pursuant to NRCP 54(B)

HEARD BY: Scotti, Richard F. COURTROOM: Chambers

COURT CLERK: Jacobson, Alice

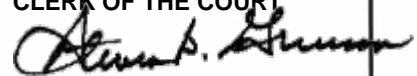
RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

The Court DENIES Defendant OMNI Financial s Motion to Certify Order Granting Summary Judgment As Final Pursuant to NRCP 54(B). Under the circumstances of this case, the Court cannot certify that there is no just reason to delay Omni s appeal of the Court s prior Order. Despite the Court s Order granting Summary Judgment on the Fourth (Declaratory Relief) and Fifth (Quiet Title) causes of action against Omni, Omni still remains a party involved in the remaining causes of action against it: Sixth, Seventh, Eighth, Ninth, and Tenth. Further, the issues that are the subject of the Court s prior Order of partial summary judgment are very closely related to the issues that would be the subject of Omni s appeal. For instance, the subject of Omni s appeal of the partial judgment of the Fourth and Fifth causes of Action is the existence, enforceability, and notice of the Omni Deeds of Trust. In Plaintiff s Complaint, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth causes of action also all expressly reference the existence, enforceability, and/or notice of the Omni Deeds of Trust, and issues relating thereto. The Supreme Court must necessarily decide these issues below in order to decide the issues appealed. The Supreme Court needs the context of the Omni/First 100 litigation to resolve the appeal on the Fourth and Fifth causes of action against Omni. Omni s rights cannot be determined to be superior to Kal-Mor s rights until Omni and First 100 litigate dispute to determine the nature of the rights then transferred from First 100 to Kal-Mor. Further, a delay in the Omni appeal would avoid piecemeal litigation. Further, Omni has already delayed Kal-Mor s progression of this action for many months through its unmeritorious attempted removal to Federal Court. An appeal by Omni now would probably result in a stay of the progress of Kal-Mors remaining claims against Omni, and perhaps its other claims as well. It would be unfairly prejudicial for Omni s actions to now cause a further delay in Kal-Mor s efforts to obtain its day in Court on all of the remaining claims, including the remaining claims against Omni. Omni s involvement in the remaining claims would not change at all if Omni is granted Certification, or denied Certification. For these reasons, there is no valid basis to Certify the partial summary judgment for appeal



1 OSCH

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 KAL-MOR USA, INC.,
7 PLAINTIFF,
8 vs.
9 OMNI FINANCIAL, et al.,
10 DEFENDANTS.

CASE NO.: A-17-757061-C
DEPT NO.: II

Date: July 29, 2019
Time: 9:00 a.m.

**ORDER SCHEDULING STATUS
CHECK RE: ANSWER AND JOINT
CASE CONFERENCE REPORT**

11
12
13 YOU ARE HEREBY ORDERED TO APPEAR in District Court, 200 Lewis Avenue,
14 Department II (Courtroom #3B), on the **29th day of July, 2019**, at 9:00 a.m., to give status
15 regarding filing the Answer and Joint Case Conference Report in this matter.

16 Failure to appear may result in Dismissal.

17 DATED this 15th day of July, 2019.



18
19
20 Richard F. Scotti
District Court Judge

21
22
23
24
25
26
27
28
Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey EFileNV system.

/s/ Melody Howard

Melody Howard
Judicial Executive Assistant

Other Title to Property

COURT MINUTES

July 29, 2019

A-17-757061-C Kal-Mor-USA, Inc., Plaintiff(s)
vs.
Omni Financial, LLC, Defendant(s)

July 29, 2019 09:00 AM Re: Answer and Joint Case Conference Report

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Vargas, Elizabeth

RECORDER: Easley, Dalayne

REPORTER:

PARTIES PRESENT:

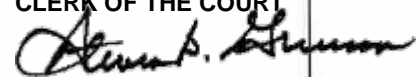
Bart K. Larsen Attorney for Plaintiff

Brian J. Pezzillo Attorney for Defendant

JOURNAL ENTRIES

Court stated there was no Answer or a Joint Case Conference Report on file. Mr. Larsen stated he submitted a 54(b) Motion and it was denied. Court advised it did not have enough information to rule on the 54(b) Motion. Mr. Pezzillo provided a history of the case. Court encouraged parties to engage in further discussion before submitting a 54(b) certification. Court inquired if a Mandatory Settlement Conference would be beneficial. Mr. Pezzillo stated he would need to talk to his client. COURT ORDERED, Status Check CONTINUED.

CONTINUED TO: 8/26/19 9:00 AM



ANS
Robert W. Hernquist; Nevada Bar No. 10616
Brian J. Pezzillo; Nevada Bar No. 7136
HOWARD & HOWARD ATTORNEYS PLLC
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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

OMNI FINANCIAL, LLC a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10.

Counter-defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Case No.: A-17-757061-C

Dept. 2

**ANSWER TO COMPLAINT,
COUNTERCLAIM AND CROSS
CLAIM OF OMNI FINANCIAL, LLC**

1 Cross-Claimant,
2 vs.

3 FIRST 100, LLC, a Nevada limited liability
4 company; DOES 11 – 20, ROE ENTITIES
5 11 – 20.

6 Cross-Defendants.
7

8 Defendant Omni Financial, LLC (“Omni”) submits the following Answer, Counter-Claim
9 and Cross-Claim to the Complaint filed by Kal-Mor-USA, LLC (“Kal-Mor”) on June 19, 2017:

10 1. Omni is without sufficient information to either admit or deny the allegations
11 contained in Paragraph 1 of the Complaint and therefore denies same.

12 2. Omni admits the allegations contained in paragraph 2 of the Complaint to the
13 extent it is alleged that Omni is a California limited liability company. Omni is without sufficient
14 information to either admit or deny the remaining allegations and therefore denies same.

15 3. Omni is without sufficient information to either admit or deny the allegations
16 contained in Paragraph 3 of the Complaint and therefore denies same..

17 4. Omni is without sufficient information to either admit or deny the allegations
18 contained in Paragraph 4 of the Complaint and therefore denies same.

19 5. Omni is without sufficient information to either admit or deny the allegations
20 contained in Paragraph 5 of the Complaint and therefore denies same.

21 6. Omni admits the allegations contained in paragraph 6 of the Complaint.

22 7. Omni admits the allegations contained in paragraph 7 of the Complaint.

23 8. Omni admits the allegations contained in paragraph 8 of the Complaint to the
24 extent it is a partial recitation of the document referenced, and states that the document referenced
25 speaks for itself and Omni denies any allegation implied which is contrary to the underlying
26 documents.

27 9. Omni admits the allegations contained in paragraph 9 of the Complaint.

1 10. Omni admits the allegations contained in paragraph 10 of the Complaint to the
2 extent it is alleged that First 100 pledged the listed properties. Omni is without sufficient
3 information and belief to either admit or deny any remaining allegations contained in paragraph
4 10 of the Complaint and therefore denies same.

5 11. Omni is without sufficient information to either admit or deny the allegations
6 contained in Paragraph 11 of the Complaint and therefore denies same.

7 12. Omni admits the allegations contained in paragraph 12 of the Complaint.

8 13. Omni admits the allegations contained in paragraph 13 of the Complaint to the
9 extent it is alleged that First 100 pledged the listed properties. Omni is without sufficient
10 information and belief to either admit or deny any remaining allegations contained in paragraph
11 13 of the Complaint and therefore denies same.

12 14. Omni is without sufficient information to either admit or deny the allegations
13 contained in Paragraph 14 of the Complaint.

14 15. Omni admits the allegations contained in paragraph 15 of the Complaint.

15 16. Omni admits the allegations contained in paragraph 16 of the Complaint to the
16 extent that it is alleged that First 100 pledged the property listed therein. Omni is without
17 sufficient information to either admit or deny any remaining allegations contained in paragraph
18 16 of the Complaint and therefore denies same.

19 17. Omni is without sufficient information to either admit or deny the allegations
20 contained in Paragraph 17 of the Complaint and therefore denies same.

21 18. Omni admits the allegations contained in paragraph 18 of the Complaint.

22 19. Omni admits the allegations contained in paragraph 19 of the Complaint.

23 20. Omni admits the allegations contained in paragraph 20 of the Complaint.

24 21. Omni admits the allegations contained in paragraph 21 of the Complaint.

25 22. Omni is without sufficient information to either admit or deny the allegations
26 contained in Paragraph 22 of the Complaint and therefore denies same.

23. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 23 of the Complaint and therefore denies same.

24. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 24 of the Complaint and therefore denies same.

25. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 25 of the Complaint and denies same.

26. Omni admits the allegations contained in paragraph 26 of the Complaint.

27. Omni admits the allegations contained in paragraph 27 of the Complaint.

28. Omni admits the allegations contained in paragraph 28 of the Complaint.

29. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 29 of the Complaint and therefore denies same.

30. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 30 of the Complaint and therefore denies same.

31. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 31 of the Complaint and therefore denies same.

32. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 32 of the Complaint and therefore denies same.

33. Omni admits the allegations contained in paragraph 33 of the Complaint.

34. Omni admits the allegations contained in paragraph 34 of the Complaint.

35. Omni admits the allegations contained in paragraph 35 of the Complaint.

36. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 36 of the Complaint and therefore denies same.

37. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 37 of the Complaint and therefore denies same.

38. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 38 of the Complaint and therefore denies same.

41. Omni admits the allegations contained in paragraph 41 of the Complaint.

43. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 43 of the Complaint and therefore denies same.

44. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 44 of the Complaint and therefore denies same.

45. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 45 of the Complaint and therefore denies same.

46. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 46 of the Complaint and therefore denies same.

47. Omni admits the allegations contained in paragraph 47 of the Complaint.

48. Omni admits the allegations contained in paragraph 48 of the Complaint.

49. Omni admits the allegations contained in paragraph 49 of the Complaint.

50. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 50 of the Complaint and therefore denies same.

51. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 51 of the Complaint and therefore denies same.

52. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 52 of the Complaint and therefore denies same.

53. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 53 of the Complaint and therefore denies same.

54. Omni admits the allegations contained in paragraph 54 of the Complaint.

55. Omni admits the allegations contained in paragraph 55 of the Complaint.

56. Omni admits the allegations contained in paragraph 56 of the Complaint.

57. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 57 of the Complaint and therefore denies same.

58. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 58 of the Complaint and therefore denies same.

59. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 59 of the Complaint and therefore denies same.

60. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 60 of the Complaint and therefore denies same.

61. Omni admits the allegations contained in paragraph 61 of the Complaint.

62. Omni admits the allegations contained in paragraph 62 of the Complaint.

63. Omni admits the allegations contained in paragraph 63 of the Complaint.

64. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 64 of the Complaint and therefore denies same.

65. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 65 of the Complaint and therefore denies same.

66. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 66 of the Complaint and therefore denies same.

67. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 67 of the Complaint and therefore denies same.

68. Omni admits the allegations contained in paragraph 68 of the Complaint.

69. Omni admits the allegations contained in paragraph 69 of the Complaint.

70. Omni admits the allegations contained in paragraph 70 of the Complaint.

71. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 71 of the Complaint and therefore denies same.

72. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 72 of the Complaint and therefore denies same.

1 73. Omni is without sufficient information to either admit or deny the allegations
2 contained in Paragraph 73 of the Complaint and therefore denies same.

3 74. Omni is without sufficient information to either admit or deny the allegations
4 contained in Paragraph 74 of the Complaint and therefore denies same.

5 75. Omni admits the allegations contained in paragraph 75 of the Complaint.

6 76. Omni admits the allegations contained in paragraph 76 of the Complaint.

7 77. Omni admits the allegations contained in paragraph 77 of the Complaint.

8 78. Omni is without sufficient information to either admit or deny the allegations
9 contained in Paragraph 78 of the Complaint and therefore denies same.

10 79. Omni is without sufficient information to either admit or deny the allegations
11 contained in Paragraph 79 of the Complaint and therefore denies same.

12 80. Omni is without sufficient information to either admit or deny the allegations
13 contained in Paragraph 80 of the Complaint and therefore denies same.

14 81. Omni is without sufficient information to either admit or deny the allegations
15 contained in Paragraph 81 of the Complaint and therefore denies same.

16 82. Omni admits the allegations contained in paragraph 82 of the Complaint.

17 83. Omni admits the allegations contained in paragraph 83 to the extent it states a
18 generalization of what was contained in the Complaint filed by First 100 in Case No. A-16-
19 730374-C. The Complaint speaks for itself and to the extent anything in the Complaint is
20 inconsistent with the allegations in the Complaint the allegations in the Complaint are denied.

21 84. Omni admits the allegations contained in paragraph 84 of the Complaint.

22 85. Omni admits the allegations contained in paragraph 85 to the extent it provides a
23 general overview of the factual assertions. Any other allegations are denied.

24 86. Omni denies the allegations contained in paragraph 86 of the Complaint.

25 87. Omni admits the allegations contained in paragraph 87 of the Complaint to the
26 extent that Omni's credit bid was less than the amount due and owing by First 100. To the extent
27 any other allegations are being made, such allegations are denied.

1 88. Omni admits the allegations contained in paragraph 88 of the Complaint to the
2 extent it is alleged that various disputes existed between Omni and First 100. All other allegations
3 are denied.

4 89. Omni admits the allegations contained in paragraph 89 of the Complaint.

5 90. Omni admits the allegations contained in paragraph 90 of the Complaint to the
6 extent they accurately quote the Counterclaim referenced. Omni further states that the previously
7 filed Counterclaim speaks for itself.

8 91. Omni admits the allegations contained in paragraph 91 of the Complaint to the
9 extent is represents a generalization. Omni states that the Counterclaim referenced speaks for
10 itself and denies the allegations of paragraph 91 to the extent they are inconsistent with the
11 Counterclaim.

12 92. Omni admits the allegations contained in paragraph 92 of the Complaint to the
13 extent that a settlement agreement was entered into between Omni and First 100. Omni is without
14 sufficient information to either admit or deny any remaining allegations contained in Paragraph
15 92 of the Complaint and therefore denies same.

16 93. Omni denies the allegations contained in paragraph 93 of the Complaint and
17 further states that the Settlement Agreement referenced speaks for itself.

18 94. Omni admits that a Stipulated Judgment was entered on or about February 16,
19 2017. Omni denies the remaining allegations contained in paragraph 94 of the Complaint.

20 95. Omni denies the allegations contained in paragraph 95 of the Complaint and
21 further states that the Stipulated Judgment speaks for itself. Further, this paragraph contains a
22 legal conclusion and not a factual allegation and therefore no response is required.

23 96. Omni denies the allegations contained in paragraph 96 of the Complaint.

24 97. Omni denies the allegations contained in paragraph 97 of the Complaint.

25 98. Omni is without sufficient information to either admit or deny the allegations
26 contained in Paragraph 98 of the Complaint and therefore denies same.

1 99. Omni admits to collecting rents from tenants of certain properties. Omni is without
2 sufficient information to either admit or deny the allegations contained in Paragraph 99 of the
3 Complaint and therefore denies same.

4 100. Omni is without sufficient information to either admit or deny the allegations
5 contained in Paragraph 100 of the Complaint and therefore denies same.

6 101. Omni denies the allegations contained in paragraph 101 of the Complaint.

7 102. Omni admits the allegations contained in paragraph 102 of the Complaint.

8 103. Omni admits that it is the rightful owner of the properties subject of this dispute
9 and is entitled to foreclose upon those properties. All other allegations are denied.

10 104. Omni admits the allegations contained in paragraph 104 of the Complaint to the
11 extent that it is alleged that Omni is entitled to foreclose upon the properties at issue in this action.
12 Omni denies that it is currently engaged in non-judicial foreclosure sales. All other allegations
13 are denied.

14 105. Paragraph 105 of the Complaint does not require an admission or denial on behalf
15 of Omni. To the extent a response may be required, Omni denies the allegations contained in
16 paragraph 105 of the Complaint.

17 106. Omni is without sufficient information to either admit or deny the allegations
18 contained in Paragraph 106 of the Complaint and therefore denies same.

19 107. Omni is without sufficient information to either admit or deny the allegations
20 contained in Paragraph 107 of the Complaint and therefore denies same.

21 108. Omni is without sufficient information to either admit or deny the allegations
22 contained in Paragraph 108 of the Complaint and therefore denies same.

23 109. Omni is without sufficient information to either admit or deny the allegations
24 contained in Paragraph 109 of the Complaint and therefore denies same.

25 110. Omni is without sufficient information to either admit or deny the allegations
26 contained in Paragraph 110 of the Complaint and therefore denies same.

111. Paragraph 111 of the Complaint does not require an admission or denial on behalf of Omni. To the extent a response may be required, Omni denies the allegations contained in paragraph 111 of the Complaint.

112. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 112 of the Complaint and therefore denies same.

113. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 113 of the Complaint and therefore denies same.

114. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 114 of the Complaint and therefore denies same.

115. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 116 of the Complaint and therefore denies same.

116. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 116 of the Complaint and therefore denies same.

117. Paragraph 117 of the Complaint does not require an admission or denial on behalf of Omni. To the extent a response may be required, Omni denies the allegations contained in paragraph 117 of the Complaint.

118. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 118 of the Complaint and therefore denies same.

119. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 119 of the Complaint and therefore denies same.

120. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 120 of the Complaint and therefore denies same.

121. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 121 of the Complaint and therefore denies same.

122. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 122 of the Complaint and therefore denies same.

123. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 123 of the Complaint and therefore denies same.

124. Paragraph 124 of the Complaint does not require an admission or denial on behalf of Omni. To the extent a response may be required Omni denies the allegations contained in paragraph 124 of the Complaint.

125. Omni admits the allegations contained in paragraph 125 of the Complaint.

126. Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 126 of the Complaint and therefore denies same.

127. Omni denies that Kal-Mor is entitled to any of the relief requested in paragraph 127 of the Complaint.

128. Omni denies the allegations contained in paragraph 128 of the Complaint.

129. Paragraph 129 of the Complaint does not require an admission or denial on behalf of Omni. To the extent a response may be required Omni denies the allegations contained in paragraph 129 of the Complaint.

130. The allegations contained in paragraph 130 do not require an admission or denial on behalf of Omni as they constitute legal conclusions and not factual assertions. To the extent a response is required Omni is without sufficient information to either admit or deny the allegations contained in Paragraph 130 of the Complaint and therefore denies same.

131. Omni denies the allegations contained in paragraph 131 of the Complaint.

132. Omni admits the allegations in paragraph 132 of the Complaint to the extent that it alleges that a dispute exists regarding the properties subject of the action. Omni denies any remaining allegations.

133. Omni denies the allegations contained in paragraph 133 of the Complaint.

134. Omni denies the allegations contained in paragraph 134 of the Complaint.

135. Paragraph 135 of the Complaint does not require an admission or denial on behalf of Omni. To the extent a response may be required, Omni denies the allegations contained in paragraph 135 of the Complaint.

136. Omni denies the allegations contained in paragraph 136 of the Complaint.

137. Omni admits the allegations of paragraph 137 of the Complaint to the extent that it is alleged that Omni has previously made claim for rents for the properties subject of the action. All other allegations are denied.

138. Omni admits the allegations in paragraph 138 of the Complaint to the extent it is alleged that Omni is claiming it is entitled to collect rent for the subject properties. All other allegations are denied.

139. Omni denies the allegations contained in paragraph 139 of the Complaint.

140. Omni denies the allegations contained in paragraph 140 of the Complaint.

141. Omni denies the allegations contained in paragraph 141 of the Complaint.

142. Paragraph 142 of the Complaint does not require an admission or denial on behalf of Omni. To the extent a response may be required, Omni denies the allegations contained in paragraph 142 of the Complaint.

143. Omni denies the allegations contained in paragraph 143 of the Complaint.

144. Omni admits the allegations contained in paragraph 144 of the Complaint to the extent it alleges that Omni has made claim to certain rents. All other allegations are denied.

145. Omni denies the allegations contained in paragraph 145 of the Complaint.

146. Omni denies the allegations contained in paragraph 146 of the Complaint.

147. Omni denies the allegations contained in paragraph 147 of the Complaint.

148. Paragraph 148 of the Complaint does not require an admission or denial on behalf of Omni. To the extent a response may be required, Omni denies the allegations contained in paragraph 148 of the Complaint.

149. Omni denies the allegations contained in paragraph 149 of the Complaint.

150. Omni denies the allegations contained in paragraph 150 of the Complaint.

151. Omni admits that it has recorded a notice of default to be recorded previously and was entitled to do so. All other allegations contained in paragraph 151 of the Complaint are denied.

1 152. Omni denies the allegations contained in paragraph 152 of the Complaint.

2 153. Omni denies the allegations contained in paragraph 153 of the Complaint.

3 154. Omni denies the allegations contained in paragraph 154 of the Complaint.

4 155. Paragraph 155 of the Complaint does not require an admission or denial on behalf
5 of Omni. To the extent a response may be required, Omni denies the allegations contained in
6 paragraph 155 of the Complaint.

7 156. Omni is without sufficient information to either admit or deny the allegations
8 contained in Paragraph 156 of the Complaint and therefore denies same.

9 157. Omni denies the allegations contained in paragraph 157 of the Complaint.

10 158. Omni denies the allegations contained in paragraph 158 of the Complaint.

11 159. Omni denies the allegations contained in paragraph 159 of the Complaint.

12 160. Omni denies the allegations contained in paragraph 160 of the Complaint.

13 161. Omni denies the allegations contained in paragraph 161 of the Complaint.

14 162. Paragraph 162 of the Complaint does not require an admission or denial on behalf
15 of Omni. To the extent a response may be required, Omni denies the allegations contained in
16 paragraph 162 of the Complaint.

17 163. Omni denies the allegations contained in paragraph 163 of the Complaint.

18 164. Omni is without sufficient information to either admit or deny the allegations
19 contained in Paragraph 164 of the Complaint and therefore denies same. Omni admits the
20 allegations of paragraph 164 to the extent it is alleged that Omni is entitled to collect rents from
21 the subject properties.

22 165. Omni denies the allegations contained in paragraph 165 of the Complaint.

23 166. Omni denies the allegations contained in paragraph 166 of the Complaint.

24 167. Omni denies that Kal-Mor-USA is entitled to any relief requested in the Prayer for
25 Relief.

26 168. If any allegation in the Complaint has not been expressly responded to, Omni
27 denies such allegation.

28

1 169. Omni should be awarded its fees and costs incurred in being forced to respond to
2 the pending Complaint.

3 **AFFIRMATIVE DEFENSES**

- 4 1. The Complaint fails to state valid causes of action against Omni.
- 5 2. The claims asserted by Kal-Mor are barred by waiver, laches, estoppel and/or
6 unclean hands.
- 7 3. KAL-MOR's claims are barred by the applicable statute of limitations or statute of
8 repose.
- 9 4. KAL-MOR's claims are barred by the statute of frauds.
- 10 5. KAL-MOR, and its predecessor in interest, were on notice that Omni's Deed of Trust
11 was a valid encumbrance upon the properties at issue.
- 12 6. KAL-MOR is not entitled to declaratory relief, as KAL-MOR is seeking an improper
13 and impermissible advisory opinion from the Court.
- 14 7. Whatever damages were sustained by KAL-MOR, if any, were caused in whole or
15 in part or were contributed to by KAL-MOR's own actions.
- 16 8. KAL-MOR failed to mitigate its damages, if any.
- 17 9. Omni has been forced to retain the services of an attorney to defend this action and
18 are therefore entitled to an award of reasonable attorneys' fees and costs.
- 19 10. KAL-MOR's claims are barred by its own misfeasance and/or malfeasance.
- 20 11. KAL-MOR's claims are barred by its own bad faith.
- 21 12. KAL-MOR's claims are barred by its own breach of contract.
- 22 13. Pursuant to NRCP Rules 8 and 11, as amended, all possible affirmative defenses
23 may not have been alleged herein insofar as sufficient facts were not available after reasonable
24 inquiry upon the filing of this Answer, and therefore, Omni and Orbis reserve the right to amend
25 their Answer to allege additional affirmative defenses if subsequent investigation so warrants.

26 **WHEREFORE**, Omni prays for relief as follows:

- 27 1. Plaintiff take nothing by way of its Complaint;
- 28 2. Omni be awarded reasonable attorneys' fees and costs incurred herein; and

1 3. For such other and further relief as the Court deems proper.

2
3 **COUNTERCLAIM**

4 As for its Counterclaim, Omni claims and alleges as follows:

5 1. Omni is a California limited liability company.

6 2. Plaintiff/Counter-Defendant Kal-Mor-USA ("Kal-Mor") is a Nevada limited
7 liability company which, at all relevant times hereto, was conducting business in Clark County,
8 NV.

9 3. Defendants, DOES 1 – 10, and ROE ENTITIES 1 – 10, are unknown to Omni at
10 the present time and therefore named by fictitious names. Omni will seek leave of Court to
11 amend its Counterclaim to show the true names of the parties when they have been identified.
12 Upon information and belief it is alleged that each fictitious party is in some manner responsible
13 for the damages incurred by Omni.

14 4. In 2014, Omni agreed to loan up to \$5 million to First 100, LLC ("First 100") to
15 finance the purchase and enforcement of homeowner association receivables (the "Loan").

16 5. On May 27, 2014, (i) Omni and First 100 entered into a Loan Agreement; (ii)
17 First 100 executed a Promissory Note and Security Agreement in Omni's favor; and (iii) certain
18 First 100 principals issued Payment Guarantees in Omni's favor.

19 6. The Security Agreement granted Omni a security interest in all of First 100's
20 present and future-acquired personal property, ranging from HOA Receivables to accounts to
21 equipment and so forth, as further evidenced by first-in-time UCC-1 filings made with the
22 Secretary of State of Nevada and Florida.

23 7. On or about May 27, 2014, First 100 also executed multiple deeds of trust in
24 Omni's favor (the "Omni Deeds of Trust").

25 8. The Omni Deeds of Trust encumbered, as security for the Loan, approximately
26 thirty properties in the State of Nevada.

27 9. The Omni Deeds of Trust were recorded on May 27, 2014 (the "May 2014 Deed
28

1 of Trust”), June 17, 2014 (the “June 2014 Deed of Trust”) and August 21, 2014 (the “August
2 2014 Deed of Trust”).

3 10. The May 2014 Deed of Trust was recorded in the official records of the Clark
4 County, Nevada Recorder as instrument number 20140529-0001342 and re-recorded as
5 instrument number 20170424-0000178.

6 11. Pursuant to the May 2014 Deed of Trust the following properties were secured:

- 7 a. 1217 Neva Ranch Avenue, North Las Vegas, NV 89081 (APN 124-26-
8 311-029);
9 b. 230 East Flamingo Road #330, Las Vegas, NV 89169 (APN 162-16-810-
10 355);
11 c. 2615 West Gary Avenue #1065, Las Vegas, NV 89123 (APN 177-20-
12 813-127);
13 d. 6575 Shining Sand Avenue, Las Vegas, NV 89142 (APN 161-10-511-
14 072).

15 12. The June 2014 Deed of Trust secured the following properties in favor of Omni:

- 16 a. 4921 Indian River Drive, #112, Las Vegas, NV 89103 (APN 163-24-612-
17 588);
18 b. 5009 Indian River Drive #155, Las Vegas, NV 89103 (APN 163-24-612-
19 639);
20 c. 5295 Indian River Drive, #314, Las Vegas, NV 89103 (APN 163-24-612-
21 798);
22 d. 4400 Sandy River Drive #16, Las Vegas, NV 89103 (APN 163-24-612-
23 500).

24 13. The August 2014 Deed of Trust secured the following property:

- 25 a. 5782 Camino Ramon Avenue, Las Vegas, NV 89156 (APN 140-21-
26 611-018).

27 14. Kal-Mor contends it subsequently purchased and owns nine of those thirty
28

1 parcels (the "Kal-Mor Properties").

2 15. In 2013, 2014 and 2015, Kal-Mor purchased several properties from First 100,
3 including the Kal-Mor Properties at issue here.

4 16. First 100 represented to Omni that it "in transferring the Real Properties...to third
5 parties, [First 100] provided all of those third parties, prior to closing the transfer transaction,
6 with actual notice of the existence of Omni's first-priority security interest in those Real
7 Properties."

8 17. Upon information and belief, and unbeknownst to Omni when it extended the
9 Loan, First 100 and Kal-Mor were *not* independent parties. Greg Darroch—Kal-Mor's principal,
10 owned equity in First 100.

11 18. Upon information and belief it is alleged that Mr. Darroch still owns equity in
12 First 100.

13 19. Under Nevada law, a deed of trust automatically "creates an assignment of rents
14 arising from the real property described in the security instrument, unless the security instrument
15 provides otherwise." NRS 107A.230(1).

16 20. Prior to Kal-Mor's purchases First 100 breached the Loan.

17 21. Among other things, it failed to: (i) pay principal and interest when due; (ii) cure
18 the defects in Omni's Deeds of Trust; (iii) properly prosecute and enforce the HOA receivables;
19 and (iv) provide Omni with required monthly, quarterly, and annual financial statements.

20 22. Omni issued a notice of default on April 8, 2015.

21 23. First 100 failed to respond, forcing Omni to hire legal counsel.

22 24. On November 2, 2015, Omni sent First 100 a second notice of default, categorizing
23 First 100's breaches in more detail. That notice accelerated the Loan and demanded payment in
24 full.

25 25. Throughout November 2015, First 100 and Kal-Mor repeatedly promised Omni
26 that Kal-Mor would buy out the Omni Loan at full face value.

27 26. At times, First 100 and Kal-Mor promised Omni that a \$4 million pay-off would
28

1 be wired within hours.

2 27. Kal-Mor's counsel delivered a draft loan assignment agreement to Omni on
3 November 20, 2015, and Omni responded with a revised draft a few days later.

4 28. Negotiations continued into early December, until Kal-Mor's counsel simply
5 "went dark"—declining to respond to any email or phone messages.

6 29. Upon information and belief it is alleged that Kal-Mor's entire loan payoff
7 proposals were a ruse to buy First 100 more time.

8 30. Omni and First 100 entered into a Forbearance Agreement dated December 18,
9 2015, and a related Addendum three days later.

10 31. Omni agreed to forego foreclosure over First 100's personalty in exchange for
11 various First 100 promises, including (i) delivery of financial statements by December 18th and
12 (ii) a \$270,500 payment by December 28th.

13 32. Both deadlines came and went with no performance; First 100 eventually violated
14 virtually every single forbearance term.

15 33. Given those immediate defaults, Omni suspected the forbearance was another
16 delay tactic, the aim of First 100 and Kal-Mor—acting in concert—being to delay foreclosure and
17 further stifle Omni.

18 34. Given First 100's then year-old payment default, Omni noticed a UCC sale
19 pursuant to NRS Chapter 104, by issuing a "Notification of Disposition of Collateral" in January
20 2016 (the "1st UCC Notice").

21 35. In response, First 100 filed suit and sought an emergency, *ex parte* TRO to stop
22 the sale.

23 36. Kal-Mor filed a virtually identical suit and emergency, *ex parte* TRO request (Case
24 No. A-16-730447-C).

25 37. Over the course of the next year of proceedings, First 100 and Kal-Mor's positions
26 were virtually 100% in alignment as Kal-Mor, on many occasions, filed one- to two-paragraph
27 joinders to lengthy First 100 filings. (*See, e.g.* Case No. 2:16-cv-00099, ECF 20, 65, 91).

38. Omni removed the two cases to federal court, and they were consolidated into one case.

39. Giving First 100 and Kal-Mor the benefit of the doubt, the U.S. District Court granted a TRO and postponed Omni's foreclosure sale. (Case No. 2:16-cv-00099, ECF 21).

40. Several months later, after three days of evidentiary hearings and extensive briefings and oral arguments, the U.S. District Court held that: (i) the original TRO was wholly unwarranted; (ii) Omni could proceed with the foreclosure sale; and (iii) Omni was entitled to Kal-Mor's TRO bond.

41. Not only was Kal-Mor a party to the federal proceedings, but its disputes with Omni were resolved in an agreement specifically addressing the Kal-Mor Real Properties and anticipating Omni's future real-property foreclosure actions.

42. In documents dated November 23, 2016, Omni and Kal-Mor agreed to a (i) "Settlement and Mutual General Release Agreement" (the "Kal-Mor Settlement"); and (ii) "Stipulation and Order for Entry of Final Judgment" (the "Kal-Mor SAO"). Critically, the former states:

W. The Parties now desire to resolve all differences, disputes and disagreements between them relating to the 2014-2015 Receivables and the ACR Receivables. *This Agreement, however, is not intended to address or resolve any dispute between the Parties as to the Kal-Mor Real Properties.*

Notwithstanding the terms provided herein, *Omni reserves all rights to assert claims and conduct Enforcement Actions relating to any asset or property other than the 2013 Receivables, 2014-2015 Receivables, and/or ACR Receivables, whether owned (previously, currently, or in the future) by GFY or a third party, including but not limited to the Kal-Mor Real Properties, associated proceeds, rents, and/or other assets.*

43. The Kal-Mor SAO states:

The entry final judgment by the Court pursuant to this Stipulation shall not preclude or otherwise impair any claim or defense that may exist between the Parties other than those expressly stated in the Complaint or the Counterclaim.

44. Several weeks later, Omni and First 100 entered into a similar agreement ("First 100 Settlement").

1 45. First 100 and Omni each understood that the First 100 Settlement entered into
2 between the parties would not preclude Omni's ability and right to foreclose on the properties
3 which are subject of its Deeds of Trust and First 100 actively assisted Omni with the foreclosure
4 of its Deeds of Trust.

5 46. Omni was in constant discussions with First 100 and Kal-Mor during that time,
6 and Omni consistently and unequivocally told both of them it would be foreclosing on the Kal-
7 Mor Properties.

8 47. While negotiating the First 100 Settlement, Jay Bloom of First 100 repeatedly told
9 Martin Boone of Omni that Omni was still secured by the Deeds of Trust.

10 48. The First 100 Settlement specifically stated no third parties were being granted any
11 rights by virtue of the Settlement Agreement.

12 49. Kal-Mor was specifically identified as not being afforded any rights and under the
13 First 100 Settlement Agreement.

14 50. Shortly after settling, Omni's counsel notified First 100 that Omni would be
15 foreclosing on the encumbered real property, but could not locate the original 2014 Promissory
16 Note, which its trustees (under the Deeds of Trust) were requesting.

17 51. In lieu of the original, Omni's title company requested that First 100 provide a
18 "Lost Note Affidavit."

19 52. First 100 signed and returned a Lost Note Affidavit on January 30, 2017, and
20 signed and returned another version on April 21, 2017.

21 53. In neither instance did First 100 challenge Omni's course of action or claim that
22 the parties had intended in their settlement that Omni forfeited its real property liens.

23 54. Following settlement of the federal case regarding First 100's *personalty*, Omni
24 turned to foreclosing on the 24 real properties liened in its Deeds of Trust.

25 55. On May 15, 2017, Omni caused a Notice of Breach and Election to Sell under
26 Deeds of Trust (the "Notice of Default") to be recorded with the Clark County Recorder's Office.

27 56. After the mandatory three-month waiting period required by statute, Omni caused
28

1 the Trustee to record a "Notice of Sale."

2 57. The Notice of Sale scheduled the foreclosure sale for September 12, 2017.

3 58. The sales were voluntarily postponed.

4 59. In late September and early October of 2016, Omni sent letters to all 24
5 properties, including the properties in which Plaintiff claims an interest (the "Properties in
6 Dispute"), directing tenants to pay rents not to their property owners and/or managers, but
7 directly to Omni.

8 60. Upon information and belief, the Plaintiff has directed the tenants occupying the
9 Properties in Dispute to ignore Omni's demand for payment of rents, thereby depriving Omni of
10 its right to those rents as provided by NRS 107A.230.

11 61. Plaintiff contends that the Omni Deeds of Trust are not legally enforceable and
12 thus that Omni has no valid interest in any of the Properties in Dispute.

13 62. Pursuant to Nevada law, the Plaintiff had notice of the Omni Deeds of Trust at
14 the time it purportedly took an interest in the Properties in Dispute.

15 63. Plaintiff contends that Omni has waived its rights in the Properties in Dispute as
16 well as the rents from said properties.

17 64. In May 2017, Omni caused a Notice of Breach and Election to Sell Under
18 Deeds of Trust to be recorded against the Properties in Dispute.

19 65. In August of 2017, Omni caused to be recorded a Notice of Trustee's Sale
20 scheduling a non-judicial foreclosure sale of each of the Properties in Dispute.

21 66. Each of the Plaintiffs has challenged Omni's efforts to foreclose upon the
22 Properties in Dispute, and contends that the Omni Deeds of Trust are void and of no effect.

23 67. In light of this dispute, Omni voluntarily agreed to continue the scheduled
24 foreclosure sales.

25 68. This action was filed by Plaintiff in 2017.

26 69. Plaintiff has filed a Motion for Partial Summary Judgment which sought, in part,
27 a ruling that Omni's claims are barred by the doctrine of novation.

1 70. The Court granted, in part, Plaintiff's Motion for Partial Summary Judgment on
2 the issue of novation on or about October 3, 2018.

3 71. Implicit in the Court's ruling was that both Omni and First 100 intended their
4 settlement agreement to constitute a novation.

5 72. Neither Omni, nor First 100, intended the First 100 Settlement Agreement to
6 constitute a novation or affect Omni's rights under the Deeds of Trust.

7 **FIRST CLAIM FOR RELIEF**

8 **(Declaratory Judgment)**

9 73. Omni realleges and incorporates by reference the allegations of the preceding
10 paragraphs of the Counterclaim as if fully set forth herein.

11 74. A justifiable controversy now exists between Omni, on the one hand, and
12 Plaintiff, on the other hand, pursuant to NRS 30.010 *et seq.* Such controversy exists where a
13 claim of right is asserted against one who has an interest in contesting a claim of right.

14 75. Omni has a legally protectable interest in prosecuting this claim, and Omni's
15 interest is adverse to the interests of Plaintiff.

16 76. The issues involved in this controversy are ripe for judicial determination.

17 77. The Court has the power to declare the rights, status and other legal relationships
18 between Omni, on the one hand, and Plaintiffs, on the other hand, relating to the Properties in
19 Dispute.

20 78. Omni seeks a declaratory judgment pursuant to NRS 30.010 *et seq.* that the Omni
21 Deeds of Trust are valid and enforceable encumbrances against the Properties in Dispute.

22 79. Omni seeks a declaratory judgment pursuant to d NRS 30.010 *et seq.* that
23 Plaintiff had constructive, if not actual, notice of the Omni Deeds of Trust and that any interest
24 Plaintiff may have in the Properties in Dispute are subordinate to Omni's rights against those
25 same properties.

26 80. Omni seeks a declaration that it rights have not been barred by any prior
27 litigation or settlement, including, but not limited to the application of Nevada's "One-action
28

1 Rule" or the doctrine of novation.

2 81. Omni seeks a declaratory judgment pursuant to NRS 30.010 *et seq.* that it is
3 entitled to foreclose upon each of the Properties in Dispute.

4 82. It has been necessary for Omni to obtain the services of an attorney in order to
5 seek relief in this matter, and it is entitled to recover reasonable attorneys' fees and costs
6 incurred.

7 **SECOND CLAIM FOR RELIEF**
(Unjust Enrichment)

8 83. Omni realleges and incorporates by reference the allegations of the preceding
9 Paragraphs of the Counterclaim as if fully set forth herein.

10 84. Following service of Omni's demand for rents pursuant to NRS 107A.230(1),
11 Plaintiff has unjustly and profitably retained those rents and has refused to return those funds to
12 Omni.

13 85. As a result of its failure to return Omni's funds, Plaintiff has unjustly retained a
14 benefit in an amount in excess of \$15,000.

15 86. An accounting should be ordered so that the value of the benefits Plaintiffs have
16 unjustly retained may be accurately determined.

17 87. It has been necessary for Omni to retain the services of attorneys to pursue this
18 claim and it is entitled to recover its reasonable attorneys' fees.

19
20 **THIRD CLAIM FOR RELIEF**
(Conversion)

21 88. Omni realleges and incorporates by reference the foregoing allegations of the
22 Counterclaim as if fully set forth herein.

23 89. By retaining tenant rents following service of Omni's demand for rents pursuant
24 to NRS 107A.230(1), Plaintiff has improperly exercised dominion over Omni's assets without
25 the consent of Omni and has denied, defied and wrongfully interfered with Omni's right to
26 exercise complete and exclusive dominion over such assets.
27
28

1 90. Plaintiffs' conduct constitutes a conversion of Omni's property and has damaged
2 Omni in an amount to be proven at trial, but in excess of \$15,000.

3 91. The actions of Plaintiffs were intentional, willful and malicious, and Omni is
4 entitled to punitive and exemplary damages.

5 92. It has been necessary for Omni to retain the services of attorneys to pursue this
6 claim and it is entitled to recover its reasonable attorneys' fees.

7
8 **FOURTH CLAIM FOR RELIEF**
 (Constructive Trust against all Defendants)

9 93. Omni realleges and incorporates by reference the allegations of the preceding
10 Paragraphs of the Counterclaim as if fully set forth herein.

11 94. As a proximate result of Plaintiffs' wrongful conduct as alleged herein, Omni has
12 been damaged in an amount to be proven at trial but which is in excess of \$15,000.

13 95. By reason of the wrongful manner in which Plaintiff obtained its alleged right,
14 claim or interest in rents, they have no legal or equitable right, claim or interest therein, but,
15 instead, Plaintiffs are involuntary trustees holding said property and profits therefrom in
16 constructive trust for Omni with the duty to convey the same to Omni.

17
18 **FIFTH CLAIM FOR RELIEF**
 (Accounting)

19 96. Omni realleges and incorporates by reference the allegations of the preceding
20 Paragraphs of the Counterclaim as if fully set forth herein.

21 97. Omni is entitled to a full and complete accounting of all rents received by
22 Plaintiffs from the tenants of the Properties in Dispute from the date of service of Omni's
23 demand for rents through the present.

24 98. It has been necessary for Omni to retain the services of attorneys to pursue this
25 claim and it is entitled to recover its reasonable attorneys' fees.

1 **WHEREFORE**, Omni prays for relief as follows:

- 2 A. For monetary damages in excess of \$15,000 on all claims;
- 3 B. For costs and attorneys' fees incurred in pursuing this action;
- 4 C. For an accounting;
- 5 D. For a declaratory judgment that the Omni Deeds of Trust and valid and
- 6 enforceable encumbrances against the Properties in Dispute;
- 7 E. For a declaratory judgment that the Plaintiff had constructive and/or actual notice
- 8 of the Omni Deeds of Trust and that any interest Plaintiff may have in the Properties in Dispute
- 9 are subordinate to Omni's rights against those same properties;
- 10 F. For a declaratory judgment that Omni is entitled to foreclose upon each of the
- 11 Properties in Dispute;
- 12 G. For a declaratory judgment that Omni's claims are not barred by Nevada's "one
- 13 action rule" or the doctrine of novation;
- 14 H. Omni be awarded reasonable attorneys' fees and costs incurred herein; and,
- 15 I. For such other and further relief as the Court deems proper.

16
17 **CROSSCLAIM**

18 As for its Cross-claim Omni states as follows:

- 19 1. Omni incorporates the factual allegations set forth in its Counter-claim as if set
- 20 forth in the Cross-claim in full.
- 21 2. Cross-Defendant, First 100, LLC is a Nevada limited liability company which at
- 22 all times relevant to the facts set forth in this Cross-claim was doing business in Clark County,
- 23 Nevada.
- 24 3. Defendants, DOES 11 - 20, and ROE ENTITIES 11 - 20, are unknown to Omni
- 25 at the present time and therefore named by fictitious names. Omni will seek leave of Court to
- 26 amend its Cross-claim to show the true names of the parties when they have been identified. Upon
- 27 information and belief it is alleged that each fictitious party is in some manner responsible for the

1 damages incurred by Omni.

2 4. When Omni and First 100 entered into the Settlement Agreement, it was with the
3 express understanding that Omni's rights to foreclose pursuant to its Deeds of Trust would be
4 preserved.

5 5. First 100, acting through its principal, Jay Bloom, expressly stated in connection
6 with the execution of the Settlement Agreement that Omni's Deeds of Trust would remain intact.

7 6. The Court's Order granting the Motion for Partial Summary Judgment finding that
8 the intent of Omni and First 100 to effectuate a novation of contract by entering into the Settlement
9 Agreement does not accurately reflect the intent of either party.

10 **FIRST CLAIM FOR RELIEF**

11 **(Intentional Misrepresentation)**

12 7. Omni incorporates the preceding paragraph of the Cross-claim and the Counter-
13 claim as if expressly set forth herein.

14 8. To the extent that the Court's order granting the Motion for Partial Summary is
15 accurate and First 100 did not have an intent to allow Omni to pursue foreclosure of the real
16 properties subject of its Deeds of Trust, then First 100's representations were false and were made
17 with full knowledge of their falsity.

18 9. Omni relied upon the representations of First 100 as made by Jay Bloom in
19 agreeing to enter into the Settlement Agreement.

20 10. If not for the representations of First 100 relating to Omni's ability to foreclose
21 upon the real properties at issue, Omni would not have entered into the First 100 Settlement
22 Agreement.

23 11. Omni has expended extensive time and money seeking to foreclose upon the
24 properties subject of the First 100 Settlement Agreement and otherwise complying with the First
25 100 Settlement Agreement.

26 12. Omni has suffered damages in an amount in excess of \$15,000 as a result of the
27 conduct of First 100 if the Court's prior ruling is accurate.

1 13. To the extent the Court's prior ruling regarding the issue of novation is accurate,
2 the misrepresentations were made intentionally, were wanton and malicious and therefore entitle
3 Omni to punitive damages.

4 14. Omni is entitled to an award of special damages including attorneys fees, costs and
5 interest in an amount in excess of \$15,000.

6 **WHEREFORE**, Omni prays for relief as follows:

- 7 A. For monetary damages in excess of \$15,000 on all claims;
8 B. For costs and attorneys' fees incurred in pursuing this action;
9 C. For punitive damages; and,
10 D. For such other and further relief as the Court deems proper.

11
12
13 HOWARD & HOWARD ATTORNEYS PLLC

14 Dated: August 12, 2019

 By: /s/ Brian J. Pezzillo
Robert Hernquist, Nevada Bar No. 10616
Brian J. Pezzillo; Nevada Bar No. 7136

16 *Attorneys for Defendant Omni Financial, LLC*
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CERTIFICATE OF SERVICE

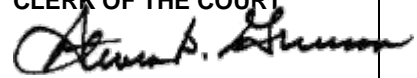
I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 12th day of August 2019, I caused to be served a copy of the foregoing Answer, Counterclaim and Cross-claim in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

Bart K. Larsen
KOLESAR & LEATHAM
400 South Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145

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LLC*


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MDSM

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Attorneys for Defendant First 100, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X; and
ROE ENTITIES I through X, inclusive,

Defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10,

Counter-defendants.

Case No.: A-17-757061-C

Dept. No.: II

**FIRST 100, LLC'S MOTION TO DISMISS
OMNI FINANCIAL, LLC'S
CROSSCLAIM PURSUANT TO NRCP
12(b)(5) OR IN THE ALTERNATIVE
MOTION FOR SUMMARY JUDGMENT**

[REQUEST FOR HEARING]

1 OMNI FINANCIAL, LLC, a foreign limited
2 liability company,

3 Cross-Claimant,

4 vs.

5 FIRST 100, LLC, a Nevada limited liability
6 company; DOES 11 – 20, ROE ENTITIES 11 –
20.

7 Cross-Defendants

8 Cross-defendant First 100, LLC (“First 100”), by and through its attorneys of record, the law
9 firm MAIER GUTIERREZ & ASSOCIATES, hereby moves for dismissal of the crossclaims asserted
10 against it in Cross-Claimant OMNI FINANCIAL, LLC’S (“Omni”) Answer to Complaint,
11 Counterclaim and Cross Claim filed on August 12, 2019.

12 This motion is made upon Rule 12(b)(5) of the Nevada Rules of Civil Procedure and is
13 supported by the following Memorandum of Points and Authorities, the pleadings and papers on file
14 in this case, and any oral argument the Court may choose to consider.

15 DATED this 3rd day of September 2019.

16 Respectfully submitted,

17 **MAIER GUTIERREZ & ASSOCIATES**

18 */s/ Danielle J. Barraza*

19 JOSEPH A. GUTIERREZ, ESQ.
20 Nevada Bar No. 9046
21 DANIELLE J. BARRAZA, ESQ.
22 Nevada Bar No. 13822
23 8816 Spanish Ridge Avenue
24 Las Vegas, Nevada 89148
25 *Attorneys for Defendant First 100, LLC*

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

27 **I. INTRODUCTION**

28 Omni has filed a cross-claim against First 100 for intentional misrepresentation based on
undescribed alleged “representations” that First 100’s principal Jay Bloom purportedly made to Omni
at some undetermined time regarding Omni’s Deeds of Trust remaining intact following the execution

1 of the Settlement Agreement.

2 This is nonsensical, as the Court has already ruled that “a clear and unambiguous term of the
3 Release Agreement is that the Omni Loan was extinguished. This meant that the Deeds of Trusts for
4 the Omni Loan were gone.” See **Exhibit 1**, 4/19/2019 Order Denying Defendant Omni Financial
5 LLC’s Motion for Reconsideration at p. 5. Omni apparently wants the Court to rely upon alleged and
6 vague representations that were made prior to execution of the Settlement Agreement. This directly
7 contravenes the unambiguous language in the Settlement Agreement which states:

8 (4) No Other Representations. The Representing Party acknowledges that (i) no
9 person, agent, or attorney has made any promises, representations or warranties
10 whatsoever, express or implied, that are not contained herein, to induce the
11 Representing Party’s execution of this Agreement, and (ii) this instrument has not
been executed in reliance on any such promise, representation, warranty or
agreement not contained herein.¹

12 Further, Omni’s crossclaim does not come anywhere close to satisfying Nevada’s heightened
13 pleading standard for claims for intentional misrepresentation. As such, this Court should dismiss
14 the crossclaim in its entirety, or grant summary judgment in favor of First 100, as there is no set of
15 facts that will impose liability on First 100.

16 **II. LEGAL ANALYSIS**

17 **A. LEGAL STANDARD FOR MOTION TO DISMISS**

18 A motion to dismiss is properly granted where the allegations in the complaint, “taken at
19 ‘face value’ ... [and] construed favorably in the [plaintiffs] behalf,” fail to state a cognizable claim
20 for relief. *Morris v. Bank of America Nevada*, 110 Nev. 1274, 886 P.2d 454, 456 (1994).
21 Additionally, a motion pursuant to NRCP 12(b)(5) should be granted if it appears beyond a doubt
22 that plaintiff can prove no set of facts which, if accepted by the trier of fact, would entitle it to relief.
23 See *Blackjack Bonding v. City of Las Vegas Muni. Ct.*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278
24 (2000) (citation omitted); see also *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228,
25 181 P.3d 670, 672 (Nev. 2008). In other words, “[a] complaint must set forth sufficient facts to
26

27 ¹ A copy of the Settlement Agreement was previously attached to Omni’s 8/15/2018 Opposition to
28 Motion for Partial Summary Judgment as Exhibit A-4. Because Omni previously attached this
document in its own briefing submitted to the Court, authentication should not be in dispute.

1 establish all necessary elements of a claim for relief.” *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672,
2 674 (1984) (citing *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973)).

3 For purposes of a Rule 12(b)(5) motion, however, only the “factual allegations of [the]
4 complaint must be accepted as true.” *Bratcher v. City of Las Vegas*, 113 Nev. 502, 507, 937 P.2d
5 485, 489 (1997) (emphasis added); *Johnson*, 89 Nev. at 472, 515 P.2d at 71 (1973) (stating “the
6 complaint must, in any event, allege facts sufficient to establish all necessary elements of the claim
7 for relief...” (emphasis added). This Court does not assume the truth of conclusions of law. *See*
8 *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *In re Verifone Sec. Litig.*, 11 F.3d
9 865, 868 (9th Cir. 1993) (“Conclusory allegations of law and unwarranted inferences are insufficient
10 to defeat a motion to dismiss for failure to state a claim.”); *Lee v. City of Los Angeles*, 250 F.3d 668,
11 679 (9th Cir. 2001) (same).

12 **B. LEGAL STANDARD FOR MOTION FOR SUMMARY JUDGMENT**

13 If, on a motion under Rule 12(b)(5) or 12(c), matters outside the pleadings are present to and
14 not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.
15 All parties must be given a reasonable opportunity to present all the material that is pertinent to the
16 motion. NRCp 12(d).

17 Entry of summary judgment is proper “when the pleadings, depositions, answers to
18 interrogatories, admissions, and affidavits ... demonstrate that no genuine issue of material fact exists,
19 and the moving party is entitled to judgment as a matter of law.” *Wood v. Safeway, Inc.*, 121 Nev.
20 724, 731, 121 P.3d 1026, 1031 (2005) (citation omitted); *see also* Nev. R. Civ. P. 56(c). “[C]onclusory
21 statements along with general allegations do not create an issue of fact.” *Yeager v. Harrah’s Club,*
22 *Inc.*, 111 Nev. 830, 833, 897 P.2d 1093, 1095 (1995). Rather, “[a] genuine issue of material fact exists
23 where the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”
24 *Valley Bank of Nevada v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1279 (1989) (citing *Anderson*
25 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986)).

26 “Although evidence presented in support of a motion for summary judgment must be
27 construed in the light most favorable to the nonmoving party, that party must set forth facts
28 demonstrating the existence of a genuine issue in order to withstand a disfavorable summary

1 judgment.” *Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 61, 128 P.3d 452,
2 458 (2006).

3 For the reasons below, it is clear that Omni does not have — and cannot maintain — a viable
4 claim against First 100 as a matter of law. Accordingly, First 100 respectfully requests that this
5 Court dismiss Omni’s cross-claim against First 100, or in the alternative grant summary judgment in
6 First 100’s favor on all causes of action.

7 **C. OMNI FAILED TO PROPERLY PLEAD A CLAIM FOR INTENTIONAL MISREPRESENTATION**

8 These elements for intentional misrepresentation are:

- 9 1. A false representation made by the defendant;
10 2. Defendant's knowledge or belief that the representation is false (or insufficient basis
11 for making the representation);
12 3. Defendant's intention to induce the plaintiff to act or to refrain from acting in reliance
upon the misrepresentation;
4. Plaintiff's justifiable reliance upon the misrepresentation; and
5. Damage to the plaintiff resulting from such reliance.

13 *Lubbe v. Barba*, 91 Nev. 596, 540 P.2d 115 (1975). NRCP 9(b) states that in “alleging fraud or
14 mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice,
15 intent, knowledge, and other conditions of a person’s mind may be alleged generally.” To comply
16 with NRCP 9(b), a complaint for fraud must allege the “time, place, identity of the parties involved
17 and the nature of the fraud.” *In re CityCenter Const.*, 127 Nev. 1144, 373 P.3d 925 (2011). *See also*,
18 *Rocker v. KPMG LLP*, 122 Nev. 1185, 1187, 148 P.3d 703, 704 (2006), *abrogated on other grounds*
19 *by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008) (“If a plaintiff does
20 not plead fraud with particularity, his complaint is subject to dismissal.”).

21 Here, Omni vaguely claims that on some unknown date at some unknown location, “while
22 negotiating the First 100 Settlement, Jay Bloom of First 100 repeatedly told Martin Boone of Omni
23 that Omni was still secured by the Deeds of Trust.” *See Answer, Counterclaim, Crossclaim at p. 20.*
24 The remainder of Omni’s allegations mostly regurgitate that point and offer no specifics as to the
25 time and place of the alleged fraud. *See id.* at p. 26 (Omni alleging that “When Omni and First 100
26 entered into the Settlement Agreement, it was with the express understanding that Omni’s rights to
27 foreclose pursuant to its Deeds of Trust would be preserved.”); *Id.* at p. 26 (Omni alleging that “First
28 100, acting through its principal, Jay Bloom, expressly stated in connection with the execution of the

1 Settlement Agreement that Omni's Deeds of Trust would remain intact.").

2 Omni's allegations do not include the actual time and place of the purported representations,
3 nor are there any non-conclusory details as to whether any alleged misrepresentations made by First
4 100 were actually made with full knowledge of their falsity. There is also no allegation that First
5 100 intended to induce Omni to act or refrain from acting in reliance upon the alleged
6 misrepresentations.

7 Because Omni has failed to meet all of the requirements of the pleading standard with regard
8 to the intentional misrepresentation cross-claim against First 100, as a consequence, the cross-claim
9 should be dismissed.

10 **D. THE UNAMBIGUOUS TERMS OF THE SETTLEMENT AGREEMENT PREVENT THIS COURT**
11 **FROM GRANTING RELIEF TO OMNI**

12 The Settlement Agreement is clear: "no person, agent, or attorney has made any promises or
13 warranties whatsoever, express or implied, that are not contained herein, to induce the Representing
14 Party's execution of this Agreement, and . . . this instrument has not been executed in reliance on
15 any such promise, representation, warranty or agreement not contained therein." *See* Omni's
16 8/15/2018 Opposition to Motion for Partial Summary Judgment at Exhibit A-4, *on file*.

17 Omni's intentional misrepresentation claim against First 100 would require the Court to
18 consider evidence that contradicts these clear and unambiguous terms, and would result in the
19 Settlement Agreement's terms being varied – in violation of the parol evidence rule. "Extrinsic or
20 parol evidence is not admissible to contradict or vary the terms of an unambiguous written
21 instrument, 'since all prior negotiations and agreements are deemed to have been merged
22 therein.'" *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001)(quoting *Daly v.*
23 *Del E. Webb Corp.*, 96 Nev. 359, 361, 609 P.2d 319, 320 (1980)).

24 The Court has already ruled that the Settlement Agreement "is not ambiguous in the
25 extinguishment of the Omni Loan Agreement." And there remains "no genuine issue of material fact
26 that the Kal-Mor properties are no longer subject to the Omni Deeds of Trust." *See* Ex. 1 at p. 2.
27 *See id.* at p. 3 ("If the Omni Loan ceased to exist, then a fortiori, the security for the Omni Loan
28 ceased to exist.").

1 To put it more simply, this Court has determined that “pre-agreement discussions cannot
2 modify the clear and unambiguous terms of the [Settlement] Agreement,” and “a clear and
3 unambiguous term of the [Settlement] Agreement is that the Omni Loan was extinguished,” thus
4 “the Deeds of Trust for the Omni Loan were gone.” Ex. 1 at p. 5.

5 Omni does not now get to introduce extrinsic evidence in an attempt to support a baseless
6 intentional misrepresentation claim against First 100 which would only result in the terms of the
7 Settlement Agreement being modified. Accordingly, this Court should grant summary judgment in
8 favor of First 100 on the intentional misrepresentation claim.

9 **III. CONCLUSION**

10 Based on the foregoing, this Court should dismiss Omni’s cross-claim against First 100 for
11 failure to state a claim, or in the alternative grant summary judgment in favor of First 100.

12 DATED this 3rd day of September, 2019.

13 Respectfully submitted,

14 **MAIER GUTIERREZ & ASSOCIATES**

15 /s/ Danielle J. Barraza

16 JOSEPH A. GUTIERREZ, ESQ.

Nevada Bar No. 9046

17 DANIELLE J. BARRAZA, ESQ.

Nevada Bar No. 13822

18 8816 Spanish Ridge Avenue

19 Las Vegas, Nevada 89148

Attorneys for Defendant First 100, LLC

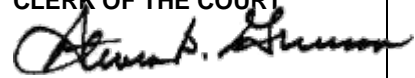
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Attorneys for Plaintiff/Counter-defendant,
KAL-MOR-USA, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X;
and ROE ENTITIES I through X,

Defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Counter-claimant,

Vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1-10; ROE
ENTITIES 1-10,

Counter-defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Cross-claimants,

Vs.

FIRST 100, LLC, a Nevada limited liability
company; DOES 11-20; ROE ENTITIES 11-
20,

Cross-defendants.

Case No. A-17-757061-C

Dept. No. 2

**KAL-MOR-USA, LLC'S ANSWER
TO OMNI FINANCIAL, LLC'S
COUNTERCLAIM**

KOLESAR & LEATHAM
400 S. Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145
Tel: (702) 362-7800 / Fax: (702) 362-9472

KAL-MOR-USA, LLC'S ANSWER TO OMNI FINANCIAL, LLC'S COUNTERCLAIM

Counter-defendant KAL-MOR-USA, LLC ("Counter-defendant" or "KAL-MOR"), by and through its counsel, Kolesar & Leatham, for its Answer to the Counterclaim ("Counterclaim") asserted by Omni Financial, LLC ("Counter-claimant" or "Omni") through its Answer to Complaint, Counterclaim and Cross Claim, respectfully responds as follows:

1. In answering Paragraph 1 of the Counterclaim, KAL-MOR admits the allegations set forth therein.

2. In answering Paragraph 2 of the Counterclaim, KAL-MOR admits the allegations set forth therein.

3. In answering Paragraph 3 of the Counterclaim, KAL-MOR is without sufficient knowledge or information to either admit or deny the allegations contained in this Paragraph and, on this basis, denies each and every allegation set forth therein.

4. In answering Paragraph 4 of the Counterclaim, KAL-MOR admits that Omni entered into a loan agreement with First 100 in 2014. KAL-MOR is without sufficient knowledge or information to either admit or deny the remaining allegations contained in this Paragraph and, on this basis, denies each and every such allegation.

5. In answering Paragraph 5 of the Counterclaim, KAL-MOR admits that Omni entered into a loan agreement with First 100 in 2014. KAL-MOR is without sufficient knowledge or information to either admit or deny the remaining allegations contained in this Paragraph and, on this basis, denies each and every such allegation.

6. In answering Paragraph 6 of the Counterclaim, KAL-MOR admits that Omni entered into a loan agreement with First 100 in 2014. KAL-MOR is without sufficient knowledge or information to either admit or deny the remaining allegations contained in this Paragraph and, on this basis, denies each and every such allegation.

7. In answering Paragraph 7 of the Counterclaim, KAL-MOR admits that Omni entered into a loan agreement with First 100 in 2014. KAL-MOR is without sufficient knowledge or information to either admit or deny the remaining allegations contained in this Paragraph and, on this basis, denies each and every such allegation.

8. In answering Paragraph 8 of the Counterclaim, KAL-MOR is without sufficient knowledge or information to either admit or deny the allegations contained in this Paragraph and, on this basis, denies each and every allegation set forth therein.

9. In answering Paragraph 9 of the Counterclaim, KAL-MOR admits the allegations set forth therein.

10. In answering Paragraph 10 of the Counterclaim, KAL-MOR admits the allegations set forth therein.

11. In answering Paragraph 11 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

12. In answering Paragraph 12 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

13. In answering Paragraph 13 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

14. In answering Paragraph 14 of the Counterclaim, KAL-MOR admits that it purchased the nine “Kal-Mor Properties” that are identified in Kal-Mor’s Complaint. KAL-MOR is without sufficient knowledge or information to either admit or deny the allegations contained in this Paragraph and, on this basis, denies each and every allegation set forth therein.

15. In answering Paragraph 15 of the Counterclaim, KAL-MOR admits the allegations set forth therein.

16. In answering Paragraph 16 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

17. In answering Paragraph 17 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

18. In answering Paragraph 18 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

19. In answering Paragraph 19 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

20. In answering Paragraph 20 of the Counterclaim, KAL-MOR is without sufficient knowledge or information to either admit or deny the allegations contained in this Paragraph and, on this basis, denies each and every allegation set forth therein.

21. In answering Paragraph 21 of the Counterclaim, KAL-MOR is without sufficient knowledge or information to either admit or deny the allegations contained in this Paragraph and, on this basis, denies each and every allegation set forth therein.

22. In answering Paragraph 22 of the Counterclaim, KAL-MOR is without sufficient knowledge or information to either admit or deny the allegations contained in this Paragraph and, on this basis, denies each and every allegation set forth therein.

23. In answering Paragraph 23 of the Counterclaim, KAL-MOR is without sufficient knowledge or information to either admit or deny the allegations contained in this Paragraph and, on this basis, denies each and every allegation set forth therein.

24. In answering Paragraph 24 of the Counterclaim, KAL-MOR is without sufficient knowledge or information to either admit or deny the allegations contained in this Paragraph and, on this basis, denies each and every allegation set forth therein.

25. In answering Paragraph 25 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

26. In answering Paragraph 26 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

27. In answering Paragraph 27 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

28. In answering Paragraph 28 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

29. In answering Paragraph 29 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

30. In answering Paragraph 30 of the Counterclaim, KAL-MOR admits that Omni and First 100 entered into a forbearance agreement in 2015. KAL-MOR is without sufficient

1 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
2 on this basis, denies each and every allegation set forth therein.

3 31. In answering Paragraph 31 of the Counterclaim, KAL-MOR is without sufficient
4 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
5 on this basis, denies each and every allegation set forth therein.

6 32. In answering Paragraph 32 of the Counterclaim, KAL-MOR is without sufficient
7 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
8 on this basis, denies each and every allegation set forth therein.

9 33. In answering Paragraph 33 of the Counterclaim, KAL-MOR denies the allegations
10 set forth therein.

11 34. In answering Paragraph 34 of the Counterclaim, KAL-MOR admits that Omni
12 noticed a UCC sale in or around January 2016. KAL-MOR is without sufficient knowledge or
13 information to either admit or deny the allegations contained in this Paragraph and, on this basis,
14 denies each and every allegation set forth therein.

15 35. In answering Paragraph 35 of the Counterclaim, KAL-MOR admits the allegations
16 set forth therein.

17 36. In answering Paragraph 36 of the Counterclaim, KAL-MOR admits that it filed a
18 lawsuit against Omni in January 2016 and that it requested a temporary restraining order to prevent
19 Omni from completing a UCC sale as to certain personal property of First 100 in which KAL-
20 MOR also held a security interest. KAL-MOR otherwise denies the allegations set forth in this
21 paragraph.

22 37. In answering Paragraph 37 of the Counterclaim, KAL-MOR denies the allegations
23 set forth therein.

24 38. In answering Paragraph 38 of the Counterclaim, KAL-MOR admits that Omni
25 removed the lawsuits filed by First 100 and KAL-MOR to federal court. KAL-MOR otherwise
26 denies the allegations set forth in this paragraph.

1 39. In answering Paragraph 39 of the Counterclaim, KAL-MOR admits that a
2 temporary restraining order was entered to prevent Omni from completing a UCC sale. KAL-
3 MOR otherwise denies the allegations set forth in this paragraph.

4 40. In answering Paragraph 40 of the Counterclaim, KAL-MOR admits that the
5 temporary restraining order entered to prevent Omni from completing a UCC sale was later
6 vacated. KAL-MOR otherwise denies the allegations set forth in this paragraph.

7 41. In answering Paragraph 41 of the Counterclaim, KAL-MOR denies the allegations
8 set forth therein.

9 42. In answering Paragraph 42 of the Counterclaim, KAL-MOR admits the allegations
10 set forth therein to the extent such allegations accurately quote the “Kal-Mor Settlement.” KAL-
11 MOR otherwise denies the allegations set forth in this paragraph.

12 43. In answering Paragraph 43 of the Counterclaim, KAL-MOR admits the allegations
13 set forth therein to the extent such allegations accurately quote the “Kal-Mor Settlement.” KAL-
14 MOR otherwise denies the allegations set forth in this paragraph.

15 44. In answering Paragraph 44 of the Counterclaim, KAL-MOR admits that Omni and
16 First 100 entered into a settlement agreement in or around January 2017. KAL-MOR otherwise
17 denies the allegations set forth in this paragraph.

18 45. In answering Paragraph 45 of the Counterclaim, KAL-MOR is without sufficient
19 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
20 on this basis, denies each and every allegation set forth therein.

21 46. In answering Paragraph 46 of the Counterclaim, KAL-MOR denies the allegations
22 set forth therein.

23 47. In answering Paragraph 47 of the Counterclaim, KAL-MOR is without sufficient
24 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
25 on this basis, denies each and every allegation set forth therein.

26 48. In answering Paragraph 48 of the Counterclaim, KAL-MOR denies the allegations
27 set forth therein.
28

1 49. In answering Paragraph 49 of the Counterclaim, KAL-MOR denies the allegations
2 set forth therein.

3 50. In answering Paragraph 50 of the Counterclaim, KAL-MOR is without sufficient
4 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
5 on this basis, denies each and every allegation set forth therein.

6 51. In answering Paragraph 51 of the Counterclaim, KAL-MOR is without sufficient
7 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
8 on this basis, denies each and every allegation set forth therein.

9 52. In answering Paragraph 52 of the Counterclaim, KAL-MOR is without sufficient
10 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
11 on this basis, denies each and every allegation set forth therein.

12 53. In answering Paragraph 53 of the Counterclaim, KAL-MOR is without sufficient
13 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
14 on this basis, denies each and every allegation set forth therein.

15 54. In answering Paragraph 54 of the Counterclaim, KAL-MOR is without sufficient
16 knowledge or information to either admit or deny the allegations contained in this Paragraph and,
17 on this basis, denies each and every allegation set forth therein.

18 55. In answering Paragraph 55 of the Counterclaim, KAL-MOR admits the allegations
19 set forth therein.

20 56. In answering Paragraph 56 of the Counterclaim, KAL-MOR admits the allegations
21 set forth therein.

22 57. In answering Paragraph 57 of the Counterclaim, KAL-MOR admits the allegations
23 set forth therein.

24 58. In answering Paragraph 58 of the Counterclaim, KAL-MOR admits the allegations
25 set forth therein.

26 59. In answering Paragraph 59 of the Counterclaim, KAL-MOR admits that Omni sent
27 demand letters to at least some of the Kal-Mor Properties in 2016 demanding that the occupants
28 of such Kal-Mor Properties remit rents to Omni. KAL-MOR is without sufficient knowledge or

1 information to either admit or deny the remaining allegations contained in this Paragraph and, on
2 this basis, denies each and every such allegation.

3 60. In answering Paragraph 60 of the Counterclaim, KAL-MOR denies the allegations
4 set forth therein.

5 61. In answering Paragraph 61 of the Counterclaim, KAL-MOR admits that it disputes
6 Omni's claimed interests in the Kal-Mor Properties. KAL-MOR is without sufficient knowledge
7 or information to either admit or deny the remaining allegations contained in this Paragraph and,
8 on this basis, denies each and every such allegation.

9 62. In answering Paragraph 62 of the Counterclaim, KAL-MOR denies the allegations
10 set forth therein.

11 63. In answering Paragraph 63 of the Counterclaim, KAL-MOR admits that it disputes
12 Omni's claimed interests in the Kal-Mor Properties. KAL-MOR is without sufficient knowledge
13 or information to either admit or deny the remaining allegations contained in this Paragraph and,
14 on this basis, denies each and every such allegation.

15 64. In answering Paragraph 64 of the Counterclaim, KAL-MOR admits that Omni
16 caused a Notice of Breach and Election to Sell Under Deeds of Trust to be recorded against the
17 Kal-Mor Properties in or around May 2017. KAL-MOR is without sufficient knowledge or
18 information to either admit or deny the remaining allegations contained in this Paragraph and, on
19 this basis, denies each and every such allegation.

20 65. In answering Paragraph 65 of the Counterclaim, KAL-MOR admits that Omni
21 caused a Notice of Trustee's Sale to be recorded against the Kal-Mor Properties in or around
22 August 2017. KAL-MOR is without sufficient knowledge or information to either admit or deny
23 the remaining allegations contained in this Paragraph and, on this basis, denies each and every
24 such allegation.

25 66. In answering Paragraph 66 of the Counterclaim, KAL-MOR admits that it disputes
26 Omni's claimed interests in the Kal-Mor Properties. KAL-MOR is without sufficient knowledge
27 or information to either admit or deny the remaining allegations contained in this Paragraph and,
28 on this basis, denies each and every such allegation.

1 67. In answering Paragraph 67 of the Counterclaim, KAL-MOR admits the allegations
2 set forth therein.

3 68. In answering Paragraph 68 of the Counterclaim, KAL-MOR admits the allegations
4 set forth therein.

5 69. In answering Paragraph 69 of the Counterclaim, KAL-MOR admits the allegations
6 set forth therein.

7 70. In answering Paragraph 70 of the Counterclaim, KAL-MOR admits the allegations
8 set forth therein.

9 71. In answering Paragraph 71 of the Counterclaim, KAL-MOR denies the allegations
10 set forth therein.

11 72. In answering Paragraph 72 of the Counterclaim, KAL-MOR denies the allegations
12 set forth therein.

13 **FIRST CLAIM FOR RELIEF**

14 **(Declaratory Judgment)**

15 73. In response to Paragraph 73 of the Counterclaim, KAL-MOR restates its answers
16 to the foregoing Paragraphs 1 through 72 of the Counterclaim as if set forth fully herein.

17 74. In answering Paragraph 74 of the Counterclaim, KAL-MOR denies the allegations
18 set forth therein.

19 75. In answering Paragraph 75 of the Counterclaim, KAL-MOR denies the allegations
20 set forth therein.

21 76. In answering Paragraph 76 of the Counterclaim, KAL-MOR denies the allegations
22 set forth therein.

23 77. In answering Paragraph 77 of the Counterclaim, KAL-MOR denies the allegations
24 set forth therein.

25 78. In answering Paragraph 78 of the Counterclaim, KAL-MOR denies the allegations
26 set forth therein.

27 79. In answering Paragraph 79 of the Counterclaim, KAL-MOR denies the allegations
28 set forth therein.

1 80. In answering Paragraph 80 of the Counterclaim, KAL-MOR denies the allegations
2 set forth therein.

3 81. In answering Paragraph 81 of the Counterclaim, KAL-MOR denies the allegations
4 set forth therein.

5 82. In answering Paragraph 82 of the Counterclaim, KAL-MOR denies the allegations
6 set forth therein.

7 **SECOND CLAIM FOR RELIEF**

8 **(Unjust Enrichment)**

9 83. In response to Paragraph 83 of the Counterclaim, KAL-MOR restates its answers
10 to the foregoing Paragraphs 1 through 82 of the Counterclaim as if set forth fully herein.

11 84. In answering Paragraph 84 of the Counterclaim, KAL-MOR denies the allegations
12 set forth therein.

13 85. In answering Paragraph 85 of the Counterclaim, KAL-MOR denies the allegations
14 set forth therein.

15 86. In answering Paragraph 86 of the Counterclaim, KAL-MOR denies the allegations
16 set forth therein.

17 87. In answering Paragraph 87 of the Counterclaim, KAL-MOR denies the allegations
18 set forth therein.

19 **THIRD CLAIM FOR RELIEF**

20 **(Conversion)**

21 88. In response to Paragraph 88 of the Counterclaim, KAL-MOR restates its answers
22 to the foregoing Paragraphs 1 through 87 of the Counterclaim as if set forth fully herein.

23 89. In answering Paragraph 89 of the Counterclaim, KAL-MOR denies the allegations
24 set forth therein.

25 90. In answering Paragraph 90 of the Counterclaim, KAL-MOR denies the allegations
26 set forth therein.

27 91. In answering Paragraph 91 of the Counterclaim, KAL-MOR denies the allegations
28 set forth therein.

92. In answering Paragraph 92 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

FOURTH CLAIM FOR RELIEF

(Constructive Trust against all Defendants)

93. In response to Paragraph 93 of the Counterclaim, KAL-MOR restates its answers to the foregoing Paragraphs 1 through 92 of the Counterclaim as if set forth fully herein.

94. In answering Paragraph 94 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

95. In answering Paragraph 95 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

FIFTH CLAIM FOR RELIEF

(Accounting)

96. In response to Paragraph 96 of the Counterclaim, KAL-MOR restates its answers to the foregoing Paragraphs 1 through 95 of the Counterclaim as if set forth fully herein.

97. In answering Paragraph 97 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

98. In answering Paragraph 98 of the Counterclaim, KAL-MOR denies the allegations set forth therein.

AFFIRMATIVE DEFENSES

1. The Counterclaim, in whole or in part, fails to state any claim against KAL-MOR upon which relief can be granted.

2. At all material times, KAL-MOR acted in good faith and exercised its lawful rights in dealing with Counter-claimant.

3. Counter-claimant's claims are barred by its own failure to act in good faith and deal fairly with KAL-MOR.

4. Counter-claimant is barred from maintaining this action by virtue of its own unclean hands and inequitable conduct.

5. Counter-claimant's claims are barred by the doctrine of estoppel.

6. Counter-claimant materially breached the parties' agreements thereby excusing KAL-MOR from performance.

7. Counter-claimant's claims are barred by a lack of consideration.

8. Counter-claimant's claims are barred by Counter-claimant's own intentional misrepresentations to KAL-MOR.

9. Counter-claimant has waived any claims it may have held against KAL-MOR.

10. KAL-MOR hereby incorporates by reference those affirmative defenses enumerated in NRCP 8 as though fully set forth herein. Such defenses are herein incorporated by reference for the specific purpose of not waiving the same.

11. Pursuant to NRCP 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of this answer to the Counterclaim, therefore, KAL-MOR reserves the right to amend this answer to allege additional affirmative defenses if subsequent investigation so warrants.

WHEREFORE, KAL-MOR prays for relief as follows:

1. Dismissal of Counter-claimant's Counterclaim with prejudice as to KAL-MOR;
2. An award of reasonable attorney's fees and costs to KAL-MOR for the defense of this matter; and
3. For such other relief as the Court deems reasonable and proper.

DATED this 3rd day of September, 2019.

KOLESAR & LEATHAM

By /s/ Bart K. Larsen, Esq.

BART K. LARSEN, ESQ.

Nevada Bar No. 8538

400 South Rampart Boulevard, Suite 400

Las Vegas, Nevada 89145

Attorneys for Plaintiff

KAL-MOR-USA, LLC

CERTIFICATE OF SERVICE

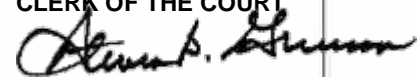
I hereby certify that I am an employee of Kolesar & Leatham, and that on the 3rd day of September, 2019, I caused to be served a true and correct copy of foregoing **ERROR! NO TEXT OF SPECIFIED STYLE IN DOCUMENT**, in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.

/s/ Kristina R. Cole

An Employee of KOLESAR & LEATHAM

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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

OMNI FINANCIAL, LLC a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10.

Counter-defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Case No.: A-17-757061-C

Dept. 2

**OPPOSITION TO FIRST 100, LLC'S
MOTION TO DISMISS OMNI
FINANCIAL, LLC'S CROSSCLAIM
PURSUANT TO NRCP 12(B)(5) OR IN
THE ALTERNATIVE MOTION FOR
SUMMARY JUDGMENT**

DATE: October 14, 2019

TIME: 9:00 a.m.

1 Cross-Claimant,
2 vs.

3 FIRST 100, LLC, a Nevada limited liability
4 company; DOES 11 – 20, ROE ENTITIES
5 11 – 20.

6 Cross-Defendants.
7

8 Cross-Claimant Omni Financial, LLC (“Omni”) submits the following OPPOSITION TO
9 FIRST 100, LLC’S MOTION TO DISMISS ONI FINANCIAL, LLC’S CROSSCLAIM
10 PURSUANT TO NRCP 12(B)(5) OR IN THE ALTERNATIVE MOTION FOR SUMMARY
11 JUDGMENT (“Motion”). This Opposition is supported by the following Memorandum of Points
12 and Authorities, the Court’s file herein and any oral argument submitted.

13 ARGUMENT AND AUTHORITIES

14 I. INTRODUCTION

15 The Motion filed by First 100 is based on two arguments: 1) the Cross-claim is not pled
16 with enough specificity; and, 2) the Court’s prior ruling on Kal-Mor’s Motion for partial Summary
17 Judgment somehow precludes Omni’s Cross-claim. First, the Cross-claim alleges facts sufficient
18 to comply with the mandates of NRCP 9. Detailed facts have been asserted regarding the nature
19 and specifics of Omni’s claims. To the extent the Court feels that additional facts are required,
20 Omni requests permission to file an amended cross-claim to allege such facts.

21 The second basis for the motion is apparently the belief that the Court’s prior interpretation
22 of the terms of the Settlement Agreement (“Agreement”) serves to bar Omni’s claim. The Court,
23 however, has never addressed issues as between Omni and First 100 and its prior ruling is not
24 relevant to the Cross-claim asserted by Omni. In fact, the Court’s prior ruling is what gave rise
25 to the Cross-claim. With regard to the terms of the Agreement entered into between Omni and
26 First 100, LLC’s (“First 100”), First 100 has misrepresented both the arguments raised by Omni
27 and has ignored the provisions of the Agreement which support Omni’s claim. As the Court is
28

well aware, an order was entered which granted partial summary judgment to Kal-Mor-USA, LLC ("Kal-Mor"), based upon the argument that the Agreement constituted a novation of the original lending agreement entered into between Omni and First 100. *See* Motion, Exhibit "A". First 100 argues that the Court has ruled that the Agreement is unambiguous and because the Agreement contains a provision that states that the Agreement was not executed based upon reliance of any prior representations, the Cross-complaint must be dismissed. [Motion, p. 6]. First 100 omits the fact that the Agreement itself acknowledges the existence of Omni's continued interest in the real properties pursuant to its Deeds of Trust and the fact that First 100 acted in accordance with this understanding by assisting Omni with the foreclosure of its Deeds of Trust. First 100 misrepresents the allegations of Omni by claiming that Omni's Cross-claim is based solely upon representations made prior to the Agreement being entered into. This is false. First 100 relies upon a single exhibit from Omni's previously filed Opposition to Kal-Mor's Motion for Partial Summary Judgment ("Opposition"). When all exhibits are considered it is clear that a viable cause of action exists for fraud as First 100 consistently represented to Omni both before the Agreement was entered into, in the Agreement itself and after the Agreement was entered into that Omni's interest in the real properties at issue herein would not be effected by the Agreement and Omni would not be waiving any rights vis-à-vis the real property. Taking the entirety of facts as they exist, a viable cause of action exists and First 100's Motion must be denied.

II. STANDARD APPLICABLE TO MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT

A motion to dismiss is subject to a rigorous review. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). All alleged facts in the complaint are presumed true and all inferences drawn in favor of the plaintiff. *Id.* Dismissal under NRC 12(b)(5) is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672; *see also Fitzgerald v. Mobile Billboards, LLC*, 134 Nev., Adv. Op. 30, 416 P.3d 209, 210 (2018). Accepting the factual allegations as true, First 100's Motion must be denied as it must be accepted

that it represented that Omni's interest in the subject properties would not be effected by the Agreement reached between the parties. The fact that First 100 is now asserting the precise opposite in its Motion is further evidence of its fraudulent conduct.

First 100 likewise fails to meet the requirements for relief pursuant to NRCP 56. The Supreme Court of Nevada has held that:

Generally, "[t]his court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Pursuant to NRCP 56(c), summary judgment is proper when no genuine issue of material fact remains and the movant "is entitled to a judgment as a matter of law." *Id.* (internal quotation omitted). And this court views the evidence in a light most favorable to the nonmoving party. *Id.* Further, issues of statutory construction are reviewed de novo. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007).

Saticoy Bay LLC Series 9050 W Warm Springs 2079 v. Nev. Ass'n Servs., 444 P.3d 428, 431 (2019). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood v. Safeway, Inc.*, 121 at 731, 121 P.3d at 1031. The allegations raised in the Cross-claim clearly raise questions of fact preventing the granting of a motion for summary judgment.¹

III. ARGUMENTS AND AUTHORITIES

A. Facts Supporting Cross-Claim

First 100 has made the allegation that sufficient facts have not been pled upon which a claim for fraud could be based. The following facts have been alleged and expressly incorporated into the Cross-claim alleged against First 100:

1. In 2014, Omni agreed to loan up to \$5 million to First 100, LLC ("First 100") to finance the purchase and enforcement of homeowner association receivables (the "Loan").
2. On May 27, 2014, (i) Omni and First 100 entered into a Loan Agreement; (ii) First 100 executed a Promissory Note and Security Agreement in Omni's favor; and (iii) certain First 100 principals issued Payment Guarantees in Omni's favor.

¹ Attached hereto as Exhibit "3" is the Declaration of Brian J. Pezzillo supporting a request to conduct discovery with regard to the allegations raised by the Cross-claim.

1 3. The Security Agreement granted Omni a security interest in all of First 100's
2 present and future-acquired personal property, ranging from HOA Receivables to accounts to
3 equipment and so forth, as further evidenced by first-in-time UCC-1 filings made with the
4 Secretary of State of Nevada and Florida.

5 4. On or about May 27, 2014, First 100 also executed multiple deeds of trust in
6 Omni's favor (the "Omni Deeds of Trust").

7 5. The Omni Deeds of Trust encumbered, as security for the Loan, approximately
8 thirty properties in the State of Nevada.

9 6. The Omni Deeds of Trust were recorded on May 27, 2014 (the "May 2014 Deed
10 of Trust"), June 17, 2014 (the "June 2014 Deed of Trust") and August 21, 2014 (the "August
11 2014 Deed of Trust").

12 7. The May 2014 Deed of Trust was recorded in the official records of the Clark
13 County, Nevada Recorder as instrument number 20140529-0001342 and re-recorded as
14 instrument number 20170424-0000178.

15 8. Pursuant to the May 2014 Deed of Trust the following properties were secured:

- 16 a. 1217 Neva Ranch Avenue, North Las Vegas, NV 89081 (APN 124-26-
17 311-029);
- 18 b. 230 East Flamingo Road #330, Las Vegas, NV 89169 (APN 162-16-810-
19 355);
- 20 c. 2615 West Gary Avenue #1065, Las Vegas, NV 89123 (APN 177-20-
21 813-127);
- 22 d. 6575 Shining Sand Avenue, Las Vegas, NV 89142 (APN 161-10-511-
23 072).

24 9. The June 2014 Deed of Trust secured the following properties in favor of Omni:

- 25 a. 4921 Indian River Drive, #112, Las Vegas, NV 89103 (APN 163-24-612-
26 588);
- 27 b. 5009 Indian River Drive #155, Las Vegas, NV 89103 (APN 163-24-612-
28

639);

c. 5295 Indian River Drive, #314, Las Vegas, NV 89103 (APN 163-24-612-798);

d. 4400 Sandy River Drive #16, Las Vegas, NV 89103) (APN 163-24-612-500).

10. The August 2014 Deed of Trust secured the following property:

a. 5782 Camino Ramon Avenue, Las Vegas, NV 89156 (APN 140-21-611-018).

11. Kal-Mor contends it subsequently purchased and owns nine of those thirty parcels (the "Kal-Mor Properties").

12. In 2013, 2014 and 2015, Kal-Mor purchased several properties from First 100, including the Kal-Mor Properties at issue here.

13. ***First 100 represented to Omni that it "in transferring the Real Properties...to third parties, [First 100] provided all of those third parties, prior to closing the transfer transaction, with actual notice of the existence of Omni's first-priority security interest in those Real Properties."***

14. Upon information and belief, and unbeknownst to Omni when it extended the Loan, First 100 and Kal-Mor were *not* independent parties. Greg Darroch –Kal-Mor's principal, owned equity in First 100.

15. Upon information and belief it is alleged that Mr. Darroch still owns equity in First 100.

16. Under Nevada law, a deed of trust automatically "creates an assignment of rents arising from the real property described in the security instrument, unless the security instrument provides otherwise." NRS 107A.230(1).

17. Prior to Kal-Mor's purchases First 100 breached the Loan.

18. Among other things, it failed to: (i) pay principal and interest when due; (ii) cure the defects in Omni's Deeds of Trust; (iii) properly prosecute and enforce the HOA receivables; and (iv) provide Omni with required monthly, quarterly, and annual financial statements.

1 19. Omni issued a notice of default on April 8, 2015.

2 20. First 100 failed to respond, forcing Omni to hire legal counsel.

3 21. On November 2, 2015, Omni sent First 100 a second notice of default, categorizing
4 First 100's breaches in more detail. That notice accelerated the Loan and demanded payment in
5 full.

6 22. Throughout November 2015, First 100 and Kal-Mor repeatedly promised Omni
7 that Kal-Mor would buy out the Omni Loan at full face value.

8 23. At times, First 100 and Kal-Mor promised Omni that a \$4 million pay-off would
9 be wired within hours.

10 24. Kal-Mor's counsel delivered a draft loan assignment agreement to Omni on
11 November 20, 2015, and Omni responded with a revised draft a few days later.

12 25. Negotiations continued into early December, until Kal-Mor's counsel simply
13 "went dark"—declining to respond to any email or phone messages.

14 26. Upon information and belief it is alleged that Kal-Mor's entire loan payoff
15 proposals were a ruse to buy First 100 more time.

16 27. Omni and First 100 entered into a Forbearance Agreement dated December 18,
17 2015, and a related Addendum three days later.

18 28. Omni agreed to forego foreclosure over First 100's personalty in exchange for
19 various First 100 promises, including (i) delivery of financial statements by December 18th and
20 (ii) a \$270,500 payment by December 28th.

21 29. Both deadlines came and went with no performance: First 100 eventually violated
22 virtually every single forbearance term.

23 30. Given those immediate defaults, Omni suspected the forbearance was another
24 delay tactic, the aim of First 100 and Kal-Mor—acting in concert—being to delay foreclosure and
25 further stifle Omni.

26 31. Given First 100's then year-old payment default, Omni noticed a UCC sale
27 pursuant to NRS Chapter 104, by issuing a "Notification of Disposition of Collateral" in January
28

1 2016 (the "1st UCC Notice).

2 32. In response, First 100 filed suit and sought an emergency, *ex parte* TRO to stop
3 the sale.

4 33. Kal-Mor filed a virtually identical suit and emergency, *ex parte* TRO request (Case
5 No. A-16-730447-C).

6 34. Over the course of the next year of proceedings, First 100 and Kal-Mor's positions
7 were virtually 100% in alignment as Kal-Mor, on many occasions, filed one- to two-paragraph
8 joinders to lengthy First 100 filings. (*See, e.g.* Case No. 2:16-cv-00099, ECF 20, 65, 91).

9 35. Omni removed the two cases to federal court, and they were consolidated into one
10 case.

11 36. Giving First 100 and Kal-Mor the benefit of the doubt, the U.S. District Court
12 granted a TRO and postponed Omni's foreclosure sale. (Case No. 2:16-cv-00099, ECF 21).

13 37. Several months later, after three days of evidentiary hearings and extensive
14 briefings and oral arguments, the U.S. District Court held that: (i) the original TRO was wholly
15 unwarranted; (ii) Omni could proceed with the foreclosure sale; and (iii) Omni was entitled to
16 Kal-Mor's TRO bond.

17 38. Not only was Kal-Mor a party to the federal proceedings, but its disputes with
18 Omni were resolved in an agreement specifically addressing the Kal-Mor Real Properties and
19 anticipating Omni's future real-property foreclosure actions.

20 39. In documents dated November 23, 2016, Omni and Kal-Mor agreed to a (i)
21 "Settlement and Mutual General Release Agreement" (the "Kal-Mor Settlement"); and (ii)
22 "Stipulation and Order for Entry of Final Judgment" (the "Kal-Mor SAO"). Critically, the former
23 states:

24 W. The Parties now desire to resolve all differences, disputes and
25 disagreements between them relating to the 2014-2015 Receivables and the ACR
26 Receivables. ***This Agreement, however, is not intended to address or resolve any
dispute between the Parties as to the Kal-Mor Real Properties.***

27 Notwithstanding the terms provided herein, ***Omni reserves all rights to
assert claims and conduct Enforcement Actions relating to any asset or property***
28

1 other than the 2013 Receivables, 2014-2015 Receivables, and/or ACR Receivables,
2 whether owned (previously, currently, or in the future) by GFY or a third party,
3 including but not limited to the Kal-Mor Real Properties, associated proceeds, rents,
4 and/or other assets.

5 40. The Kal-Mor SAO states:

6 The entry final judgment by the Court pursuant to this Stipulation shall not preclude
7 or otherwise impair any claim or defense that may exist between the Parties other than those
8 expressly stated in the Complaint or the Counterclaim.

9 41. *Several weeks later, Omni and First 100 entered into a similar agreement ("First
10 100 Settlement").*

11 42. *First 100 and Omni each understood that the First 100 Settlement entered into
12 between the parties would not preclude Omni's ability and right to foreclose on the properties
13 which are subject of its Deeds of Trust and First 100 actively assisted Omni with the foreclosure
14 of its Deeds of Trust.*

15 43. Omni was in constant discussions with First 100 and Kal-Mor during that time,
16 and Omni consistently and unequivocally told both of them it would be foreclosing on the Kal-
17 Mor Properties.

18 44. *While negotiating the First 100 Settlement, Jay Bloom of First 100 repeatedly
19 told Martin Boone of Omni that Omni was still secured by the Deeds of Trust.*

20 45. The First 100 Settlement specifically stated no third parties were being granted any
21 rights by virtue of the Settlement Agreement.

22 46. Kal-Mor was specifically identified as not being afforded any rights and under the
23 First 100 Settlement Agreement.

24 47. Shortly after settling, Omni's counsel notified First 100 that Omni would be
25 foreclosing on the encumbered real property, but could not locate the original 2014 Promissory
26 Note, which its trustees (under the Deeds of Trust) were requesting.

27 48. In lieu of the original, Omni's title company requested that First 100 provide a
28 "Lost Note Affidavit."

49. *First 100 signed and returned a Lost Note Affidavit on January 30, 2017, and*

1 *signed and returned another version on April 21, 2017.*

2 50. In neither instance did First 100 challenge Omni's course of action or claim that
3 the parties had intended in their settlement that Omni forfeited its real property liens.

4 51. Following settlement of the federal case regarding First 100's *personalty*, Omni
5 turned to foreclosing on the 24 real properties liened in its Deeds of Trust.

6 52. Implicit in the Court's ruling was that both Omni and First 100 intended their
7 settlement agreement to constitute a novation.

8 53. Neither Omni, nor First 100, intended the First 100 Settlement Agreement to
9 constitute a novation or affect Omni's rights under the Deeds of Trust.
10 (emphasis added).

11 In addition to the facts asserted in the Cross-claim, the very Exhibit which First 100 relies
12 upon [Exhibit 1], the Agreement, states as follows with regard to Omni's continued interest in the
13 real properties at issue:

14 Representation: First 100 (for itself, Holding, Guarantors and its and their
15 Affiliates) hereby represents and warrants to Omni that in transferring the Real
16 Properties other than the four Real Properties to which it still retains title) to third
17 parties, Omni [sic] provided all of those third parties, prior to closing the transfer
18 transaction, *with actual notice of the existence of Omni's first-priority security*
19 *interest in those Real Properties.* This representation and warranty is true and may
20 not be or become false or misleading in whole or in part without that constituting
21 a material breach hereof. This representation and warranty shall survive the
22 termination or expiration of this Agreement.

23 Ex. A-4, p. 04183, ¶(e)(emphasis added). In addition, the Agreement provides that:

24 Omni shall have the right, but not the obligation, to advance additional funds that
25 may be required to:

- 26 (i) Retain attorneys, *initiate foreclosure*, bid at foreclosure
27 sales, manage and repair properties to which Omni has taken
28 title, satisfy rival liens, collect rents, enforce settlements,
and/or to otherwise pursue such collections . . .

29 *Id.* at ¶(b)(i)(emphasis added). In addition to ignoring prior language contained in the Agreement,
30 First 100 ignores other portions of Omni's previously filed Opposition, specifically Exhibit "A"

1 thereto – Declaration of Martin Boone, a copy of which is attached hereto as Exhibit “2”. Mr.
2 Boone’s sworn statement further supports the language of the Agreement as he has testified that
3 on behalf of First 100, Jay Bloom was in regular communication and consistently stated that Omni
4 remained secured by the properties subject of this action.

5 **B. Omni Has Alleged Sufficient Facts to State a Claim Upon Which Relief May be**
6 **Granted**

7 As set forth above, Omni has pled specific facts as to the nature of the
8 misrepresentations made, the parties to the communications as well as the time frame of when
9 the misrepresentations occurred. Likewise, the very document relied upon by First 100, the
10 Agreement between Omni and First 100, expressly acknowledges the fact that First 100
11 represented to third parties that Omni held an interest in the real properties subject of this action
12 and that failure to do so constitutes a material breach of the terms of the Agreement.

13 Additionally, the Agreement expressly acknowledges that Omni may foreclose upon the
14 properties at issue. First 100 cannot have previously represented the fact that Omni’s rights in
15 the properties was preserved under the Agreement, but now take the opposite approach when
16 faced with the pending lawsuit. If anything, First 100 has now conclusively established its fraud
17 by having affirmatively represented that Omni’s rights were not impaired in the properties in
18 order to entice Omni to enter into the Agreement, but now assert the precise opposite.

19 In addition, First 100’s argument that Omni’s cross-claim is based solely upon
20 representation made before the Agreement was entered into is patently false. As set forth above,
21 the claim is based on the fact that First 100 represented before the Agreement, in the Agreement
22 and after the Agreement was executed that Omni’s rights to execute upon the properties was not
23 impaired in any way. This is further seen in the fact that after the Agreement was entered into,
24 Omni sought to foreclose upon the properties. Due to the fact that the original 2014 original
25 promissory note entered into between the parties could not be located, First 100 assisted in
26 Omni’s foreclosure of the subject properties by executing a lost note affidavit. This is consistent
27 with and supports the allegations that First 100, at all times, represented that Omni’s rights to
28

1 the properties were preserved in the Agreement. If First 100 is now changing its position and is
2 asserting the opposite, then it is admitting to the fact that it has acted in a fraudulent fashion.
3 Omni has alleged that it has relied upon the representation of First 100 (specifically Jay Bloom)
4 to its detriment. At this early stage of the proceedings, Omni has met its burden in stating a
5 valid cause of action.

6 Lastly, it should be noted that First 100 does not deny any of the pertinent allegations
7 contained in the Cross-claim. Therefore, it must be accepted as true that First 100 did represent
8 to Omni that as part of the Agreement, Omni's right to foreclose upon the real properties subject
9 of its Deeds of Trust remained intact. Omni relied upon First 100's representations, which were
10 incorporated into the Agreement, and has now suffered harm as First 100 is claiming its own
11 representations were not true.

12 **IV. CONCLUSION**

13 For the foregoing reasons it is respectfully requested that the Motion to Dismiss or
14 Alternatively, Motion for Summary Judgment be denied.
15
16

17 HOWARD & HOWARD ATTORNEYS PLLC

18 Dated: September 17, 2019

By: /s/ Brian J. Pezzillo

Robert Hernquist, Nevada Bar No. 10616

Brian J. Pezzillo; Nevada Bar No. 7136

21 *Attorneys for Defendant Omni Financial, LLC*
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 17th day of September 2019, I caused to be served a copy of the foregoing Answer, Counter-claim and Cross-claim in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

Bart K. Larsen, Esq.
KULCSAR & LEATHAM
400 South Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145

*Attorney for Plaintiff Kal-Mor-USA,
LLC*

Joseph A. Gutierrez, Esq.
MAIER GUTIERREZ & ASSOC.
8816 Spanish Ridge Ave.
Las Vegas, NV 89148

Attorney for First 100, LLC


An employee of Howard & Howard Attorneys PLLC

EXHIBIT “1”

EXHIBIT “1”

EXHIBIT "A-4"

EXHIBIT "A-4"

Initials:
Omni: *TSB*
First 100/Holdings/Guarantors: *JTB*

SETTLEMENT AND MUTUAL GENERAL RELEASE AGREEMENT

This Settlement and Mutual General Release Agreement ("Agreement") is entered into as of this 15th day of January 2017 (the "Effective Date") by and between Omni Financial, LLC, a California limited liability company ("Omni"), on the one hand, and First 100, LLC ("First 100"), a Nevada limited liability company, 1st One Hundred Holdings, LLC ("Holdings"), and Jay Bloom, Carlos Cardenas, Christopher Morgando, and Matthew Farkas (collectively, and together with Holdings, "Guarantors"), on the other hand, each of which is a "Party" and collectively the "Parties" with respect to the following facts:

RECITALS

A. First 100, LLC ("First 100") purchased certain homeowner association liens/receivables ("HOA Receivables") from the Association of Poinciana Villages ("APV") pursuant to a July 2013 contract and two Addenda thereto dated October and December 2015 (collectively, the "APV Contract"). The initial APV Contract provided for First 100's purchase of HOA Receivables for the year 2013 (the "2013 Receivables"), as well as the purchase of future HOA Receivables in return for a promise to pay the additional subsequent price for those future delinquent HOA Receivables. Addendum 1 involved the sale of HOA Receivables for 2014 and 2015 (the "2014-2015 Receivables") and Addendum 2 involved the sale of HOA Receivables for additional properties located within APV (the "ACR Receivables").

B. Omni made available a line to First 100 in the original potential maximum principal amount of Five Million Dollars (USD \$5,000,000.00) against which Omni made an initial actual advance of \$2,550,000.00 the "Omni Loan" pursuant to that certain Loan Agreement dated May 27, 2014, and the addenda and amendments thereto (collectively, the "Omni Loan Documents"), by and among First 100 as Borrower and Omni as the lead participating lender, and evidenced by, among other things, (1) a Promissory Note dated May 27, 2014 by First 100 as obligor and Omni as payee; (2) a Security Agreement dated May 27, 2014 between First 100 as pledgor and Omni as pledgee (the "Security Agreement"), and (3) UCC-1 filings by Omni against First 100 in Nevada and Florida (the "UCC-1s"). Together, the Security Agreement and those UCC-1s expressly encumbered all of First 100's personal property, including all of its rights in HOA Receivables, with Omni being promised and taking a first-priority, senior position against all other First 100 creditors.

C. After the initial Omni Loan disbursement, First 100, with Omni's consent and participation, transferred certain interests in the 2013 Receivables to PrenPoinciana, LLC, a Delaware limited liability company ("PrenPoinciana"), by virtue of (i) a Proceeds Purchase and Sharing Agreement dated February 2, 2015 among Omni, PrenPoinciana, and First 100; and (ii) a Payment Arrangement Agreement dated March 2015 among Omni, PrenPoinciana, and First 100, and McCabe Law Group, P.A. (the "McCabe Firm"). In the first of those two agreements, First 100 expressly gave PrenPoinciana a "second lien security interest in, and lien, claim and encumbrance on, the Poinciana Beneficial Interest and the Company Purchased Poinciana Net Proceeds," which First 100 contends was for the sole purpose of creating a public record of PrenPoinciana's equity interest in that negotiated portion of First 100 future cash flows to be realized, later perfected by a UCC-1 financing statement dated February 18, 2015.

Initials:
Omni: *AB*
First 100/Holdings/Guarantors: *JB*

D. On or around April 20, 2015, a PrenPoinciana Affiliate, Prentice Lending II, LLC, a Delaware limited liability company ("Prentice Lending") agreed to lend, and lent, First 100 USD \$150,000.00, net funded in the amount of USD \$126,617.30, pursuant to that certain Secured Short Term Original Issue Discount Promissory Note, as amended by Amendment No. 1 dated on or about May 14, 2015 (the "Prentice Loan"). On May 31, 2016, Omni paid USD \$800,000.00 to PrenPoinciana and Prentice Lending primarily to acquire the PrenPoinciana interests, and secondarily the Prentice Loan, both of which Omni asserts that it did in large part to simplify settlement negotiations with First 100, resulting in this Agreement.

E. On March 17, 2016, First 100 and GFY Management LLC ("GFY") entered into a Proceeds Purchase & Sharing Agreement (the "First 100/GFY PPSA") whereby First 100 agreed, for a purchase price of \$2,000,000.00, to transfer the following HOA portfolios to GFY: (1) the 2014-15 Receivables purchased by First 100 from APV under Addendum 1 to the APV Contract; and (2) the ACR Receivables purchased by First 100 from APV under Addendum 2 to the APV Contract. The First 100/GFY PPSA states, among other things, that (i) First 100 previously "purchased" the 2014-2015 Receivables and the ACR Receivables from APV and (ii) First 100 was to "sell, transfer and re-assign" this right to purchase to GFY, and GFY was to "purchase," under First 100's right, the Poinciana and ACR respective interests in the 2014-2015 Receivables and ACR Receivables. First 100 contends that the term "purchased" referred to an option to acquire the 2014-2015 Receivables and the ACR Receivables from APV, and Omni contends it was the actual purchase of the 2014-2015 Receivables and the ACR Receivables from APV.

F. A dispute has arisen between Omni and First 100 regarding a number of issues, as detailed in the pleadings among the parties, including but not limited to First 100's assertion in Court that after Omni UCC Sales #1, #2 and #3, the Omni debt was satisfied in full, and the amount due to Omni was Zero Dollars (USD \$0.00) (the "First 100 Asserted Actual Debt").

G. The Parties desire to resolve all differences, disputes and disagreements between them relating to all aspects of the Agreements and claims among the parties.

NOW THEREFORE, based on the foregoing, and in consideration of the mutual agreements, covenants, and conditions contained herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties hereby agree as follows:

TERMS OF AGREEMENT

1. Recitals; Definitions.

(a) The Recitals are true and accurate and are incorporated into this Agreement as an integral part hereof.

(b) Definitions. The following terms have the meanings set forth in the Agreement Sections cross-referenced below:

Term	Definition or Section Reference
"ACR"	Association Capital Resources, LLC
"ACR Receivables"	Recital A
"Additional Debt"	Section 9(b)

Initials:
Omni: *2013*
First 100/ Holdings/Guarantors: *[Signature]*

"Additional HOA Receivables"	Section 4(c)(1)
"Affiliate"	Section 4(a)(1)
"Agreement"	1 st Paragraph
"APV"	Recital A
"APV Contract"	Recital A
"Business Day"	Section 7(d)
"Claims"	Section 14(a)
"Deeds of Trust"	Deeds of Trust and Mortgages encumbering the parcels of Real Property in the State of Nevada and elsewhere U.S. District Court for the District of Nevada
"District Court"	1 st Paragraph
"Effective Date"	Omni letters dated April 8, 2015 and November 2, 2015 claiming First 100 to be in default of the Omni Loan; Omni asserting that it had accelerated that Loan; Omni commencing foreclosure actions which are the subject of this dispute; and Omni's response to the filing of lawsuits related to its claims
"Enforcement Actions"	1 st Paragraph
"First 100"	Section 7(a)
"First 100 Actions and Claims"	Recital F
"First 100 Asserted Actual Debt"	Recital B
"First 100/GFY PPSA"	Section 13
"First 100 Parties"	Recital B
"GFY"	1 st Paragraph
"Guarantors"	1 st Paragraph
"Holdings"	Recital A
"HOA Receivables"	Section 14(c)
"Indemnities"	First 100 lawsuit against Omni and PrenPoinciana filed on January 15, 2016, which includes the lawsuit by Kal-Mor and GFY filed against Omni and PrenPoinciana on the same date
"Lawsuit"	Section 14(a)
"Liabilities"	Section 7(a)
"Litigation Liens"	Recital C
"McCabe Firm"	1 st Paragraph
"Omni"	Recital B
"Omni Loan"	Recital B
"Omni Loan Documents"	Section 13
"Omni Parties"	1 st Paragraph
"Parties"	Omni May 17, 2014 Loan guarantees made by the Guarantors
"Payment Guaranties"	Recital C
"PrenPoinciana"	Recital D
"Prentice Lending"	Recital D
"Prentice Loan"	

Initials:
Omni: *AB*
First 100/Holdings/Guarantors: *JP*

"Real Properties"	All parcels for which First 100 was required to record deeds of trust or mortgages under the Omni Loan Documents, which properties are listed in <u>Exhibit A</u>
"Representing Party"	Section 18(a)
"Re-Transferred Assets"	Section 11(a)
"Security Agreement"	Recital B
"Stipulated Judgment"	Section 15(e)
"Stipulated Judgment Debt"	Section 3(a)
"Stipulated Judgment Debt Return"	Section 3(b)
"UCC Sale"	May 25, 2016 Omni's disputed UCC foreclosure sale, referenced in the Notification of Disposition dated April 1, 2016 and Bill of Sale dated May 26, 2016, pursuant to which Omni claims to have sold First 100's personal property in eight separate lots to itself for credit bids, but which First 100 disputed
"UCC-1s"	Recital B
"2013 Receivables"	Recital A
"2014-2015 Receivables"	Recital A

2. No Admission of Liability. Nothing in this Agreement is meant to suggest that Omni has any valid claims against First 100 or the Guarantors, or that First 100 has any valid claims against Omni. In this Agreement, each Party denies any wrongdoing, illegal conduct, or liability whatsoever on its part in connection with the Lawsuit or otherwise, whether in contract or tort, and this Agreement shall not be construed as an admission of liability by any Party. Each Party agrees that it is in its best interests to settle these disputes on the terms set forth herein, strictly as a means to (i) settle their disputes regarding the UCC Sale and the default of the Omni Loan; (ii) terminate the Lawsuit as among them; and (iii) avoid further disputes or disagreements among them regarding the UCC Sale and the default of the Omni Loan.

3. Debt Amounts.

(a) The Parties agree and consent to a stipulated judgment debt owed to Omni (the "Stipulated Judgment Debt") in the amount of Four Million Eight Hundred Thousand Dollars (USD \$4,800,000).

(b) The Parties acknowledge and agree that the Stipulated Judgment Debt is a settlement figure and does not represent the comprehensive, actual debt owed by First 100 to Omni as of the date hereof, which debt, including as a result of Omni's acquisition of the PrenPoinciana Loan and related interest, currently exceeds Six Million Two Hundred Thousand Dollars (USD \$6,200,000) (notwithstanding First 100's assertion in its pleadings that the actual debt owed is zero dollars (\$0.00) after the completion of Omni Sales #1, #2 and #3, which Sales allegedly fully and completely satisfied any debt to Omni). The Parties hereby agree that in addition to the Stipulated Judgment Debt and Additional Debt, Omni would be paid an additional One Million Two Hundred Thousand Dollars (USD \$1,200,000) (the "Stipulated Judgment Debt Return") under the terms of Sections 11(b)(ii) and/or 13.

Initials:
Omni: *MB*
First 100/Holdings/Guarantors: *JS*

(c) For the avoidance of doubt, pursuant to Section 9(b), the Stipulated Judgment Debt shall be deemed automatically increased by the amount of Additional Debt accrued but outstanding from time to time.

4. Relinquishment of Claims to HOA Receivables.

(a) 2013 and 2014-2015 Receivables.

(1) The Parties acknowledge and agree that as a result of the Omni UCC Sales #1 and #2, Omni has absolute ownership and all right, title, and interest in the 2013 Receivables and 2014-2015 Receivables and any and all related proceeds, including (i) future proceeds which may be collected; and (ii) all proceeds collected to date and currently held by (or in the process of being collected by) the McCabe Firm with respect to the 2013 Receivables and 2014-2015 Receivables, regardless of whether such proceeds are currently allocated to Omni or First 100. If (or to the extent) Omni does not already have such absolute ownership and all right, title, and interest in the 2013 Receivables and 2014-2015 Receivables and all related proceeds as a result of the UCC Sales #1 and #2, then First 100 (for itself, Holdings, Guarantors, and its and their Affiliates) hereby irrevocably transfers and assigns such Receivables to Omni. Omni agrees and acknowledges that any and all proceeds received under the 2013, 2014 or 2015 assessments are to be applied to the Stipulated Judgment Debt of First 100. First 100 (for itself, Holdings, Guarantors, and its and their Affiliates) irrevocably relinquishes any and all claims relating to the 2013 Receivables and 2014-2015 Receivables and all related proceeds, as against Omni, in each case for the past, present, and future, and Omni agrees that the amount of the Stipulated Judgment Debt shall be reduced by any and all monies received by Omni under the 2013, 2014 and 2015 Assessments, either directly from lien payoffs, sales proceeds from auctions resulting therein, or from rents or equities realized from real property resulting from each and any lien foreclosure. In this Agreement, "Affiliate" means, for any particular entity, any other entity controlling, controlled by or under common control with such particular Person, where "control" means the possession, directly or indirectly, of the power to direct the management and policies of an entity whether through the ownership of voting securities, by contract, or otherwise.

(2) Upon entry of the Stipulated Judgment provided in Section 15(e) herein, First 100 shall direct the McCabe Firm, in the signed writing in the form of Exhibit B hereto, that it (for itself, Holdings, Guarantors, and its and their Affiliates) irrevocably relinquishes all claims relating to the 2013 Receivables and 2014-2015 Receivables and related proceeds, and that all such proceeds shall be immediately re-allocated to Omni without any setoff, deduction, or withholding whatsoever, until such time as the Stipulated Judgment Debt has been satisfied. That letter shall expressly reference (without limitation) the relevant proceeds listed in the McCabe Firm accounting(s) attached in Exhibit C hereto (but that reference shall not mean that other proceeds to be relinquished to Omni hereunder are waived).

(3) All proceeds derived from the 2013 Receivables and 2014-2015 Receivables, be it by lien payoffs to the McCabe Law Firm, sales proceeds from auction, or from rents or equity realized in real property from properties derived from sheriffs sales of the real property collateral for each and every 2013, 2014 and 2015 lien, shall be applied by Omni to the Stipulated Judgment Debt referenced above in Section 3, reducing the amount thereof on a dollar-for-dollar basis.

Initials:
Omni: *MR*
First 100/Holdings/Guarantors: *LF*

(b) ACR Receivables. As noted in the Recitals, Omni contends it took all right, title and interest in the ACR Receivables (and related proceeds) as a result of the Omni non-judicial UCC Sale #3, but subsequently relinquished any such claim to GFY and Kal-Mor via a Lawsuit settlement. To the extent First 100 currently has, or acquires in the future, a "back-end" or similar interest in the ACR Receivables or proceeds thereof, Omni hereby disclaims any absolute ownership and/or right, title, and interest in such First 100 interest or any cash flow derived thereunder.

(c) Other HOA Receivables.

(1) The Parties acknowledge and agree that as a result of the Omni non-judicial UCC Sale #3, Omni has absolute ownership and all right, title, and interest in all other HOA Receivables owned by First 100 from time to time from the inception of the Omni Loan through the date hereof, if and to the extent serviced by the McCabe Firm. Those other HOA Receivables (collectively the "Additional HOA Receivables") include but are not limited to those relating to Harbor Watch (a/k/a Harbour Watch), Images Condominium Association, Black Bear Reserve, Brightwaters, Autumnwood Grove and Hartlake Cove (a/k/a Hart Lake Cove), including (i) future proceeds which may be collected therefrom; and (ii) any and all proceeds collected to date and currently held by (or in the process of being collected by) the McCabe Firm (or any other servicer) with respect to the Additional HOA Receivables, regardless of whether such proceeds are currently allocated to Omni or First 100 (or any of its Affiliates), and Omni agrees that the amount of the Stipulated Judgment Debt shall be reduced by any and all monies received by Omni under these liens, either directly from lien payoffs, sales proceeds from auctions resulting therein, or from rents or equities realized from real property resulting from each and any lien foreclosure. If (or to the extent) Omni does not already have such absolute ownership and all right, title, and interest in the Additional HOA Receivables and all related proceeds as a result of the UCC Sale, First 100 (for itself, Holdings, Guarantors, and its and their Affiliates) hereby irrevocably transfers and assigns such Receivables to Omni. First 100 (for itself, Holdings and its and their Affiliates) irrevocably relinquishes any and all claims relating to the Additional HOA Receivables and all related proceeds, as against Omni, in each case for the past, present, and future.

(2) On the date hereof, as a condition precedent to closing, First 100 shall provide Omni with all documents in its possession relating to the Additional HOA Receivables that have not already been provided in discovery in the Lawsuit, if any, including any related (i) contracts, agreements, amendments, and instruments, (ii) powers of attorney, (iii) correspondence, (iv) collection history, accountings, claim ledgers, and similar, itemized, detailed HOA Receivable lists. After the date hereof, First 100 shall use reasonable best efforts to ensure that Omni has all information and legal authority necessary to control, manage, exercise rights with regards to, foreclose upon, collect upon, and retain the proceeds of the Additional HOA Receivables.

(3) Upon entry of the Stipulated Judgment provided in Section 15(c) herein, First 100 shall direct the McCabe Firm, in the signed writing in the form of Exhibit B hereto, that First 100 relinquishes all claims relating to the Additional HOA Receivables and related proceeds, and that all such proceeds shall be immediately re-allocated to Omni without any setoff, deduction, or withholding whatsoever.

Initials:
Omni: *MB*
First 100/Holdings/Guarantors: *[Signature]*

(4) All proceeds derived from the Additional HOA Receivables, be it by lien payoffs to the McCabe Law Firm, sales proceeds from auction, or from rents or equity realized in real property from properties derived from sheriff's sale of the real property collateral for each and every lien herein, shall be applied to the Stipulated Judgment Debt referenced above in Section 3, reducing the amount thereof on a dollar-for-dollar basis.

(5) First 100 (for itself, Holdings, Guarantors, and its and their Affiliates) hereby represents and warrants to Omni that from the inception of the Omni Loan through the date hereof, it has not owned or held, nor currently owns or holds, any interest in any HOA Receivables serviced by the McCabe Firm except for those identified in the Disclosure Schedule attached as Exhibit D hereto. This representation and warranty is true and may not be or become false or misleading in whole or in part without that constituting a material breach hereof. This representation and warranty shall survive the termination or expiration of this Agreement.

5. Relinquishment of All Claims to Cash Held By the McCabe Firm. As discussed above in Section 4, First 100 acknowledges and agrees that as a result of the UCC Sale #4, Omni has absolute ownership and all right, title, and interest in all cash held by the McCabe Firm in trust relating to the servicing of any HOA Receivables (except to the extent such proceeds (i) accrue from time to time to APV and/or the McCabe Firm, pursuant to applicable contract or (ii) accrue to Kal-Mor or GFY with respect to the ACR Receivables only). That includes without limitation any amounts previously or currently being held by the McCabe Firm in trust for Omni, First 100, PrenPoinciana, Kal-Mor, or GFY (except with respect to the ACR Receivables only). Upon entry of the Stipulated Judgment provided in Section 15(e) herein, First 100 shall direct the McCabe Firm, in the signed writing in the form of Exhibit E hereto, that First 100 relinquishes all claims relating to all such proceeds, and that all such proceeds shall be immediately re-allocated to Omni without any setoff, deduction, or withholding whatsoever. All such proceeds shall be applied on a dollar for dollar basis to the reduction of the Stipulated Judgment Debt amount (pursuant to Sections 4(a)(2) and 4(c)(4) herein).

6. Relinquishment of Settlement Funds.

(a) First 100 (i) hereby stipulates and agrees to release to Omni any and all right, title and interest in any settlement funds held by any of First 100's attorneys, worldwide, relating to litigation in which First 100 is a party (including but not limited to any funds currently held by the law firm of Well & Drage) and (ii) shall direct those attorneys to release said settlement funds to Omni, without any setoffs or deductions, or withholding whatsoever, subject to and except for those specified in Section 7(c) below and subject to the limitation of any remaining outstanding amount of debt owed to Omni. All such proceeds shall be applied dollar for dollar to the Stipulated Judgment Debt referenced above in Section 3, reducing the amount thereof on a dollar-for-dollar basis.

(b) First 100 (for itself, Holdings, Guarantors, and its and their Affiliates) hereby represents and warrants to Omni that other than as listed in Exhibit D, there are no other settlement funds held by any of First 100's attorneys, worldwide, relating to litigation in which First 100 is a party. This representation and warranty is true and may not be or become false or misleading in whole or in part without that constituting a material breach hereof. This representation and warranty shall survive the termination or expiration of this Agreement.

Initials:
Omni: *MB*
First 100 Holdings/Guarantors: *[Signature]*

7. Stipulated Lien In All First 100 Litigation.

(a) To the extent not already secured in Omni's favor pursuant to the Loan Documents, First 100 hereby grants to Omni a lien in all pending lawsuits, administrative actions, arbitrations, and litigation in which First 100 has asserted an affirmative claim, as well as in all unasserted claims that may give rise to such future litigation (collectively, the "First 100 Actions and Claims"), including but not limited to those specified in Exhibit E hereto (collectively, the "Litigation Liens") (but not including claims expressly listed in Exhibit D).

(b) First 100 hereby represents and warrants that the Litigation Liens granted to Omni have first priority over any and all other third parties (excepting for any governmental or tax authority), and that no other liens or assignments have been granted, issued or recorded against the First 100 Actions and Claims or are senior to the Litigation Liens.

(c) First 100 consents to any and all measures which Omni may take to attach and/or perfect the Litigation Liens, including but not limited to the recording of amendments to the UCC-1s and further UCC-1 financing statements or related documents.

(d) Omni may execute and file a Notice of Lien in each of the pending lawsuits identified in Section 7(a) above, the form of which is attached hereto as Exhibit E, within five (5) Business Days of full execution of this Agreement, and shall thereafter have the right, but not the duty, to file a similar Notice of Lien in any future lawsuits or filings arising with respect to the relevant lawsuits and unasserted claims. First 100 hereby covenants to give Omni prompt notice (i.e., within three (3) Business Days of filing) of any future lawsuits or similar actions arising out of the First 100 Actions and Claims. In this Agreement, a "Business Day" means a day except for a Saturday, Sunday, or a day when commercial banks in Las Vegas, Nevada and Capitola, California are authorized to close. The parties shall discuss and agree in good faith if such action should be added to Exhibit D or Exhibit E. If Omni chooses not to file a Notice of Lien in a given case, that does not constitute a waiver of Omni's Litigation Lien in such case.

(e) First 100 hereby covenants that within three (3) Business Days from receipt of any and all settlement funds, awards, payments, or any other amounts or consideration received or recovered by First 100 (including but not limited to funds received by First 100's principals, counsel, Affiliates, and/or agents) as a result of any settlement, compromise, preliminary or final resolution of the First 100 Actions and Claims, seventy-five percent (75%) of those funds (in excess of reasonable legal fees and costs) shall be forwarded by First 100 to Omni in the form of a cashier's check, money order, or wire transfer of immediately-available funds, without any setoff or deduction whatsoever, and without distributing all or any portion of such amounts to First 100, its other creditors, or any other third parties. Notwithstanding the foregoing, if any settlement is being consummated through a third-party escrow or title agent, then the payment to Omni shall be done directly through escrow or title, not to First 100 and then forwarded to Omni thereafter. Notwithstanding, the parties agree that no attorney-client relationship will be created by any lien with First 100's attorneys. All such proceeds shall be applied to the Stipulated Judgment Debt referenced above in Section 3, reducing the amount thereof on a dollar-for-dollar basis.

Initials:
Omni: *JSB*
First 100/Holdings/Guarantors: *JSB*

(f) First 100 hereby covenants and warrants that it will use its reasonable best efforts to diligently and competently pursue each of the First 100 Actions and Claims to ensure that the Stipulated Judgment Debt is repaid to Omni in full.

(g) Within five (5) days of full execution of this agreement Omni shall file a "Notice of Withdrawal and Release of Claim of Transfer of Interest in All of First 100, LLC's Right Title & Interest in All Choses of Action" in the following matters: *First 100, LLC v. Shinderman et al.*, Case No. A-13-692189; *First 100, LLC v. Great Wash Park LLC et al.*, Case No. A-15-718640; *First 100, LLC v. Joel Just et al.*, Case No. A-14-705993; *First 100, LLC v. Richard Shanks et al.*, Case No. A-15-712626; and *First 100, LLC v. John Lasala*, Case No. 2:14-cv-01460-GMN-(CWH). This shall not effect Omni's right to file a Notice of Lien in those actions pursuant to Section 7(d).

(h) First 100 shall provide Omni with a reasonable opportunity to review and assess all potential settlements before agreeing to any partial or full resolution of any of the First 100 Actions and Claims. First 100 shall provide Omni with copies of all settlement offers and/or settlement agreements exchanged between parties in any of the lawsuits and unasserted claims, within two (2) calendar days of First 100's receipt of said proposed settlement agreements, for Omni's approval (which will not unreasonably be withheld), and shall also inform Omni of its incurred fees and costs (in the form of legal invoices, redacted solely to protect privileged communications between First 100 and its counsel). Should First 100 decide in its sole discretion not to pursue an action, it may make such determination and has no affirmative duty to Omni with respect thereto.

(i) Other than the Litigation Liens, Omni shall hold no interest, title or right in any of the First 100 Actions and Claims and shall not bear any responsibility for any costs, fees or liabilities that may arise with respect thereto (including without limitation attorneys' fees, filing fees, and witness/expert fees). Unless cross-sued or compulsorily joined by a third party, Omni shall not be a party to any claims, shall not provide any input or advice regarding litigation strategies, and shall not discuss said litigation with anyone other than its counsel and other advisors. Other than any filings that may be reasonable to protect or enforce its rights in the Litigation Liens, Omni shall not participate in any way in the prosecution of any such claims.

(j) Any disputes between the Parties regarding a proposed settlement shall be resolved by arbitration in Las Vegas, Nevada before one arbitrator, and the arbitration shall be administered by JAMS within fourteen days of submission and electronic service of Omni's complaint (or as soon thereafter, in the event JAMS does not have any available mediators until after fourteen days). The arbitration shall not provide for discovery (except limited discovery in favor of Omni if First 100 failed to provide Omni with the additional information referenced in Section 7(h) hereof). The arbitration shall not provide for appeal. The Party seeking arbitration shall initially bear the initial arbitration filing fees, but the prevailing party in any such arbitration shall be entitled to recovery of its reasonable costs and legal fees. This arbitration provision shall only apply to disputes between First 100 and Omni regarding the reasonableness of a potential settlement, and shall not be interpreted to enjoin Omni from seeking relief from any Court to protect or enforce its rights in

Initials:
Omni: *JA*
First 100 Holdings/Guarantors: *JP*

the Litigation Liens in relation to third parties, nor its other rights and remedies with respect to this Agreement.

8. Real Properties.

(a) Transfer of Real Property from First 100 to Omni or Omni affiliate. Within five (5) business days of the execution of this Settlement Agreement, First 100 shall execute and deliver to Omni a quitclaim deed transferring all of its right, title, and interest in the four specific Real Properties identified in Exhibit A as still being owned by First 100. The quitclaim deeds shall be to an Omni Affiliate designated by Omni. Omni would place these properties with property management and these properties would be treated under the same terms and conditions as other properties taken back from foreclosure of HOA Receivables (e.g., Omni has a right but not the obligation to advance) as outlined in Section 4 above. The deeds shall be held by Omni's Affiliate and deemed delivered irrespective of recording by Omni. Omni will proceed with the management and evaluation as to whether or not quiet title action and/or foreclosure action is required and prudent in order to clear title. All costs relating to any such transfer, including fees for preparation of documents, recording costs and transfer taxes, are to be solely born by Omni or its Affiliate.

(b) Quiet Title and Other Actions. On and after the Effective Date, with respect to all Real Properties for which no quitclaim deeds have been provided, First 100 may continue pursuing and exercising all appropriate First 100 Actions and Claims arising with including appropriate lawsuits to quiet title, defend title, eliminate other encumbrances and liens, and recover rents and other sums due from tenants and occupants. With respect to all Real Properties for which such quitclaim deeds are recorded, with effect from such recording, First 100 shall have sole and absolute discretion in the determination as to whether it will pursue a quiet title or wrongful foreclosure action with respect to each property. Should First 100 deem a property not worthy of a quiet title or wrongful foreclosure action, Omni or its Affiliate shall have the right to pursue the same at its own expense, such expense not subject to chargeback to First 100, but which expense will be treated as an Advance.

(c) Documents. On the date hereof, as a condition precedent to closing, First 100 shall provide Omni with all documents in its possession relating to the four Real Properties for which quitclaim deeds were provided, including any related (i) leases, subleases, licenses, contracts, agreements, amendments, and instruments; (ii) past and current contracts with property management companies; (iii) correspondence; (iv) repair and maintenance records; and (v) collection history, accountings, claim ledgers, and similar information regarding the rents and other revenues from those Properties. After the date hereof, First 100 shall use reasonable best efforts to ensure that Omni has all information and legal authority necessary to control, manage, exercise rights with regards to, collect upon, and retain the proceeds from those Properties.

(d) Management; Control; Rents. With respect to all four Real Properties for which quitclaim deeds were provided, Omni shall have sole management rights and control over those Properties, regardless of whether or not it records the quitclaim deeds. Neither First 100 nor any of its Affiliates shall directly or indirectly interfere in Omni's management of those Properties (e.g., no communications to or with the Omni's property manager(s)). Omni's management services shall be provided in a commercially reasonable manner (measured in accordance with Nevada's "business judgment rule", and further measured by the standard described in Section

Initials:
Omni: *MB*
First 100/Holdings/Guarantors: *JA*

9(c)). All rents and other proceeds from the four Real Properties shall be collected by Omni and allocated:

- (i) first, to the satisfaction of any and all costs, fees, and expenses attributable to the management, repair, upkeep, and servicing of the four Real Properties (including without limitation property management fees, repair/maintenance costs, HOA dues, property taxes, utility charges, and quiet title, wrongful foreclosure, or similar actions). For the purposes of this Section 8(d), such costs, fees, and expenses include Omni's arrearages with respect to its temporary management of certain other Real Properties following the February 2, 2016 Court hearing; and
- (ii) second, regarding the remaining (i.e., net) proceeds, to the Stipulated Judgment Debt referenced above in Section 3, reducing the amount thereof on a dollar-for-dollar basis.

If First 100 or its Affiliates is in possession of any such rents or other proceeds from the four Real Properties on the Effective Date or takes possession thereafter, it shall immediately (within three (3) Business Days) give notice of the same to Omni and remit all such rents and other proceeds directly to Omni. If necessary, First 100 shall countersign a notice from Omni to the current occupants of those Properties, advising them to direct all future rents and other revenues directly to Omni's designated property-management company.

(e) Representation. First 100 (for itself, Holdings, Guarantors, and its and their Affiliates) hereby represents and warrants to Omni that in transferring the Real Properties (other than the four Real Properties to which it still retains title) to third parties, Omni provided all of those third parties, prior to closing the transfer transaction, with actual notice of the existence of Omni's first-priority security interest in those Real Properties. This representation and warranty is true and may not be or become false or misleading in whole or in part without that constituting a material breach hereof. This representation and warranty shall survive the termination or expiration of this Agreement.

9. Omni's Management and Collection of HOA Receivables.

(a) Collections Efforts. Omni shall pursue collections of the 2013 Receivables, 2014-2015 Receivables and Additional HOA Receivables through the McCabe Firm (or a similarly qualified attorney, at Omni's discretion) in a commercially reasonable manner (measured in accordance with Nevada's "business judgment rule", and further measured by the standard described in Section 9(c)).

(b) Omni Advances. Omni shall have the right, but not the obligation, to advance additional funds that may be required to:

(i) retain attorneys, initiate foreclosures, bid at foreclosure sales, manage and repair properties to which Omni has taken title, satisfy rival liens, collect rents, enforce settlements, and/or to otherwise pursue such collections, all at Omni's sole and absolute discretion; and

(ii) preserve and increase the collections from any and all foreclosed-upon properties (if the rents therefrom are insufficient to cover such expenditures), including without limitation outlays on improvements, repairs, property management fees, and HOA or other

Initials:
Omni: *MB*
First 100/Holdings/Guarantors: *JP*

lien/creditor payoffs. This shall extend to the four Real Properties which are the subject of Section 8 above.

Any and all such funds advanced by Omni (collectively, as it may change from time to time, the "Additional Debt") shall be (i) treated as debt which forms a part of, and which increases (on a dollar-for-dollar basis), the Stipulated Judgment Debt and (ii) shall be the first portion of such Stipulated Judgment Debt which is satisfied from the proceeds identified in Section 4(a)(3) and 4(c)(4) herein.

(c) Management Standard. The Parties agree that (i) the management of the portfolio of liens is proper and adequate as long as the liens are serviced by the McCabe Firm or another licensed firm generally active in lien collections in Florida, and (ii) the management of any properties foreclosed upon is proper and adequate as long as placed with a licensed property management company in the relevant area to manage the properties until they are sold. Omni owes no fiduciary duty to First 100 (or its Affiliates) in relation to the 2013 Receivables, 2014-2015 Receivables, Additional HOA Receivables, and the real properties relating to the same. First 100 shall not assert any claim against Omni (or its principals or Affiliates) for any alleged fiduciary breaches or other mismanagement, absent clear and convincing evidence of gross negligence, willful misconduct and/or fraud by Omni. This standard would also be applied to the First 100 Parties when relevant assets are transferred pursuant to Section 11.

(d) First 100 Covenants. Neither First 100 nor any of its Affiliates shall directly or indirectly (i) bid at any such foreclosure sales unless it first obtains Omni's prior, written consent; nor (ii) interfere in Omni's management of the HOA Receivables or the underlying real properties.

(e) Reporting. Omni shall instruct (i) the McCabe Firm (and/or Omni's other counsel handling the 2013 Receivables, 2014-2015 Receivables and/or Additional HOA Receivables), and (ii) Omni's property manager(s) with respect to post-foreclosure properties, to copy all reports which they prepare for Omni directly to First 100. Omni shall be responsible to provide quarterly accountings of monies received as relates to the liens herein, or any real property resultant therefrom, as well as the application of such funds to the reduction of the Stipulation Judgment Amount, and additional moneys that Omni wishes to add to the Stipulated Judgment Debt and the end-of-quarter, adjusted Stipulated Judgment Debt balance. Notwithstanding, all other accountings are to be provided by the duly designated collection attorney(s) or property management company(ies).

10. Omni's Security Interest.

(a) Retention; Amendment. Except as set forth in the following sentences, Omni neither waives nor relinquishes its existing, first-priority security interest in all of First 100's current and future assets as security for any Debt, and the subordinate security interest originally granted to PrenPoinciana. Effective as of the Effective Date, Omni hereby agrees to forbear any collection actions under those security interests not agreed to be transferred hereunder, so long as First 100 is not in breach of this Agreement. Omni hereby (i) terminates, waives, and relinquishes its security interest, if any, in First 100's interest in the ACR Receivables and First 100's Office Equipment; and (ii) shall, within five (5) Business Days of the Effective Date, file a UCC-3 termination to the UCC-1s reflecting the same. The UCC-3 termination shall terminate the prior Omni's security interests in those two assets only.

Omni: Initials
First 100/Holdings/Guarantors: Initials

(b) No Merger. The Parties' express intention is that the common-law doctrine of merger not be applicable, directly or indirectly, in whole or in part, to the assets to which it has taken title pursuant to this Agreement (if applicable), including the four real properties referenced in Section 8(a).

11. Return of Assets to First 100.

(a) If and when Omni has received in immediately available funds an amount equal to the Stipulated Judgment Debt (plus any Additional Debt) from the proceeds attributable to:

- (i) the 2013 Receivables, 2014-2015 Receivables and Additional HOA Receivables (pursuant to Sections 4(a)(3) and 4(c)(4));
- (ii) any real estate acquired (be it rents collected or equity realized) from the foreclosure of those HOA Receivable portfolios;
- (iii) the settlements received from litigation as provided in Section 7(e) above; and
- (iv) the four specific Real Properties identified in Exhibit A as still being owned by First 100 (and which are the subject of Section 8(a) above);

then, within thirty (30) days of such date, and provided that First 100 is not then in breach of this Agreement, Omni shall:

- (1) quitclaim to First 100 (or its Affiliate, pursuant to First 100's instructions) all of its right, title, and interest in the remaining 2013 Receivables, 2014-2015 Receivables and Additional HOA Receivables, real estate acquired from the foreclosure of those HOA Receivable portfolios, and litigation referenced in Section 7 above;
- (2) release all remaining Litigation Liens in the First 100 Actions and Claims;
- (3) cease any claim or recovery of the seventy-five percent (75%) of settlement funds described in Section 7(e); and
- (4) quitclaim all of its right, title, and interest in the relevant four Real Properties to First 100 (or its Affiliate, pursuant to First 100's instructions);

(such HOA Receivable portfolios, the First 100 Actions and Claims, the settlement proceeds, and the four Real Properties, collectively, the "Re-Transferred Assets").

(b) Once Omni has been paid in full the Stipulated Judgment Debt (plus any Additional Debt) and First 100 (and/or its Affiliate(s)) is in ownership of the Re-Transferred Assets:

- (i) the Parties will execute a written proceeds agreement with all third party legal counsel and management companies or agencies managing the properties, to carry out the distribution of proceeds as provided in this Section 11(b); and
- (ii) First 100 and/or its Affiliate(s) shall direct the relevant legal counsel and management companies or agencies to pay Omni fifty percent (50%) of all proceeds from the Re-Transferred Assets until Omni has been paid the full

Omni: MG Initials:
First 100 Holdings/Guarantors: /s/

amount of the Stipulated Judgment Debt and Stipulated Judgment Debt Return. Thereafter, Omni shall receive five percent (5%) of such proceeds until the Re-Transferred Assets have been liquidated in full; provided, however, that Omni shall have no entitlement to that five percent (5%) with respect to the proceeds from the four specific Real Properties.

Other than the written proceeds agreement contemplated above for the distributing of funds, First 100 and its Affiliate(s) would have the same management conditions and requirements over the Re-Transferred Assets as Omni had under Section 9 (including, for example, a duty to forward onward all reports from the legal counsel and management companies or agencies).

12. **Office Equipment.** Omni hereby releases the assets under its non-judicial foreclosure sale #5. In the event such sale is not recognized as void, Omni hereby quit claims all of its right, title, and interest to First 100's office equipment, furniture, and similar assets acquired in lot #5 of the UCC Sale. The Parties agree that as of the Effective Date, Omni is not and has never been in possession of any of that property.

13. **Omni Loan Guarantees.** Omni hereby releases the Payment Guaranties provided by Jay Bloom, Carlos Cardenas, Christopher Morgando, and Matthew Farkus (but not, for the avoidance of doubt, the Payment Guaranty provided by Holdings); provided, however, that as a condition subsequent to such release, First 100 shall not commit a material breach of this Agreement in the form of (1) any one of First 100, its Affiliates, or its or their owners, members, stockholders, partners, managers, directors, officers, employees, professionals, attorneys, advisors, agents, or family members of the same (the "First 100 Parties") directly or indirectly bringing a suit or proceeding of any kind against Omni, its Affiliates (including without limitation Orbis, Genesis, and Firmus), or its or their owners, members, stockholders, partners, managers, directors, officers, employees, professionals, attorneys, advisors, agents, or family members of the same (the "Omni Parties") (except with respect to Section 15(d) or Omni's failure to turn over the Re-transferred Assets once the Stipulated Judgment Debt is paid, as provided in Section 11(a) above; or (2) a First 100 Party not tendering payments first received by First 100 wherein such payments received are due Omni or directing the relevant third party to make a payment due under Section 7(c) hereunder. In either such event, First 100 and the Guarantors shall be jointly and severally liable as to (i) any and all amounts still due to Omni under the Stipulated Judgment Debt and Stipulated Judgment Debt Return (including the Additional Debt) (and not just the Stipulated Judgment Debt), and (ii) all damages resulting from that breach. As a condition precedent to the release herein, each of the Guarantors must execute and deliver this Agreement to Omni.

14. **Mutual Indemnification.**

(a) **Indemnity.** To the maximum extent permitted by applicable law, (i) First 100, Holdings, and the Guarantors jointly and severally acknowledge and agree that each of them is solely responsible for, and hereby agrees to indemnify, defend, protect, and hold harmless, the Omni Parties, and (ii) Omni acknowledges and agrees that it is solely responsible for, and hereby agrees to indemnify, defend, protect, and hold harmless First 100, Holdings, and the Guarantors, from and against,

any and all liabilities, losses, promises, obligations, agreements, compensation, damages, accounts, liens, fines, assessments, indebtedness, costs, charges, or other expenses, including, but not limited to, reasonable attorneys' fees and costs, including, but not limited to any claims that may be brought by Prentice Lending or PrenticePoinciana or their respective positions, and whether of

Omni: Initials:

First 100 Holdings/Guarantors:

any kind or nature, liquidated or unliquidated, suspected or unsuspected, or fixed or contingent (collectively, "Liabilities") and claims, controversies, causes of action, lawsuits, choses in action, arbitrations, administrative actions or proceedings, judgments, orders, and remedies (collectively, "Claims") arising out of, with respect to, or relating to:

- (i) any claim by a third party with respect to the acts or omissions of the indemnifying Party (regardless of whether or not the indemnifying Party is at fault), including without limitation any Liabilities or Claims by or from: (A) the indemnifying Party's creditors; (B) any governmental or tax authority; (C) the indemnifying Party's counsel, professionals, advisors, and property managers; (D) GFY and Kal-Mor; (E) any homeowner association (including APV); (F) any purported assignee, delegate, or transferee of any assets or claims which are the subject of this Agreement; and/or (G) any owner, occupant, or other Deed of Trust beneficiary or lienholder in or of a Real Property (including without limitation regarding title, priority as among liens, rents, the assignment of rents, outstanding HOA obligations, utility obligations, property defects, and the habitability/condition of the Real Property);
- (ii) the indemnifying Party's breach of this Agreement (including any breach of a representation or warranty); and/or
- (iii) the indemnifying Party's fraud or willful misconduct.

(b) Cumulative Remedies. This right to indemnification shall be in addition to and cumulative with any other rights in law or equity that a Party may have against another Party pursuant to the terms of this Agreement or applicable law.

(c) Procedure. All indemnity provisions in this Agreement are governed by the following procedures. Promptly after becoming aware of a claim as to which indemnity may be sought, the party seeking indemnification (the "Indemnitee") will notify the indemnifying party(ies) of such claim. The Indemnitee's failure or delay in providing the notice will not relieve the indemnifying party of its obligations (except to the extent that the indemnifying party is materially prejudiced). Unless the indemnifying party notifies the Indemnitee that the indemnifying party will assume the defense or settlement of such claim (such notice to be given no event later than five (5) Business Days following notice to the indemnifying party), the Indemnitee will have the exclusive right to defend, settle, or pay such claim. If the indemnifying party assumes the defense of a third-party claim, such assumption will conclusively establish that the claims made in the third-party claim are subject to indemnification. The Indemnitee will not be liable to the indemnifying party for any legal or other expense incurred by the indemnifying party in connection with the defense or settlement undertaken by the indemnifying party. If the indemnifying party assumes the defense or settlement, the indemnifying party will not agree to any settlement, compromise or discharge of a third-party claim without the Indemnitee's prior written consent (not to be unreasonably withheld if the resolution is solely for monetary losses fully covered by the indemnity). If the indemnifying party has assumed the defense or settlement of such claim, the Indemnitee will have the right to employ its own counsel, at its own expense. If (i) the Indemnitee concludes that there are specific defenses available to it that are different from

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

OMNI FINANCIAL, LLC, a foreign limited
liability company Appellant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company;

Respondent.

No.: 82028

Eighth Judicial District Court
Case No: A-17-757061-C
(Honorable Richard Scotti)

**JOINT APPENDIX
Volume VII
(JA001501 – JA001647)**

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OPPOSITION TO MOTION FOR RECONSIDERATION FILED BY KAL-MOR-USA	11/9/2018	VI	JA001356 - 001370
OPPOSITION (LIMITED) OF FIRST 100, LLC TO RENEWED MOTION TO CERTIFY PARTIAL SUMMARY JUDGMENT AS FINAL PURSUANT TO NRCP 54(B)	7/14/2020	VII	JA001719 - 001722
ORDER DENYING MOTION TO INTERVENE	5/1/2019	VI	JA001394 - 001397
ORDER DENYING MOTION FOR RECONSIDERATION	4/19/2019	VI	JA001387 - 001393
ORDER GRANTING MOTION TO CERTIFY ORDER PURSUANT TO RULE 54(B)	9/30/2020	VII	JA001726 - 001729
ORDER OF REMAND FROM FEDERAL COURT	7/12/2018	III	JA000560 - 000565
ORDER SETTING STATUS CHECK	7/15/2019	VI	JA001419 - 001420
ORDER SETTING STATUS CHECK	4/23/2020	VII	JA001614 - 001615

ORDER TO STATISTICALLY CLOSE CASE	9/26/2017	III	JA000558 - 000559
RENEWED MOTION TO CERTIFY ORDER PURSUANT TO NRCP 54(B)	6/30/2020	VII	JA001708 - 001718
REPLY IN SUPPORT OF MOTION TO CERTIFY PURSUANT TO NRCP 54(B)	6/21/2019	VI	JA001411 - 001417
REPLY IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT FILED BY FIRST 100, LLC	10/7/2019	VII	JA001544 - 001556
REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT	8/22/2018	VI	JA001281 - 001303
REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION FILED BY OMNI FINANCIAL	11/27/2018	VI	JA001371 - 001384
SUMMONS ISSUED TO FIRST 100, LLC	6/19/2017	I	JA000025 - 000026
SUMMONS ISSUED TO OMNI FINANCIAL, LLC	6/19/2017	I	JA000027 - 000028
TRANSCRIPT FROM HEARING RE: KAL-MOR-USA'S MOTION FOR PARTIAL SUMMARY JUDGEMENT	8/27/2018	VII	JA001740 - 001783
TRANSCRIPT FROM HEARING ON MOTION RE: MOTION FOR RECONSIDERATION OF PARTIAL SUMMARY JUDGMENT	3/20/2019	VII	JA001784 - 001812

Dated this 8th day of April 2021.

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ Brian J. Pezzillo

BRIAN J. PEZZILLO, ESQ.

Nevada Bar No. 007136

ROBERT HERNQUIST, ESQ.

Nevada Bar No. 010616

3800 Howard Hughes Pkwy., Ste. 1000

Las Vegas, Nevada 89169

Attorneys for Appellant Omni Financial, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2021, a true and correct copy of the foregoing **JOINT APPENDIX (Volume VII)** was served by the following method(s):

XXX BY ELECTRONIC MEANS: by electronically filing and serving with the court's vendor pursuant to NRAP 14(f).

/s/ Anya Ruiz

An employee of Howard & Howard Attorneys PLLC

SERVICE LIST

Bart K. Larsen, Esq.
SHEA & LARSEN
1731 Village Center Circle, Suite 150
Las Vegas, NV 89134
Attorneys for Kal-Mor-USA, LLC

Danielle J. Barraza, Esq.
MAIER GUTIERREZ & ASSOCIATES
8816 Spanish Ridge Avenue
Las Vegas, NV 89148
Attorneys for First 100, LLC

4828-9358-1540, V. 1
4828-9358-1540, V. 1
4828-9358-1540, V. 1
4828-9358-1540, V. 1
4828-9358-1540, V. 1

Initials:
 Omni: *MM*
 First 100/Holdings/Guarantors: *JH*

or additional to those available to the indemnifying party or such claim may have a material adverse effect upon the Indemnitee as to matters beyond the scope of indemnification; (ii) a court rules that the indemnifying party has failed or is failing to prosecute or defend such claim; or (iii) the claim seeks damages other than monetary damages, then the Indemnitee has the right to direct the defense of such claim at the indemnifying party's expense. In any event, the defending party will (A) settle or defend such claim with reasonable diligence; (B) cooperate with the other Parties in the investigation and analysis of such claim or proceeding; (C) afford the other Parties reasonable access to such relevant information as it has in its possession (subject to reasonable restrictions to preserve any privilege); and (D) keep the other Parties reasonably informed about such claim and any related proceedings.

15. General Releases; Lawsuit Dismissals.

(a) Omni Release. Except for the rights and obligations of the Parties under this Agreement, and effective immediately upon the exchange of fully executed counterparts of this Agreement (and fulfillment of all condition precedents hereto), Omni hereby unconditionally relieves, releases, acquits and forever discharges First 100, Holdings, and the Guarantors of and from any and all Liabilities and Claims arising out of, concerning, or in any manner relating to, the 2013 Receivables, 2014-2015 Receivables, ACR Receivables, proceeds relating to the same, the Parties' prior settlement efforts and negotiations, and Enforcement Actions undertaken by Omni with respect to the Omni Loan (including without limitation the UCC Sale and exercise of the assignment of rents).

(b) First 100, Holdings and Guarantors' Release. Except for the rights and obligations of the Parties under this Agreement, and effective immediately upon the exchange of fully executed counterparts of this Agreement (and fulfillment of all condition precedents hereto), each of First 100, Holdings, and the Guarantors, acting jointly and severally, hereby unconditionally relieves, releases, acquits and forever discharges the Omni Parties of and from any and all Liabilities and Claims arising out of, concerning, or in any manner relating solely to, the 2013 Receivables, 2014-2015 Receivables, ACR Receivables, proceeds relating to the same, the Parties' prior settlement efforts and negotiations, and Enforcement Actions undertaken by Omni with respect to the Omni Loan (including without limitation the UCC Sale and exercise of the assignment of rents).

(c) Lawsuits. It is a condition subsequent to the releases set forth in Sections 15(a) and (b) that the other Parties shall not commit a material breach of the same by directly or indirectly bringing an action or asserting a Claim which has been released hereunder. If Omni, on the one hand, or a First 100 Party, on the other hand, should commence any such action or assert such Claim against the other, then that shall render null and void the release granted above with respect to the non-commencing Party or Parties, which may then bring counterclaims and cross-claims, commence an action, or assert its own Claims as against the other Parties.

(d) Intent. It is the intention of the Parties under this Section 15 that under no circumstances will any Party commence any action or assert any claim as against any other party (and in the express case of Omni, the Omni Parties such as Martin Buons or Genesis), other than with respect to (i) the enforcement of the terms of this Settlement Agreement, or (ii) for fraud, gross negligence or willful misconduct as discussed herein.

Initials:
Omni: *MB*
First 100 Holdings/Guarantors: *JF*

(e) **Stipulated Judgment.** On the Effective Date, the Parties' counsel shall deliver executed originals of the Stipulated Judgment attached as Exhibit G hereto (the "Stipulated Judgment"). Pursuant to FRCP 54, the Parties shall cause the Stipulated Judgment to be filed within three (3) District Court days after the Effective Date. The Stipulated Judgment shall, *inter alia*, include findings allocating the 2013 Receivables, 2014-2015 Receivables and Additional Receivables and related proceeds as well as the release of the ACR Receivables and Office Equipment as provided herein and shall serve as a final judgment between Omni, First 100, Holdings, and all Guarantors as to all claims asserted in the Lawsuit. The Stipulated Judgment shall also provide for Judge Boulware to retain sole jurisdiction to consider alleged claims regarding the breach of this Agreement.

(f) **Dismissal of Genesis Lawsuit.** Within five (five) calendar days of the full execution of this Agreement, First 100 shall file a Notice of Dismissal with Prejudice pursuant to NRCP 41(a) dismissing, with prejudice, Case No. A-16-746672-C, styled as *First 100 LLC v. Martin Boone et al.*

16. **Severability.** If any provision of this Agreement is found to be invalid or otherwise unenforceable, such provision (or portion thereof) shall be deemed deleted from this Agreement, while all other terms and conditions will remain in full force and effect and continue to bind the Parties. In lieu of the invalid or unenforceable provision (or portion thereof), the Parties (or Court, if necessary) shall add to the Agreement a provision that is (i) valid, not void, and enforceable and (ii) as similar (in effecting the Parties' intentions) to such invalid or unenforceable provision as may be possible.

17. **Governing Law; Venue; Waiver; Fees.**

(a) **Governing Law.** This Agreement and its interpretation, enforcement, and/or any matters arising out of, related to, or in any way connected with this Agreement shall be governed by the substantive laws of the State of Nevada, excluding that body of law relating to conflicts or choice of laws.

(b) **Venue; Waiver.** The exclusive venue for any disputes and disagreements arising from and/or otherwise relating to this Agreement shall be the courts of competent jurisdiction in the State of Nevada, Clark County, with the Parties first attempting to bring such disputes in the District Court (Judge Boulware, presiding), and only bringing the same in another court if the District Court cannot exercise jurisdiction. With respect to any such litigation, the Parties hereby knowingly, voluntarily, and intentionally, after consultation with legal counsel, waive their respective rights to a jury trial.

(c) **Fees.** The Parties have each agreed to pay their own respective attorneys' fees and costs that have been incurred during or in connection with the Omni foreclosure action, this Lawsuit and the negotiation and preparation of this Agreement; provided, however, that in the event of any breach of this Agreement, the prevailing Party in any litigation or arbitration brought in connection with such breach shall be entitled to its reasonable attorneys' fees and costs. The term "prevailing party" for the purposes of this Section shall mean the Party which prevailed on

Initials:
Omni: *MB*
First 100 Holdings/Guarantors: *[Signature]*

the main issue or issues (and thus can include a Party who has successfully defended itself against any claim that has been asserted against such Party).

18. Representations, Warranties, and Covenants.

(a) Mutual Representations, Warranties, and Covenants. Each Party (the "Representing Party") represents, warrants, and covenants to the other Parties as of the Effective Date as follows:

(1) *Authorization; Execution; Enforceability.* The Representing Party: (i) has full power and authority to enter into this Agreement and perform its obligations hereunder; and (ii) has taken all necessary action to authorize the execution, delivery and performance of this Agreement (and the person(s) signing on behalf of the Representing Party hereby represent and warrant such due authorization). Upon full execution, this Agreement shall constitute a legal, valid and binding obligation of the Representing Party, enforceable in accordance with its terms (except as modified by insolvency laws, and subject to principles of equity).

(2) *No Conflict.* The execution, delivery and performance of this Agreement will not violate or conflict with (i) the Representing Party organizational / charter documents; (ii) any provision of applicable law governing the Representing Party or the transactions contemplated herein; (iii) any provision or term of the Representing Party's permits, licenses, or other governmental accreditations; (iv) any other contract or agreement to which the Representing Party is a party; or (v) any judgment or order of any court. The Representing Party does not need the consent or approval of any non-Party to this Agreement to execute, deliver, and perform this Agreement. The Representing Party is not a party to any pending or threatened lawsuit, action, arbitration, proceeding, inquiry, or investigation which could reasonably be expected to prevent or delay the consummation of the Representing Party's obligations set forth herein or frustrate the other Parties' objectives herein.

(3) *Legal Advice.* The Representing Party has received or had the full opportunity to receive independent legal advice from attorneys of its choice with respect to this Agreement, and is knowingly and voluntarily entering into this Agreement, intending to be legally bound by all of the provisions hereof.

(4) *No Other Representations.* The Representing Party acknowledges that (i) no person, agent or attorney has made any promises, representations or warranties whatsoever, express or implied, that are not contained herein, to induce the Representing Party's execution of this Agreement, and (ii) this instrument has not been executed in reliance on any such promise, representation, warranty or agreement not contained herein.

(5) *No Prior Assignments.* The Representing Party has not assigned, transferred, or purported to assign or transfer (i) any of the Liabilities or Claims that are being released pursuant to this Agreement, or (ii) any property or assets which are the subject of this Agreement (except for the March 2016 assignments to Kal-Mor discussed in the Recitals); nor will the Representing Party purport to assign or transfer any of the same after the Effective Date. The parties agree that neither party shall voluntarily file bankruptcy within one year of the Effective Date.

(6) *Notification.* The Representing Party shall immediately (and in no event later than 48 hours) deliver notice to the other Parties if it commits a breach of this Agreement.

Initials:
Omni: *MB*
First 100/Holdings/Guarantors: *JA*

(b) First 100's Representations, Warranties, and Special Covenants. First 100 represents, warrants, and covenants to Omni as of the Effective Date:

(1) First 100 Transfers. Except as listed in Exhibit D hereto, since the making of the Omni Loan on May 27, 2014, neither First 100 nor any of its Affiliates has transferred, gifted, or sold to any third party, at any time, whether directly or indirectly, whether made and then returned, any property or assets of any kind, regardless of value (as long as in excess of USD \$1,000), other than the purported transfer of the 2014-2015 Receivables and ACR Receivables to Kal-Mor and/or GFY pursuant to the First 100/GFY PPSA.

(2) Sworn Asset Statements. Except as listed in Exhibit D hereto, the sworn asset statements (with amounts) provided by First 100 and 1st One Hundred Holdings as the Guarantor to the Court on or around February 1, 2016, and the sworn asset statements (with valuations) submitted to the Court on July 20, 2016 (as ECF 157-4), all of which are attached hereto as Exhibit H, were true, accurate, and complete in all material respects, and did not omit any material properties or assets of any kind. For the purposes of this Section 18(b)(2) only, a "material" misstatement, error, or omission would be one (i) in excess of USD \$50,000 or (ii) involving First 100's gross negligence, fraud, or intentional misconduct.

(3) HOA Receivable Proceeds. Except as listed in Exhibit D hereto, (i) no First 100 Party has collected, nor is any First 100 Party currently in possession of, the proceeds of collection actions on the 2013 Receivables, 2014-2015 Receivables, and/or Additional HOA Receivables (other than proceeds held in trust for the same by McCabe, but which are being relinquished to Omni hereunder), and (ii) no third party (other than McCabe) is in possession of any such proceeds.

(4) No Undisclosed Back-and Interests. Except as listed in Exhibit D hereto, no First 100 Party has any direct or indirect interest in any assets or property which are the subject of this Agreement, including without limitation in the 2013 Receivables, 2014-2015 Receivables, Additional HOA Receivables, ACR Receivables, First 100 Actions and Claims, or Real Properties.

19. Notices. Any notices by any Party required or desired hereunder shall be in writing and be validly made only if (i) deposited in the United States mail, certified or registered, postage prepaid, return receipt requested, (ii) made by Federal Express or similar courier keeping records of deliveries and attempted deliveries, or (iii) when successfully served by facsimile or email, if also served in accordance with (i) or (ii) above. Service by mail or courier shall be conclusively made on the earlier of the first Business Day delivery is attempted or upon receipt. Facsimile and email transmissions received during business hours during a Business Day shall be deemed made on such Business Day, and received at any other time shall be deemed received on the next Business Day. Any notice or demand shall be addressed as follows:

To an Omni Party:
Omni Financial LLC
Attention: M. Boone
1260 41st Ave Suite C
Capitola, CA 95010
Fax: (831) 462-1618
Email: martin@shermanandboone.com

To a First 100 Party:
First 100, LLC
Attention: J. Bloom
2485 Village View Drive, Suite #190
Henderson, NV 89074
Fax: (702) 629-7925
Email: jbloom@f100llc.com

Initials:
Omni: *THB*
First 100 Holdings/Guarantors: *JE*

with a mandatory copy to:
Howard & Howard Attorneys
Attention: R. Hernquist & M. Gardberg
3800 Howard Hughes Pkwy, 10th Floor
Las Vegas, NV 89169
Fax: (702) 667-4842
Email: rwh@h2law.com, mg@h2law.com

A Party may change its address for notices by a written notice given in the manner above, which notice of change of address shall not become effective against another Party, however, until actual receipt by such Party.

20. Miscellaneous.

(a) Agreement Not to Be Construed Against Drafter. This Agreement shall not be construed in favor of or against any of the Parties hereto, regardless of which Party initially drafted or subsequently edited any portion of it. This Agreement has been reviewed and revised by counsel for each Party, and the terms and conditions hereof were determined through arms-length negotiations by the Parties.

(b) Entire Agreement. This Agreement constitutes the entire agreement of the parties hereto and shall supersede and replace all promises, representations, covenants, warranties, guaranties and agreements that occurred prior to the date hereof (including without limitation any term sheets, letters of intent, issue lists, or related emails among the Parties' principals, none of which was or is legally valid, binding, or enforceable).

(c) Modification Only in Writing; No Waiver. This Agreement may only be modified by a writing signed in ink by both Parties. No waiver of any term or condition of this Agreement shall be effective unless in writing and signed in ink by the Party sought to be charged with such waiver.

(d) Further Assurances. The Parties agree to do any commercially reasonable act or thing and execute any and all commercially reasonable documents or instruments necessary or proper to effectuate the provisions and intent of this Agreement, at its own reasonable cost and expense.

(e) Cumulative Remedies. The rights and remedies of the Parties are cumulative and not alternative, except as otherwise expressly provided for herein.

(f) Successors and Assigns; No Third Party Beneficiaries. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective heirs, successors and assigns. Except as expressly set forth herein, (i) nothing in this Agreement shall be construed to give any person/entity (e.g., GFY, Kal-Mor, or APV) other than the Parties (and their permitted successors and assigns) any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement, and (ii) this Agreement is for the sole and exclusive benefit of the Parties (and their permitted successors and assigns, as well as the principals and agents thereof if expressly referenced herein).

Initials:
Omni: *MB*
First 100 Holdings/Cusumors: *J*

(g) Survival. Any provision herein which should, given its purpose and content, reasonably survive the expiration or termination of this Agreement, including without limitation all indemnities and representations and warranties, shall survive for a reasonable period of time (and not less than six (6) years from the expiration or termination date).

(h) Headings. The headings of the Sections and subsections of this Agreement are for convenience of reference only and shall not be of any effect in construing the meanings of any Section or provision of this Agreement.

(i) Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. An emailed or facsimile signature of a signed Agreement shall constitute an original. This Agreement shall not be binding upon any Party until signed by all Parties where indicated below. Notwithstanding the foregoing, the Parties desire to exchange original, hard-copy signatures hereto.

[The remainder of this page is blank and the signature page follows.]

Omni: 203 Initials: JS
First 100 Holdings/Quintana: JS

[Signature Page to Settlement Agreement]

Omni Financial, LLC,
a California limited liability company

First 100, LLC,
a Nevada limited liability company

By: **SJC Ventures Holding Company LLC,**
a SV limited liability company, its
Manager

By: Martin Boone
Name: Martin Boone
Title: Manager
Date: January 16, 2017

By: Jay Bloom
Name: Jay Bloom
Title: Manager
Date: January 17, 2017

1st One Hundred Holdings LLC,
a Nevada limited liability company

Jay Bloom,
a Nevada resident

By: Jay Bloom
Name: Jay Bloom
Title: Manager
Date: January 17, 2017

By: Jay Bloom
Date: January 17, 2017

Chris Morgando,
a Nevada resident

Matthew Parkas,
a Nevada resident

By: Chris Morgando
Date: January 17, 2017

By: Matthew Parkas
Date: January 17, 2017

Carlos Cardenas,
a Nevada resident

By: Carlos Cardenas
Date: January 17, 2017

Owner: *208* Initials:First 100 Holdings/Guarantors: *208*

EXHIBIT A
Real Properties
(Recital D)

DEEDS OF TRUST RECORDED: CURRENTLY OWNED BY 1ST 100

1	30 Strada Di Villaggio #321, Henderson, NV	Clark, NV	160-22-817-093
2	30 Strada Di Villaggio #323, Henderson, NV	Clark, NV	160-22-817-095
3	2080 Karen Ave. #93, Las Vegas, NV	Clark, NV	162-11-511-093
4	601 Cabrillo Cir Unit #1291, Henderson, NV	Clark, NV	179-17-611-091

SOLD TO 3RD PARTIES

5	1217 Neve Ranch Avenue, North Las Vegas	Clark, NV	124-26-311-029
6	101 Luna Way #145, Las Vegas, NV	Clark, NV	138-27-413-052
7	7708 Himalayas Ave, Unit 204, Las Vegas (Satisfied Quiet Title)	Clark, NV	138-28-513-128
8	1204 Observation Dr. #102, Las Vegas	Clark, NV	138-28-613-007
9	220 Mission Newport Ln, #201, Las Vegas (Satisfied Quiet Title)	Clark, NV	138-36-515-301
10	5782 Camino Ramon Ave., Las Vegas, NV	Clark, NV	140-21-611-018
11	230 E. Flamingo Road #330, Las Vegas, NV	Clark, NV	162-16-810-355
12	4400 Sandy River Dr. #16, Las Vegas, NV	Clark, NV	163-24-612-300
13	4921 Indian River Dr. #112, Las Vegas, NV	Clark, NV	163-24-612-588
14	3009 Indian River Dr. #155, Las Vegas, NV	Clark, NV	163-24-612-639
15	3295 Indian River Dr. #314, Las Vegas, NV	Clark, NV	163-24-612-798
16	2615 W. Gary Avenue #1065, Las Vegas, NV	Clark, NV	177-28-813-127
17	2200 Port Apache Rd #1104, Las Vegas NV	Clark, NV	163-05-415-200
18	601 Cabrillo Cir Unit #644, Henderson, NV	Clark, NV	179-17-611-044
19	601 Cabrillo Cir Unit #1076, Henderson, NV	Clark, NV	179-17-611-076
20	6800 E. Lake Mead #1033, Las Vegas, NV	Clark	140-23-217-065
21	6575 Shining Sand Avenue, Las Vegas, NV	Clark	161-18-511-072
22	3520 Hidden Rainbow Street, North Las Vegas, NV	Clark	124-34-512-057
23	17745 Sapphire Canyon Court, Reno, NV	Washoe, NV	56611012
25	665 Monument Point Street, Henderson NV	Clark, NV	179-31-714-007

DEEDS OF TRUST NOT RECORDED

26	210 E. Flamingo Road #229, Las Vegas, NV	Clark, NV	162-16-810-067
27	7920 Los Robles Court, Jacksonville, FL	Duval	148521-0846
28	2205 Windy Drive, Garland, TX	Dallas, TX	264457-00010-150000
29	9707 Richmond Ave. #82, Houston, TX	Harris, TX	114-240-018-004
30	3149 Oak Brook Lane, Eustis, FL	Lake, FL	07-19-27-095000007900
31	2143 E Wildhorse Drive, Chandler, AZ	Maricopa, AZ	303-30-360
32	10878 NW 78th Terrace, Doral, FL	Miami-Dade, FL	35-3007-048-2100
33	1211 Celebration Ave., #101, Kissimmee, FL	Osceola, FL	14-25-28-5084-0001-1010
34	7533 Lintwhite Street, North Las Vegas NV	Clark, NV	124-17-313-075

(Exhibits)

Initials:
Omni: *MB*
First 100 Holdings/Guarantors: *PT*

EXHIBIT B
Omni and First 100's
Letter of Instruction to the McCabe Firm
(Sections 4(a)(2), 4(c)(3), 5)

Omni Financial, LLC
1260 41st Ave Suite O
Capitola, CA 95010

First 100, LLC
2485 Village View Drive, Suite #190
Henderson, NV 89074

January 16, 2017

URGENT

BY EMAIL (mccabec@jaxlandlaw.com) AND FAX ((904) 396-0088)

Michael McCabe, Esq.
McCabe Law Group
1400 Prudential Drive, Suite 3
Jacksonville, Florida 32207

re: *Settlement of Litigation: Allocation of All Proceeds from the 2013 Receivables, 2014-2015 Receivables, and Additional HOA Receivables*

Dear Mr. McCabe:

As you know, Omni Financial, LLC, a California limited liability company ("Omni"), and First 100, LLC, a Nevada limited liability company ("First 100"), as well as various other persons and entities, are parties to litigation in the U.S. District Court, District of Nevada, under Case No. 2:16-cv-00099-RFB-(CWH). Pursuant to a Settlement and Mutual General Release Agreement dated on or about the date of this letter (the "Settlement Agreement"), the parties to that lawsuit have settled the disputes among them.

In the Settlement Agreement, the parties agreed, among other things, that First 100, "(for itself, Holdings, Guarantors, and its and their Affiliates) irrevocably relinquishes all claims relating to the 2013 Receivables and 2014-2015 Receivables and related proceeds, and that all such proceeds shall be immediately re-allocated to Omni without any setoff, deduction, or withholding whatsoever...." Similarly, First 100 relinquished "all other HOA Receivables owned by First 100 from time to time from the inception of the Omni Loan through the date hereof, if and to the extent serviced by the McCabe Firm. Those other HOA Receivables (collectively the "Additional HOA Receivables") include but are not limited to those relating to Harbor Watch (a/k/a Harbour Watch), Images Condominium Association, Black Bear Reserve, Brightwaters, Autumnwood Grove and Hartlake Cove (a/k/a Hart Lake Cove), including (i) future proceeds which may be collected therefrom; and (ii) any and all proceeds collected to date and currently held by (or in the process of being collected by) the McCabe Firm (or any other servicer) with respect to the Additional HOA Receivables, regardless of whether such proceeds are currently allocated to Omni or First 100 (or any of its Affiliates)."

(Exhibits)

Initials:
Omni: *MB*
First 100 Holdings/Owners: *[Signature]*

Further to that point, in the Settlement Agreement, First 100 acknowledged and agreed "that as a result of the UCC Sale #4, Omni has absolute ownership and all right, title, and interest in all cash held by the McCabe Firm in trust relating to the servicing of any HOA Receivables (except to the extent such proceeds (i) accrue from time to time to APV and/or the McCabe Firm, pursuant to applicable contract or (ii) accrue to Kal-Mor or GFY with respect to the ACR Receivables only). That includes without limitation any amounts previously or currently being held by the McCabe Firm in trust for Omni, First 100, PrenPolnciana, Kal-Mor, or GFY (except with respect to the ACR Receivables only)....First 100 relinquishes all claims relating to all such proceeds, and that all such proceeds shall be immediately re-allocated to Omni without any setoff, deduction, or withholding whatsoever."

In other words, all proceeds relating to the 2013 Receivables, 2014-2015 Receivables, and Additional HOA Receivables should be allocated to Omni. (That list does not include the ACR Receivables. Omni disclaims any interest in or claim to the ACR Receivables. Any allocation of proceeds for that portfolio should be addressed to parties other than Omni.)

This Settlement Agreement further contemplates that upon notice to your office by Omni and First 100 of satisfaction of the Stipulated Judgment Debt having been received by Omni, including those provided by your firm, all rights title and interest in any remaining lien portfolios shall revert back to First 100, with a shared allocation of proceeds to Omni and First 100. The parties expressly acknowledge that there are other sources of monies satisfying the Stipulated Judgment amount and that the entirety of the Stipulated Judgment Debt need not come from payments issued by your office.

Given the foregoing, First 100 confirms that, until such time as you are provided notice of satisfaction of the Stipulated Judgment Debt, you no longer need its consent or approval to disburse trust funds to Omni. In the near future, Omni will give you unilateral instructions regarding disbursement and you may rely upon those in full. Notwithstanding, notice is to be provided to First 100 of any and all such distributions, and any and all reports issued by your office are to be copied directly to First 100.

If you have any questions or comments, please direct them to counsel for both Omni and First 100. Thank you for your time and understanding.

Sincerely,

Omni Financial, LLC,
a California limited liability company

First 100, LLC,
a Nevada limited liability company

By: SJC Ventures Holding Company LLC,
a ~~Del~~ limited liability company, its
Manager

By: *[Signature]*
Name: Martin Boone
Title: Manager

By: *[Signature]*
Name: Jay Bloom
Title: Manager

(Exhibits)

Omni: *MB* ^{Initials:}
First 100 Holdings/Guarantors: *JS*

EXHIBIT C
McCabe Firm Accountings
(Section 4(a)(2))

[See attached.]

(Exhibits)

Letter Date	Total	MLG	First 100	APV	GFY	Omni	Prep Poin	HO Refund	X Check	
12/22/2015	22,707.70	2,054.38	0.00	0.00	3,426.00	11,197.77	6,029.57		22,707.70	0.00
12/29/2015	20,264.83	3,779.30	0.00	0.00	4,635.00	13,617.80	7,339.89	0.00	20,264.83	0.00
1/12/2016	81,942.81	12,410.40	0.00	0.00	9,888.00	35,037.81	13,983.48	629.24	81,942.81	0.00
2/22/2016	118,187.84	24,520.45	0.00	1,260.00	18,120.00	18,497.32	8,900.00	0.00	118,187.84	0.00
1/19-2/27/16	72,388.78	17,914.86	0.00	4,168.00	11,844.00	28,541.85	18,837.97	0.00	72,388.78	0.00
3/1-3/1/16	117,888.85	22,288.07	0.00	6,318.00	18,848.00	44,328.17	23,887.86	63.46	117,888.85	0.00
Total	482,996.75	125,907.42	0.00	14,184.00	68,402.00	168,278.88	76,811.74	768.88	482,979.79	0.00

Trust Fund Rpt Dates	Total	MLG	First 100	APV	GFY	Omni	Prep Poin	HO Refund	X Check
03/08-4/12/16	209,038.50	66,204.39	0.00	14,112.00	32,903.00	62,282.41	31,438.70		209,038.50
4/19-04/18/16	168,844.41	63,975.14	0.00	18,592.00	21,924.00	40,107.13	21,896.54	450.00	168,844.41
05/17-03/21/16	3,341,342.82	47,673.63	0.00	14,358.00	27,872.00	189,967.00	84,386.73		3,341,342.82
3/1/2016-7/31/16	108,074.17	21,977.80	0.00	5,292.00	12,348.00	46,148.84	24,908.89		108,074.17
8/1/16-8/31/16	101,373.84	51,785.91	0.00	5,786.00	12,348.00	18,190.88	10,333.48		101,373.84
9/1/16-03/31/16	97,888.88	21,728.34	0.00	6,048.10	18,838.00	38,478.86	20,718.38	62.88	97,888.88
Total	621,534.42	276,364.81	0.00	68,894.10	118,829.00	389,172.48	184,882.05	902.88	621,534.42

	Total	MLG	First 100	APV	GFY	Omni	Prep Poin	HO Refund	X Check
Grand Total	1,344,305.16	400,871.83	0.00	70,548.10	181,731.00	448,431.34	341,472.79	1,269.20	1,344,306.18
Less Distributions	(325,438.38)	(325,438.38)							
Total Cash to Disperse	1,018,866.77								
Bank Balance	1,292,884.12								
Difference	274,117.35								
** Lines on payment plan - Not on report									
checks cut and paid									

Initials:
Omni: *AB*
First 100/Holdings/Guarantors: *JH*

EXHIBIT D
Disclosure Schedule

Section 4(c)(5):

- 2013 Receivables,
- 2014-2015 Receivables,
- ACR Receivables, and
- Additional HOA Receivables listed in the second sentence of Section 4(c)(1)

Section 6(b):

- Approximately USD \$17,600 held in trust by the law firm of Weil & Drago pursuant to the state court settlement referenced in the Parties' joint filing (BCP 145) in the Lawsuit (i.e., the *Twin Peak* case)).

Section 7(a):

- None.

Section 18(b)(1):

- None.

Section 18(b)(2):

- None.

Section 18(b)(3):


- None.

Section 18(b)(4):

- None.

Approved by:

First 100, LLC,
a Nevada limited liability company

By: 
Name: Jay Blum
Title: Manager

(Exhibits)

Omni: *JB* Initials:
First 100 Holdings/Guarantors: *JP*

EXHIBIT E
Litigation Liens
(Section 7(a))

Lawsuits:

1. First 100, LLC v. Wells Fargo Bank, et al.: Case No. A-13-675519
2. First 100, LLC v. Ronald Burns, et al.: Case No. A-13-677693
3. First 100, LLC v. Points West Financial Group SPE, LLC, et al.: Case No. A-15-715636
4. First 100, LLC v. Richard Shanks et al.: Case No. A-15-712626
5. First 100, LLC v. Martin Boone, et al.: Case No. A-16-746672
6. First 100, LLC v. Joel Just, et al.: Case No. A-14-705993 (state court action); AAA Case No. 01-15-0002-8881.
7. First 100, LLC v. John Lasala: Case No. 2:14-cv-01460-GMN-(CWH).
8. First 100, LLC v. Raymond Ngan, et al.: Case No. A-16-738970
9. First 100, LLC v. Omni Financial, LLC et al.: Case No. 2:16-cv-00099-RFB-(CWH).
10. First 100, LLC v. Shinderman, et al.: Case No. A-13-692189
11. First 100, LLC v. Marnie Ragan, et al.: Case No. A-15-712264.
12. First 100, LLC v. Great Wash Park, LLC et al.: Case No. A-15-718640
13. Kal-Mor-USA, LLC v. Bank of NY Mellon, et al.: Case No. A-14-703039
14. Kal-Mor-USA, LLC v. Green Tree Servicing, et al.: Case No. A-14-704704
15. Kal-Mor-USA, LLC v. HSBC Bank USA, et al.: Case No. A-14-704734
16. Stephen Kehres v. Bank of America, N.A., et al.: Case No. CV14-01408
17. First 100, LLC v. HSBC Bank USA, N.A., et al.: Case No. A-14-705364
18. First 100, LLC v. FNMA, et al.: Case No. A-14-705365
19. First 100, LLC v. FNMA: Case No. CV14-01753
20. First 100, LLC v. FNMA, et al.: Case No. A-14-705367
(Exhibits)

Initials:
Omni: MB
First 100 Holdings/Guarantors: Q

21. Kal-Mor-USA, LLC v. Homecomings Financial, et al.: Case No. A-14-705622
22. Kal-Mor-USA, LLC v. World Savings Bank, et al.: Case No. A-14-705619
23. First 100, LLC v. Cenlar, et al.: Case No. A-14-705631
24. First 100, LLC v. Greenpoint, et al.: Case No. A-14-705634
25. Kal-Mor-USA, LLC v. Bank of NY Mellon, et al.: Case No. A-14-705636
26. First 100, LLC v. Bank of NY Mellon, et al.: Case No. A-14-706265
27. First 100, LLC v. CitiMortgage Inc., et al.: Case No. A-14-705078
28. First 100, LLC v. Bank of NY Mellon, et al.: Case No. A-14-707553
29. First 100, LLC v. California Reconveyance, et al.: Case No. A-12-671357
30. First 100, LLC v. First Horizon, et al.: Case No. A-13-677349
31. First 100, LLC v. Wilmington, et al.: Case No. A-15-715230
32. Manuel Martinez v. First 100, LLC, et al.: Case No. A-13-682128
33. First 100, LLC v. Wilmington Trust, et al.: Case No. A-15-715254
34. First 100, LLC v. Federal Home Loan Mortgage Corporation, et al.: U.S. District Court, District of Nevada, Case No. 2:15-cv-01303-APG-PAL, District Court Case No. A-15-715635

Unasserted Claims:

- No known claims at this time

(Exhibits)

On: 12/8 Initials:

First 100 Holdings/Guarantors: 12/8

EXHIBIT F
Notice of Lien
(Section 7(d))

[See attached.]

(Exhibits)

HOWARD & HOWARD ATTORNEYS, PLLC

3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169
(702) 257-1483 FAX: (702) 567-1568

HOWARD & HOWARD ATTORNEYS PLLC
Robert Hemquist, Nevada Bar No. 10616
RHemquist@HowardandHoward.com
Mark Gardberg, Nevada Bar No. 10879
MGardberg@HowardandHoward.com
Wells Fargo Tower, Suite 1000
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169-5980
Telephone: (702) 257-1483
Facsimile: (702) 567-1568

Attorneys for Omni Financial LLC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Plaintiffs,
vs.

Defendants.

Case No. _____

Dept. No. _____

NOTICE OF LIEN

TO: ALL INTERESTED PARTIES; and

TO: ALL ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that Plaintiff First 100, LLC, a Nevada limited liability company ("First 100") and a party to the above-captioned action (the "Action"), has granted a lien in the Action to Omni Financial, LLC ("Omni"), which is represented by and through its undersigned attorneys, Howard & Howard Attorneys PLLC, in the amount, as of the date hereof, of Four Million Eight Hundred Thousand Dollars (USD \$4,800,000).

This lien shall attach to any money or property which is to be titled to or paid to First 100 as a result of the Action (including without limitation arising out of or pursuant to any claims,

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3800 Howard Hughes Parkway, Suite 1000
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(702) 257-1483 FAX: (702) 567-1564

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counterclaims, cross-claims, judgments, orders, executions, demands, and settlements).

Dated: January __, 2017

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ Robert Hernquist

Robert Hernquist, Nevada Bar No. 10616

Mark Gerdberg, Nevada Bar No. 10979

Wells Fargo Tower, Suite 1000

3800 Howard Hughes Parkway

Las Vegas, Nevada 89169-5980

Attorneys for Omni Financial LLC

CERTIFICATE OF SERVICE

The undersigned, an employee of the law firm of Howard & Howard Attorneys PLLC, hereby certifies that on _____, 2017, a true and correct copy of the foregoing document, NOTICE OF LIEN, was electronically served through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9 to the following:

A true and correct copy of the same was also deposited in a sealed envelope, first class U.S. mail, postage prepaid, at Las Vegas, Nevada, addressed as follows:

/s/ x

HOWARD & HOWARD ATTORNEYS, PLLC

3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169
(702) 253-1440 FAX: (702) 567-1566

Initials:

Owner:

First Holdings/Custodian:

EXHIBIT G
Stipulated Judgment
(Section 15(a))

[See attached.]

(Exhibits)

HOWARD & HOWARD ATTORNEYS, PLLC

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Las Vegas, Nevada 89169
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HOWARD & HOWARD ATTORNEYS PLLC
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RHernquist@HowardandHoward.com
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MGardberg@HowardandHoward.com
Wells Fargo Tower, Suite 1000
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169-5980
Telephone: (702) 257-1483
Facsimile: (702) 567-1568

*Attorneys for Defendant, Counter-Plaintiff,
and Third Party Plaintiff Omni Financial LLC*

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIRST 100, LLC, a Nevada limited liability
company; 1st ONE HUNDRED HOLDINGS,
LLC, a Nevada limited liability company,

Plaintiffs,
vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; PRENPOINCIANA, LLC, a
foreign limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

AND ALL RELATED CLAIMS

Case No. 2:16-cv-00099-RFB-(CWH)

Related Case No. 2:16-cv-00109-RFB-CWH
(Jointly Administered Cases)

STIPULATION AND ORDER FOR
ENTRY OF FINAL JUDGMENT

COME NOW, (1) Plaintiffs and Counter-Defendants First 100, LLC ("First 100") and 1st
One Hundred Holdings, LLC ("Holdings," and together with First 100, the "Plaintiffs"), by and
through their undersigned attorneys, Maier Gutierrez Ayon; (2) Third-Party Defendants Holdings,
Jay Bloom, Carlos Cardenas, Christopher Morgando, and Matthew Farkas (collectively, the
"Guarantors"), by and through their undersigned attorneys, Maier Gutierrez Ayon, (3) Defendant,

Counterplaintiff, and Third Party Plaintiff Omni Financial, LLC ("Omni"), by and through its undersigned attorneys, Howard & Howard Attorneys PLLC, (4) Defendants PrenPoinciana, LLC and Prentice Lending II LLC (collectively, "PrenPoinciana"), by and through their undersigned attorneys, Greenberg Traurig, LLP; and (5) Plaintiffs KAL-MOR-USA LLC and GFY Management LLC (in Case No. 2:16-cv-00109) (collectively, "Kal-Mor/GFY"), by and through their undersigned attorneys, Kolesar & Leatham, all of whom stipulate and agree as follows:

RECITALS

1. On January 15, 2016, First 100 filed a Complaint asserting various claims for relief (the "Claims") against Omni and PrenPoinciana in the Eighth Judicial District Court in Clark County, Nevada (the "Lawsuit"), seeking an *ex parte* temporary restraining order stopping a foreclosure sale which Omni had previously noticed.

2. Omni removed the Lawsuit to the U.S. District Court for the District of Nevada (the "District Court") (Notice of Removal, ECF No. 1),¹ where it is known as Case No. 2:16-cv-00099.

3. On February 9, 2016, the Lawsuit was consolidated with a separate action filed by Kal-Mor USA LLC (which had also been removed by Omni and is Case No. 2:16-cv-00109, and which case constitutes part of the defined term, the "Lawsuit").

4. On June 15, 2016, Defendant Omni filed its Answer to First 100, LLC's Complaint and Counterclaim and Third-Party Complaint (ECF 99), asserting various counterclaims and third-party claims for relief against the Plaintiffs and Guarantors (the "Counterclaims and Third-Party Claims").

5. As set forth in extensive detail in the pleadings and papers in the Lawsuit, numerous disputes (collectively, the "Disputes") have arisen between Plaintiffs, Defendants, and Guarantors regarding, for example:²

- (a) First 100's default on a line of credit loan extended by Omni pursuant to a loan agreement and other transaction documents dated May 27, 2014;

¹ All references herein to "ECF" numbers are to filings in Case No. 2:16-cv-00099.

² This list is not exhaustive.

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Las Vegas, Nevada 89169
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- (b) the ownership, management, and control of certain homeowner association liens/receivables ("HOA Receivables") those acquired from the Association of Poinciana Villages ("APV") and (i) relating to the calendar year 2013 (the "2013 Receivables"), (ii) relating to the calendar years 2014-2015 (the "2014-2015 Receivables") and (iii) certain additional properties previously managed by Association Capital Resources, LLC (the "ACR Receivables");
- (c) the ownership, management, and control of all other HOA Receivables owned all other HOA Receivables owned by First 100 from time to time from the inception of the Omni loan through the date hereof, if and to the extent serviced by the McCabe Firm, including those relating to Harbor Watch (a/k/a Harbour Watch), Images Condominium Association, Black Bear Reserve, Brightwaters, Autumnwood Grove and Hartlake Cove (a/k/a Hart Lake Cove) (collectively, the "Additional HOA Receivables");
- (d) the ownership, management, and control of First 100's other personal property;
- (e) the reasonableness of Omni's foreclosure sale on May 25, 2016 regarding such HOA Receivables and other personal property; and
- (f) Omni's first-priority security interest, as beneficiary, under deeds of trust in various real properties previously or currently owned by First 100.

6. After negotiating in good faith, the Parties have reached a settlement agreement dated on or about the date hereof (the "Settlement Agreement") to fully resolve their Disputes, the Lawsuit, and the Claims, Counterclaims, and Third-Party Claims on the terms set forth below.

STIPULATION

NOW, THEREFORE, the Parties hereby stipulate and agree to the immediate entry of a Stipulated Judgment³ by the Court fully resolving the Parties' Disputes, the Lawsuit, and the

³ A proposed Stipulated Judgment has been approved in form and content by the Parties and is attached hereto as Exhibit 1.

Claims, Counterclaims, and Third-Party Claims by and among them, upon the following terms and conditions:

Stipulated Judgment

1. The Parties agree and consent to a stipulated judgment debt owed by First 100 to Omni in the amount of Four Million Eight Hundred Thousand Dollars (USD \$4,800,000), but which amount could increase by a specific sum if certain conditions subsequent were not met.

HOA Receivables & Proceeds; Other Property

2. Omni is, and shall be determined to be, the absolute owner of all right, title, and interest in the 2013 Receivables, the 2014-2015 Receivables, and Additional HOA Receivables, including, without limitation, (a) all future proceeds arising therefrom, (b) all undisbursed proceeds thereof being held by the Parties or any third party (e.g., the McCabe law firm), regardless of how such proceeds may have previously been allocated among the Parties, and (c) any rights or privileges enjoyed by, or benefiting, First 100 with respect to those HOA Receivables, including rights or privileges under any continuing powers of attorney granted by a third party.

3. Omni disclaims any right, title, or interest in the ACR Receivables.

4. The Parties hereby agree and consent to the unfreezing of the HOA Receivables and all proceeds derived therefrom (meaning, for example, all undisbursed proceeds held by the McCabe law firm may be disbursed upon the unilateral instruction(s) of the Party(ies) to whom such proceeds belong).

5. To the extent not already secured in Omni's favor pursuant to the loan documents, First 100 has granted to Omni a lien in all pending lawsuits, administrative actions, arbitrations, and litigation in which First 100 has asserted an affirmative claim, as well as in all unasserted claims that may give rise to such future litigation.

6. Upon full repayment of the stipulated judgment debt, Omni shall return or release to First 100 (i) any and all interest in the 2013 Receivables, the 2014-2015 Receivables, and Additional HOA Receivables; (ii) all remaining liens in First 100's claims and litigation; (iii) four

specific real properties in Nevada, to First 100 or its Affiliate; and (iv) all real property derived from foreclosure actions on any of the HOA Receivables conveyed.

Dismissal; Jurisdiction; Bonds

7. The Lawsuit and any and all Disputes, Claims, Counterclaims, and Third-Party Claims are and shall be hereby dismissed with prejudice.

8. Notwithstanding the foregoing, the entry of a final judgment by this Court pursuant to this Stipulation and Order shall not preclude or otherwise impair any claim or defense that may exist or arise between or among the Parties with respect to a breach of the Settlement Agreement.

9. Notwithstanding the foregoing, the Court shall retain jurisdiction (over the Parties, the Lawsuit, the Disputes, Claims, Counterclaims, and Third-Party Claims, and the Settlement Agreement (and alleged breaches thereof)), to hear any further proceedings regarding the same, if necessary or appropriate.

10. Each Party shall each bear responsibility for its own fees and costs incurred in connection with this matter (including, in particular, the Lawsuit).

11. The two monetary bonds deposited with the Clerk of the Court during the Lawsuit, by First 100 (in the amount of \$15,000, deposited on January 21, 2016 (ECF 13-14)) and Omni (in the amount of \$1,000, deposited on June 28, 2016 (ECF 131-32)), shall be immediately released to Omni.

Settlement Terms

12. The Parties wish to keep the terms of their Settlement Agreement confidential. This Stipulation and Order is not intended to be an exhaustive summary of the relevant terms of the Settlement Agreement. Any description of a term of the Settlement Agreement in this Stipulation and Order is not intended to amend or modify that term. Any omission of a term of the Settlement Agreement in this Stipulation and Order is not intended to constitute a waiver of that term.

[Signature Page to Stipulation and Order]

Dated: January __, 2017

Dated: January __, 2017

**HOWARD & HOWARD ATTORNEYS
PLLC**

MAIER GUTIERREZ AYON

By: /s/ Robert Hernquist
Robert Hernquist
Nevada Bar No. 10616
Mark Gardberg
Nevada Bar No. 10879
Wells Fargo Tower, Suite 1000
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169-5980

By: /s/ Joseph A. Gutierrez
Joseph A. Gutierrez
Nevada Bar No. 9046
Jason R. Maier, Nevada Bar No. 8557
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148

*Attorneys for Defendant, Counterplaintiff,
and Third Party Plaintiff Omni Financial
LLC*

*Attorneys for (1) Plaintiffs and
Counterdefendants First 100, LLC and
1st One Hundred Holdings, LLC and (2)
Third-Party Defendants 1st One Hundred
Holdings, LLC, Jay Bloom, Carlos
Cardenas, Christopher Morgando, and
Matthew Farkas*

Dated: January __, 2017

Dated: January __, 2017

GREENBERG TRAUIG, LLP

KOLESAR & LEATHAM

By: /s/ Christopher Miltenberger
Christopher Miltenberger
Nev. Bar No. 10153
3773 Howard Hughes Parkway, #400
Las Vegas, NV 89169

By: /s/ Bart K. Larsen
Bart K. Larsen
Nevada Bar No. 08538
400 South Rampart Blvd., Suite 400
Las Vegas, Nevada 89145

*Attorneys for Defendants PrenPoinciana,
LLC and Prentice Lending II LLC*

*Attorneys for Plaintiffs KAL-MOR-USA LLC
and GFY Management LLC (in Case No.
2:16-cv-00109)*

Order

IT IS SO ORDERED.

Dated: _____

UNITED STATES DISTRICT JUDGE

Exhibit 1
Stipulated Judgment

JOINTLY SUBMITTED

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FIRST 100, LLC, a Nevada limited liability company; 1st ONE HUNDRED HOLDINGS, LLC, a Nevada limited liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited liability company; PRENPOINCIANA, LLC, a foreign limited liability company; DOES I through X and ROE ENTITIES I through X;

Defendants.

AND ALL RELATED CLAIMS

Case No. 2:16-cv-00099-RFB-(CWH)

Related Case No. 2:16-cv-00109-RFB-CWH
(Jointly Administered Cases)

STIPULATED JUDGMENT

COME NOW, (1) Plaintiffs and Counter-Defendants First 100, LLC ("First 100") and 1st One Hundred Holdings, LLC ("Holdings," and together with First 100, the "Plaintiffs"), by and through their undersigned attorneys, Maier Gutierrez Ayon; (2) Third-Party Defendants Holdings, Jay Bloom, Carlos Cardenas, Christopher Morgando, and Matthew Farkas (collectively, the "Guarantors"), by and through their undersigned attorneys, Maier Gutierrez Ayon, (3) Defendant, Counterplaintiff, and Third Party Plaintiff Omni Financial, LLC ("Omni"), by and through its undersigned attorneys, Howard & Howard Attorneys PLLC, (4) Defendants PrenPoinciana, LLC and Prentice Lending II LLC (collectively, "PrenPoinciana"), by and through their undersigned attorneys, Greenberg Traurig, LLP; and (5) Plaintiffs KAL-MOR-USA LLC and GFY

Management LLC (in Case No. 2:16-cv-00109) (collectively, "Kal-Mor/GEY"), by and through their undersigned attorneys, Kolesar & Leatham.

RECITALS

On January 15, 2016, First 100 filed a complaint asserting various claims for relief (the "Claims") against Omni and PrenPoinciana in the Eighth Judicial District Court in Clark County, Nevada (the "Lawsuit"), seeking an *ex parte* temporary restraining order stopping a foreclosure sale which Omni had previously noticed. Omni removed the Lawsuit to the U.S. District Court for the District of Nevada (the "District Court") (Notice of Removal, ECF No. 1),⁴ where it is known as Case No. 2:16-cv-00099. On February 9, 2016, the Lawsuit was consolidated with a separate action filed by Kal-Mor USA LLC (which had also been removed by Omni and is Case No. 2:16-cv-00109, and which case constitutes part of the defined term, the "Lawsuit"). On June 15, 2016, Defendant Omni filed its Answer to First 100, LLC's Complaint and Counterclaim and Third-Party Complaint (ECF 99), asserting various counterclaims and third-party claims for relief against the Plaintiffs and Guarantors (the "Counterclaims and Third-Party Claims").

As set forth in extensive detail in the pleadings and papers in the Lawsuit, numerous disputes (collectively, the "Disputes") have arisen between Plaintiffs, Defendants, and Guarantors regarding, for example:⁵

(a) First 100's default on a line of credit loan extended by Omni pursuant to a loan agreement and other transaction documents dated May 27, 2014;

(b) the ownership, management, and control of certain homeowner association liens/receivables ("HOA Receivables") those acquired from the Association of Poinciana Villages ("APV") and (i) relating to the calendar year 2013 ((the "2013 Receivables"), (ii) relating to the calendar years 2014-2015 (the "2014-2015 Receivables") and (iii) certain additional properties previously managed by Association Capital Resources, LLC (the "ACR Receivables");

⁴ All references herein to "ECF" numbers are to filings in Case No. 2:16-cv-00099.

⁵ This list is not exhaustive.

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Las Vegas, Nevada 89169
(702) 257-1483 FAX: (702) 567-1568

(c) the ownership, management, and control of all other HOA Receivables owned all other HOA Receivables owned by First 100 from time to time from the inception of the Omni loan through the date hereof, if and to the extent serviced by the McCabe Firm, including those relating to Harbor Watch (a/k/a Harbour Watch), Images Condominium Association, Black Bear Reserve, Brightwaters, Autumnwood Grove and Hartlake Cove (a/k/a Hart Lake Cove) (collectively, the "Additional HOA Receivables");

(d) the ownership, management, and control of First 100's other personal property;

(e) the reasonableness of Omni's foreclosure sale on May 25, 2016 regarding such HOA Receivables and other personal property; and

(f) Omni's first-priority security interest, as beneficiary, under deeds of trust in various real properties previously or currently owned by First 100.

Without admitting liability, the Parties waive the entry of findings of fact and conclusions of law by the Court and voluntarily consent to the entry of this Stipulated Judgment fully resolving the Lawsuit, Disputes, Claims, Counterclaims, and Third-Party Claims.

NOW, THEREFORE, it is accordingly ORDERED, ADJUDGED, and DECREED that:

1. First 100 owes Omni a stipulated judgment debt in the amount of Four Million Eight Hundred Thousand Dollars (USD \$4,800,000), but which amount could increase by a specific sum if certain conditions subsequent were not met.

2. Omni is the absolute owner of all right, title, and interest in the 2013 Receivables 2014-2015 Receivables, and ACR Receivables, including without limitation (a) all future proceeds arising therefrom, (b) all undisbursed proceeds thereof being held by any third party, regardless of how such proceeds may have previously been allocated among the Parties, and (c) any rights or privileges enjoyed by, or benefiting, First 100 with respect to those HOA Receivables, including rights or privileges under any continuing powers of attorney granted by a third party.

3. The Court unfreezes the HOA Receivables and all proceeds derived therefrom (meaning, for example, all undisbursed proceeds held by the McCabe law firm may be disbursed upon the unilateral instruction(s) of the Party(ies) to whom such proceeds belong).

4. Upon full repayment of the stipulated judgment debt, Omni shall return or release to First 100 (i) any and all interest in the 2013 Receivables, the 2014-2015 Receivables, and Additional HOA Receivables; (ii) all remaining liens in First 100's claims and litigation; (iii) four specific real properties in Nevada, to First 100 or its Affiliate; and (iv) all real property derived from foreclosure actions on any of the HOA Receivables conveyed.

5. The Lawsuit and any and all Disputes, Claims, Counterclaims, and Third-Party Claims are hereby dismissed with prejudice.

6. This judgment shall not preclude or otherwise impair any claim or defense that may exist or arise between or among the Parties with respect to a breach of the Settlement Agreement. The Court hereby retains jurisdiction (over the Parties, the Lawsuit, the Disputes, Claims, Counterclaims, and Third-Party Claims, and the Settlement Agreement (and alleged breaches thereof)), to hear any further proceedings regarding the same, if necessary or appropriate.

7. Each Party bears responsibility for its own fees and costs incurred in connection with this matter (including, in particular, the Lawsuit).

8. The two monetary bonds deposited with the Clerk of the Court during the Lawsuit, by First 100 (in the amount of \$15,000, deposited on January 21, 2016 (ECF 13-14)) and Omni (in the amount of \$1,000, deposited on June 28, 2016 (ECF 131-32)), are to be immediately released to Omni.

ORDER

IT IS SO ORDERED.

Dated: _____

UNITED STATES DISTRICT JUDGE

Approved as to form and content by:

Dated: January __, 2017

Dated: January __, 2017

**HOWARD & HOWARD ATTORNEYS
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1st One Hundred Holdings, LLC and (2)
Third-Party Defendants 1st One Hundred
Holdings, LLC, Jay Bloom, Carlos
Cardenas, Christopher Morgando, and
Matthew Farkas*

Dated: January __, 2017

Dated: January __, 2017

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2:16-cv-00109)*

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On: MB Initials:
First 100 Holdings/Guarantors: CP

EXHIBIT H

**First 100 and 1st One Hundred Holdings as Guarantor Asset Statements
(Section 18(b)(2))**

[See attached.]

(Exhibits)

EXHIBIT “2”

EXHIBIT “2”

EXHIBIT “A”

EXHIBIT “A”

DECLARATION OF MARTIN BOONE

Martin Boone, being first duly sworn, depose and say that I have personal knowledge of and am competent to testify to the following facts:

1. I am Martin Boone, a principal of Defendant Omni Financial, LLC ("Omni"). I am over the age of 18 and mentally competent. I have personal knowledge of the facts in this matter and if called upon to testify, could and would do so.

2. I make this declaration in support of *Defendant Omni Financial, LLC's Opposition to Plaintiff's Motion for Partial Summary Judgment* ("Omni's Opposition") in *Kal-Mor USA LLC v. Omni Financial LLC et al.*, Case No.: A-17-757601-C.

3. Omni Financial LLC, Orbis Financial LLC and Firmus Financial LLC (collectively, "Omni") are entities in the business, among other things, of making real estate-backed loans.

4. In 2014, First 100 submitted a loan request to Omni. On May 27, 2014, First 100 and Omni entered into a Loan Agreement (as amended and supplemented, the "Loan Agreement"), under which Omni would loan First 100 a maximum of \$5,000,000 (the "Loan") to finance purchases of HOA receivables. As part of that Loan, First 100 (as obligor) executed a Promissory Note dated May 27, 2014 in favor of Omni. First 100 (as pledgor) also entered into a Security Agreement dated May 27, 2014 with Omni. True and correct copies of these Loan Documents were previously submitted in Case No. 2:16-cv-00099-RFB-CWH (D. Nev.) (the "First 100 Lawsuit") and are attached to this Declaration as Exhibit A-1.

5. Unbeknownst to Omni when it extended that Loan, First 100 and Kal-Mor were not independent parties. Documents produced in the First 100 Lawsuit indicated that Greg Darroch—Kal-Mor's principal—owned equity in First 100. Upon information and belief, he still does.

6. On May 29, 2014, Omni filed UCC-1 financing statements with both the Florida Secretary of State and Nevada Secretary of State to evidence its security interest. True and correct copies of those UCC-1 financing statements were previously submitted as ECF 27-6 in Case No. 2:16-cv-00099 (D. Nev.). When Omni filed those UCC-1s, no other entity had an

1 existing UCC-1 against First 100. Thus, Omni thus holds a first-priority security interest against
2 First 100's personal property.

3 7. First 100 also executed deeds of trust in Omni's favor (the "Omni Deeds of
4 Trust"). Those Deeds of Trust encumbered, as security for the Loan, approximately thirty
5 properties in Nevada. Kal-Mor contends it subsequently purchased and currently owns nine of
6 those thirty parcels (the "Kal-Mor Real Properties").

7 8. Unfortunately, some of Deeds of Trust prepared by First 100 contained drafting
8 errors.

9 9. For instance, some of the Deeds of Trust contained clerical problems in need of
10 correction. First 100 had recorded the May, June, and August 2014 Deeds of Trust (as defined in
11 Kal-Mor's Motion, p. 4, ¶3), but erred with certain legal descriptions. Critically, though, there
12 were no errors in the grantor/grantee information, meaning they were valid liens and a title
13 company report would have identified them as an encumbrance. Although the title company
14 advised Omni that the Deeds of Trust were valid documents, it advised Omni to rerecord the
15 Deeds of Trust with corrected legal descriptions. Omni pressed First 100 to fix them, but all
16 through 2014 and 2015, First 100 failed to do so.

17 10. In April and May of 2015, Kal-Mor purchased the Kal-Mor Real Properties at
18 issue in this Motion. Upon information and belief, Kal-Mor began collecting rents from the
19 tenants of those Properties.

20 11. A month later, on May 13, 2015, Mr. Darroch filed a UCC-1 financing statement
21 against First 100, claiming he had loaned money to First 100 and was granted a security interest
22 in certain HOA receivables. Based on his filing date, Mr. Darroch's interest was fourth in
23 priority, behind the interests of Omni, the IRS, and PrenPoinciana, respectively.

24 12. Prior to Kal-Mor's purchases and loan, First 100 committed the first of numerous
25 breaches of the Omni Loan. Among other things, it failed to: (i) pay principal and interest when
26 due; (ii) cure the defects in the Omni Deeds of Trust; (iii) properly prosecute and enforce the
27 HOA receivables; and (iv) provide Omni with required monthly, quarterly, and annual financial
28 statements.

1 13. Omni issued a notice of default on April 8, 2015, a true and correct copy of which
2 is attached hereto as **Exhibit A-11**. First 100 failed to respond, forcing Omni to hire legal counsel.
3 On November 2, 2015, Omni sent First 100 a second notice of default, categorizing its breaches in
4 more detail. That notice accelerated the Loan and demanded payment in full, a true and correct
5 copy of which is attached hereto as **Exhibit A-12**.

6 14. Throughout November 2015, First 100 and Kal-Mor repeatedly promised Omni
7 that Kal-Mor would buy out the Loan at full face value. At times, they promised that a \$4 million
8 pay-off would be wired within hours. Kal-Mor's counsel delivered a draft loan assignment
9 agreement to Omni on November 20, 2015, and Omni responded with a revised draft a few days
10 later. Negotiations continued into early December, until Kal-Mor's counsel simply "went
11 dark"—declining to respond to any email or phone messages. To this day, Omni does not know if
12 Kal-Mor was sincere or if the payoff promises were a mere delay tactic.

13 15. First 100 then asked Omni for a forbearance. Omni and First 100 entered into a
14 Forbearance Agreement dated December 18, 2015, and a related Addendum three days later, a
15 true and correct copy of which is attached as **Exhibit A-13**. Omni agreed to forego foreclosure in
16 exchange for various First 100 promises, including (i) delivery of financial statements by
17 December 18th and (ii) a \$270,500 payment by December 28th. Both deadlines came and went
18 with no performance: First 100 eventually violated virtually every single forbearance term. Given
19 those immediate defaults, Omni suspected the forbearance was another delay tactic, the aim of
20 First 100 and Kal-Mor—acting in concert—being to delay foreclosure and further stifle Omni.

21 16. Given First 100's then year-old payment default, Omni noticed a UCC sale
22 pursuant to NRS Chapter 104, by issuing a "Notification of Disposition of Collateral" dated (the
23 "1st UCC Notice"), a true and correct copy of which is attached hereto as **Exhibit A-14**. In
24 response, First 100 filed suit and sought an emergency, *ex parte* TRO to stop the sale. A few
25 days later, Kal-Mor filed a separate lawsuit against Omni which was also removed. A second
26 "Notification of Disposition of Collateral of *Personal Property* of First 100, LLC dated April 1,
27 2016 (the "2nd UCC Notice") was subsequently sent as well, a true and correct copy of which is
28 attached hereto as **A-15**.

1 17. Omni held the UCC sale on May 25, 2016. The resulting "Bills of Sale" only
2 covered those eight lots of personalty. (Ex. A-16).

3 18. From the Fall of 2015 through January of 2017, I was in near-constant
4 communication with Jay Bloom of First 100 and Greg Darroch of Kal-Mor regarding possible
5 settlement.

6 19. During that time period, I exchanged numerous emails and had numerous
7 telephone conversations with Mr. Darroch. Throughout our discussions and negotiations, I
8 repeatedly stated that Omni intended on foreclosing on the twenty-four properties pledged by
9 First 100 to Omni as collateral for the Loan. We considered numerous potential settlement
10 scenarios, some of which included a resolution of the real property. However, we were never
11 able to reach an agreement regarding the Kal-Mor Properties. Accordingly, we agreed to settle
12 our disputes regarding our claims to First 100's personal property (such as the HOA lien
13 portfolios) with both Omni and Kal-Mor reserving all claims and defenses relating to the real
14 property. In other words, we agreed that our settlement would not impact either party's ability
15 to assert claims and defenses relating to the real property. Our mutual intent is reflected in the
16 written settlement agreement Omni and Kal-Mor executed, a true and correct copy of which is
17 attached as **Exhibit A-3**.

18 20. Similarly, during my communications with Mr. Bloom I also consistently stated
19 that Omni intended to foreclose on the properties pledged by First 100 to Omni as collateral for
20 the Loan. During those discussions, Mr. Bloom repeatedly told me that Omni was still secured
21 by the deeds of trust and we also discussed the fact that any proceeds from foreclosures on those
22 properties would be credited to stipulated debt. Thus, at the time that Omni's settlement with
23 First 100 was negotiated and executed it was our mutual intent and understanding that Omni
24 would maintain its security interest in the real properties and pursue foreclosures against those
25 properties.

26 21. The written settlement agreement with First 100 did not include the carve-out
27 language that was included in the written settlement agreement with Kal-Mor, but only because
28 that issue—i.e., Omni's foreclosure on Kal-Mor Real Properties—was irrelevant to First 100.

1 First 100 knew Omni would proceed with real property foreclosures, but expressly including
2 that in the First 100 Settlement would have been a *non-sequitur*, because First 100 no longer
3 had any real property for Omni to foreclose upon (other than the four properties First 100 still
4 held title to, and agreed to transfer to Omni as part of the settlement). Other than those four
5 parcels, only the twenty-four third party properties remained. A true and correct copy of
6 Omni's written settlement agreement with First 100 is attached as **Exhibit A-4**.

7 22. The written settlement agreement with First 100 reflects that mutual intent. In
8 Section 8(e) Omni required First 100 to confirm that "in transferring the Real Properties...to
9 third parties, [First 100] provided all of those third parties, prior to closing the transfer
10 transaction, with actual notice of the existence of Omni's first-priority security interest in those
11 Real Properties." Omni included this language because it would foreclose on the 24 properties
12 at issue and anticipated baseless motions like the one here.

13 23. Had Omni intended to obtain a judgment on its debt and forfeit its Deeds of
14 Trust, none of the language above from the Kal-Mor or First 100 Settlements would have had
15 any purpose.

16 24. Shortly after settling, Omni's counsel notified First 100 that Omni would be
17 foreclosing but could not locate the original Promissory Note. In lieu of the original, Omni's
18 title company requested that First 100 provide a "Lost Note Affidavit." First 100 signed and
19 returned a Lost Note Affidavit on January 30, 2017, and signed and returned another version on
20 April 21, 2017. A true and correct copy of an email exchange dated January 30, 2017 between
21 myself and Jay Bloom including the Lost Note Affidavit he attached to that email is attached as
22 **Exhibit A-5**, and a true and correct copy of an email exchange dated April 21, 2017, between
23 counsel for Omni and First 100 reflecting this is attached as **Exhibit A-6**. In neither instance
24 did First 100 challenge Omni's course of action or claim that the parties had intended, in their
25 settlement, that Omni forfeited its real property liens.

26 25. In late September and early October of 2016, Omni sent letters to all 24
27 properties, including the nine Kal-Mor Real Properties, directing tenants to pay rents not to their
28 property owners and/or managers, but directly to Omni. Notably, these demands for rents were

1 served before Omni reached a settlement with Kal-Mor. Omni copied those letters to First 100
2 and Kal-Mor, thereby triggering NRS 107A.270, obligating the assignor to remit any rents
3 received by them (instead of by the creditor). To date, however, Omni has only received rents
4 from two of the nine tenants of the Kal-Mor Real Properties (and Kal-Mor responded by
5 attempting to evict one of those tenants). Kal-Mor improperly refuses to hand over the bulk of
6 those rents. Upon information and belief, Kal-Mor's primary motivation for delaying Omni's
7 foreclosure is to continue unlawfully pocketing those rents.

8 26. Following settlement of the federal case regarding First 100's personalty, Omni
9 turned to foreclosing on the 23 real properties lien by its Deeds of Trust. On May 15, 2017,
10 Omni caused a Notice of Breach and Election to Sell under Deeds of Trust (the "Notice of
11 Default") to be recorded with the Clark County Recorder's Office. After the mandatory three-
12 month waiting period required by statute, Omni cause the Trustee to record a "Notice of Trustee
13 Sale." The Notice of Sale scheduled the foreclosure for September 12, 2017.

14 27. In its Motion, Kal-Mor argues that it had no notice of the Omni deeds of trust at
15 the time it purchased the Kal-Mor Properties from First 100. Omni has ordered title reports for
16 all of the Kal-Mor Properties, with the expectation that all of those title reports will show that
17 the Omni deeds of trust were all a matter of public record. Omni has received four of those title
18 reports, and all four show that the Omni deeds of trust would have been discoverable had Kal-
19 Mor obtained a title report. True and correct copies of these title reports are collectively
20 attached as **Exhibit A-7**.

21 28. Due to Kal-Mor's lawsuit, Omni has voluntarily continued the trustee sales on
22 the Kal-Mor Properties to a date to be determined.

23
24
25 8-18-18

26 Date

27
28


Martin Boone

EXHIBIT “3”

EXHIBIT “3”

DECLARATION OF BRIAN J. PEZZILLO

I, Brian J. Pezzillo, depose and state as follows under penalty of perjury:

1. I am over the age of 18 and mentally competent. I am an attorney with Howard & Howard Attorneys PLLC and counsel of record for Defendant Omni Financial, LLC ("Omni"). I make this declaration in support of Omni's *Opposition To First 100, LLC's Motion to Dismiss or Alternatively Motion for Summary Judgment* in this matter. I have personal knowledge of the facts in this matter except for those matters stated upon information and belief, and to those I believe them to be true. If called upon to testify, I could and would do so.

2. Discovery in this case has not begun. The parties have not scheduled or participated in an NRCP 16.1 early case conference and have not submitted a Joint Case Conference Report.

3. During discovery, Omni will seek deposition testimony of Martin Boone of Omni and Jay Bloom of First 100. This testimony will establish that it was always the intent of the parties that the separate settlements reached in Case Nos. 16-cv-00099 and 16-cv-00109 (the "Prior Litigation") between Omni and First 100 would not hinder or otherwise impact Omni's ability to later pursue foreclosures against the real properties pledged to Omni by First 100 as collateral for the underlying loan (the "Real Properties").

4. Omni will also pursue additional discovery to establish that when settlements were reached in the Prior Litigation, Omni and First 100 intended that Omni reserve all rights to assert claims and conduct foreclosure actions against the Real Properties. Omni has already submitted lost note affidavits provided by First 100 after settlement was reached as evidence which reflects this mutual intent. This is also supported by the previously submitted Declaration of Martin Boone. Omni believes that there is additional evidence regarding the conduct of First 100 which will reflect this mutual intent.

5. As discussed in the Declaration of Martin Boone, it is anticipated that First 100's discovery responses and deposition testimony will also affirm, *inter alia*, that: (1) throughout the settlement negotiations and communications between Omni and First 100, Omni repeatedly stated that it intended on foreclosing on the Real Properties; (2) during those discussions, Mr. Bloom

1 repeatedly told Mr. Boone that Omni was still secured by the deeds of trust and discussed the fact
2 that any proceeds from foreclosures on the Real Properties would be credited to the stipulated debt;
3 (3) at the time that Omni's settlement with First 100 was negotiated and executed it was the
4 parties' mutual intent and understanding that Omni would maintain its security interest in the real
5 properties and pursue foreclosures against those properties; (4) that the reason the written
6 settlement agreement with First 100 did not include the carve-out language that was included in the
7 written settlement agreement with Kal-Mor was because that issue—i.e., Omni's foreclosure on
8 the Real Properties—was irrelevant to First 100 because First 100 knew Omni would proceed with
9 real property foreclosures; (5) that the written settlement agreement between Omni and First 100
10 reflects that mutual intent; (6) that, consistent with their mutual intent at the time the First
11 100/Omni settlement was reached, following the settlement First 100 provided Omni with lost note
12 affidavits to assist Omni with pursuing foreclosures against the Real Properties.

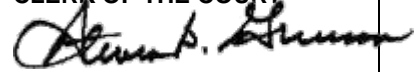
13
14 I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE
15 UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

16 9.17.19

17 Date

16 /s/ Brian J. Pezzillo

17 Brian J. Pezzillo



RPLY

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Attorneys for Defendant First 100, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X; and
ROE ENTITIES I through X, inclusive,

Defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10,

Counter-defendants.

Case No.: A-17-757061-C

Dept. No.: II

**FIRST 100, LLC'S REPLY IN SUPPORT
OF MOTION TO DISMISS OMNI
FINANCIAL, LLC'S CROSSCLAIM
PURSUANT TO NRCP 12(b)(5) OR IN
THE ALTERNATIVE MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: October 14, 2019

Hearing Time: 9:00 a.m.

1 OMNI FINANCIAL, LLC, a foreign limited
2 liability company,

3 Cross-Claimant,

4 vs.

5 FIRST 100, LLC, a Nevada limited liability
6 company; DOES 11 – 20, ROE ENTITIES 11 –
20.

7 Cross-Defendants

8 Cross-defendant First 100, LLC (“First 100”), by and through its attorneys of record, the law
9 firm MAIER GUTIERREZ & ASSOCIATES, hereby files this reply in support of its motion for dismissal
10 of the crossclaims asserted against it in Cross-Claimant OMNI FINANCIAL, LLC’S (“Omni”)
11 Answer to Complaint, Counterclaim and Cross Claim filed on August 12, 2019.

12 This reply is supported by the following Memorandum of Points and Authorities, the
13 pleadings and papers on file in this case, and any oral argument the Court may choose to consider.

14 DATED this 7th day of October 2019.

15 Respectfully submitted,

16 **MAIER GUTIERREZ & ASSOCIATES**

17 */s/ Danielle J. Barraza*

18 _____
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20 Nevada Bar No. 9046
21 DANIELLE J. BARRAZA, ESQ.
22 Nevada Bar No. 13822
23 8816 Spanish Ridge Avenue
24 Las Vegas, Nevada 89148
25 *Attorneys for Defendant First 100, LLC*

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

27 **I. INTRODUCTION**

28 Litigation in this matter commenced over two years ago, on June 19, 2017. Defendant Omni,
only after losing on summary judgment against plaintiff Kal-Mor-USA, LLC (and subsequently
losing on a motion for reconsideration) is now attempting to bring a claim against First 100 for
intentional misrepresentation with respect to certain promises that First 100 allegedly made to Omni

1 which go against the plain and unambiguous terms of the Settlement Agreement that Omni signed
2 after fully consulting with its legal counsel.

3 Specifically, Omni is claiming that prior to the execution of the Settlement Agreement, First
4 100 stated that Omni's rights to foreclose pursuant to its Deeds of Trust would be preserved following
5 the execution of the Settlement Agreement. Omni has resorted to filing this cross-claim against First
6 100 despite the fact that this Court has ruled the Settlement Agreement unambiguously indicates the
7 Deeds of Trust for the Omni Loan were gone upon execution of the Settlement Agreement. In its
8 opposition, Omni continues its pattern of misrepresenting the clear terms of the Settlement Agreement
9 in an effort to manufacture "misrepresentations" that simply aren't there. Omni also harkens back to
10 the Loan Agreement and alleged representations associated with the Loan Agreement, but this Court
11 has already ruled that the Loan Agreement was extinguished by the Settlement Agreement, thus
12 extinguishing First 100's obligations and alleged representations regarding the Loan Agreement.

13 There is also no need to conduct more discovery when this Court has already reviewed all of
14 the relevant documents which speak for themselves in its analysis of Kal-Mor's summary judgment
15 motion.

16 Because Omni cannot establish that it has stated a valid claim for intentional
17 misrepresentation, this Court should dismiss the crossclaim in its entirety, or grant summary judgment
18 in favor of First 100, as there are no facts that will impose liability on First 100.

19 **II. LEGAL ANALYSIS**

20 **A. OMNI IS BARRED FROM LITIGATING ANY CLAIMS THAT IT HAS ALREADY RELEASED** 21 **IN THE SETTLEMENT AGREEMENT**

22 Omni's "Facts Supporting Cross-Claim" includes many "facts" from the 2014 time period
23 which involved First 100 and Omni entering into the Loan Agreement and First 100 executing
24 multiple deeds of trust in Omni's favor. But none of that has any relevance to this litigation, as in the
25 Settlement Agreement, Omni issued a general release to First 100, which stated:

26 . . . Omni hereby unconditionally relieves, releases, acquits and forever discharges
27 First 100, Holdings, and the Guarantors of and from any and all Liabilities and
28 Claims arising out of, concerning, or in any manner relating to, the 2013
Receivables, 2014-2015 Receivables, ACR Receivables, proceeds relating to the
same, the Parties' prior settlement efforts and negotiations, and Enforcement

1 Actions undertaken by Omni with respect to the Omni Loan (including without
2 limitation the UCC Sale and exercise of the assignment or rents).

3 See Omni's Opp. at Ex. 1 at p. 16 of 22 (Bate-stamped as 04188). Thus, in executing the Settlement
4 Agreement, Omni released and discharged First 100 from any purported claims regarding the Omni
5 Loan Agreement and the Receivables, which makes the bulk of Omni's "misrepresentation" claims
6 on pages 4-8 of Omni's opposition inapplicable to this litigation, as Omni obviously elected to enter
7 into a subsequent Settlement Agreement with First 100 which (per this Court's own orders)
8 extinguished the Omni Loan Agreement.

9 Omni also filed the First 100 Judgment (**Exhibit 1**) on February 16, 2017, which
10 unambiguously states that both Omni and First 100 dismissed with prejudice all disputed claims
11 related to the Omni Note and the Deeds of Trust, reserving only the right to enforcement of the First
12 100 Settlement. Pointedly, one of the issues singled out in the First 100 Judgment for dismissal with
13 prejudice was: "Omni's first-priority security interest, as beneficiary, under deeds of trust in various
14 real properties previously or currently owned by First 100." This is exactly what Omni is attempting
15 to litigate with First 100 now, as Omni is making misrepresentation allegations regarding its alleged
16 security interest under deeds of trust in properties owned by First 100. Omni has already dismissed
17 such claims and openly *released* First 100 from liability on such claims, and is only now trying to go
18 after First 100 because it has learned its subjective intent regarding the properties was apparently
19 incorrect.

20 Further, as the Court has acknowledged, regardless of Omni's subjective intent, by "express
21 written agreement of Omni and First 100, the debt under the Omni Loan was gone. If the Omni Loan
22 ceased to exist, then, a fortiori, the security for the Omni Loan ceased to exist." See 4/19/2019 Order
23 Denying Defendant Omni Financial, LLC's Motion for Reconsideration at p. 3. Additionally, "no
24 right to foreclose existed because the underlying debt was extinguished." *Id.* at p. 5.

25 The plain language of the Settlement Agreement simply prohibits Omni from pursuing claims
26 that it has already dismissed First 100 from, which is why this Court should grant summary judgment
27 in favor of First 100.

28 ///

1 **B. OMNI HAS NOT ALLEGED SUFFICIENT FACTS TO STATE A FRAUD CLAIM AGAINST**
2 **FIRST 100**

3 Even after submitting a self-serving declaration from its principal Martin Boone (Opposition
4 at Ex. 2), Omni still has failed to identify the basic details required for a fraud claim which needs to
5 be pled with proper particularity. As far as the time and place of the alleged fraud, Omni is still unable
6 to provide any specifics. The best Omni can come up with is that certain (unspecific representations)
7 were made at some point from “the Fall of 2015 through January of 2017”). *Id.* The exact nature of
8 the alleged fraud has not been identified, as it has not been established exactly what First 100
9 purportedly represented to Omni with respect to Omni’s ability or inability to foreclose on First 100’s
10 properties.

11 Omni points to the selective language in the Settlement Agreement, but that involves notice that
12 First 100 would merely inform third parties about deeds of trust that were extinguished by operation
13 of law – as this Court has acknowledged. *See* 4/19/2019 Order Denying Defendant Omni Financial,
14 LLC’s Motion for Reconsideration at p. 5. First 100 putting third parties on notice of Omni’s claimed
15 interest is separate and distinct from First 100 representing *to Omni* that it would have an affirmative
16 ability to foreclose on certain properties.

17 Omni also makes much of First 100 executing a Lost Note Affidavit, which purportedly would
18 help Omni foreclose on encumbered real property, but again, First 100 providing a Lost Note Affidavit
19 which was designed to be provided to third parties is separate from First 100 representing *to Omni* that
20 Omni has certain foreclosure rights.

21 Finally, further discovery would not change anything, especially as the terms of the Settlement
22 Agreement conclusively establish the parties’ obligations and Omni’s release of First 100’s liability
23 related to the Receivables. There is nothing further to investigate, as Omni’s claim is barred by the
24 plain language of the Settlement Agreement.

25 ///

26 ///

27 ///

28 ///

1 **III. CONCLUSION**

2 Based on the foregoing, this Court should dismiss Omni's cross-claim against First 100 for
3 failure to state a claim, or in the alternative grant summary judgment in favor of First 100.

4 DATED this 7th day of October, 2019.

5 Respectfully submitted,

6 **MAIER GUTIERREZ & ASSOCIATES**

7 /s/ Danielle J. Barraza

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11 Las Vegas, Nevada 89148

Attorneys for Defendant First 100, LLC

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EXHIBIT 1

EXHIBIT 1

JOINTLY SUBMITTED

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FIRST 100, LLC, a Nevada limited liability
company; 1st ONE HUNDRED HOLDINGS,
LLC, a Nevada limited liability company.

Plaintiffs,
vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; PRENPOINCIANA, LLC, a
foreign limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

AND ALL RELATED CLAIMS

Case No. 2:16-cv-00099-RFB-(CWH)

Related Case No. 2:16-cv-00109-RFB-CWH
(Jointly Administered Cases)

STIPULATED JUDGMENT

COME NOW, (1) Plaintiffs and Counter-Defendants First 100, LLC ("First 100") and 1st One Hundred Holdings, LLC ("Holdings," and together with First 100, the "Plaintiffs"), by and through their undersigned attorneys, Maier Gutierrez Ayon; (2) Third-Party Defendants Holdings, Jay Bloom, Carlos Cardenas, Christopher Mergando, and Matthew Farkas (collectively, the "Guinamores"), by and through their undersigned attorneys, Maier Gutierrez Ayon, (3) Defendant, Counterplaintiff, and Third Party Plaintiff Omni Financial, LLC ("Omni"), by and through its undersigned attorneys, Howard & Howard Attorneys PLLC, (4) Defendants PrenPoinciana, LLC and Prentice Lending II LLC (collectively, "PrenPoinciana"), by and through their undersigned attorneys, Greenberg Traurig, LLP; and (5) Plaintiffs KAL-MOR-USA LLC and GIF Management LLC (in Case No. 2:16-cv-00109) (collectively, "Kal Mor USA"), by and through their undersigned attorneys, Marcus & Lenthorn.

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JA001552

RECITALS

On January 15, 2016, First 100 filed a complaint asserting various claims for relief (the "Claims") against Omni and PrenPoinciana in the Eighth Judicial District Court in Clark County, Nevada (the "Lawsuit"), seeking an *ex parte* temporary restraining order stopping a foreclosure sale which Omni had previously noticed. Omni removed the Lawsuit to the U.S. District Court for the District of Nevada (the "District Court") (Notice of Removal, ECF No. 1),¹ where it is known as Case No. 2:16-cv-00099. On February 9, 2016, the Lawsuit was consolidated with a separate action filed by Kal-Mor USA LLC (which had also been removed by Omni and is Case No. 2:16-cv-00109, and which case constitutes part of the defined term, the "Lawsuit"). On June 15, 2016, Defendant Omni filed its Answer to First 100, LLC's Complaint and Counterclaim and Third-Party Complaint (ECF 99), asserting various counterclaims and third-party claims for relief against the Plaintiffs and Guarantors (the "Counterclaims and Third-Party Claims").

As set forth in extensive detail in the pleadings and papers in the Lawsuit, numerous disputes (collectively, the "Disputes") have arisen between Plaintiffs, Defendants, and Guarantors regarding, for example:²

- (a) First 100's default on a line of credit loan extended by Omni pursuant to a loan agreement and other transaction documents dated May 27, 2014;
- (b) the ownership, management, and control of certain homeowner association liens/receivables ("HOA Receivables") those acquired from the Association of Poinciana Villages ("APV") and (i) relating to the calendar year 2013 (the "2013 Receivables"), (ii) relating to the calendar years 2014-2015 (the "2014-2015 Receivables") and (iii) certain additional properties previously managed by Association Capital Resources, LLC (the "ACR Receivables");
- (c) the ownership, management, and control of all other HOA Receivables owned all other HOA Receivables owned by First 100 from time to time from the inception of the Omni loan through the date hereof, if and to the extent serviced by the McCabe Firm, including those relating

¹ All references herein to ECF numbers are to filings in Case No. 2:16-cv-00099.

² This list is not exhaustive.

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1 to Harbor Watch (a/k/a Harbour Watch), Images Condominium Association, Black Bear Reserve,
2 Brightwaters, Autumnwood Grove and Hartlake Cove (a/k/a Hart Lake Cove) (collectively, the
3 "Additional HOA Receivables");

4 (d) the ownership, management, and control of First 100's other personal property;

5 (e) the reasonableness of Omni's foreclosure sale on May 25, 2016 regarding such
6 HOA Receivables and other personal property; and

7 (f) Omni's first-priority security interest, as beneficiary, under deeds of trust in various
8 real properties previously or currently owned by First 100.

9 Without admitting liability, the Parties waive the entry of findings of fact and conclusions
10 of law by the Court and voluntarily consent to the entry of this Stipulated Judgment fully resolving
11 the Lawsuit, Disputes, Claims, Counterclaims, and Third-Party Claims.

12 NOW, THEREFORE, it is accordingly ORDERED, ADJUDGED, and DECREED that:

13 1. First 100 owes Omni a stipulated judgment debt in the amount of Four Million
14 Eight Hundred Thousand Dollars (USD \$4,800,000), but which amount could increase by a
15 specific sum if certain conditions subsequent were not met.

16 2. Omni is the absolute owner of all right, title, and interest in the 2013 Receivables
17 2014-2015 Receivables, and Additional HOA Receivables, including without limitation (a) all
18 future proceeds arising therefrom, (b) all undisbursed proceeds thereof being held by any third
19 party, regardless of how such proceeds may have previously been allocated among the Parties, and
20 (c) any rights or privileges enjoyed by, or benefiting, First 100 with respect to those HOA
21 Receivables, including rights or privileges under any continuing powers of attorney granted by a
22 third party.

23 3. The prior Order entered in this action on April 18, 2016 (ECF No. 60) is hereby
24 vacated, and the restrictions set forth therein upon the distribution of HOA Receivables and the
25 proceeds thereof are null and void. The HOA Receivables and all proceeds derived therefrom
26 (including, for example, all undisbursed proceeds held by the Mediate law firm) may be disbursed
27 upon the mutual instruction of the Party(ies) in accordance with this Stipulated Judgment and

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1 the Stipulated Judgment entered in Case No. 2:16-cv-00109 on January 2, 2017 [ECF No. 58].

2 4. Upon full repayment of the stipulated judgment debt, Omni shall return or release
3 to First 100 (i) any and all interest in the 2013 Receivables, the 2014-2015 Receivables, and
4 Additional HOA Receivables; (ii) all remaining liens in First 100's claims and litigation; (iii) four
5 specific real properties in Nevada, to First 100 or its Affiliate; and (iv) all real property derived
6 from foreclosure actions on any of the HOA Receivables conveyed.

7 5. The Lawsuit and any and all Disputes, Claims, Counterclaims, and Third-Party
8 Claims are hereby dismissed with prejudice.

9 6. This judgment shall not preclude or otherwise impair any claim or defense that may
10 exist or arise between or among the Parties with respect to a breach of the Settlement Agreement.
11 The Court hereby retains jurisdiction (over the Parties, the Lawsuit, the Disputes, Claims,
12 Counterclaims, and Third-Party Claims, and the Settlement Agreement (and alleged breaches
13 thereof)), to hear any further proceedings regarding the same, if necessary or appropriate.

14 7. Each Party bears responsibility for its own fees and costs incurred in connection
15 with this matter (including, in particular, the Lawsuit).

16 8. The two monetary bonds deposited with the Clerk of the Court during the Lawsuit,
17 by First 100 (in the amount of \$15,000, deposited on January 21, 2016 (ECF 13-14)) and Omni (in
18 the amount of \$1,000, deposited on June 28, 2016 (ECF 131-32)), are to be immediately released
19 to Omni.

20 ORDER

21 IT IS SO ORDERED.

22 Dated: February 16, 2017.

23
24 
25 RICHARD F. BOULWARE, II
26 United States District Judge
27

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Approved as to form and content by:

Dated: February 14, 2017

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Dated: February 14, 2017

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Dated: February 14, 2017

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1st One Hundred Holdings, LLC and (2)
Third-Party Defendants 1st One Hundred
Holdings, LLC, Jay Bloom, Carlos
Cardenas, Christopher Morgando, and
Matthew Parkas*

Dated: February 14, 2017

KOLFSAR & LEATHAM

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*Attorneys for Plaintiffs KAL-MOR-USA LLC
and GFY Management LLC (in Case No.
2:16-cv-00109)*

Other Title to Property

COURT MINUTES

October 14, 2019

A-17-757061-C Kal-Mor-USA, Inc., Plaintiff(s)
vs.
Omni Financial, LLC, Defendant(s)

October 14, 2019 09:00 AM First 100, LLC s Motion To Dismiss Omni Financial, LLC s
Crossclaim Pursuant To NRCP 12(B)(5) Or In The Alternative
Motion For Summary Judgment

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Vargas, Elizabeth

RECORDER: Easley, Dalayne

REPORTER:

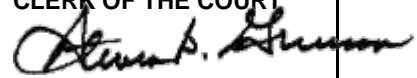
PARTIES PRESENT:

Brian J. Pezzillo Attorney for Counter Claimant, Cross
Claimant, Defendant

Danielle J. Barraza Attorney for Cross Defendant, Defendant

JOURNAL ENTRIES

Arguments by Ms. Barraza and Mr. Pezzillo regarding the merits of the Motion to Dismiss.
COURT ORDERED, Motion DENIED. Court directed Omni to plead with specificity the facts
that would establish a valid claim for intentional misrepresentation, and specifically who, to
whom, and when representations were made to be amended within 10 days.



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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

OMNI FINANCIAL, LLC a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10.

Counter-defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Cross-Claimant,

vs.

Case No.: A-17-757061-C

Dept. 2

NOTICE OF ENTRY OF ORDER

JA001558

FIRST 100, LLC, a Nevada limited liability company; DOES 11 – 20, ROE ENTITIES 11 – 20.

Cross-Defendants.

PLEASE TAKE NOTICE that on the 21st day of October, 2019, an Order Denying First 100, LLC’s Motion to Dismiss Omni Financial, LLC’s Crossclaim Pursuant to NRCP 12(B)(5) or in the Alternative Motion for Summary Judgment was filed in the above-referenced action. A copy of which is attached hereto and incorporated herein by reference.

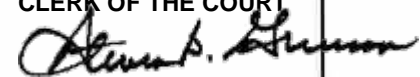
DATED this 21st day of October, 2019.

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/s/ Amber Clayton
An Employee of Howard & Howard Attorneys PLLC



ORD

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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

OMNI FINANCIAL, LLC a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10.

Counter-defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Case No.: A-17-757061-C

Dept. 2

**ORDER DENYING FIRST 100, LLC'S
MOTION TO DISMISS OMNI
FINANCIAL, LLC'S CROSSCLAIM
PURSUANT TO NRCP 12(B)(5) OR IN
THE ALTERNATIVE MOTION FOR
SUMMARY JUDGMENT**

DATE: October 14, 2019

TIME: 9:00 a.m.

OCT 15 2019

1

1 Cross-Claimant,
2 vs.

3 FIRST 100, LLC, a Nevada limited liability
4 company; DOES 11 – 20, ROE ENTITIES
5 11 – 20.

6 Cross-Defendants.
7

8 This matter came before the Court on October 14, 2019 on FIRST 100, LLC'S MOTION
9 TO DISMISS OMNI FINANCIAL, LLC'S CROSSCLAIM PURSUANT TO NRCP 12(B)(5)
10 OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT ("Motion"). The Court
11 having reviewed the Motion, Omni Financial, LLC's Opposition to the Motion and First 100's
12 Reply in Support of the Motion and having accepted oral argument of the parties and being fully
13 advised in the premises finds as follows:

14 It is hereby ORDERED, ADJUDGED and DECREED that the Motion to Dismiss Omni
15 Financial, LLC's Crossclaim Pursuant to NRCP 12(b)(5) or in the Alternative Motion for
16 Summary Judgment is DENIED.

17 It is further ORDERED, ADJUDGED and DECREED that Omni shall have ten (10) days
18 to supplement its Cross-claim with additional facts more specifically setting forth the facts and
19 circumstances with which support its allegations of Fraud.

20 IT IS SO ORDERED.


21 Dated: October 17, 2019

22 
District Court Judge
23 

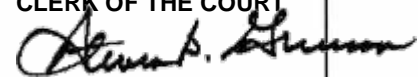
1 RESPECTFULLY SUBMITTED:

3 HOWARD & HOWARD ATTORNEYS PLLC

4 Dated: October 15, 2019

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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES 1
through X and ROE ENTITIES I through X;

Defendants.

OMNI FINANCIAL, LLC a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10.

Counter-defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Cross-Claimant.

Case No.: A-17-757061-C

Dept. 2

**FIRST AMENDED CROSS CLAIM OF
OMNI FINANCIAL, LLC**

Cross-Claimant,
vs.

FIRST 100, LLC, a Nevada limited liability
company; DOES 11 – 20, ROE ENTITIES
11 – 20.

Cross-Defendants.

Defendant Omni Financial, LLC (“Omni”) submits the following First Amended Cross-Claim against First 100, LLC. Nothing herein should be deemed to affect the Answer or Counterclaim filed by Omni on August 12, 2019 in response to the Complaint filed by Kal-Mor-USA the contents of which are incorporated herein as if set forth in full. Omni states as follows with regard to its Cross-claim against First 100, LLC:

1. Omni is a California limited liability company.
2. Cross-Defendant, First 100, LLC is a Nevada limited liability company which at all times relevant to the facts set forth in this Cross-claim was doing business in Clark County, Nevada.
3. Defendants DOES 11 – 20, and ROE ENTITIES 11 – 20, are unknown to Omni at the present time and therefore named by fictitious names. Omni will seek leave of Court to amend its Cross-claim to show the true names of the parties when they have been identified. Upon information and belief, it is alleged that each fictitious party is in some manner responsible for the damages incurred by Omni.
4. Defendants DOES 1 – 10, and ROE ENTITIES 1 – 10, are unknown to Omni at the present time and therefore named by fictitious names. Omni will seek leave of Court to amend its Counterclaim to show the true names of the parties when they have been identified. Upon information and belief, it is alleged that each fictitious party is in some manner responsible for the damages incurred by Omni.
5. In 2014, Omni agreed to loan up to \$5 million to First 100, LLC (“First 100”) to

1 finance the purchase and enforcement of homeowner association receivables (the "Loan").

2 6. On May 27, 2014, (i) Omni and First 100 entered into a Loan Agreement; (ii)
3 First 100 executed a Promissory Note and Security Agreement in Omni's favor; and (iii) certain
4 First 100 principals issued Payment Guarantees in Omni's favor.

5 7. The Security Agreement granted Omni a security interest in all of First 100's
6 present and future-acquired personal property, ranging from HOA Receivables to accounts to
7 equipment and so forth, as further evidenced by first-in-time UCC-1 filings made with the
8 Secretary of State of Nevada and Florida.

9 8. On or about May 27, 2014, First 100 also executed multiple deeds of trust in
10 Omni's favor (the "Omni Deeds of Trust").

11 9. The Omni Deeds of Trust encumbered, as security for the Loan, approximately
12 thirty properties in the State of Nevada.

13 10. The Omni Deeds of Trust were recorded on May 27, 2014 (the "May 2014 Deed
14 of Trust"), June 17, 2014 (the "June 2014 Deed of Trust") and August 21, 2014 (the "August
15 2014 Deed of Trust").

16 11. The May 2014 Deed of Trust was recorded in the official records of the Clark
17 County, Nevada Recorder as instrument number 20140529-0001342 and re-recorded as
18 instrument number 20170424-0000178.

19 12. Pursuant to the May 2014 Deed of Trust the following properties were secured:

- 20 a. 1217 Ncva Ranch Avenue, North Las Vegas, NV 89081 (APN 124-26-
21 311-029);
- 22 b. 230 East Flamingo Road #330, Las Vegas, NV 89169 (APN 162-16-810-
23 355);
- 24 c. 2615 West Gary Avenue #1065, Las Vegas, NV 89123 (APN 177-20-
25 813-127);
- 26 d. 6575 Shining Sand Avenue, Las Vegas, NV 89142 (APN 161-10-511-
27 072).

13. The June 2014 Deed of Trust secured the following properties in favor of Omni:
 - a. 4921 Indian River Drive, #112, Las Vegas, NV 89103 (APN 163-24-612-588);
 - b. 5009 Indian River Drive #155, Las Vegas, NV 89103 (APN 163-24-612-639);
 - c. 5295 Indian River Drive, #314, Las Vegas, NV 89103 (APN 163-24-612-798);
 - d. 4400 Sandy River Drive #16, Las Vegas, NV 89103) (APN 163-24-612-500).

14. The August 2014 Deed of Trust secured the following property:
 - a. 5782 Camino Ramon Avenue, Las Vegas, NV 89156 (APN 140-21-611-018).

15. Kal-Mor contends it subsequently purchased and owns nine of those thirty parcels (the "Kal-Mor Properties").

16. In 2013, 2014 and 2015, Kal-Mor purchased several properties from First 100, including the Kal-Mor Properties at issue here.

17. First 100 represented to Omni that it "in transferring the Real Properties...to third parties, [First 100] provided all of those third parties, prior to closing the transfer transaction, with actual notice of the existence of Omni's first-priority security interest in those Real Properties."

18. Upon information and belief, and unbeknownst to Omni when it extended the Loan, First 100 and Kal-Mor were *not* independent parties. Greg Darroch—Kal-Mor's principal, owned equity in First 100.

19. Upon information and belief it is alleged that Mr. Darroch still owns equity in First 100.

20. Under Nevada law, a deed of trust automatically "creates an assignment of rents arising from the real property described in the security instrument, unless the security instrument

1 provides otherwise.” NRS 107A.230(1).

2 21. Prior to Kal-Mor’s purchases First 100 breached the Loan.

3 22. Among other things, it failed to: (i) pay principal and interest when due; (ii) cure
4 the defects in Omni’s Deeds of Trust; (iii) properly prosecute and enforce the HOA receivables;
5 and (iv) provide Omni with required monthly, quarterly, and annual financial statements.

6 23. Omni issued a notice of default on April 8, 2015.

7 24. First 100 failed to respond, forcing Omni to hire legal counsel.

8 25. On November 2, 2015, Omni sent First 100 a second notice of default, categorizing
9 First 100’s breaches in more detail. That notice accelerated the Loan and demanded payment in
10 full.

11 26. Throughout November 2015, First 100 and Kal-Mor repeatedly promised Omni
12 that Kal-Mor would buy out the Omni Loan at full face value.

13 27. At times, First 100 and Kal-Mor promised Omni that a \$4 million pay-off would
14 be wired within hours.

15 28. Kal-Mor’s counsel delivered a draft loan assignment agreement to Omni on
16 November 20, 2015, and Omni responded with a revised draft a few days later.

17 29. Negotiations continued into early December, until Kal-Mor’s counsel simply
18 “went dark”— declining to respond to any email or phone messages.

19 30. Upon information and belief it is alleged that Kal-Mor’s entire loan payoff
20 proposals were a ruse to buy First 100 more time.

21 31. Omni and First 100 entered into a Forbearance Agreement dated December 18,
22 2015, and a related Addendum three days later.

23 32. Omni agreed to forego foreclosure over First 100’s personalty in exchange for
24 various First 100 promises, including (i) delivery of financial statements by December 18th and
25 (ii) a \$270,500 payment by December 28th.

26 33. Both deadlines came and went with no performance: First 100 eventually violated
27 virtually every single forbearance term.

1 34. Given those immediate defaults, Omni suspected the forbearance was another
2 delay tactic, the aim of First 100 and Kal-Mor—acting in concert—being to delay foreclosure and
3 further stifle Omni.

4 35. Given First 100's then year-old payment default, Omni noticed a UCC sale
5 pursuant to NRS Chapter 104, by issuing a "Notification of Disposition of Collateral" in January
6 2016 (the "1st UCC Notice").

7 36. In response, First 100 filed suit and sought an emergency, *ex parte* TRO to stop
8 the sale.

9 37. Kal-Mor filed a virtually identical suit and emergency, *ex parte* TRO request (Case
10 No. A-16-730447-C).

11 38. Over the course of the next year of proceedings, First 100 and Kal-Mor's positions
12 were virtually 100% in alignment as Kal-Mor, on many occasions, filed one- to two-paragraph
13 joinders to lengthy First 100 filings. (*See, e.g.* Case No. 2:16-cv-00099, ECF 20, 65, 91).

14 39. Omni removed the two cases to federal court, and they were consolidated into one
15 case.

16 40. Giving First 100 and Kal-Mor the benefit of the doubt, the U.S. District Court
17 granted a TRO and postponed Omni's foreclosure sale. (Case No. 2:16-cv-00099, ECF 21).

18 41. Several months later, after three days of evidentiary hearings and extensive
19 briefings and oral arguments, the U.S. District Court held that: (i) the original TRO was wholly
20 unwarranted; (ii) Omni could proceed with the foreclosure sale; and (iii) Omni was entitled to
21 Kal-Mor's TRO bond.

22 42. Not only was Kal-Mor a party to the federal proceedings, but its disputes with
23 Omni were resolved in an agreement specifically addressing the Kal-Mor Real Properties and
24 anticipating Omni's future real-property foreclosure actions.

25 43. In documents dated November 23, 2016, Omni and Kal-Mor agreed to a (i)
26 "Settlement and Mutual General Release Agreement" (the "Kal-Mor Settlement"); and (ii)
27 "Stipulation and Order for Entry of Final Judgment" (the "Kal-Mor SAO"). Critically, the former
28

1 states:

2 W. The Parties now desire to resolve all differences, disputes and
3 disagreements between them relating to the 2014-2015 Receivables and the ACR
4 Receivables. ***This Agreement, however, is not intended to address or resolve any
dispute between the Parties as to the Kal-Mor Real Properties.***

5 Notwithstanding the terms provided herein, ***Omni reserves all rights to
assert claims and conduct Enforcement Actions relating to any asset or property***
6 other than the 2013 Receivables, 2014-2015 Receivables, and/or ACR Receivables,
7 whether owned (previously, currently, or in the future) by GFY or a third party,
including but not limited to the Kal-Mor Real Properties, associated proceeds, rents,
and/or other assets.

8 44. The Kal-Mor SAO states:

9 The entry final judgment by the Court pursuant to this Stipulation shall not preclude
10 or otherwise impair any claim or defense that may exist between the Parties other than those
expressly stated in the Complaint or the Counterclaim.

11 45. Several weeks later, Omni and First 100 entered into a similar agreement ("First
12 100 Settlement").

13 46. First 100 and Omni each understood that the First 100 Settlement entered into
14 between the parties would not preclude Omni's ability and right to foreclose on the properties
15 which are subject of its Deeds of Trust and First 100 actively assisted Omni with the foreclosure
16 of its Deeds of Trust.

17 47. Omni was in constant discussions with First 100 and Kal-Mor during that time,
18 and Omni consistently and unequivocally told both of them it would be foreclosing on the Kal-
19 Mor Properties.

20 48. While negotiating the First 100 Settlement, Jay Bloom of First 100 repeatedly told
21 Martin Boone of Omni that Omni was still secured by the Deeds of Trust.

22 49. The First 100 Settlement specifically stated no third parties were being granted any
23 rights by virtue of the Settlement Agreement.

24 50. Kal-Mor was specifically identified as not being afforded any rights and under the
25 First 100 Settlement Agreement.

26 51. Confirming the representations leading up to the execution of the Settlement
27
28

1 Agreement between Omni and First 100, First 100 made affirmative representations within the
2 Settlement Agreement confirming the fact that Omni was entitled to foreclose upon the relevant
3 Deeds of Trust.

4 52. In the Settlement Agreement [p. 11 of 22] with an effective date of January 16th,
5 2017 First 100 represented through Jay Bloom:

6 Representation. First 100 (for itself, Holdings, Guarantors, and its and their Affiliates)
7 hereby represents and warrants to Omni that in transferring the Real Properties (other than
8 the four Real Properties to which it still retains title) to third parties, Omni [should read
9 First 100] provided all of those third parties, prior to closing the transfer transaction, with
10 actual notice of the existence of Omni's first-priority security interest in those Real
11 Properties. This representation and warranty is true and may not be or become false or
12 misleading in whole or in part without that constituting a material breach hereof. This
13 representation and warranty shall survive the termination or expiration of this Agreement.

14 53. Upon information and belief it is alleged that this statement false and that First 100
15 failed to make the required representation as it affirmatively represented it would.

16 54. Additionally, First 100, acting through Jay Bloom, affirmatively represented in the
17 aforementioned Settlement Agreement [p. 11 of 22] that:

18 Omni shall have the right, but not the obligation, to advance additional funds
19 that may be required to:

20 Retain attorneys, *initiate foreclosure*, bid at foreclosure sales, manage and repair
21 properties to which Omni has taken title, satisfy rival liens, collect rents, enforce
22 settlements, and/or to otherwise pursue such collections . . .

23 55. Upon information and belief and as alleged in its Motion to Dismiss filed on
24 September 3, 2019 and in the Reply in support therefore filed on October 7, 2019, it is alleged
25 that First 100's statement at the time of execution of the Settlement Agreement was false and First
26 100 actually believed that Omni did not have the right to foreclose upon various properties at
27 issue and made the above statement with fully knowledge of its falsity in order to induce Omni to
28 enter into the Settlement Agreement.

56. Shortly after settling, Omni's counsel notified First 100 that Omni would be
foreclosing on the encumbered real property, but could not locate the original 2014 Promissory

1 Note, which its trustees (under the Deeds of Trust) were requesting.

2 57. In lieu of the original, Omni's title company requested that First 100 provide a
3 "Lost Note Affidavit."

4 58. First 100 signed and returned a Lost Note Affidavit on January 30, 2017 and
5 provided the original to the title company.

6 59. On January 27, 2017 at 10:29 a.m., Martin Boone of Omni contacted Jay Bloom
7 of First 100 regarding the need to acquire a Lost Note Affidavit.

8 60. On January 30, 2017 Jay Bloom of First 100 executed a Lost Note Affidavit, under
9 oath, which stated in part:

10 a. The Omni Loan was governed and evidenced by various contracts,
11 addenda and amendments (collectively, the "Loan Documents"),
12 including without limitation that certain:

13 i. Loan Agreement dated May 27, 2014, by First 100, as borrower,
14 and Omni as the lead participating lender;

15 ii. Promissory Note dated May 27, 2014 by First 100, as obligor, and
16 Omni as payee (the "Note");

17 iii. Security Agreement da ed May 27, 2014 between First 100, as
18 pledger, and Omni as pledgee, supported by UCC-1 filings by
19 Omni against First 100 in Nevada and Florida; and

20 b. numerous deeds of trust and mortgages granted (or to have been granted)
21 by First 100, as trustor or mortgagor, in favor of Omni, as beneficiary or
22 mortgagee, over real property located in the State of Nevada and
23 elsewhere.

24 61. On April 6, 2017 in email communications between Jay Bloom of First 100 and
25 Kimberlee Kay and Martin Boone of Omni, Jay Bloom inquired as to what properties were being
26 foreclosed upon by Omni.

27 62. Several hours after the email of April 6, 2017, Martin Boone of Omni phoned Jay
28

1 Bloom of First 100 and explained which properties were being foreclosed upon. Jay Bloom
2 agreed to execute necessary documents to assist with Omni's planned action of foreclosure and
3 did not dispute the fact that Omni had the ability to foreclose on various properties.

4 63. On April 14, 2017 at 4:25 p.m., Kimberlee Kay of Omni emailed Jay Bloom of
5 First 100 and enclosed a copy of the Lost Note Affidavit which Omni was in need of in order to
6 proceed with the foreclosure of the Properties.

7 64. Jay Bloom executed the requested Lost Note Affidavit, under oath on April 21,
8 2017 which stated in part:

9 a. The Omni Loan was governed and evidenced by various contracts,
10 addenda and amendments (collectively, the "Loan Documents"),
11 including without limitation that certain:

12 i. Loan Agreement dated May 27, 2014, by First 100, as borrower,
13 and Omni as the lead participating lender;

14 ii. Promissory Note dated May 27, 2014 by First 100, as obligor, and
15 Omni as payee (the "Note");

16 iii. Security Agreement dated May 27, 2014 between First 100, as
17 pledger, and Omni as pledgee, supported by UCC-1 filings by
18 Omni against First 100 in Nevada and Florida; and

19 iv. numerous deeds of trust and mortgages granted (or to have been
20 granted) by First 100, as trustor or mortgagor, in favor of Omni,
21 as beneficiary or mortgagee, over real property located in the
22 State of Nevada and elsewhere.

23 65. In neither instance did First 100 challenge Omni's course of action or claim that
24 the parties had intended in their settlement that Omni forfeit its real property liens.

25 66. Following settlement of the federal case regarding First 100's *personalty*, Omni
26 turned to foreclosing on the 24 real properties liened in its Deeds of Trust.

27 67. On May 15, 2017, Omni caused a Notice of Breach and Election to Sell under
28

Deeds of Trust (the "Notice of Default") to be recorded with the Clark County Recorder's Office.

68. After the mandatory three-month waiting period required by statute, Omni caused the Trustee to record a "Notice of Sale."

69. The Notice of Sale scheduled the foreclosure sale for September 12, 2017.

70. The sales were voluntarily postponed pursuant to negotiations with Kal-Mor.

71. In late September and early October of 2016, Omni sent letters to all 24 properties, including the properties in which Plaintiff claims an interest (the "Properties in Dispute"), directing tenants to pay rents not to their property owners and/or managers, but directly to Omni.

72. Upon information and belief, the Plaintiff has directed the tenants occupying the Properties in Dispute to ignore Omni's demand for payment of rents, thereby depriving Omni of its right to those rents as provided by NRS 107A.230.

73. Plaintiff contends that the Omni Deeds of Trust are not legally enforceable and thus that Omni has no valid interest in any of the Properties in Dispute.

74. Pursuant to Nevada law, the Plaintiff had notice of the Omni Deeds of Trust at the time it purportedly took an interest in the Properties in Dispute.

75. Plaintiff contends that Omni has waived its rights in the Properties in Dispute as well as the rents from said properties.

76. In May 2017, Omni caused a Notice of Breach and Election to Sell Under Deeds of Trust to be recorded against the Properties in Dispute.

77. In August of 2017, Omni caused to be recorded a Notice of Trustee's Sale scheduling a non-judicial foreclosure sale of each of the Properties in Dispute.

78. Each of the Plaintiffs has challenged Omni's efforts to foreclose upon the Properties in Dispute and contends that the Omni Deeds of Trust are void and of no effect.

79. In light of this dispute, Omni voluntarily agreed to continue the scheduled foreclosure sales.

80. This action was filed by Plaintiff in 2017.

83. Implicit in the Court's ruling was that both Omni and First 100 intended their settlement agreement to constitute a novation.

84. Neither Omni, nor First 100, intended the First 100 Settlement Agreement to constitute a novation or affect Omni's rights under the Deeds of Trust.

85. When Omni and First 100 entered into the Settlement Agreement, it was with the express understanding that Omni's rights to foreclose pursuant to its Deeds of Trust would be preserved.

86. First 100, acting through its principal, Jay Bloom, expressly stated in connection with the execution of the Settlement Agreement that Omni's Deeds of Trust would remain intact.

87. The Court's Order granting the Motion for Partial Summary Judgment finding that the intent of Omni and First 100 to effectuate a novation of contract by entering into the Settlement Agreement does not accurately reflect the intent of either party.

(Intentional Misrepresentation)

88. Omni incorporates the preceding paragraph of the Cross-claim and the Counter-claim as if expressly set forth herein.

89. To the extent that the Court's order granting the Motion for Partial Summary is accurate and First 100 did not have an intent to allow Omni to pursue foreclosure of the real properties subject of its Deeds of Trust, then First 100's representations were false and were made with full knowledge of their falsity.

90. Omni relied upon the representations of First 100 as made by Jay Bloom in agreeing to enter into the Settlement Agreement.

91. If not for the wanton and malicious representations of First 100 relating to Omni's

ability to foreclose upon the real properties at issue, Omni would not have entered into the First 100 Settlement Agreement.

92. Omni has expended extensive time and money seeking to foreclose upon the properties subject of the First 100 Settlement Agreement and otherwise complying with the First 100 Settlement Agreement.

93. Omni has suffered damages in an amount in excess of \$15,000 as a result of the conduct of First 100 if the Court's prior ruling is accurate.

94. To the extent the Court's prior ruling regarding the issue of novation is accurate, the misrepresentations were made intentionally, were wanton and malicious and therefore entitle Omni to punitive damages.

95. Omni is entitled to an award of special damages including attorneys' fees, costs and interest in an amount in excess of \$15,000.

WHEREFORE, Omni prays for relief as follows:

- A. For monetary damages in excess of \$15,000 on all claims;
- B. For costs and attorneys' fees incurred in pursuing this action;
- C. For punitive damages; and,
- D. For such other and further relief as the Court deems proper.

HOWARD & HOWARD ATTORNEYS PLLC

Dated: October 31, 2019

By: /s/ Brian J. Pezzillo
Robert Hernquist, Nevada Bar No. 10616
Brian J. Pezzillo; Nevada Bar No. 7136

Attorneys for Defendant Omni Financial, LLC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 31st day of October 2019, I caused to be served a copy of the foregoing First Amended Cross Claim of Omni Financial, LLC in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

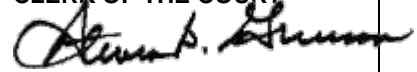
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Attorneys for Defendant First 100, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X; and
ROE ENTITIES I through X, inclusive,

Defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10,

Counter-defendants.

Case No.: A-17-757061-C
Dept. No.: XVIII

**FIRST 100, LLC'S ANSWER TO OMNI
FINANCIAL, LLC'S FIRST AMENDED
CROSS CLAIM**

1 OMNI FINANCIAL, LLC, a foreign limited
2 liability company,

3 Cross-Claimant,

4 vs.

5 FIRST 100, LLC, a Nevada limited liability
6 company; DOES 11 – 20, ROE ENTITIES 11 –
7 20.

8 Cross-Defendants

9 Cross-defendant First 100, LLC (“First 100” or “Cross-defendant”), by and through its
10 attorneys of record, the law firm MAIER GUTIERREZ & ASSOCIATES, hereby answers the crossclaims
11 asserted against it in Cross-Claimant OMNI FINANCIAL, LLC’s (“Omni”) First Amended
12 Crossclaim (“Amended Crossclaim”), filed on October 31, 2019 as follows:

13 First 100 denies each and every allegation contained in the Amended Crossclaim except those
14 allegations which are hereinafter admitted, qualified or otherwise answered.

15 **ANSWER**

16 1. Cross-defendant is without sufficient knowledge or information upon which to form
17 a belief as to the truth of the allegation contained in said paragraph, and therefore generally and
18 specifically denies the allegations contained therein

19 2. Cross-defendant admits that First 100, LLC is a Nevada limited liability company
20 which at all times relevant was doing business in Clark County, Nevada.

21 3. The allegations contained in this paragraph of the Amended Crossclaim do not relate
22 to First 100, thus no response is required. To the extent a response is deemed required, Cross-
23 defendant specifically and generally denies each and every allegation.

24 4. The allegations contained in this paragraph of the Amended Crossclaim do not relate
25 to First 100, thus no response is required. To the extent a response is deemed required, Cross-
26 defendant specifically and generally denies each and every allegation.

27 5. The allegations contained in this paragraph attempt to characterize the terms of a
28 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
denies the allegations contained in this paragraph.

1 6. The allegations contained in this paragraph attempt to characterize the terms of a
2 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
3 denies the allegations contained in this paragraph.

4 7. The allegations contained in this paragraph attempt to characterize the terms of a
5 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
6 denies the allegations contained in this paragraph.

7 8. The allegations contained in this paragraph attempt to characterize the terms of a
8 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
9 denies the allegations contained in this paragraph.

10 9. The allegations contained in this paragraph attempt to characterize the terms of a
11 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
12 denies the allegations contained in this paragraph.

13 10. The allegations contained in this paragraph attempt to characterize the terms of a
14 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
15 denies the allegations contained in this paragraph.

16 11. The allegations contained in this paragraph attempt to characterize the terms of a
17 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
18 denies the allegations contained in this paragraph.

19 12. The allegations contained in this paragraph (along with all subparts) attempt to
20 characterize the terms of a written document, which speaks for itself. Therefore, Cross-defendant
21 specifically and generally denies the allegations contained in this paragraph.

22 13. The allegations contained in this paragraph (along with all subparts) attempt to
23 characterize the terms of a written document, which speaks for itself. Therefore, Cross-defendant
24 specifically and generally denies the allegations contained in this paragraph.

25 14. The allegations contained in this paragraph (along with its subpart) attempt to
26 characterize the terms of a written document, which speaks for itself. Therefore, Cross-defendant
27 specifically and generally denies the allegations contained in this paragraph.

28 15. Cross-defendant lacks the knowledge or information sufficient to form a belief as to

1 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
2 specifically and generally denies the same.

3 16. The allegations contained in this paragraph are vague and ambiguous with respect to
4 which properties Kal-Mor is referring to, therefore, Cross-defendant lacks the knowledge or
5 information sufficient to form a belief as to the truth or falsity of the allegations contained in this
6 paragraph of the crossclaim, and specifically and generally denies the same.

7 17. The allegations contained in this paragraph attempt to characterize the terms of a
8 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
9 denies the allegations contained in this paragraph.

10 18. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
11 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
12 specifically and generally denies the same.

13 19. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
14 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
15 specifically and generally denies the same.

16 20. To the extent the allegations contained in this paragraph are legal conclusions, no
17 response is required. To the extent an answer is required, Cross-defendant generally and specifically
18 denies the allegations contained therein.

19 21. Cross-defendant denies the allegations contained in this paragraph.

20 22. Cross-defendant denies the allegations contained in this paragraph.

21 23. The allegations contained in this paragraph attempt to characterize the terms of a
22 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
23 denies the allegations contained in this paragraph.

24 24. Cross-defendant denies the allegations contained in this paragraph.

25 25. The allegations contained in this paragraph attempt to characterize the terms of a
26 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
27 denies the allegations contained in this paragraph.

28 26. Cross-defendant lacks the knowledge or information sufficient to form a belief as to

1 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
2 specifically and generally denies the same.

3 27. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
4 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
5 specifically and generally denies the same.

6 28. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
7 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
8 specifically and generally denies the same.

9 29. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
10 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
11 specifically and generally denies the same.

12 30. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
13 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
14 specifically and generally denies the same.

15 31. The allegations contained in this paragraph attempt to characterize the terms of a
16 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
17 denies the allegations contained in this paragraph.

18 32. The allegations contained in this paragraph attempt to characterize the terms of a
19 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
20 denies the allegations contained in this paragraph.

21 33. The allegations contained in this paragraph attempt to characterize the terms of a
22 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
23 denies the allegations contained in this paragraph.

24 34. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
25 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
26 specifically and generally denies the same.

27 35. Cross-defendant denies the allegations regarding a “year-old payment default.” The
28 remaining allegations contained in this paragraph attempt to characterize the terms of a written

1 document, which speaks for itself. Therefore, Cross-defendant specifically and generally denies the
2 allegations contained in this paragraph.

3 36. The allegations contained in this paragraph attempt to characterize the terms of a
4 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
5 denies the allegations contained in this paragraph.

6 37. The allegations contained in this paragraph attempt to characterize the terms of a
7 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
8 denies the allegations contained in this paragraph.

9 38. The allegations contained in this paragraph contain a self-serving summary of legal
10 proceedings and therefore, no response is required. To the extent an answer is required, Cross-
11 defendant generally and specifically denies the allegations contained therein.

12 39. The allegations contained in this paragraph relate to legal conclusions/legal
13 proceedings. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
14 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
15 specifically and generally denies the same.

16 40. The allegations contained in this paragraph relate to legal conclusions/legal
17 proceedings. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
18 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
19 specifically and generally denies the same.

20 41. The allegations contained in this paragraph attempt to characterize the terms of a
21 written document/order, which speaks for itself. Therefore, Cross-defendant specifically and
22 generally denies the allegations contained in this paragraph.

23 42. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
24 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
25 specifically and generally denies the same.

26 43. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
27 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
28 specifically and generally denies the same.

1 44. The allegations contained in this paragraph attempt to characterize the terms of a
2 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
3 denies the allegations contained in this paragraph.

4 45. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
5 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
6 specifically and generally denies the same.

7 46. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
8 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
9 specifically and generally denies the same.

10 47. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
11 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
12 specifically and generally denies the same.

13 48. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
14 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
15 specifically and generally denies the same.

16 49. The allegations contained in this paragraph attempt to characterize the terms of a
17 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
18 denies the allegations contained in this paragraph.

19 50. The allegations contained in this paragraph attempt to characterize the terms of a
20 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
21 denies the allegations contained in this paragraph.

22 51. The allegations contained in this paragraph attempt to characterize the terms of a
23 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
24 denies the allegations contained in this paragraph.

25 52. The allegations contained in this paragraph attempt to characterize the terms of a
26 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
27 denies the allegations contained in this paragraph.

28 53. To the extent the allegations contained in this paragraph are legal conclusions, no

1 response is required. To the extent an answer is required, Cross-defendant generally and specifically
2 denies the allegations contained therein.

3 54. The allegations contained in this paragraph attempt to characterize the terms of a
4 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
5 denies the allegations contained in this paragraph.

6 55. To the extent the allegations contained in this paragraph are legal conclusions, no
7 response is required. To the extent an answer is required, Cross-defendant generally and specifically
8 denies the allegations contained therein.

9 56. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
10 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
11 specifically and generally denies the same.

12 57. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
13 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
14 specifically and generally denies the same.

15 58. The allegations contained in this paragraph attempt to characterize the terms of a
16 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
17 denies the allegations contained in this paragraph.

18 59. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
19 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
20 specifically and generally denies the same.

21 60. The allegations contained in this paragraph (including all subparts) attempt to
22 characterize the terms of a written document, which speaks for itself. Therefore, Cross-defendant
23 specifically and generally denies the allegations contained in this paragraph.

24 61. The allegations contained in this paragraph attempt to characterize the terms of a
25 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
26 denies the allegations contained in this paragraph.

27 62. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
28 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore

1 specifically and generally denies the same.

2 63. The allegations contained in this paragraph attempt to characterize the terms of a
3 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
4 denies the allegations contained in this paragraph.

5 64. The allegations contained in this paragraph (including all subparts) attempt to
6 characterize the terms of a written document, which speaks for itself. Therefore, Cross-defendant
7 specifically and generally denies the allegations contained in this paragraph.

8 65. The allegations contained in this paragraph attempt to characterize the terms of a
9 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
10 denies the allegations contained in this paragraph.

11 66. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
12 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
13 specifically and generally denies the same.

14 67. The allegations contained in this paragraph attempt to characterize the terms of a
15 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
16 denies the allegations contained in this paragraph.

17 68. The allegations contained in this paragraph attempt to characterize the terms of a
18 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
19 denies the allegations contained in this paragraph.

20 69. The allegations contained in this paragraph attempt to characterize the terms of a
21 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
22 denies the allegations contained in this paragraph.

23 70. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
24 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
25 specifically and generally denies the same.

26 71. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
27 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
28 specifically and generally denies the same.

1 72. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
2 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
3 specifically and generally denies the same.

4 73. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
5 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
6 specifically and generally denies the same.

7 74. To the extent the allegations contained in this paragraph are legal conclusions, no
8 response is required. To the extent an answer is required, Cross-defendant lacks the knowledge or
9 information sufficient to form a belief as to the truth or falsity of the allegations contained in this
10 paragraph of the crossclaim, and therefore specifically and generally denies the same.

11 75. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
12 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
13 specifically and generally denies the same.

14 76. The allegations contained in this paragraph attempt to characterize the terms of a
15 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
16 denies the allegations contained in this paragraph.

17 77. The allegations contained in this paragraph attempt to characterize the terms of a
18 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
19 denies the allegations contained in this paragraph.

20 78. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
21 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
22 specifically and generally denies the same.

23 79. Cross-defendant lacks the knowledge or information sufficient to form a belief as to
24 the truth or falsity of the allegations contained in this paragraph of the crossclaim, and therefore
25 specifically and generally denies the same.

26 80. The allegations contained in this paragraph attempt to characterize the terms of a
27 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
28 denies the allegations contained in this paragraph.

1 81. The allegations contained in this paragraph attempt to characterize the terms of a
2 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
3 denies the allegations contained in this paragraph.

4 82. The allegations contained in this paragraph attempt to characterize the terms of a
5 written document, which speaks for itself. Therefore, Cross-defendant specifically and generally
6 denies the allegations contained in this paragraph.

7 83. To the extent the allegations contained in this paragraph are legal conclusions, no
8 response is required. To the extent an answer is required, Cross-defendant generally and specifically
9 denies the allegations contained therein.

10 84. To the extent the allegations contained in this paragraph are legal conclusions, no
11 response is required. To the extent an answer is required, Cross-defendant generally and specifically
12 denies the allegations contained therein.

13 85. To the extent the allegations contained in this paragraph are legal conclusions, no
14 response is required. To the extent an answer is required, Cross-defendant generally and specifically
15 denies the allegations contained therein.

16 86. Cross-defendant denies the allegations contained in this paragraph.

17 87. To the extent the allegations contained in this paragraph are legal conclusions, no
18 response is required. To the extent an answer is required, Cross-defendant generally and specifically
19 denies the allegations contained therein.

20 **FIRST CLAIM FOR RELIEF**

21 **(Intentional Misrepresentation)**

22 88. Cross-defendant repeats and realleges its answers to paragraphs 1 through 87 above,
23 and incorporates the same herein by reference as though fully set forth herein.

24 89. Cross-defendant denies the allegations contained in this paragraph.

25 90. Cross-defendant denies the allegations contained in this paragraph.

26 91. Cross-defendant denies the allegations contained in this paragraph.

27 92. Cross-defendant denies the allegations contained in this paragraph.

28 93. Cross-defendant denies the allegations contained in this paragraph.

1 94. Cross-defendant denies the allegations contained in this paragraph.

2 95. Cross-defendant denies the allegations contained in this paragraph.

3 **ANSWER TO PRAYER FOR RELIEF**

4 Answering the allegations contained in the entirety of Plaintiff's prayer for relief, Cross-
5 defendant denies that Omni is entitled to the relief being sought therein or to any relief in this matter.

6 **AFFIRMATIVE DEFENSES**

7 Cross-defendant First 100, without altering the burdens of proof the parties must bear, asserts
8 the following affirmative defenses to Cross-claimant Omni's First Amended Cross-Claim, and the
9 claims asserted therein, and specifically incorporates into these affirmative defenses its answers to the
10 preceding paragraphs of the First Amended Cross-Claim as if fully set forth herein.

11 **FIRST AFFIRMATIVE DEFENSE**

12 The First Amended Cross-Claim, and all the claims for relief alleged therein, fails to state a
13 claim against Cross-defendant upon which relief can be granted.

14 **SECOND AFFIRMATIVE DEFENSE**

15 Cross-claimant has not been damaged directly, indirectly, proximately or in any manner
16 whatsoever by any conduct of Cross-defendant.

17 **THIRD AFFIRMATIVE DEFENSE**

18 Cross-defendant alleges that the occurrence referred to in the First Amended Cross-Claim, and
19 all alleged damages, if any, resulting therefrom, were caused by the acts or omissions of a third party
20 over whom Cross-defendant had no control.

21 **FOURTH AFFIRMATIVE DEFENSE**

22 Cross-claimant has failed to mitigate its damages, if any, as required by law and is barred from
23 recovering by reason thereof.

24 **FIFTH AFFIRMATIVE DEFENSE**

25 Any harm or claim of damage of Cross-claimant or cause of action of Cross-claimant, as
26 alleged or stated in the First Amended Cross-Claim, is barred by the doctrines of laches, unclean
27 hands, Statute of Frauds, estoppel and/or waiver, as to all or part of the claims of Cross-claimant.

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SIXTH AFFIRMATIVE DEFENSE

Cross-claimant failed to allege sufficient facts and cannot carry the burden of proof imposed on it by law to recover attorney’s fees incurred to bring this action.

SEVENTH AFFIRMATIVE DEFENSE

Any amount sought to be recovered in this action is barred, in whole or in part, by a setoff and/or offset of the amount already recovered by Cross-claimant.

EIGHTH AFFIRMATIVE DEFENSE

Cross-claimant’s claims are barred, in whole or in part, by failure of contract or by Cross-claimant’s own breach of contract.

NINTH AFFIRMATIVE DEFENSE

Cross-claimant’s claims are barred, in whole or in part, by its failure to perform or satisfy required conditions precedent and by its own bad acts.

TENTH AFFIRMATIVE DEFENSE

Cross-claimant is barred by law from accelerating damages, if any.

ELEVENTH AFFIRMATIVE DEFENSE

The claims, and each of them, are barred by the failure of Cross-claimant to plead those claims with particularity.

TWELFTH AFFIRMATIVE DEFENSE

Cross-claimant has failed to join an indispensable party.

THIRTEENTH AFFIRMATIVE DEFENSE

Any recovery by Cross-claimant must be settled, reduced, abated, set-off, or apportioned to the extent that any other party’s actions or non-party’s actions, including those of Cross-claimant, caused or contributed to Cross-claimant’s damages, if any.

FOURTEENTH AFFIRMATIVE DEFENSE

Cross-claimant has waived any right of recovery against First 100.

FIFTEENTH AFFIRMATIVE DEFENSE

First 100 acted reasonably and in good faith at all times material to this action, based upon all relevant facts and circumstances known by it at the time it so acted and, accordingly, Cross-claimant

1 is barred from any recovery in this action.

2 **SIXTEENTH AFFIRMATIVE DEFENSE**

3 All damages sought by the Cross-claimant fail as a matter of law because they are speculative.

4 **SEVENTEENTH AFFIRMATIVE DEFENSE**

5 Pursuant to Nevada Rules of Civil Procedure, all possible affirmative defenses may not have
6 been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the
7 filing of this answer and, therefore, Cross-defendant reserves the right to amend this answer to allege
8 additional affirmative defenses if subsequent investigation warrants.

9 WHEREFORE, Cross-defendant First 100, LLC prays for the following:

- 10 1. That Cross-claimant Omni take nothing by way of its complaint;
11 2. That Cross-claimant Omni's First Amended Cross-Claim be dismissed in its entirety;
12 3. That First 100 be awarded reasonable attorney fees and costs incurred in defending
13 this action;
14 4. For such other and further relief as the Court may deem just and proper.

15 DATED this 25th day of November, 2019.

16 Respectfully submitted,

17 **MAIER GUTIERREZ & ASSOCIATES**

18 /s/ Danielle J. Barraza

19 JOSEPH A. GUTIERREZ, ESQ.

20 Nevada Bar No. 9046

DANIELLE J. BARRAZA, ESQ.

21 Nevada Bar No. 13822

8816 Spanish Ridge Avenue

22 Las Vegas, Nevada 89148

Attorneys for Defendant First 100, LLC

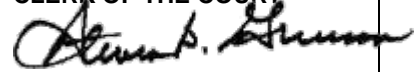
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1 **ANSC**
JOSEPH A. GUTIERREZ, ESQ.
2 Nevada Bar No. 9046
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3 Nevada Bar No. 13822
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4 8816 Spanish Ridge Avenue
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6 E-mail: jag@mgalaw.com
djb@mgalaw.com

7 *Attorneys for Defendant First 100, LLC*

8
9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 KAL-MOR-USA, LLC, a Nevada limited
12 liability company,

13 Plaintiff,

14 vs.

15 OMNI FINANCIAL, LLC, a foreign limited
16 liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X; and
17 ROE ENTITIES I through X, inclusive,

18 Defendants.

19 OMNI FINANCIAL, LLC, a foreign limited
liability company,

20 Counter-claimant,

21 vs.

22 KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
23 ENTITIES 1 – 10,

24 Counter-defendants.

Case No.: A-17-757061-C
Dept. No.: XVIII

**FIRST 100, LLC'S ANSWER TO
PLAINTIFF'S COMPLAINT**

25 Defendant First 100, LLC ("Defendant" or "First 100"), by and through its attorneys of
26 record, the law firm MAIER GUTIERREZ & ASSOCIATES, hereby answers the complaint of plaintiff
27 Kal-Mor-USA, LLC ("Plaintiff" or "Kal-Mor"), as follows:

28 Defendant denies each and every allegation contained in the complaint except those

1 allegations which are hereinafter admitted, qualified or otherwise answered.

2 **JURISDICTIONAL ALLEGATIONS**

3 1. Defendant is without sufficient knowledge or information upon which to form a belief
4 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
5 denies the allegations contained therein.

6 2. Defendant is without sufficient knowledge or information upon which to form a belief
7 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
8 denies the allegations contained therein.

9 3. Defendant admits that First 100 is a Nevada limited liability company that, at all times
10 relevant, was conducting business in Clark County, Nevada.

11 4. The allegations contained in this paragraph of the complaint do not relate to
12 Defendant, thus no response is required. To the extent a response is deemed required, Defendant
13 specifically and generally denies each and every allegation.

14 5. The allegations contained in this paragraph of the complaint do not relate to
15 Defendant, thus no response is required. To the extent a response is deemed required, Defendant
16 specifically and generally denies each and every allegation.

17 **GENERAL ALLEGATIONS**

18 **THE OMNI LOAN AGREEMENT**

19 6. In answering the allegations contained in this paragraph of the complaint, the
20 allegations contained herein attempt to characterize the terms of an Omni Loan, which speaks for
21 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

22 7. In answering the allegations contained in this paragraph of the complaint, the
23 allegations contained herein attempt to characterize the terms of a Security Agreement, which speaks
24 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

25 8. In answering the allegations contained in this paragraph of the complaint, the
26 allegations contained herein attempt to characterize the terms of a Security Agreement, which speaks
27 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

28 9. In answering the allegations contained in this paragraph of the complaint, the

1 allegations contained herein attempt to characterize the terms of a Deed of Trust, which speaks for
2 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

3 10. In answering the allegations contained in this paragraph of the complaint, the
4 allegations contained herein (including all subparts) attempt to characterize the terms of a Deed of
5 Trust, which speaks for itself. Defendant specifically and generally denies the allegations contained
6 in this paragraph.

7 11. In answering the allegations contained in this paragraph of the complaint, the
8 allegations contained herein attempt to characterize the terms of a Deed of Trust, which speaks for
9 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

10 12. In answering the allegations contained in this paragraph of the complaint, the
11 allegations contained herein attempt to characterize the terms of a Deed of Trust, which speaks for
12 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

13 13. In answering the allegations contained in this paragraph of the complaint, the
14 allegations contained herein (including all subparts) attempt to characterize the terms of a Deed of
15 Trust, which speaks for itself. Defendant specifically and generally denies the allegations contained
16 in this paragraph.

17 14. In answering the allegations contained in this paragraph of the complaint, the
18 allegations contained herein attempt to characterize the terms of a Deed of Trust, which speaks for
19 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

20 15. In answering the allegations contained in this paragraph of the complaint, the
21 allegations contained herein attempt to characterize the terms of a Deed of Trust, which speaks for
22 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

23 16. In answering the allegations contained in this paragraph of the complaint, the
24 allegations contained herein attempt to characterize the terms of a Deed of Trust, which speaks for
25 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

26 17. In answering the allegations contained in this paragraph of the complaint, the
27 allegations contained herein attempt to characterize the terms of a Deed of Trust, which speaks for
28 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

1 18. In answering the allegations contained in this paragraph of the complaint, the
2 allegations contained herein attempt to characterize the terms of a Deed of Trust, which speaks for
3 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

4 **KAL-MOR PURCHASE OF THE REAL PROPERTIES AT ISSUE**

5 **1217 Neva Ranch Avenue, North Las Vegas, Nevada 89081 (APN 124-26-311-029)**

6 19. Defendant is without sufficient knowledge or information upon which to form a belief
7 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
8 denies the allegations contained therein.

9 20. Defendant is without sufficient knowledge or information upon which to form a belief
10 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
11 denies the allegations contained therein.

12 21. In answering the allegations contained in this paragraph of the complaint, the
13 allegations contained herein attempt to characterize the terms of a Foreclosure Deed Upon Sale,
14 which speaks for itself. Defendant specifically and generally denies the allegations contained in this
15 paragraph.

16 22. In answering the allegations contained in this paragraph of the complaint, the
17 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
18 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

19 23. Defendant denies the allegations contained in this paragraph.

20 24. In answering the allegations contained in this paragraph of the complaint, the
21 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
22 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

23 25. Defendant denies the allegations contained in this paragraph.

24 **230 East Flamingo Road, #330, Las Vegas, Nevada 89169 (APN 162-16-810-355)**

25 26. Defendant is without sufficient knowledge or information upon which to form a belief
26 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
27 denies the allegations contained therein.

28 27. Defendant is without sufficient knowledge or information upon which to form a belief

1 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
2 denies the allegations contained therein.

3 28. In answering the allegations contained in this paragraph of the complaint, the
4 allegations contained herein attempt to characterize the terms of a Foreclosure Deed Upon Sale,
5 which speaks for itself. Defendant specifically and generally denies the allegations contained in this
6 paragraph.

7 29. In answering the allegations contained in this paragraph of the complaint, the
8 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
9 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

10 30. Defendant denies the allegations contained in this paragraph.

11 31. In answering the allegations contained in this paragraph of the complaint, the
12 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
13 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

14 32. Defendant denies the allegations contained in this paragraph.

15 ***2615 West Gary Avenue, #1065, Las Vegas, Nevada 89123 (APN 177-20-813-127)***

16 33. Defendant is without sufficient knowledge or information upon which to form a belief
17 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
18 denies the allegations contained therein.

19 34. Defendant is without sufficient knowledge or information upon which to form a belief
20 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
21 denies the allegations contained therein.

22 35. In answering the allegations contained in this paragraph of the complaint, the
23 allegations contained herein attempt to characterize the terms of a Foreclosure Deed Upon Sale,
24 which speaks for itself. Defendant specifically and generally denies the allegations contained in this
25 paragraph.

26 36. In answering the allegations contained in this paragraph of the complaint, the
27 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
28 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

1 37. Defendant denies the allegations contained in this paragraph.

2 38. In answering the allegations contained in this paragraph of the complaint, the
3 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
4 itself. Defendant specifically and generally denies the allegations contained in this paragraph.
5 Defendant denies the allegations contained in this paragraph.

6 39. Defendant denies the allegations contained in this paragraph.

7 ***6575 Shining Sand Avenue, Las Vegas, Nevada 89142 (APN 161-10-511-072)***

8 40. Defendant is without sufficient knowledge or information upon which to form a belief
9 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
10 denies the allegations contained therein.

11 41. Defendant is without sufficient knowledge or information upon which to form a belief
12 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
13 denies the allegations contained therein.

14 42. In answering the allegations contained in this paragraph of the complaint, the
15 allegations contained herein attempt to characterize the terms of a Foreclosure Deed Upon Sale,
16 which speaks for itself. Defendant specifically and generally denies the allegations contained in this
17 paragraph.

18 43. In answering the allegations contained in this paragraph of the complaint, the
19 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
20 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

21 44. Defendant denies the allegations contained in this paragraph.

22 45. In answering the allegations contained in this paragraph of the complaint, the
23 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
24 itself. Defendant specifically and generally denies the allegations contained in this paragraph.
25 Defendant denies the allegations contained in this paragraph.

26 46. Defendant denies the allegations contained in this paragraph.

27 ***4921 Indian River Drive, #112, Las Vegas, Nevada 89103 (APN 163-24-612-588)***

28 47. Defendant is without sufficient knowledge or information upon which to form a belief

1 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
2 denies the allegations contained therein.

3 48. Defendant is without sufficient knowledge or information upon which to form a belief
4 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
5 denies the allegations contained therein.

6 49. In answering the allegations contained in this paragraph of the complaint, the
7 allegations contained herein attempt to characterize the terms of a Foreclosure Deed Upon Sale,
8 which speaks for itself. Defendant specifically and generally denies the allegations contained in this
9 paragraph.

10 50. In answering the allegations contained in this paragraph of the complaint, the
11 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
12 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

13 51. Defendant denies the allegations contained in this paragraph.

14 52. In answering the allegations contained in this paragraph of the complaint, the
15 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
16 itself. Defendant specifically and generally denies the allegations contained in this paragraph.
17 Defendant denies the allegations contained in this paragraph.

18 53. Defendant denies the allegations contained in this paragraph.

19 ***5009 Indian River Drive, #155, Las Vegas, Nevada 89103 (APN 163-24-612-639)***

20 54. Defendant is without sufficient knowledge or information upon which to form a belief
21 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
22 denies the allegations contained therein.

23 55. Defendant is without sufficient knowledge or information upon which to form a belief
24 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
25 denies the allegations contained therein.

26 56. In answering the allegations contained in this paragraph of the complaint, the
27 allegations contained herein attempt to characterize the terms of a Foreclosure Deed Upon Sale,
28 which speaks for itself. Defendant specifically and generally denies the allegations contained in this

1 paragraph.

2 57. In answering the allegations contained in this paragraph of the complaint, the
3 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
4 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

5 58. Defendant denies the allegations contained in this paragraph.

6 59. In answering the allegations contained in this paragraph of the complaint, the
7 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
8 itself. Defendant specifically and generally denies the allegations contained in this paragraph.
9 Defendant denies the allegations contained in this paragraph.

10 60. Defendant denies the allegations contained in this paragraph.

11 ***5295 Indian River Drive, #314, Las Vegas, Nevada 89103 (APN 163-24-612-798)***

12 61. Defendant is without sufficient knowledge or information upon which to form a belief
13 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
14 denies the allegations contained therein.

15 62. Defendant is without sufficient knowledge or information upon which to form a belief
16 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
17 denies the allegations contained therein.

18 63. In answering the allegations contained in this paragraph of the complaint, the
19 allegations contained herein attempt to characterize the terms of a Foreclosure Deed Upon Sale,
20 which speaks for itself. Defendant specifically and generally denies the allegations contained in this
21 paragraph.

22 64. In answering the allegations contained in this paragraph of the complaint, the
23 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
24 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

25 65. Defendant denies the allegations contained in this paragraph.

26 66. In answering the allegations contained in this paragraph of the complaint, the
27 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
28 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

1 Defendant denies the allegations contained in this paragraph.

2 67. Defendant denies the allegations contained in this paragraph.

3 ***4400 Sandy River Drive, #16, Las Vegas, Nevada 89103 (APN 163-24-612-500)***

4 68. Defendant is without sufficient knowledge or information upon which to form a belief
5 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
6 denies the allegations contained therein.

7 69. Defendant is without sufficient knowledge or information upon which to form a belief
8 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
9 denies the allegations contained therein.

10 70. In answering the allegations contained in this paragraph of the complaint, the
11 allegations contained herein attempt to characterize the terms of a Foreclosure Deed Upon Sale,
12 which speaks for itself. Defendant specifically and generally denies the allegations contained in this
13 paragraph.

14 71. In answering the allegations contained in this paragraph of the complaint, the
15 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
16 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

17 72. Defendant denies the allegations contained in this paragraph.

18 73. In answering the allegations contained in this paragraph of the complaint, the
19 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
20 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

21 Defendant denies the allegations contained in this paragraph.

22 74. Defendant denies the allegations contained in this paragraph.

23 ***5782 Camino Ramon Avenue, Las Vegas, Nevada 89156 (APN 140-21-611-018)***

24 75. Defendant is without sufficient knowledge or information upon which to form a belief
25 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
26 denies the allegations contained therein.

27 76. Defendant is without sufficient knowledge or information upon which to form a belief
28 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically

1 denies the allegations contained therein.

2 77. In answering the allegations contained in this paragraph of the complaint, the
3 allegations contained herein attempt to characterize the terms of a Foreclosure Deed Upon Sale,
4 which speaks for itself. Defendant specifically and generally denies the allegations contained in this
5 paragraph.

6 78. In answering the allegations contained in this paragraph of the complaint, the
7 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
8 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

9 79. Defendant denies the allegations contained in this paragraph.

10 80. In answering the allegations contained in this paragraph of the complaint, the
11 allegations contained herein attempt to characterize the terms of a Deed of Sale, which speaks for
12 itself. Defendant specifically and generally denies the allegations contained in this paragraph.

13 Defendant denies the allegations contained in this paragraph.

14 81. Defendant denies the allegations contained in this paragraph.

15 **THE FIRST 100 ACTION**

16 82. In answering the allegations contained in this paragraph of the complaint, the
17 allegations contained herein attempt to characterize the terms of a written document, which speaks
18 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

19 83. In answering the allegations contained in this paragraph of the complaint, the
20 allegations contained herein attempt to characterize the terms of a written document, which speaks
21 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

22 84. In answering the allegations contained in this paragraph of the complaint, the
23 allegations contained herein attempt to characterize the terms of a written document, which speaks
24 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

25 85. Defendant is without sufficient knowledge or information upon which to form a belief
26 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
27 denies the allegations contained therein.

28 86. Defendant is without sufficient knowledge or information upon which to form a belief

1 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
2 denies the allegations contained therein.

3 87. Defendant is without sufficient knowledge or information upon which to form a belief
4 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
5 denies the allegations contained therein.

6 88. Defendant admits the allegations contained in this paragraph.

7 89. In answering the allegations contained in this paragraph of the complaint, the
8 allegations contained herein attempt to characterize the terms of a written document, which speaks
9 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

10 90. In answering the allegations contained in this paragraph of the complaint, the
11 allegations contained herein attempt to characterize the terms of a written document, which speaks
12 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

13 91. In answering the allegations contained in this paragraph of the complaint, the
14 allegations contained herein attempt to characterize the terms of a written document, which speaks
15 for itself. Defendant specifically and generally denies the allegations contained in this paragraph

16 92. Defendant admits that First 100 and Omni entered into a written settlement agreement
17 (the "First 100 Settlement").

18 93. In answering the allegations contained in this paragraph of the complaint, the
19 allegations contained herein attempt to characterize the terms of a written document, which speaks
20 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

21 94. In answering the allegations contained in this paragraph of the complaint, the
22 allegations contained herein attempt to characterize the terms of a written document, which speaks
23 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

24 95. In answering the allegations contained in this paragraph of the complaint, the
25 allegations contained herein attempt to characterize the terms of a written document, which speaks
26 for itself. Defendant specifically and generally denies the allegations contained in this paragraph.

27 96. To the extent the allegations contained in this paragraph are legal conclusions, no
28 response is required. To the extent an answer is required, Defendant is without sufficient knowledge

1 or information upon which to form a belief as to the truth of the allegation contained in said
2 paragraph, and therefore generally and specifically denies the allegations contained therein.

3 **OMNI EFFORTS TO ENFORCE THE DEEDS OF TRUST**

4 97. To the extent the allegations contained in this paragraph are legal conclusions, no
5 response is required. To the extent an answer is required, Defendant is without sufficient knowledge
6 or information upon which to form a belief as to the truth of the allegation contained in said
7 paragraph, and therefore generally and specifically denies the allegations contained therein.

8 98. Defendant is without sufficient knowledge or information upon which to form a belief
9 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
10 denies the allegations contained therein.

11 99. Defendant is without sufficient knowledge or information upon which to form a belief
12 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
13 denies the allegations contained therein.

14 100. Defendant is without sufficient knowledge or information upon which to form a belief
15 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
16 denies the allegations contained therein.

17 101. Defendant is without sufficient knowledge or information upon which to form a belief
18 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
19 denies the allegations contained therein.

20 102. Defendant is without sufficient knowledge or information upon which to form a belief
21 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
22 denies the allegations contained therein.

23 103. Defendant is without sufficient knowledge or information upon which to form a belief
24 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
25 denies the allegations contained therein.

26 104. Defendant is without sufficient knowledge or information upon which to form a belief
27 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
28 denies the allegations contained therein.

1 **FIRST CAUSE OF ACTION**

2 **(Breach of Contract – Against First 100)**

3 105. Defendant repeats and realleges its answers to paragraphs 1 through 104 above, and
4 incorporates the same herein by reference as though fully set forth herein.

5 106. To the extent the allegations contained in this paragraph are legal conclusions, no
6 response is required. To the extent an answer is required, Defendant is without sufficient knowledge
7 or information upon which to form a belief as to the truth of the allegation contained in said
8 paragraph, and therefore generally and specifically denies the allegations contained therein.

9 107. In answering the allegations contained in this paragraph of the complaint, the
10 allegations contained herein attempt to characterize the terms of written documents, which speak for
11 themselves. Defendant specifically and generally denies the allegations contained in this paragraph.

12 108. Defendant denies the allegations contained in this paragraph.

13 109. Defendant denies the allegations contained in this paragraph.

14 110. Defendant denies the allegations contained in this paragraph.

15 **SECOND CAUSE OF ACTION**

16 **(Breach of Implied Covenant of Good Faith and Fair Dealing – Against First 100)**

17 111. Defendant repeats and realleges its answers to paragraphs 1 through 110 above, and
18 incorporates the same herein by reference as though fully set forth herein.

19 112. To the extent the allegations contained in this paragraph are legal conclusions, no
20 response is required. To the extent an answer is required, Defendant is without sufficient knowledge
21 or information upon which to form a belief as to the truth of the allegation contained in said
22 paragraph, and therefore generally and specifically denies the allegations contained therein.

23 113. To the extent the allegations contained in this paragraph are legal conclusions, no
24 response is required. To the extent an answer is required, Defendant is without sufficient knowledge
25 or information upon which to form a belief as to the truth of the allegation contained in said
26 paragraph, and therefore generally and specifically denies the allegations contained therein.

27 114. Defendant denies the allegations contained in this paragraph.

28 115. Defendant denies the allegations contained in this paragraph.

116. Defendant denies the allegations contained in this paragraph.

THIRD CAUSE OF ACTION

(Negligent Misrepresentation – Against First 100)

117. Defendant repeats and realleges its answers to paragraphs 1 through 116 above, and incorporates the same herein by reference as though fully set forth herein.

118. Defendant denies the allegations contained in this paragraph.

119. Defendant denies the allegations contained in this paragraph.

120. Defendant denies the allegations contained in this paragraph.

121. Defendant denies the allegations contained in this paragraph.

122. Defendant denies the allegations contained in this paragraph.

123. Defendant denies the allegations contained in this paragraph.

FOURTH CAUSE OF ACTION

(Declaratory Relief – All Defendants)

124. Defendant repeats and realleges its answers to paragraphs 1 through 123 above, and incorporates the same herein by reference as though fully set forth herein.

125. Defendant denies the allegations contained in this paragraph.

126. Defendant denies the allegations contained in this paragraph.

127. Defendant denies the allegations contained in this paragraph.

128. Defendant denies the allegations contained in this paragraph.

FIFTH CAUSE OF ACTION

(Quiet Title – Against All Defendants)

129. Defendant repeats and realleges its answers to paragraphs 1 through 128 above, and incorporates the same herein by reference as though fully set forth herein.

130. To the extent the allegations contained in this paragraph are legal conclusions, no response is required. To the extent an answer is required, Defendant is without sufficient knowledge or information upon which to form a belief as to the truth of the allegation contained in said paragraph, and therefore generally and specifically denies the allegations contained therein.

131. Defendant is without sufficient knowledge or information upon which to form a belief

1 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
2 denies the allegations contained therein.

3 132. Defendant is without sufficient knowledge or information upon which to form a belief
4 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
5 denies the allegations contained therein.

6 133. Defendant is without sufficient knowledge or information upon which to form a belief
7 as to the truth of the allegation contained in said paragraph, and therefore generally and specifically
8 denies the allegations contained therein.

9 134. Defendant denies the allegations contained in this paragraph.

10 **SIXTH CAUSE OF ACTION**

11 **(Unjust Enrichment – Against Omni)**

12 135. Defendant repeats and realleges its answers to paragraphs 1 through 134 above, and
13 incorporates the same herein by reference as though fully set forth herein.

14 136. This paragraph does not assert allegations against Defendant, thus no response is
15 necessary.

16 137. This paragraph does not assert allegations against Defendant, thus no response is
17 necessary.

18 138. This paragraph does not assert allegations against Defendant, thus no response is
19 necessary.

20 139. This paragraph does not assert allegations against Defendant, thus no response is
21 necessary.

22 140. This paragraph does not assert allegations against Defendant, thus no response is
23 necessary.

24 141. This paragraph does not assert allegations against Defendant, thus no response is
25 necessary.

26 **SEVENTH CAUSE OF ACTION**

27 **(Conversion – Against Omni)**

28 142. Defendant repeats and realleges its answers to paragraphs 1 through 141 above, and

incorporates the same herein by reference as though fully set forth herein.

143. This paragraph does not assert allegations against Defendant, thus no response is necessary.

144. This paragraph does not assert allegations against Defendant, thus no response is necessary.

145. This paragraph does not assert allegations against Defendant, thus no response is necessary.

146. This paragraph does not assert allegations against Defendant, thus no response is necessary.

147. This paragraph does not assert allegations against Defendant, thus no response is necessary.

EIGHTH CAUSE OF ACTION

(Slander of Title – Against Omni)

148. Defendant repeats and realleges its answers to paragraphs 1 through 147 above, and incorporates the same herein by reference as though fully set forth herein.

149. This paragraph does not assert allegations against Defendant, thus no response is necessary.

150. This paragraph does not assert allegations against Defendant, thus no response is necessary.

151. This paragraph does not assert allegations against Defendant, thus no response is necessary.

152. This paragraph does not assert allegations against Defendant, thus no response is necessary.

153. This paragraph does not assert allegations against Defendant, thus no response is necessary.

154. This paragraph does not assert allegations against Defendant, thus no response is necessary.

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1 **NINTH CAUSE OF ACTION**

2 **(Intentional Interference with Contractual Relations – Against Omni)**

3 155. Defendant repeats and realleges its answers to paragraphs 1 through 154 above, and
4 incorporates the same herein by reference as though fully set forth herein.

5 156. This paragraph does not assert allegations against Defendant, thus no response is
6 necessary.

7 157. This paragraph does not assert allegations against Defendant, thus no response is
8 necessary.

9 158. This paragraph does not assert allegations against Defendant, thus no response is
10 necessary.

11 159. This paragraph does not assert allegations against Defendant, thus no response is
12 necessary.

13 160. This paragraph does not assert allegations against Defendant, thus no response is
14 necessary.

15 161. This paragraph does not assert allegations against Defendant, thus no response is
16 necessary.

17 **TENTH CAUSE OF ACTION**

18 **(Injunctive Relief – Against Omni)**

19 162. Defendant repeats and realleges its answers to paragraphs 1 through 161 above, and
20 incorporates the same herein by reference as though fully set forth herein.

21 163. This paragraph does not assert allegations against Defendant, thus no response is
22 necessary.

23 164. This paragraph does not assert allegations against Defendant, thus no response is
24 necessary.

25 165. This paragraph does not assert allegations against Defendant, thus no response is
26 necessary.

27 166. This paragraph does not assert allegations against Defendant, thus no response is
28 necessary.

1 **ANSWER TO PRAYER FOR RELIEF**

2 Answering the allegations contained in the entirety of Plaintiff's prayer for relief, Defendant
3 denies that Plaintiff is entitled to the relief being sought therein or to any relief in this matter.

4 **AFFIRMATIVE DEFENSES**

5 Defendant, without altering the burdens of proof the parties must bear, asserts the following
6 affirmative defenses to the complaint, and the claims asserted therein, and Defendant specifically
7 incorporates into these affirmative defenses its answers to the preceding paragraphs of the complaint
8 as if fully set forth herein.

9 **FIRST AFFIRMATIVE DEFENSE**

10 The complaint, and all the claims for relief alleged therein, fails to state a claim against
11 Defendant upon which relief can be granted.

12 **SECOND AFFIRMATIVE DEFENSE**

13 Plaintiff has not been damaged directly, indirectly, proximately or in any manner whatsoever
14 by any conduct of Defendant.

15 **THIRD AFFIRMATIVE DEFENSE**

16 Defendant alleges that the occurrence referred to in the complaint, and all alleged damages, if
17 any, resulting therefrom, were caused by the acts or omissions of a third party over whom Defendant
18 had no control.

19 **FOURTH AFFIRMATIVE DEFENSE**

20 Plaintiff has failed to mitigate its damages, if any, as required by law and is barred from
21 recovering by reason thereof.

22 **FIFTH AFFIRMATIVE DEFENSE**

23 Any harm or claim of damage of Plaintiff or cause of action of Plaintiff, as alleged or stated
24 in the complaint, is barred by the doctrines of laches, unclean hands, Statute of Frauds, estoppel and/or
25 waiver, as to all or part of the claims of Plaintiff.

26 **SIXTH AFFIRMATIVE DEFENSE**

27 Plaintiff failed to allege sufficient facts and cannot carry the burden of proof imposed on it by
28 law to recover attorney's fees incurred to bring this action.

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SEVENTH AFFIRMATIVE DEFENSE

Any amount sought to be recovered in this action is barred, in whole or in part, by a setoff and/or offset of the amount already recovered by Plaintiff.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff’s claims are barred, in whole or in part, by failure of contract or by Plaintiff’s own breach of contract.

NINTH AFFIRMATIVE DEFENSE

Plaintiff’s claims are barred, in whole or in part, by its failure to perform or satisfy required conditions precedent and by her own bad acts.

TENTH AFFIRMATIVE DEFENSE

Plaintiff is barred by law from accelerating damages, if any.

ELEVENTH AFFIRMATIVE DEFENSE

The claims, and each of them, are barred by the failure of Plaintiff to plead those claims with particularity.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff has failed to join an indispensable party.

THIRTEENTH AFFIRMATIVE DEFENSE

Any recovery by Plaintiff must be settled, reduced, abated, set-off, or apportioned to the extent that any other party’s actions or non-party’s actions, including those of Plaintiff, caused or contributed to Plaintiff’s damages, if any.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff has waived any right of recovery against First 100.

FIFTEENTH AFFIRMATIVE DEFENSE

First 100 acted reasonably and in good faith at all times material to this action, based upon all relevant facts and circumstances known by it at the time it so acted and, accordingly, Plaintiff is barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

All damages sought by the Plaintiff fail as a matter of law because they are speculative.

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WHEREFORE, defendant First 100, LLC prays for the following:

- DATED this 26th day of November, 2019.

MAIER GUTIERREZ & ASSOCIATES

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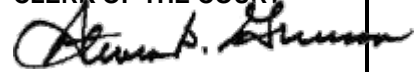
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OSCH

**DISTRICT COURT
CLARK COUNTY, NEVADA**

KAL-MOR USA, INC.,
Plaintiff(s),

vs.

OMNI FINANCIAL, et al.,
Defendant(s).

CASE NO.: A-17-757061-C
DEPT. NO.: II

Date: June 17, 2020
Time: 9:00 a.m.

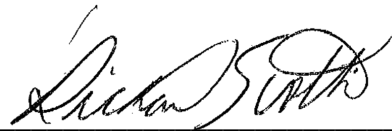
**ORDER SCHEDULING STATUS
CHECK**

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

YOU ARE HEREBY ORDERED TO APPEAR at the Eighth Judicial District Court, in and for Clark County, Nevada, Department II, Courtroom 3B, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada, on the **17th day of June, 2020, at the hour of 9:00 a.m.**

Failure to appear may result in dismissal of this case.

DATED 22nd day of April, 2020.


Richard F. Scotti
District Court Judge

Richard F. Scotti
District Judge

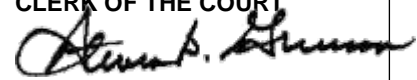
Department Two
Las Vegas, NV 89155

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey EFileNV system.

/s/ Melody Howard

Melody Howard
Judicial Executive Assistant



MPSJ

James Patrick Shea, Esq.

Nevada Bar No. 405

Bart K. Larsen, Esq.

Nevada Bar No. 8538

SHEA LARSEN

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blarsen@shea.law

Attorneys for Plaintiff

Kal-Mor-USA, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X;
and ROE ENTITIES I through X, inclusive,

Defendants.

CASE NO. A-17-757061-C

DEPT. NO. 2

**PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

[Hearing Requested]

COMES NOW Plaintiff Kal-Mor-USA, LLC ("Kal-Mor"), by and through its undersigned attorneys of record, the law firm of Kolesar & Leatham, and hereby moves this Court to enter an order granting partial summary judgment against Defendant Omni Financial, LLC ("Omni") as to Kal-Mor's sixth cause of action for unjust enrichment, seventh cause of action for conversion, and ninth cause of action for intentional interference with contractual relations.

The Motion is made and based upon Nev. R. Civ. P. 56(c), the points and authorities herein, the Declaration of Greg Darroch (the "Darroch Declaration") filed in support hereof, the

1 Exhibits attached hereto, the papers and pleadings on file, and any additional arguments the
2 Court may entertain at the hearing of this Motion.

3 DATED this 16th day of June 2020.

4 **SHEA LARSEN**

5
6 /s/ Bart K. Larsen, Esq.

7 Bart K. Larsen, Esq.

8 Nevada Bar No. 8538

9 1731 Village Center Circle, Suite 150

10 Las Vegas, Nevada 89134

11 *Attorneys for Plaintiff Kal-Mor-USA, LLC*

POINTS AND AUTHORITIES

I. INTRODUCTION

Kal-Mor purchased the nine (9) residential properties that are the subject of this action (the “Kal-Mor Properties”) in 2014 and 2015 from Defendant First 100, LLC (“First 100”), which had acquired the Kal-Mor Properties through homeowner association (“HOA”) assessment lien foreclosure sales conducted pursuant to Chapter 116 of Nevada Revised Statutes. Since that time, Kal-Mor has made significant investments to renovate, repair, and maintain the Kal-Mor Properties, which it operates as residential rental properties.

In selling the Kal-Mor Properties, however, First 100 failed to disclose to Kal-Mor that it had previously pledged its interests in the Kal-Mor Properties as partial collateral for a loan made by Omni to First 100. In early 2016, litigation erupted between Omni and First 100 concerning the enforcement of Omni’s loan. Soon thereafter, Omni sought to enforce its claimed rights secured lender and made demands on the tenants occupying the Kal-Mor Properties to pay rent to Omni instead of Kal-Mor. In early 2017, Omni and First 100 entered into a settlement agreement under which all obligations owed in connection with Omni’s loan were released and discharged and replaced with the new obligations set forth in their settlement agreement. Nevertheless, Omni continued to demand and receive rents from Kal-Mor’s tenants and initiated foreclosure proceedings against the Kal-Mor Properties.

Kal-Mor commenced this action on June 19, 2017 to stop Omni from foreclosing on the Kal-Mor Properties. On October 2, 2018, this Court entered its *Findings of Fact, Conclusions of Law, and Order Granting Plaintiff’s Motion for Partial Summary Judgment* (the “Partial Summary Judgment Order”) in which it awarded partial summary judgment in favor Kal-Mor and against Omni on Kal-Mor’s fourth cause of action for declaratory relief and fifth cause of action for quiet title. Through the Partial Summary Judgment Order, this Court held that the settlement between Omni and First 100 constituted a novation of their prior agreements concerning the Omni loan, which discharged and extinguished any security interest Omni could claim in the Kal-Mor Properties as collateral for such loan.

Through this Motion, Kal-Mor seeks to recover the rents Omni collected from Kal-Mor’s

tenants after the execution of Omni's settlement agreement with First 100 on January 16, 2017. Omni held no security interest in the Kal-Mor properties when such rents came due and had no right to intercept rent payments that rightfully belonged to Kal-Mor. Summary Judgment as to Kal-Mor's sixth cause of action for unjust enrichment, seventh cause of action for conversion, and ninth cause of action for intentional interference with contractual relations is appropriate.

II. RELEVANT FACTS

The facts from which this case arose are largely undisputed and are set forth in the Court's Partial Summary Judgment Order, which is incorporated herein by reference.¹ The Darroch Declaration attached hereto sets forth additional facts relevant to this Motion, which include the following:

1. Kal-Mor is the owner of fee title to the real property located at 5782 Camino Ramon Ave., Las Vegas, Nevada 89156 (the "Camino Ramon Property"), which is included among the Kal-Mor Properties referenced above.²

2. Kal-Mor purchased the Camino Ramon Property from Defendant First 100, LLC ("First 100") on or about April 6, 2015 and subsequently began operating the Camino Ramon Property as a residential rental property.³

3. On or about August 1, 2015, Kal-Mor entered into a Residential Lease Agreement under which it agreed to lease the Camino Ramon Property to an individual tenant (the "Camino Ramon Tenant").⁴

4. Beginning in late 2016 and continuing through 2017, Defendant Omni Financial, LLC ("Omni") made multiple demands for rents upon the Camino Ramon Tenant based upon an undisclosed deed of trust and assignment of rents that First 100 executed in favor of Omni before selling the Camino Ramon Property to Kal-Mor.⁵

¹ A copy of the Partial Summary Judgment Order is attached hereto as Exhibit 4

² Darroch Declaration, ¶ 3.

³ Darroch Declaration, ¶ 4.

⁴ Darroch Declaration, ¶ 5. A true and correct copy of the August 1, 2015 Residential Lease Agreement from which the Camino Ramon Tenant's personal identifying information has been redacted is attached hereto as Exhibit 1.

⁵ Darroch Declaration, ¶ 6. A true and correct copy of one such demand is attached hereto as Exhibit 2.

1 5. Due to Omni's continuing demands for rents, the Camino Ramon Tenant began
2 paying monthly rent to Omni instead of Kal-Mor on or about March 1, 2017.⁶

3 6. Between March 1, 2017 and July 31, 2017, the Camino Ramon Tenant paid
4 monthly rents totaling \$4,100.00 to Omni.⁷

5 7. Kal-Mor is the owner of fee title to the real property located at 4921 Indian River
6 Drive, #112, Las Vegas, Nevada 89103 (the "Indian River Property"), which is also included
7 among the Kal-Mor Properties referenced above.⁸

8 8. Kal-Mor purchased the Indian River Property from First 100 on or about April 10,
9 2015 and subsequently began operating the Indian River Property as a residential rental
10 property.⁹

11 9. On or about March 14, 2017, Kal-Mor entered into a Residential Lease
12 Agreement under which it agreed to lease the Indian River Property to two individual tenants
13 (the "Indian River Tenants").¹⁰

14 10. Shortly after the Indian River Tenants signed the March 14, 2017 Residential
15 Lease Agreement, Omni began making demands for rents upon the Indian River Tenants based
16 upon an undisclosed deed of trust and assignment of rents that First 100 executed in favor of
17 Omni before selling the Indian River Property to Kal-Mor.¹¹

18 11. Due to Omni's continuing demands for rents, the Indian River Tenants began
19 paying monthly rent to Omni instead of Kal-Mor on or about July 1, 2017.¹²

20 12. Between July 1, 2017 and September 30, 2017, the Indian River Tenants paid
21 monthly rents totaling \$2,190.00 to Omni instead of Kal-Mor.¹³

22 ⁶ Darroch Declaration, ¶ 7.

23 ⁷ Darroch Declaration, ¶ 8.

24 ⁸ Darroch Declaration, ¶ 9.

25 ⁹ Darroch Declaration, ¶ 10.

26 ¹⁰ Darroch Declaration, ¶ 11. A true and correct copy of the March 14, 2017 Residential Lease Agreement from
which the Indian River Tenants' personal identifying information has been redacted is attached hereto as Exhibit 3.

27 ¹¹ Darroch Declaration, ¶ 12.

28 ¹² Darroch Declaration, ¶ 13.

¹³ Darroch Declaration, ¶ 14.

1 **III. LEGAL ARGUMENT**

2 **A. Kal-Mor Is Entitled to Partial Summary Judgment.**

3 The court must enter summary judgment when, “after a review of the record viewed in a
4 light most favorable to the non-moving party, no genuine issues of material fact remain, and the
5 moving party is entitled to judgment as a matter of law.” *Fire Ins. Exch. v. Cornell*, 120 Nev.
6 303, 305, 90 P.3d 978, 979 (2004); NRCP 56(c). In *Wood v. Safeway, Inc.*, Nevada rejected the
7 “slightest doubt” standard, which discouraged summary judgment, and adopted the U.S.
8 Supreme Court’s standard as set forth in the Celotex trilogy, which encourages the use of
9 summary judgment to resolve litigation. 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The
10 Wood court also emphasized the language of NRCP 1, which states that the Nevada Rules of
11 Civil Procedure are designed “to secure the just, speedy, and inexpensive determination of every
12 action.” *Id.* at 730, 121 P.3d at 1030.

13 The moving party is entitled to summary judgment pursuant to NRCP 56(c) when the
14 pleadings, depositions, answers to interrogatories, admissions, and affidavits on file show that
15 there exists no genuine issue as to any material fact. *Pegasus v. Reno Newspapers, Inc.*, 118
16 Nev. 706, 713, 57 P.3d 82, 87 (2002). Conversely, to defeat a motion for summary judgment,
17 the non-moving party must rely on admissible evidence, and not “on the gossamer threads of
18 whimsy, speculation, and conjecture.” *Id.* at 713-14, 57 P.3d at 87 (citation omitted). To
19 effectuate the purpose of NRCP 56, the proper inquiry focuses on two key terms: material and
20 genuine. “The substantive law controls which factual disputes are material and will preclude
21 summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the
22 evidence is such that a rational trier of fact could return a verdict for the nonmoving party.”
23 *Wood* at 731, 121 P.3d at 1031.

24 For the reasons set forth below, Kal-Mor is entitled to partial summary judgment
25 determining as to its sixth cause of action for unjust enrichment, seventh cause of action for
26 conversion, and ninth cause of action for intentional interference with contractual relations,
27 which seek to recover the rents unlawfully collected by Omni from the tenants of the Camino
28 Ramon Property and the Indian River Property.

B. Kal-Mor Is Entitled to Summary Judgment on Its Sixth Cause of Action for Unjust Enrichment.

Unjust enrichment occurs whenever a person has and retains benefits that in equity and good conscience belong to another. *Leasepartners Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997); *Certified Fire Protection, Inc. v. Precision Construction*, 283 P.3d 250, 257 (Nev. 2012) (“Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment for the value thereof.”).

The First 100 Settlement was executed on January 16, 2017.¹⁴ From that date forward, Omni held no security interest in any of the Kal-Mor Properties under any of the Omni Deeds of Trust, which were discharged and extinguished through the First 100 Settlement. As such, Omni had no right to collect rents from Kal-Mor’s tenants pursuant to any assignment of rents contained within the Omni Deeds of Trust. Nonetheless, Omni continued making demands on such tenants and, in fact, collected and retained rents totaling at least \$6,290.00 paid by the tenants of the Camino Ramon Property and the Indian River Property. Those rents rightfully belong to Kal-Mor, and it would be inequitable to allow Omni to retain rents in which it has no rights. The Court should grant summary judgment in favor of Kal-Mor as to its sixth cause of action for unjust enrichment and order that Omni pay rents totaling \$6,290.00 to Kal-Mor.

C. Kal-Mor Is Entitled to Summary Judgment on Its Seventh Cause of Action for Conversion.

“A conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.” *Reliance Ins. Co. v. U.S. Bank of Washington, N.A.*, 143 F.3d 502, 506 (9th Cir., 1998). Conversion occurs whenever there is serious interference to a party’s rights in his property. *Bader v. Cerri*, 96 Nev. 352, 609 P.2d 314 (1980). Conversion is generally limited to those severe, major, and important interferences with the right to control personal property that justify requiring the actor to pay the property’s full value. *Edwards v. Emperor’s Garden Restaurant*, 122 Nev. 317, 130

1 P.3d 1280 (2006). Conversion is an act of general intent, which does not require wrongful intent
2 and is not excused by care, good faith, or lack of knowledge. *Evans v. Dean Witter Reynolds,*
3 *Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000).

4 Again, the First 100 Settlement was executed on January 16, 2017.¹⁵ From that date
5 forward, Omni held no security interest in any of the Kal-Mor Properties under any of the Omni
6 Deeds of Trust, which were discharged and extinguished through the First 100 Settlement, and
7 had no right to collect rents from Kal-Mor's tenants. The rents Omni collected clearly belonged
8 to Kal-Mor and were wrongfully converted by Omni. Those rents must be repaid. The Court
9 should grant summary judgment in favor of Kal-Mor as to its seventh cause of action for
10 conversion and order that Omni pay rents totaling \$6,290.00 to Kal-Mor.

11 **D. Kal-Mor Is Entitled to Summary Judgment on Its Ninth Cause of Action for**
12 **Intentional Interference with Contractual Relations.**

13 To establish a claim for tortious interference with contractual relations, the plaintiff must
14 establish "(1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3)
15 intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption
16 of the contract; and (5) resulting damage." *J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1267 (Nev.
17 2003). "At the heart of [an intentional interference] action is whether Plaintiff has
18 proved *intentional acts by Defendant* intended or designed to disrupt Plaintiff's contractual
19 relations...." *Las Vegas Investors v. Pacific Malibu Dev. Corp.*, 867 F.Supp. 920, 925
20 (D.Nev.1994) (alteration and emphasis in original).

21 It is beyond credible doubt that contractual relationships existed between Kal-Mor and
22 the tenants of the Camino Ramon Property and the Indian River Property.¹⁶ Moreover, Omni's
23 various demands for rents prove that Omni (i) knew that the Camino Ramon Property and the
24 Indian River Property were occupied by tenants that paid rents to Kal-Mor and (ii) intended to
25 disrupt those contractual relationships by intercepting the rents that would have otherwise been
26 paid to Kal-Mor. Finally, by collecting rents from the tenants of the Camino Ramon Property

27 ¹⁴ Partial Summary Judgment Order [Exhibit 4], p. 6.

28 ¹⁵ Partial Summary Judgment Order [Exhibit 4], p. 6.

1 and the Indian River Property, Omni actually disrupted the contractual relationships between
2 those tenants and Kal-Mor and caused Kal-Mor to incur at least \$6,290.00 in damages. The
3 Court should grant summary judgment in favor of Kal-Mor as to its ninth cause of action for
4 intentional interference with contractual relations and order that Omni pay rents totaling
5 \$6,290.00 to Kal-Mor.

6 **IV. CONCLUSION**

7 In summary, Kal-Mor respectfully requests that this Court enter an order granting partial
8 summary judgment in its favor and against Omni as to Kal-Mor's sixth cause of action for unjust
9 enrichment, seventh cause of action for conversion, and ninth cause of action for intentional
10 interference with contractual relations and order that Omni pay \$6,290.00 as compensation for
11 the rents wrongfully collected and withheld by Omni.

12 DATED this 16th day of June 2020.

13 **SHEA LARSEN**

14
15 /s/ Bart K. Larsen, Esq.

16 Bart K. Larsen, Esq.

17 Nevada Bar No. 8538

18 1731 Village Center Circle, Suite 150

19 Las Vegas, Nevada 89134

20 *Attorneys for Plaintiff Kal-Mor-USA, LLC*

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¹⁶ Exhibit 1, Exhibit 3.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Shea Larsen, and that on the 16th day of June 2020, I caused to be served a true and correct copy of foregoing PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereon and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List:

Robert Hernquist, Esq.
Mark Gardberg, Esq.
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Las Vegas, NV 89169
Attorneys for Defendant Omni Financial LLC

Joseph A. Gutierrez
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Las Vegas, NV 89148
Attorneys for Defendant First 100 LLC

/s/ Bart K. Larsen, Esq.

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E-Mail: blarsen@klnvada.com

Attorneys for Plaintiff
Kal-Mor-USA, LLC

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X;
and ROE ENTITIES I through X, inclusive,

Defendants.

CASE NO. A-17-757061-C

DEPARTMENT NO. 18

DECLARATION OF GREG DARROCH

I, Greg Darroch, hereby declare as follows:

1. I am over the age of 18, I have personal knowledge of the matters set forth herein except as to those matters stated on information and belief, which I believe to be true, and I am competent to testify to the matters set forth herein.

2. I am a member and manager of Kal-Mor-USA, LLC ("Kal-Mor"), which is a Nevada limited liability company.

3. Kal-Mor is the owner of fee title to the real property located at 5782 Camino Ramon Ave., Las Vegas, Nevada 89156 (the "Camino Ramon Property").

4. Kal-Mor purchased the Camino Ramon Property from Defendant First 100, LLC ("First 100") on or about April 6, 2015 and subsequently began operating the Camino Ramon Property as a residential rental property.

5. On or about August 1, 2015, Kal-Mor entered into a Residential Lease Agreement under which it agreed to lease the Camino Ramon Property to an individual tenant (the "Camino Ramon Tenant"). A true and correct copy of the August 1, 2015 Residential Lease Agreement from which the Camino Ramon Tenant's personal identifying information has been redacted is attached hereto as Exhibit 1.

6. Beginning in late 2016 and continuing through 2017, Defendant Omni Financial, LLC ("Omni") made multiple demands for rents upon the Camino Ramon Tenant based upon an undisclosed deed of trust and assignment of rents that First 100 executed in favor of Omni before selling the Camino Ramon Property to Kal-Mor. A true and correct copy of one such demand is attached hereto as Exhibit 2.

7. Due to Omni's continuing demands for rents, the Camino Ramon Tenant began paying monthly rent to Omni instead of Kal-Mor on or about March 1, 2017.

8. Between March 1, 2017 and July 31, 2017, the Camino Ramon Tenant paid monthly rents totaling \$4,100.00 to Omni.

9. Kal-Mor is the owner of fee title to the real property located at 4921 Indian River Drive, #112, Las Vegas, Nevada 89103 (the "Indian River Property").

10. Kal-Mor purchased the Indian River Property from First 100 on or about April 10, 2015 and subsequently began operating the Indian River Property as a residential rental property.

11. On or about March 14, 2017, Kal-Mor entered into a Residential Lease Agreement under which it agreed to lease the Indian River Property to two individual tenants (the "Indian River Tenants"). A true and correct copy of the March 14, 2017 Residential Lease Agreement from which the Indian River Tenants' personal identifying information has been redacted is attached hereto as Exhibit 3.

12. Shortly after the Indian River Tenants signed the March 14, 2017 Residential Lease Agreement, Omni began making demands for rents upon the Indian River Tenants based upon an undisclosed deed of trust and assignment of rents that First 100 executed in favor of Omni before selling the Indian River Property to Kal-Mor.

13. Due to Omni's continuing demands for rents, the Indian River Tenants began paying monthly rent to Omni instead of Kal-Mor on or about July 1, 2017.

14. Between July 1, 2017 and September 30, 2017, the Indian River Tenants paid monthly rents totaling \$2,190.00 to Omni instead of Kal-Mor.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated this 19 day of October, 2018.



GREG DARROCH

EXHIBIT 1



RESIDENTIAL LEASE AGREEMENT



for

5782 CAMINO RAMON AVE.

LAS VEGAS

NV

89156

(Property Address)

1. This AGREEMENT is entered into this 13th day of October, 2017 between
 OWNER'S Name: KAL-MOR-USA, OWNER'S Name: _____
 (collectively hereinafter, "OWNER" and/or "LANDLORD") legal owner(s) of the property and
 TENANT's Name: _____ TENANT's Name: _____
 TENANT's Name: _____ TENANT's Name: _____
 (collectively, "TENANT"), which parties hereby agree to as follows:

2. PREMISES: LANDLORD hereby leases to TENANT and TENANT hereby leases from LANDLORD, subject to
 the terms and conditions of the lease, the Premises known and designated as 5782 CAMINO RAMON AVE.
LAS VEGAS NV 89156 ("the Premises"). Premises Mail Box # 14,
 Parking Space # _____, Storage Unit # _____, Other _____.

3. TERM: The term hereof shall commence on 10/13/17 and continue until 01/31/19, with
 a total rent of \$ 15,413.34, then on a month-to-month basis thereafter, until either party shall terminate
 the same by giving the other party thirty (30) days written notice delivered by US mail or electronic mail. (All
 calculation based on 30 day month), as governed by paragraph 23 herein

4. RENT: TENANT agrees to pay, without demand, to LANDLORD as rent for the Premises the total sum of
800.00 per month on the first day of each calendar month,
 at WYNN REALTY GROUP, 7495 W. AZURE DR. #214, LAS VEGAS, NV 89130 or at such other place as
 LANDLORD may designate in writing.

5. SUMMARY: The initial rents, charges and deposits are as follows:

	Total	Received	Balance Due
Rent: From <u>10/13/17</u> , To <u>03/31/18</u>	\$ <u>4506.67</u>	\$ _____	\$ <u>4506.67</u>
Security Deposit	\$ <u>800.00</u>	\$ _____	\$ <u>800.00</u>
Key Deposit	\$ <u>50.00</u>	\$ _____	\$ <u>50.00</u>
Admin/Credit App Fee (non-refundable)	\$ <u>75.00</u>	\$ <u>75.00</u>	\$ _____
Pet Deposit	\$ <u>475.00</u>	\$ _____	\$ <u>475.00</u>
Cleaning Deposit	\$ <u>300.00</u>	\$ _____	\$ <u>300.00</u>
Cleaning Fee (non-refundable)	\$ _____	\$ _____	\$ _____
Additional Security	\$ _____	\$ _____	\$ _____
Utility Proration	\$ _____	\$ _____	\$ _____
Sewer/Trash Proration	\$ _____	\$ _____	\$ _____
Pre-Paid Rent	\$ _____	\$ _____	\$ _____
Pro-Rated Rent for _____	\$ _____	\$ _____	\$ _____
Other <u>LANDSCAPING 10/13-10/31/17</u>	\$ <u>25.33</u>	\$ _____	\$ <u>25.33</u>
Other _____	\$ _____	\$ _____	\$ _____
Other _____	\$ _____	\$ _____	\$ _____
TOTAL	\$ <u>6232.00</u>	\$ <u>75.00</u>	\$ <u>6157.00</u>

6. ADDITIONAL MONIES DUE:
N/A

Property 5782 CAMINO RAMON AVE.LAS VEGASNV 89156Owner's Name KAL-MOR-USA

Owner's Name _____

Tenant _____

Tenant _____

Tenant _____

Tenant _____

1
2 **7. ADDITIONAL FEES:**
3

4 **A. LATE FEES:** In the event TENANT fails to pay rent when due, TENANT shall pay a late fee of
5 \$ 75.00 plus \$ 20.00 per day for each day after 4 days that the sum was due. Such amounts shall
6 be considered to be rent.

7
8 **B. DISHONORED CHECKS:** A charge of \$ 150.00 shall be imposed for each dishonored check made by
9 TENANT to LANDLORD. TENANT agrees to pay all rents, all late fees, all notice fees and all costs to honor a
10 returned check with certified funds. After TENANT has tendered a check which is dishonored, TENANT hereby
11 agrees to pay all remaining payments including rent due under this Agreement by certified funds. Any payments
12 tendered to LANDLORD thereafter, which are not in the form of certified funds, shall be treated as if TENANT
13 failed to make said payment until certified funds are received. LANDLORD presumes that TENANT is aware of the
14 criminal sanctions and penalties for issuance of a check which TENANT knows is drawn upon insufficient funds
15 and which is tendered for the purpose of committing a fraud upon a creditor.

16
17 **C. ADDITIONAL RENT:** All late fees and dishonored check charges shall be due when incurred and shall
18 become additional rent. Payments will be applied to charges which become rent in the order accumulated. All
19 unpaid charges or any fees owed by TENANT, including but not limited to notice fees, attorney's fees, repair bills,
20 utility bills, landscape/pool repair and maintenance bills and CIC fines will become additional rent at the beginning
21 of the month after TENANT is billed. TENANT'S failure to pay the full amount for a period may result in the
22 initiation of eviction proceedings. LANDLORD'S acceptance of any late fee or dishonored check fee shall not act as
23 a waiver of any default of TENANT, or as an extension of the date on which rent is due. LANDLORD reserves the
24 right to exercise any other rights and remedies under this Agreement or as provided by law.

25
26 **8. SECURITY DEPOSITS:** Upon execution of this Agreement,

27 TENANT's Name: _____ TENANT's Name: _____
28 TENANT's Name: _____ TENANT's Name: _____

29 shall deposit with LANDLORD as a Security Deposit the sum stated in paragraph 5. TENANT shall not apply the
30 Security Deposit to, or in lieu of, rent. At any time during the term of this Agreement and upon termination of the
31 tenancy by either party for any reason, the LANDLORD may claim, from the Security Deposit, such amounts due
32 LANDLORD under this Agreement. Any termination prior to the initial term set forth in paragraph 3, or failure of
33 TENANT to provide proper notice of termination, is a default in the payment of rent for the remainder of the lease
34 term, which may be offset by the Security Deposit. Pursuant to NRS 118A.242, LANDLORD shall provide
35 TENANT with a written, itemized accounting of the disposition of the Security Deposit within thirty (30) days of
36 surrender of premises. TENANT agrees, upon termination of the tenancy, to provide LANDLORD with a
37 forwarding address to prevent a delay in receiving the accounting and any refund. At the termination of this
38 agreement, the TENANT identified in this paragraph will be refunded the remaining security deposit (if any). In the
39 event of damage to the Premises caused by TENANT or TENANT's family, agents or visitors, LANDLORD may
40 use funds from the deposit to repair, but is not limited to this fund and TENANT remains liable for any remaining
41 costs. (In addition to the above, to be refundable, property must be professionally cleaned to include carpets and all
42 hard surface flooring including tile and grout.) Upon request by Landlord, Tenant must furnish receipts for
43 professional cleaning services.

44
45 **9. CONDITION OF PREMISES:** TENANT agrees that TENANT has examined the Premises, including the
46 grounds and all buildings and improvements, and that they are, at the time of this Lease, in good order, good
47 repair, safe, clean, and rentable condition.

Property 5782 CAMINO RAMON AVE. ^{DS} ED LAS VEGAS NV 89156
Owner's Name KAL-MOR-USA Owner's Name _____
Tenant _____ Initials _____ Tenant _____ Initials _____
Tenant _____ Initials _____ Tenant _____ Initials _____

10. TRUST ACCOUNTS: BROKER shall retain all interest earned, if any, on security deposits to offset administration and bookkeeping fees.

11. EVICTION COSTS: TENANT shall be charged an administrative fee of \$ 275.00 per eviction attempt to offset the costs of eviction notices and proceedings. TENANT shall be charged for service of legal notices and all related fees according to actual costs incurred.

12. CARDS AND KEYS: Upon execution of the Agreement, TENANT shall receive the following:

<u>2</u> Door key(s)	<u>1</u> Garage Transmitter/Fob(s)	Pool Key(s)
<u>1</u> Mailbox key(s)	Gate Card/Fob(s)	Other(s) _____
Laundry Room key(s)	Gate Transmitter/Fob(s)	Other(s) _____

TENANT shall make a key deposit (if any) in the amount set forth in paragraph 2 upon execution of this Agreement. The key deposit shall be refunded within 30 days of TENANT's return of all cards and/or keys to LANDLORD or LANDLORD's BROKER/DESIGNATED PROPERTY MANAGER.

13. CONVEYANCES AND USES: TENANT shall not assign, sublet or transfer TENANT'S interest, nor any part thereof, without prior written consent of LANDLORD. The Premises shall be used and occupied by TENANT exclusively as a private single-family residence. Neither the Premises nor any part of the Premises or yard shall be used at any time during the term of this Lease for any purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than as a private single-family residence. TENANT shall comply with all the health and sanitary laws, ordinances, rules and orders of appropriate governmental authorities and homeowners associations, if any, with respect to the Premises. TENANT understands and acknowledges that they are not permitted to access the attic crawl space, roof or under the home or any other area of the property that is not considered living space. TENANT shall not commit waste, cause excessive noise, create a nuisance or disturb others.

14. OCCUPANTS: Occupants of the Premises shall be limited to 3 persons and shall be used solely for housing accommodations and for no other purpose. TENANT represents that the following person(s) will live in the Premises:

JEFFREY SWAKE, CRYSTAL SWAKE AND ONE MINOR CHILD

15. GUESTS: The TENANT agrees to pay the sum of \$ 50.00 per day for each guest remaining on the Premises more than 14 days. Notwithstanding the foregoing, in no event shall any guest remain on the Premises for more than 28 days.

16. UTILITIES: TENANT shall immediately connect all utilities and services of premises upon commencement of lease. TENANT is to pay when due all utilities and other charges in connection with TENANT's individual rented premises. Responsibility is described as (T) for TENANT and (O) for Owner:

Electricity <u>T</u>	Trash <u>T</u>	Trash Can Rental: <u>T</u>	Phone <u>T</u>
Gas <u>T</u>	Sewer <u>T</u>	Cable <u>T</u>	Other _____
Water <u>T</u>	Septic <u>N/A</u>	Association Fees <u>O</u>	Other _____

a. TENANT is responsible to connect the following utilities in TENANT'S name: EVERYTHING LISTED IN SECTION 16 OF LEASE AGREEMENT MARKED WITH A "T".

Property <u>5782 CAMINO RAMON AVE.</u>	<u>DS</u>	<u>LAS VEGAS</u>	NV	<u>89156</u>
Owner's Name <u>KAL-MOR-USA</u>	<u>ad</u>	Owner's Name _____		
Tenant _____	Initials _____	Tenant _____	Initials _____	
Tenant _____	Initials _____	Tenant _____	Initials _____	

b. LANDLORD will maintain the connection of the following utilities in LANDLORD's name and bill TENANT for connection fees and use accordingly for the entire term of the lease: N/A

c. No additional phone or cable lines or outlets or satellite dishes shall be obtained for the Premises without the LANDLORD's written consent. In the event of LANDLORD's consent, TENANT shall be responsible for all costs associated with the additional lines, outlets or dishes. TENANT shall also remove any satellite dishes and restore the subject property to its original condition at the termination of this Agreement.

d. If an alarm system exists on the Premises, TENANT may obtain the services of an alarm services company and shall pay all costs associated therewith.

e. TENANT shall not default on any obligation to a utility provider for utility services at the Property. Owner does not pay for any utilities, excluding any such UTILITIES THAT ARE INCLUDED IN HOME OWNER'S ASSOCIATION DUES. TENANT must show all utilities giving service to said property have a zero balance upon move out.

f. Other: N/A

17. **PEST NOTICE:** TENANT understands that various pest, rodent and insect species (collectively, "pests") exist in Southern Nevada. Pests may include, but are not limited to, scorpions (approximately 23 species, including bark scorpions), spiders (including black widow and brown recluse), bees, snakes, ants, termites, rats, mice and pigeons. The existence of pests may vary by season and location. Within thirty (30) days of occupancy, if the Premises has pests, LANDLORD, at TENANT's written request, will arrange for and pay for the initial pest control spraying. TENANT agrees to pay for the monthly pest control spraying fees. For more information on pests and pest control providers, TENANT should contact the State of Nevada Division of Agriculture.

18. **PETS:** No pet shall be on or about the Premises at any time without written permission of LANDLORD. In the event TENANT wishes to have a pet, TENANT will complete an Application for Pet Approval. Should written permission be granted for occupancy of the designated pet, an additional security deposit in the amount of \$ 300.00 will be required and paid by TENANT in advance subject to deposit terms and conditions aforementioned. In the event written permission shall be granted, TENANT shall be required to procure and provide to LANDLORD written evidence that TENANT has obtained such insurance as may be available against property damage to the Premises and liability to third party injury. Said policy shall name LANDLORD and LANDLORD'S AGENT as additional insureds. A copy of said policy shall be provided to LANDLORD or LANDLORD'S BROKER/DESIGNATED PROPERTY MANAGER prior to any pets being allowed within the Premises. If TENANT obtains a pet without written permission of LANDLORD, such will be an event of default under paragraph 21. TENANT further agrees to pay an immediate fine of \$ 750.00. TENANT agrees to indemnify LANDLORD for any and all liability, loss and damages which LANDLORD may suffer as a result of any animal in the Premises, whether or not written permission was granted.

(This Space Intentionally Left Blank)

Property	<u>5782 CAMINO RAMON AVE.</u>	<u>DS</u>	<u>LAS VEGAS</u>	NV	<u>89156</u>
Owner's Name	<u>KAL-MOR-USA</u>	<u>Initials</u>	Owner's Name		
Tenant		<u>Initials</u>	Tenant		<u>Initials</u>
Tenant		<u>Initials</u>	Tenant		<u>Initials</u>

19. **RESTRICTIONS:** TENANT shall not keep or permit to be kept in, on, or about the Premises: waterbeds, boats, campers, trailers, mobile homes, recreational or commercial vehicles or any non-operative vehicles except as follows:

NO SMOKING INSIDE THE DWELLING.

TENANT shall not conduct nor permit any work on vehicles on the premises without the express written consent of the Owner.

20. **ALTERATIONS:** TENANT shall make no alterations to the Premises without LANDLORD's written consent. Unless otherwise agreed in writing between TENANT and LANDLORD, all alterations or improvements to the Premises become the property of LANDLORD, shall remain upon the Premises, and shall constitute a fixture permanently affixed to the Premises. Unless otherwise agreed in writing between TENANT and LANDLORD, TENANT shall be responsible for restoring the Premises to its original condition and removing any alterations or improvements if requested by LANDLORD or LANDLORD's BROKER/DESIGNATED PROPERTY MANAGER.

21. **DEFAULT:** Failure by TENANT to pay rent, perform any obligation under this Agreement, or comply with any Association Governing Documents (if any), or TENANT's engagement in activity prohibited by this Agreement, or TENANT's failure to comply with any and all applicable laws, shall be considered a default hereunder. Upon default, LANDLORD may, at its option, terminate this tenancy upon giving proper notice. Upon default, LANDLORD shall issue a proper itemized statement to TENANT noting the amount owed by TENANT, including any and all fees related to eviction and reletting of the subject property. LANDLORD may pursue any and all legal and equitable remedies available.

a. **FORFEITURE OF SECURITY DEPOSIT - DEFAULT.** It is understood and agreed that TENANT shall not attempt to apply or deduct any portion of any security deposit from the last or any month's rent or use or apply any such security deposit at any time in lieu of payment of rent. If TENANT fails to comply, such security deposit shall be forfeited and LANDLORD may recover the rent due as if any such deposit had not been applied or deducted from the rent due. For the purpose of this paragraph, it shall be conclusively presumed that a TENANT leaving the premises while owing rent is making an attempted deduction of deposits. Furthermore, any deposit shall be held as a guarantee that TENANT shall perform the obligations of the Lease and shall be forfeited by the TENANT should TENANT breach any of the terms and conditions of this Lease. In the event of default, by TENANT, of any obligation in this Lease which is not cured by TENANT within five (5) days' notice from LANDLORD, then in addition to forfeiture of the Security Deposit, LANDLORD may pursue any other remedy available by law, equity or otherwise.

b. **TENANT PERSONAL INFORMATION UPON DEFAULT.** TENANT understands and acknowledges that if TENANT defaults on lease, LANDLORD or Owner may engage the services of an Attorney or a Collection Agency. TENANT understands and acknowledges that LANDLORD/Owner may give an Attorney or a Collection Agency, TENANT's personal information, including but not limited to, TENANT's social security number or any other information to aid in collection efforts and holds LANDLORD, Broker, and Owner harmless from any liability in relation to the release of any personal information to these entities.

22. **ENFORCEMENT:** Any failure by LANDLORD to enforce the terms of this Agreement shall not constitute a waiver of said terms by LANDLORD. Acceptance of rent due by LANDLORD after any default shall not be construed to waive any right of LANDLORD or affect any notice of termination or eviction.

Property	5782 CAMINO RAMON AVE.	DS CD	LAS VEGAS	NV	89156
Owner's Name	KAL-MOR-USA		Owner's Name		
Tenant		Initials	Tenant		Initials
Tenant		Initials	Tenant		Initials

- a. ABANDONMENT. LANDLORD is entitled to presume per NRS 118A.450 that TENANT has abandoned the Premises if the TENANT is absent from the premises for a period of time equal to one-half the time for periodic rental payments, unless the rent is current or the TENANT has in writing notified the landlord of an intended absence.
- b. If at any time during the term of this Lease, TENANT abandons the Premises, LANDLORD shall have the following rights: LANDLORD may, at LANDLORD's option, enter the Premises by any means without liability to TENANT for damages and may relet the Premises, for the whole or any part of the then unexpired term, and may receive and collect all rent payable by virtue of such reletting. At LANDLORD's option, LANDLORD may hold TENANT liable for any difference between the rent that would have been payable under this Lease during the balance of the unexpired term, if this Lease had continued in force, and the net rent for such period realized by LANDLORD by means of such reletting.
- LANDLORD also may dispose of any of TENANT's abandoned personal property, pursuant to Nevada law as LANDLORD deems appropriate, without liability to TENANT.

23. NOTICE OF INTENT TO VACATE: TENANT shall provide notice of TENANT's intention to vacate the Premises. Such notice shall be in writing and shall be provided to LANDLORD prior to the first day of the last month of the lease term set forth in Section 3 of this Agreement. In no event shall notice be less than 30 days prior to the expiration of the term of this Agreement. In the event TENANT fails to provide such notice, TENANT shall be deemed to be holding-over on a month-to-month basis until 30 days after such notice. During a holdover not authorized by LANDLORD, rent shall increase by 25 %.

24. TERMINATION: Upon termination of the tenancy, TENANT shall surrender and vacate the Premises and shall remove any and all of TENANT'S property. TENANT shall return keys, personal property and Premises to the LANDLORD in good, clean and sanitary condition, normal wear excepted.

25. EMERGENCIES: The name, address and phone number of the party who will handle maintenance or essential services emergencies on behalf of the LANDLORD is as follows: MARC GISI, 7495 W. AZURE DR. #214, LAS VEGAS, NV 89130, 702-672-6544

26. MAINTENANCE: TENANT shall keep the Premises in a clean and good condition. TENANT shall immediately report to the LANDLORD any defect or problem on the Premises. TENANT agrees to notify LANDLORD of any water leakage and/or damage within 24 hours of the occurrence. TENANT understands that TENANT may be held responsible for any water and/or mold damage, including the costs of remediation of such damage. TENANT shall be responsible for any MINOR repairs necessary to the Premises up to and including the cost of \$ 75.00. TENANT agrees to pay for all repairs, replacements and maintenance required by TENANT's misconduct or negligence or that of TENANT's family, pets, licensees and guests, including but not limited to any damage done by wind or rain caused by leaving windows open and/or by overflow of water, or stoppage of waste pipes, or any other damage to appliances, carpeting or the Premises in general. At LANDLORD's option, such charges shall be paid immediately or be regarded as additional rent to be paid no later than the next monthly payment date following such repairs. TENANT acknowledges any minor repairs made to the Property must be done by an active, licensed and insured contractor.

- a. TENANT shall change filters in the heating and air conditioning systems at least once every month, at TENANT's own expense. LANDLORD shall maintain the heating and air conditioning systems and provide for major repairs. However, any repairs to the heating or cooling system caused by dirty filters due to TENANT neglect will be the responsibility of TENANT.

Property	<u>5782 CAMINO RAMON AVE.</u>	<u>LAS VEGAS</u>	<u>NV</u>	<u>89156</u>
Owner's Name	<u>KAL-MOR-USA</u>	Owner's Name		
Tenant		Tenant	Initials	
Tenant		Tenant	Initials	

c. LANDLORD shall be responsible for all systems including heating, cooling, electrical, plumbing and sewer lines. LANDLORD shall be responsible for all major heating, cooling electrical, plumbing and sewer problems that are not caused by TENANT.

In the case of landscaping being maintained by a contractor, TENANT agrees to cooperate with the landscape contractor in a satisfactory manner. LANDLORD-provided landscaping is not to be construed as a waiver of any responsibility of the TENANT to keep and maintain landscaping and/or shrubs, trees and sprinkler system in good condition.

e. There _____ is -OR- x is not a pool contractor whose name and phone number are as follows:

In the event the pool is not being maintained by a Contractor, TENANT agrees to maintain the pool, if any. TENANT agrees to maintain the water level, sweep, clean and keep in good condition. If TENANT fails to maintain the pool in a satisfactory manner, LANDLORD may have the pool maintained by a licensed pool service and charge TENANT with the actual cost. Said costs shall become additional rent.

27. ACCESS: TENANT agrees to grant LANDLORD the right to enter the Premises at all reasonable times and for all reasonable purposes including showing to prospective lessees, buyers, appraisers, insurance agents, periodic maintenance reviews and business therein as requested by LANDLORD. If TENANT fails to keep scheduled appointments with vendors to make necessary/required repairs, TENANT shall pay for any additional charges incurred which will then become part of the next month's rent and be considered additional rent. TENANT shall not deny LANDLORD his/her rights of reasonable entry to the Premises. LANDLORD shall have the right to enter in case of emergency and other situations as specifically allowed by law. LANDLORD agrees to give TENANT twenty-four (24) hours notification for entry, except in case of emergency.

Page 7 of 13

- a. **DISPLAY OF SIGNS.** During the last thirty (30) days of this Lease, LANDLORD or LANDLORD's agent may display For Sale or For Rent or similar signs on or about the Premises and enter to show the Premises to prospective purchasers or tenants. TENANT also authorizes Broker to use an electronic keybox to show the Premises during the last 30 days of lease. TENANT further agrees to execute any and all documentation necessary to facilitate the use of a lockbox.


28. ASSOCIATIONS: Should the Premises described herein be a part of a common interest community, homeowners association planned unit development, condominium development ("the Association") or such, TENANT hereby agrees to abide by the Governing Documents (INCLUDING Declarations, Bylaws, Articles, Rules and Regulations) of such community and further agrees to be responsible for any fines or penalties levied as a result of failure to do so by TENANT, TENANT's family, licensees or guests. Noncompliance with the Governing Documents shall constitute a violation of this Agreement. Unless billed directly to TENANT by the Association, such fines shall be considered as additional rent and shall be due along with the next monthly payment of rent. By initialing this paragraph, TENANT acknowledges receipt of a copy of the applicable Governing Documents. LANDLORD, at LANDLORD's expense, shall provide TENANT with any additions to such Governing Documents as they become available. LANDLORD may, at its option, with 30 days' notice to TENANT, adopt additional reasonable rules and regulations governing use of the Premises and of the common areas (if any). [] [] []

29. INVENTORY: It is agreed that the following inventory is now on said premises. (Check if present; cross out if absent.)

<input checked="" type="checkbox"/> Refrigerator	<input type="checkbox"/> Intercom System	<input type="checkbox"/> Spa Equipment
<input checked="" type="checkbox"/> Stove	<input type="checkbox"/> Alarm System	<input type="checkbox"/> Auto Sprinklers
<input checked="" type="checkbox"/> Microwave	<input type="checkbox"/> Trash Compactor	<input checked="" type="checkbox"/> Auto Garage Openers
<input checked="" type="checkbox"/> Disposal	<input type="checkbox"/> Ceiling Fans	<input type="checkbox"/> BBQ
<input checked="" type="checkbox"/> Dishwasher	<input type="checkbox"/> Water Conditioner Equip.	<input type="checkbox"/> Solar Screens
<input checked="" type="checkbox"/> Washer	<input checked="" type="checkbox"/> Dryer	<input type="checkbox"/> Pool Equipment
<input type="checkbox"/> Garage Opener	<input type="checkbox"/> Gate Remotes	<input type="checkbox"/> Carpet
<input type="checkbox"/> Trash Can(s) (circle one) owner provided / trash service provided		
<input type="checkbox"/> Floor Coverings (specify type) _____		
<input type="checkbox"/> Window Coverings (specify type) _____		

TENANT acknowledges that any appliances that are on the premises are for TENANT's use and convenience; however, in the event of a breakdown of said appliance(s) TENANT acknowledges that property manager, LANDLORD and or the owners are not responsible for any damages caused to TENANT's personal property, to include spoilage of food, beverage or clothing etc. as a result of said appliance break down.

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Property	5782 CAMINO RAMON AVE.	DS	LAS VEGAS	NV	89156
Owner's Name	KAL-MOR-USA		Owner's Name		
Tenant		Initials	Tenant		Initials
Tenant		Initials	Tenant		Initials

30. **INSURANCE:** TENANT x is -OR- _____ is not required to purchase renter's insurance. LANDLORD BROKERAGE, and DESIGNATED PROPERTY MANAGER shall be named as additional insureds on any such policy. LANDLORD shall not be liable for any damage or injury to TENANT, or any other person, to any property occurring on the Premises or any part thereof, or in common areas thereof. TENANT agrees to indemnify, defend and hold LANDLORD harmless from any claims for damages. TENANT understands that LANDLORD's insurance does not cover TENANT's personal property. If the Premises, or any part of the Premises, shall be partially damaged by fire or other casualty not due to TENANT's negligence or willful act, or that of TENANT's family, agent, or visitor, there shall be an abatement of rent corresponding with the time during which, and the extent to which, the Premises is uninhabitable. If LANDLORD shall decide not to rebuild or repair, the term of this Lease shall end and the rent shall be prorated up to the time of the damage.

TENANT hereby acknowledges that the OWNER of the subject property does x or does not _____ have homeowner's insurance. TENANT agrees to cooperate with homeowner and homeowner's insurance company in all relevant matters. TENANT further agrees, upon written notice, to cease any and all actions that may adversely impact OWNER's insurance coverage under said policy.

31. **ILLEGAL ACTIVITIES PROHIBITED:** TENANT is aware of the following: It is a misdemeanor to commit or maintain a public nuisance as defined in NRS 202.450 or to allow any building or boat to be used for a public nuisance. Any person, who willfully refuses to remove such a nuisance when there is a legal duty to do so, is guilty of a misdemeanor. A public nuisance may be reported to the local sheriff's department. A violation of building, health or safety codes or regulations may be reported to the government entity in our local area such as the code enforcement division of the county/city government or the local health or building departments. In addition continuing violations of HOA rules and regulations will be considered a public nuisance and TENANT hereby agrees that such continuing HOA violations shall be grounds for eviction.

32. **ADDITIONAL RESPONSIBILITIES:**

a. TENANT may install or replace screens at TENANT's own expense. Solar screen installation requires written permission from LANDLORD. LANDLORD is not responsible for maintaining screens.

b. With the exception of electric cooking devices, outdoor cooking with portable barbecuing equipment is prohibited within ten (10) feet of any overhang, balcony or opening, unless the Premises is a detached single family home. The storage and/or use of any barbecuing equipment is prohibited indoors, above the first floor and within five (5) feet of any exterior building wall. Adult supervision is required at all times the barbecue equipment is generating heat.

c. The Premises _____ will -OR- x will not be freshly painted before occupancy. If not freshly painted, the Premises x will -OR- _____ will not be touched up before occupancy. TENANT will be responsible for the costs for any holes or excessive dirt or smudges that will require repainting.

d. TENANT agrees to coordinate transfer of utilities to LANDLORD or BROKER/DESIGNATED PROPERTY MANAGER no less than 7 business days of vacating the Premises.

e. Locks may be replaced or re-keyed at the TENANT'S expense provided TENANT informs LANDLORD and provides LANDLORD with a workable key for each new or changed lock. TENANT further agrees to be responsible for any and all such rekey expenses should TENANT fail to notify LANDLORD in advance of any such replacement.

Property	<u>5782 CAMINO RAMON AVE.</u>	^{DS} <u>CD</u>	<u>LAS VEGAS</u>	<u>NV</u>	<u>89156</u>
Owner's Name	<u>KAL-MOR-USA</u>		Owner's Name		
Tenant		Initials	Tenant		Initials
Tenant		Initials	Tenant		Initials

f. TENANT may conduct a risk assessment or inspection of the Premise for the presence of lead-based paint and/or lead-based paint hazards at the TENANT's expense for a period of ten days after execution of this agreement. Such assessment or inspection shall be conducted by a certified lead based paint professional. If TENANT for any reason fails to conduct such an assessment or inspection, then TENANT shall be deemed to have elected to lease the Premises "as is" and to have waived this contingency. If TENANT conducts such an assessment or inspection and determines that lead-based paint deficiencies and/or hazards exist, TENANT will notify LANDLORD in writing and provide a copy of the assessment/inspection report. LANDLORD will then have ten days to elect to correct such deficiencies and/or hazards or to terminate this agreement. In the event of termination under this paragraph, the security deposit will be refunded to TENANT. (If the property was constructed prior to 1978, refer to the attached Lead-Based Paint Disclosure.)

g. TENANT may display the flag of the United States, made of cloth, fabric or paper, from a pole, staff or in a window, and in accordance with 4 USC Chapter 1. LANDLORD may, at its option, with 30 days' notice to TENANT, adopt additional reasonable rules and regulations governing the display of the flag of the United States.

h. TENANT may display political signs subject to any applicable provisions of law governing the posting of political signs, and, if the Premises are located within a CIC, the provisions of NRS 116 and any governing documents related to the posting of political signs. All political signs exhibited must not be larger than 24 inches by 36 inches. LANDLORD may not exhibit any political sign on the Premises unless the TENANT consents, in writing, to the exhibition of the political sign. TENANT may exhibit as many political signs as desired, but may not exhibit more than one political sign for each candidate, political party or ballot question.

i. DANGEROUS MATERIALS. TENANT shall not keep or have on or around the Premises any article or thing of a dangerous, flammable, or explosive character that might unreasonably increase the danger of fire on or around the Premises or that might be considered hazardous.

33. CHANGES MUST BE IN WRITING: No changes, modifications or amendment of this Agreement shall be valid or binding unless such changes, modifications or amendment are in writing and signed by each party. Such changes shall take effect after thirty days' notice to TENANT. This Agreement constitutes the entire agreement between the Parties and supersedes any prior understanding or representation of any kind preceding the date of this Agreement. There are no other promises, conditions, understandings or other agreements, whether oral or written, relating to the subject matter of this Agreement.

34. CONFLICTS BETWEEN LEASE AND ADDENDUM: In case of conflict between the provisions of an addendum and any other provisions of this Agreement, the provisions of the addendum shall govern.

35. ATTORNEY'S FEES: In the event of any court action, the prevailing party shall be entitled to be awarded against the losing party all costs and expenses incurred thereby, including, but not limited to, reasonable attorney's fees and costs.

36. NEVADA LAW GOVERNS: This Agreement is executed and intended to be performed in the State of Nevada in the county where the Premises are located and the laws of the State of Nevada shall govern its interpretation and effect.

37. WAIVER: Nothing contained in this Agreement shall be construed as waiving any of the LANDLORD's or TENANT's rights under the laws of the State of Nevada.

Property	<u>5782 CAMINO RAMON AVE.</u>	<u>OS</u>	<u>LAS VEGAS</u>	<u>NV</u>	<u>89156</u>
Owner's Name	<u>KAL-MOR-USA</u>	<u>60</u>	Owner's Name		
Tenant		Initials	Tenant		Initials
Tenant		Initials	Tenant		Initials

38. **PARTIAL INVALIDITY:** In the event that any provision of this Agreement shall be held invalid or unenforceable, such ruling shall not affect in any respect whatsoever the validity or enforceability of the remainder of this Agreement.

39. **VIOLATIONS OF PROVISIONS:** A single violation by TENANT of any of the provisions of this Agreement shall be deemed a material breach and shall be cause for termination of this Agreement. Unless otherwise provided by the law, proof of any violation of this Agreement shall not require criminal conviction but shall be by a preponderance of the evidence.

40. **SIGNATURES:** The Agreement is accepted and agreed to jointly and severally. The undersigned have read this Agreement and understand and agree to all provisions thereof and further acknowledge that they have received a copy of this Agreement. This Agreement may be executed in any number of counterparts, electronically pursuant to NRS Chapter 719, and by facsimile copies with the same effect as if all parties to this agreement had signed the same document and all counterparts and copies will be construed together and will constitute one and the same instrument.

41. **LICENSEE DISCLOSURE OF INTEREST:** Pursuant to NAC 645.640, N/A is a licensed real estate agent in the State(s) of N/A, and has the following interest, direct or indirect, in this transaction: ☐ Principal (LANDLORD or TENANT) -OR- ☐ family relationship or business interest: N/A

42. **CONFIRMATION OF REPRESENTATION:** The Agents in this transaction are:

TENANT's Brokerage: ROOFTOP REALTY Broker's Name: _____
 DESIGNATED PROPERTY MANAGER _____
 Agent's Name: DIANA L HILLIS Agent's License # _____
 Address: 9041 W. PECOS RD. STE 4200 HENDERSON NV 89074
 Phone: 480-600-8181 Fax: _____ Email: HILLISTEAM1@GMAIL.COM

LANDLORD's Brokerage: WYNN REALTY GROUP Broker's Name: RAY CROSBY
 DESIGNATED PROPERTY MANAGER MARC GISI
 Agent's Name: MARC GISI Agent's License # 42295
 Address: 7495 W. AZURE DR. #214 LAS VEGAS NV 89130
 Phone: 702-672-6544 Fax: 702-489-3336 Email: marcgisi@cox.net

43. **NOTICES:** Unless otherwise required by law, any notice to be given or served upon any party hereto in connection with this Agreement must be in writing and mailed by certificate of mailing to the following addresses:

BROKERAGE: WYNN REALTY GROUP BROKER RAY CROSBY
 DESIGNATED PROPERTY MANAGER MARC GISI
 Address: 7495 W. AZURE DR. #214 LAS VEGAS NV 89130
 Phone: 702-672-6544 Fax: 702-489-3336 Email: _____

TENANT: _____
 Address: 5782 CAMINO RAMON AVE. LAS VEGAS NV 89156
 Phone: _____ Fax: _____ Email: _____

Property 5782 CAMINO RAMON AVE. LAS VEGAS NV 89156
 Owner's Name KAL-MOR-USA Owner's Name _____
 Tenant _____ Initials _____ Tenant _____ Initials _____
 Tenant _____ Initials _____ Tenant _____ Initials _____

44. **MILITARY PROVISION:** IN THE EVENT the TENANT is, or hereafter becomes, a member of the United States Armed Forces on extended active duty and hereafter the TENANT receives permanent change of station orders to depart from the area where the Premises are located, or is relieved from active duty, retires or separates from the military, or is ordered into military housing, then in any of these events, the TENANT may terminate this lease upon giving thirty (30) days written notice to the LANDLORD. The TENANT shall also provide to the LANDLORD a copy of the official orders or a letter signed by the TENANT's commanding officer, reflecting the change, which warrants termination under this clause. The TENANT will pay prorated rent for any days (he/she) occupy the premises past the first day of the month. The security deposit will be promptly returned to the TENANT, provided there are no damages to the premises, as described by law.

45. **ADDENDA ATTACHED:** Incorporated into this Agreement are the following addenda, exhibits and other information:

- A. ☒ Lease Addendum for Drug Free Housing
- B. ☒ Lease Addendum for Illegal Activity
- C. ☒ Smoke Detector Agreement
- D. ☐ HOA Rules and Regulations
- E. ☐ Other: _____
- F. ☐ Other: _____
- G. ☐ Other: _____
- H. ☐ Other: _____

46. **ADDITIONAL TERMS AND CONDITIONS:**

TENANT SHALL PAY RENT IN ADVANCE ON THE 1ST DAY OF EVERY MONTH AND DELINQUENT AFTER THE 5TH. THERE IS NO GRACE PERIOD. TENANT SHALL MAKE ALL PAYMENTS PAYABLE TO WYNN REALTY GROUP BY MONEY ORDER, CASHIERS CHECK OR ELECTRONIC DEPOSIT. TENANT SHALL MAIL SUCH PAYMENTS TO 7495 W. AZURE DR. #214, LAS VEGAS, NV 89130 OR MAY HAND DELIVER SUCH PAYMENTS TO 7495 W. AZURE DR., LAS VEGAS, NV 89130 DURING NORMAL BUSINESS HOURS.

NO SMOKING INSIDE THE INTERIOR OF THE DWELLING.

AFTER 30 CALENDAR DAYS OF OCCUPYING THE PROPERTY, TENANT IS AWARE AND AGREES TO PAY ANY AND ALL HOME WARRANTY SERVICE CALL FEES AT TIME OF SERVICE. NO EXCEPTIONS WILL BE MADE OR NEGOTIATED.

TENANT IS AWARE AND AGREES TO PAY QUARTERLY LANDSCAPING BILL IN ADDITION TO MONTHLY RENT. MONTHLY LANDSCAPING CHARGE TO BE \$40.00.

TENANT IS AWARE AND AGREES TO ALERT PROPERTY MANAGEMENT COMPANY AND/OR LANDLORD OF ANY DEFICIENCIES OR REPAIRS TENANT DISCOVERS WITHIN 48 HOURS. TENANT IS AWARE AND AGREES IF ANY REPAIRS REQUIRE ALTERNATIVE HOUSING, TENANT WILL VACATE THE HOME UNTIL SAID REPAIRS ARE COMPLETED.

TENANT IS AWARE AND AGREES TO CURE ANY HOA VIOLATION NOTICES BY THE DETERMINED DUE DATE. IF ANY HOA VIOLATION MATURES INTO A FINE BEING LEVIED, TENANT AGREES TO PAY FINE IN FULL BY THE DETERMINED DUE DATE.

NO FEEDING OF BIRDS, STRAY CATS, OR OTHER WILD ANIMALS ALLOWED ON THE PROPERTY.

NO PARKING OR STORING OF VEHICLES WITH EXPIRED REGISTRATION IS ALLOWED ON THE PROPERTY UNLESS KEPT IN THE GARAGE AND OUT OF VIEW.

IT IS THE PROTOCOL OF THE LANDLORD/AGENT TO SERVE A FIVE DAY NOTICE ON THE 6TH OF THE MONTH FOR NON PAYMENT OF RENT.

Property	5782 CAMINO RAMON AVE.	DS	LAS VEGAS	NV	89156
Owner's Name	KAL-MOR-USA		Owner's Name		
Tenant		Initials	Tenant		Initials
Tenant		Initials	Tenant		Initials

1 NON EMERGENCY REPAIR REQUESTS ARE TO BE PHONED TO THE FOLLOWING NUMBER:
2 702-515-4039. ALLOW 24 HOURS FOR REQUESTS TO BE PROCESSED AND A VENDOR
3 DISPATCHED.

4 EMERGENCY REPAIR REQUESTS ARE TO BE PHONED TO THE FOLLOWING NUMBER: 702--
5 672-6544. A VENDOR WILL BE DISPATCHED AS SOON AS POSSIBLE.

6 TEXTING OF REPAIR REQUESTS OF ANY NATURE WILL NOT BE RECOGNIZED.
7
8
9
10
11

12 Landlord agrees to rent the Premises on the above terms and conditions.

13 DocuSigned by:

14 Greg Darroch

15 10/13/2017

16 LANDLORD/OWNER

DATE

LANDLORD/OWNER

DATE

17 OR Authorized Signatory

OR Authorized Signatory

18 KAL-MOR-USA

19 PRINT NAME

PRINT NAME

20
21
22 Tenant agrees to rent the Premises on the above terms and conditions.
23

10/13/2017

24 TENANT'S SIGNATURE

DATE

TENANT'S SIGNATURE

DATE

25 PRINT NAME

PRINT NAME

26 TENANT'S SIGNATURE

DATE

TENANT'S SIGNATURE

DATE

27 PRINT NAME

PRINT NAME

28 Real Estate Brokers and Designated Property Managers:

29 A. Real estate brokers, licensees, agents, and Designated Property Managers who are not also disclosed as
30 a party to the transaction under paragraph 41 are not parties to this Agreement between Landlord and
31 Tenant.

32 B. Agency relationships are confirmed in paragraph 42.

33 Property 5782 CAMINO RAMON AVE.

34 Owner's Name KAL-MOR-USA

35 Tenant

36 Tenant

Initials

Initials

37 LAS VEGAS

38 NV 89156

39 Owner's Name

40 Tenant

41 Tenant

Initials

Initials

DUTIES OWED BY A NEVADA REAL ESTATE LICENSEE*This form does not constitute a contract for services nor an agreement to pay compensation.*

In Nevada, a real estate licensee is required to provide a form setting forth the duties owed by the licensee to:

- a) Each party for whom the licensee is acting as an agent in the real estate transaction, and
- b) Each unrepresented party to the real estate transaction, if any.

Licensee: The licensee in the real estate transaction is MARC GISI
 whose license number is 42295. The licensee is acting for [client's name(s)] KAL-MOR-USA
 who is/are the ☒ Seller/Landlord: ☐ Buyer/Tenant.

Broker: The broker is RAY CROSBY, whose company is WYNN REALTY GROUP.

Are there additional licensees involved in this transaction? ☐ Yes ☒ No If yes, Supplemental form 525A is required.

Licensee's Duties Owed to All Parties:

A Nevada real estate licensee shall:

1. Not deal with any party to a real estate transaction in a manner which is deceitful, fraudulent or dishonest.
2. Exercise reasonable skill and care with respect to all parties to the real estate transaction.
3. Disclose to each party to the real estate transaction as soon as practicable:
 - a. Any material and relevant facts, data or information which licensee knows, or with reasonable care and diligence the licensee should know, about the property.
 - b. Each source from which licensee will receive compensation.
4. Abide by all other duties, responsibilities and obligations required of the licensee in law or regulations.

Licensee's Duties Owed to the Client:

A Nevada real estate licensee shall:

1. Exercise reasonable skill and care to carry out the terms of the brokerage agreement and the licensee's duties in the brokerage agreement;
2. Not disclose, except to the licensee's broker, confidential information relating to a client for 1 year after the revocation or termination of the brokerage agreement, unless licensee is required to do so by court order or the client gives written permission;
3. Seek a sale, purchase, option, rental or lease of real property at the price and terms stated in the brokerage agreement or at a price acceptable to the client;
4. Present all offers made to, or by the client as soon as practicable, unless the client chooses to waive the duty of the licensee to present all offers and signs a waiver of the duty on a form prescribed by the Division;
5. Disclose to the client material facts of which the licensee has knowledge concerning the real estate transaction;
6. Advise the client to obtain advice from an expert relating to matters which are beyond the expertise of the licensee; and
7. Account to the client for all money and property the licensee receives in which the client may have an interest.

Duties Owed By a broker who assigns different licensees affiliated with the brokerage to separate parties.

Each licensee shall not disclose, except to the real estate broker, confidential information relating to client.

Licensee Acting for Both Parties:

The Licensee

MAY / **OR** MAY NOT /

in the future act for two or more parties who have interests adverse to each other. In acting for these parties, the licensee has a conflict of interest. Before a licensee may act for two or more parties, the licensee must give you a "Consent to Act" form to sign.

I/We acknowledge receipt of a copy of this list of licensee duties, and have read and understand this disclosure.Seller/Landlord: Greg Darroch Date: 10/13/2017 Time: 3 PMSeller/Landlord: KAL-MOR-USA Date: Time: **OR** Buyer/Tenant: Date: Time: Buyer/Tenant: Date: 10/13/2017 Time: 2 PMBuyer/Tenant: Date: Time:



FORECLOSURE ADDENDUM TO RESIDENTIAL LEASE AGREEMENT

for

5782 CAMINO RAMON AVE. LAS VEGAS NV 89156
(Property Address)

In reference to the Residential Lease Agreement ("Lease Agreement") executed by

OWNER'S Name: KAL-MOR-USA OWNER'S Name: _____ and
TENANT's Name: _____ TENANT's Name: _____
TENANT's Name: _____ TENANT's Name: _____

dated 10/13/2017 covering the above-referenced real property, the parties hereby agree that the Lease Agreement be amended as follows:

1. **NOTICE OF DEFAULT/FORECLOSURE.** Tenant(s) is notified that Owner has agreed to notify Broker/Designated Property Manager of any defaults on any loans, mortgages, assessments or trust deeds. The filing of a Notice of Default by a lender or other lien holder commences a foreclosure period which lasts, at a minimum, three months plus 21 days. Tenant(s) is further notified that Owner has authorized Broker/Designated Property Manager to notify Tenant(s) and make arrangements to terminate the Lease Agreement if Broker/Designated Property Manager receives any notice indicating that Owner is any one of the following situations: (1) default of any loan, mortgage, assessments or trust deed; (2) any stage of the foreclosure process including a deed-in-lieu of foreclosure; (3) default in making any payments associated with this property; or (4) acceptance of a short sale contract. In such event, Owner has authorized Broker/Designated Property Manager to negotiate termination of the Lease Agreement.

2. **TERMS OF LEASE AGREEMENT.** During any foreclosure period, the Tenant(s) shall honor ALL CONDITIONS of the current Lease Agreement including the timely payment of rent as stated in the Lease Agreement. Nevada law grants the Owner a redemption period, and the Owner remains as the legal owner of record until the actual time of the foreclosure sale.

3. **RETURN OF SECURITY DEPOSITS.** Once the Tenant(s) vacates the property, the Owner has authorized Broker/Designated Property Manager to release ALL security deposits (including non-refundable deposits) back to the Tenant(s) with no further obligations from the Tenant(s) or Broker/Designated Property Manager. The 30-day period required by Nevada law for the return of the security deposits still applies. The property must be returned in the same general condition as the Tenant(s) occupied the property. Upon Tenant(s)'s request, Broker/Designated Property Manager will attempt to find a new home to rent/lease/purchase for Tenant(s).

When executed by both parties, this Addendum is made an integral part of the aforementioned Lease Agreement. WHEN PROPERLY COMPLETED, THIS IS A BINDING CONTRACT. IF YOU DO NOT FULLY UNDERSTAND ITS CONTENTS, YOU SHOULD SEEK COMPETENT LEGAL COUNSEL BEFORE SIGNING.

DocuSigned by:

10/13/2017

LANDLORD/OWNER
OR Authorized Signatory
KAL-MOR-USA
PRINT NAME

DATE

LANDLORD/OWNER
OR Authorized Signatory

DATE

PRINT NAME

10/13/2017

DATE

PRINT NAME

TENANT'S SIGNATURE

DATE

PRINT NAME

TENANT'S SIGNATURE

DATE

TENANT'S SIGNATURE

DATE

PRINT NAME

PRINT NAME



LEASE ADDENDUM FOR DRUG FREE HOUSING



for

5782 CAMINO RAMON AVE.

LAS VEGAS

NV

89156

(Property Address)

In consideration of the execution or renewal of a lease of the dwelling unit identified in the lease, Landlord and Tenant agree as follows:

1. Tenant, any member of Tenant's household, or a guest or other person under Tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near the subject leasehold premises, "Drug-related criminal activity" means the illegal manufacture, sale distribution, use or possession with intent to manufacture, sell, distribute, or use, of controlled substance (as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. §802).
2. Tenant, any member of the Tenant's household, or a guest or other person under Tenant's control, shall not engage in any act intended to facilitate criminal activity, including drug-related criminal activity, on or near the subject leasehold premises.
3. Tenant or members of the household will not permit the dwelling unit to be used for or to facilitate criminal activity, including drug-related criminal activity, regardless of whether the individual engaging in such activity is a member of the household or a guest.
4. Tenant or member of the household will not engage in the manufacture, sale or distribution of illegal drugs at any location, whether on or near the subject leasehold premises or otherwise.
5. Tenant, any member of the Tenant's household, or a guest or other person under Tenant's control shall not engage in acts of violence, including, but not limited to the unlawful discharge of firearms, on or near the subject leasehold premises.
6. VIOLATION OF THE ABOVE PROVISIONS SHALL BE A MATERIAL VIOLATION OF THE LEASE AND GOOD CAUSE FOR TERMINATION OF TENANCY. A single violation of any of the provisions of the addendum shall be deemed a serious violation and a material noncompliance with the lease. It is understood and agreed that a single violation shall be cause for termination of the lease. Unless otherwise provided by law, proof of violation shall not require criminal conviction, but shall be by a preponderance of the evidence.
7. In case of conflict between the provisions of this addendum and any other provisions of the lease, the provisions of the addendum shall govern.
8. This addendum is incorporated into the lease executed or renewed this day between Landlord and Tenant.

DocuSigned by:

Greg Darroch

10/13/2017

LANDLORD/OWNER
OR Authorized Signatory
KAL-MOR-USA
PRINT NAME

DATE

LANDLORD/OWNER
OR Authorized Signatory

DATE

PRINT NAME

10/13/2017

DATE

PRINT NAME

TENANT'S SIGNATURE

DATE

PRINT NAME

TENANT'S SIGNATURE

DATE

PRINT NAME

TENANT'S SIGNATURE

DATE

PRINT NAME

Lease Addendum for Drug Free Housing Rev. 10.2016

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This form presented by Marc A Gisi | Wynn Realty Group |

Instantaneous

702-953-4999 | marcgisi@cox.net

JA001645



LEASE ADDENDUM FOR ILLEGAL ACTIVITY FOR



5782 CAMINO RAMON AVE. LAS VEGAS NV 89156
Property Address

In consideration of the execution or renewal of a lease of the Property, Landlord and Tenant hereby agree that the Residential Lease Agreement dated 10/13/17 be amended as follows:

1. Tenant and any member of Tenant's household or any guest shall not engage in any criminal or illegal activity, including but not limited to, illegal drug related activity, gang related activity or acts of violence on or near the subject Premises (as defined in the above-referenced Residential Lease Agreement). "Drug-related criminal activity" means the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute, or use, of controlled substance (as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. §802). "Acts of violence" includes, but is not limited to, the unlawful discharge of firearms, on or near the Premises. Any and all firearms on the Premises must be stored properly pursuant to Nevada law.
2. Tenant, any member of the Tenant's household, or a guest or other person under Tenant's control, shall not engage in any act intended to facilitate criminal activity, including drug-related criminal activity, on or near the subject Premises.
3. Tenant or members of the household will not permit the Premises to be used for or to facilitate criminal activity, including drug-related criminal activity, regardless of whether the individual engaging in such activity is a member of the household or a guest.
4. VIOLATION OF THE ABOVE PROVISIONS SHALL BE A MATERIAL BREACH OF THE LEASE AGREEMENT AND GOOD CAUSE FOR TERMINATION OF TENANCY. A single violation of any of the provisions of the addendum shall be deemed a serious violation and a material noncompliance with the lease. It is understood and agreed that a single violation shall be cause for termination of the lease. Unless otherwise provided by law, proof of violation shall not require criminal conviction, but shall be by a preponderance of the evidence.
5. In case of conflict between the provisions of this addendum and any other provisions of the Lease Agreement, the provisions of the addendum shall govern. This lease addendum is incorporated into the lease executed or renewed this day between Landlord and Tenant.

DocuSigned by:

Greg Darroch

10/13/17

LANDLORD/OWNER
OR Authorized Signatory

DATE

LANDLORD/OWNER
OR Authorized Signatory

DATE

KAL-MOR-USA

PRINT NAME

PRINT NAME

10/13/17

DATE

TENANT'S SIGNATURE

DATE

PRINT NAME

PRINT NAME

TENANT'S SIGNATURE

DATE

TENANT'S SIGNATURE

DATE

PRINT NAME

PRINT NAME



SMOKE DETECTOR AGREEMENT FOR



5782 CAMINO RAMON AVE. LAS VEGAS NV 89156
Property Address

In reference to the Residential Lease Agreement ("Lease Agreement") executed by

OWNER'S Name: KAL-MOR-USA, OWNER'S Name: _____ and

TENANT's Name: _____ TENANT's Name: _____

TENANT's Name: _____ TENANT's Name: _____

dated 10/13/2017 covering the above-referenced real property, the parties hereby agree that the Lease Agreement be amended as follows:

Landlord and Tenant agree that the premises are equipped with smoke detection devise(s). Tenant shall agree as follows:

1. It is agreed that Tenant will test the smoke detector(s) within twenty four (24) hours after occupancy and inform Landlord or his/her Agent immediately if detector(s) is not working properly.
2. It is agreed that Tenant will be responsible for testing smoke detector(s) weekly by pushing the "push to test" button on the detector for about five (5) seconds. To be operating properly, the alarm will sound when the button is pushed.
3. Tenant understands that said smoke detector(s) is a battery operated unit and it shall be Tenant's responsibility to insure that the battery is in operating condition at all times. If after replacing battery, any smoke detector(s) will not operate or has no sound, Tenant must inform Landlord or his/her Agent immediately in writing.
4. Landlord and his/her Agent recommend that Tenant provide and maintain a fire extinguisher on the premises.
5. The undersigned have read the above agreement and understand and agree to all provisions thereof and further acknowledge that they have received a copy of said agreement.
6. Tenant shall not under any circumstances remove, disable or tamper with any smoke detection device(s).

DocuSigned by:

Greg Darroche

10/13/2017

LANDLORD/OWNER

DATE

LANDLORD/OWNER

DATE

Print Name: KAL-MOR-USA

Print Name: _____

10/13/2017

DATE

TENANT'S SIGNATURE

DATE

Print Name: _____

TENANT'S SIGNATURE

DATE

TENANT'S SIGNATURE

DATE

Print Name: _____

Print Name: _____

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

OMNI FINANCIAL, LLC, a foreign limited
liability company Appellant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company;

Respondent.

No.: 82028

Eighth Judicial District Court
Case No: A-17-757061-C
(Honorable Richard Scotti)

**JOINT APPENDIX
Volume VIII
(JA001648 – JA001812)**

HOWARD & HOWARD ATTORNEYS PLLC

BRIAN J. PEZZILLO, ESQ.

Nevada Bar No. 007136

ROBERT HERNQUIST, ESQ.

Nevada Bar No.010616

3800 Howard Hughes Pkwy., Ste. 1000

Las Vegas, Nevada 89169

Attorneys for Appellant Omni Financial, LLC

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Dated this 8th day of April 2021.

HOWARD & HOWARD ATTORNEYS PLLC

By: /s/ Brian J. Pezzillo

BRIAN J. PEZZILLO, ESQ.

Nevada Bar No. 007136

ROBERT HERNQUIST, ESQ.

Nevada Bar No. 010616

3800 Howard Hughes Pkwy., Ste. 1000

Las Vegas, Nevada 89169

Attorneys for Appellant Omni Financial, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2021, a true and correct copy of the foregoing **JOINT APPENDIX (Volume VIII)** was served by the following method(s):

XXX BY ELECTRONIC MEANS: by electronically filing and serving with the court's vendor pursuant to NRAP 14(f).

/s/ Anya Ruiz

An employee of Howard & Howard Attorneys PLLC

SERVICE LIST

Bart K. Larsen, Esq.
SHEA & LARSEN
1731 Village Center Circle, Suite 150
Las Vegas, NV 89134
Attorneys for Kal-Mor-USA, LLC

Danielle J. Barraza, Esq.
MAIER GUTIERREZ & ASSOCIATES
8816 Spanish Ridge Avenue
Las Vegas, NV 89148
Attorneys for First 100, LLC

4828-9358-1540, V. 1
4828-9358-1540, V. 1
4828-9358-1540, V. 1
4828-9358-1540, V. 1

EXHIBIT 2

Howard & Howard

law for business•

Ann Arbor

Chicago

Detroit

Las Vegas

Peoria

direct dial: 702.667.4842

Mark Gardberg
Attorney / Partner

email: mgardberg@howardandhoward.com

September 29, 2016

BY CERTIFIED MAIL

LEGAL NOTIFICATION TO PAY RENTS TO PERSON OTHER THAN LANDLORD

Tenant (if known): Unknown – John/Jane Does 1-10
**Property Occupied by
Tenant (the “Premises”):** Unknown – John/Jane Does 1-10
**Assignment of Rents
Governing the Premises:** Deed of Trust dated: June 17, 2014
4921 Indian River Dr., #112, Las Vegas NV 89103-5319
Recorded in the Official Records of Clark County, Nevada
as Book/Instrument No.:20140718-0001253 on July 18, 2014

Landlord: First 100, LLC
Assignee: Omni Financial, LLC
1260 41st Ave Suite O
Capitola, CA 95010
Attention: Kimberlee Kay
Tel. No.: (831) 464-5013
Fax No.: (831) 462-1618
Email: kkay@shermanandboone.com

Dear Sir or Madam:

This law firm represents Omni Financial, LLC (the “Assignee”). Pursuant to NRS Chapter 107A, and specifically NRS 107A.280, please note the following:

1. The Assignee named above has become the person entitled to collect your rents on the Premises listed above under that Assignment of Rents specified above. (See NRS 107A.230(1).) You may obtain additional information about the Assignment of Rents and the Assignee’s right to enforce it at the address listed above.
2. The Landlord is in default under the Assignment of Rents. Under the Assignment of Rents, the Assignee is entitled to collect rents from the Premises.
3. This notification affects your rights and obligations under the written or oral lease, or other type of agreement, under which you occupy the Premises (your “Agreement”). In order to provide you with an opportunity to consult with a lawyer, if your next scheduled rental payment is due within

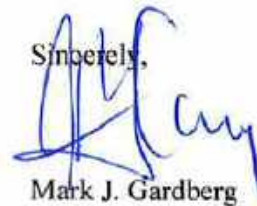
30 days after you receive this notification, neither the Assignee nor the Landlord can hold you in default under your Agreement for nonpayment of that rental payment until 10 days after the due date of that payment or 30 days following the date you receive this notification, whichever occurs first. You may consult a lawyer at your expense concerning your rights and obligations under your Agreement and the effect of this notification.

4. ***You must pay to the Assignee (Omni Financial, LLC) at the address listed above all rents under your Agreement which are due and payable on the date you receive this notification and all rents accruing under your Agreement after you receive this notification.*** If you pay rents to the Assignee after receiving this notification, the payment will satisfy your rental obligation to the extent of that payment.
5. Unless you occupy the Premises as your primary residence, if you pay any rents to the Landlord after receiving this notification, your payment to the Landlord will not discharge your rental obligation, and the Assignee may hold you liable for that rental obligation notwithstanding your payment to the Landlord.
6. If you have previously received a notification from another person that also holds an assignment of the rents due under your Agreement, you should continue paying your rents to the person that sent that notification until that person cancels that notification. Once that notification is cancelled, you must begin paying rents to the Assignee in accordance with this notification.
7. Your obligation to pay rents to the Assignee will continue until you receive either:
 - (a) a written order from a court directing you to pay the rent in a manner specified in that order; or
 - (b) written instructions from the Assignee cancelling this notification.

In the event a foreclosure occurs, the Assignee may consider allowing you to continue occupying the property, provided that the lease has fair market terms, you pay rents to Assignee in a timely manner, and the property is well maintained. Attached to this letter is a rental application for you to complete and return with your first check sent to Omni.

Please immediately contact Ms. Kay at the contact details on the first page to discuss this matter in more detail. She looks forward to hearing from you.

Sincerely,



Mark J. Gardberg

cc Joseph A. Gutierrez
MAJER GUTIERREZ AYON
400 S. Seventh Street, # 400
Las Vegas, NV 89101

Wynn Realty Group
Attention: Marc Gisi
7495 W. Azure Ave., # 214
Las Vegas NV 89130

Bart K. Larsen
KOLESAR & LEATHAM
400 S. Rampart Boulevard, # 400
Las Vegas, Nevada 89145



CALIFORNIA
ASSOCIATION
OF REALTORS®

APPLICATION TO RENT/SCREENING FEE

(C.A.R. Form LRA, Revised 12/15)

I. APPLICATION TO RENT

THIS SECTION TO BE COMPLETED BY APPLICANT. A SEPARATE APPLICATION TO RENT IS REQUIRED FOR EACH OCCUPANT 18 YEARS OF AGE OR OVER, OR AN EMANCIPATED MINOR.

1. Applicant is completing Application as a (check one) ☐ tenant, ☐ tenant with co-tenant(s) or ☐ guarantor/co-signor.

Total number of applicants _____

2. PREMISES INFORMATION

Application to rent property at 4921 Indian River Dr # 112, Las Vegas, NV 89103-5319 ("Premises")

Rent: \$ _____ per _____ Proposed move-in date _____

3. PERSONAL INFORMATION

A. FULL NAME OF APPLICANT _____

B. Date of Birth _____ (For purpose of obtaining credit reports. Age discrimination is prohibited by law.)

C. 1. Driver's License No. _____ State _____ Expires _____

2. See section II for Social Security Number

D. Phone Number: Home _____ Work _____ Other _____

E. Email _____

F. Name(s) of all other proposed occupant(s) and relationship to applicant _____

G. Pet(s) (number and type) _____

H. Auto: Make _____ Model _____ Year _____ License No. _____ State _____ Color _____

Other vehicle(s): _____

I. In case of emergency, person to notify _____

Relationship _____

Address _____ Phone _____

J. Does applicant or any proposed occupant plan to use liquid-filled furniture? ☐ No ☐ Yes Type _____

K. Has applicant been a party to an unlawful detainer action or filed bankruptcy within the last seven years? ☐ No ☐ Yes

If yes, explain _____

L. Has applicant or any proposed occupant ever been convicted of or pleaded no contest to a felony? ☐ No ☐ Yes

If yes, explain _____

M. Has applicant or any proposed occupant ever been asked to move out of a residence? ☐ No ☐ Yes

If yes, explain _____

4. RESIDENCE HISTORY

Current address _____

City/State/Zip _____

From _____ to _____

Name of Landlord/Manager _____

Landlord/Manager's phone _____

Do you own this property? ☐ No ☐ Yes

Reason for leaving current address _____

Previous address _____

City/State/Zip _____

From _____ to _____

Name of Landlord/Manager _____

Landlord/Manager's phone _____

Did you own this property? ☐ No ☐ Yes

Reason for leaving this address _____

5. EMPLOYMENT AND INCOME HISTORY

Current employer _____

Current employer address _____

From _____ To _____

Supervisor _____

Supervisor phone _____

Employment gross income \$ _____ per _____

Other income info _____

Previous employer _____

Prev. employer address _____

From _____ To _____

Supervisor _____

Supervisor phone _____

Employment gross income \$ _____ per _____

Other income info _____



6. CREDIT INFORMATION

Name of creditor	Account number	Monthly payment	Balance due

Name of bank/branch	Account number	Type of account	Account balance

7. PERSONAL REFERENCES

Name _____ Address _____
 Phone _____ Length of acquaintance _____ Occupation _____
 Name _____ Address _____
 Phone _____ Length of acquaintance _____ Occupation _____

8. NEAREST RELATIVE(S)

Name _____ Address _____
 Phone _____ Relationship _____
 Name _____ Address _____
 Phone _____ Relationship _____

Applicant understands and agrees that: (i) this is an application to rent only and does not guarantee that applicant will be offered the Premises; (ii) Landlord or Manager or Agent may accept more than one application for the Premises and, using their sole discretion, will select the best qualified applicant, and (iii) Applicant will provide a copy of applicant's driver's license upon request.

Applicant represents the above information to be true and complete, and hereby authorizes Landlord or Manager or Agent to: (i) verify the information provided; and (ii) obtain a credit report on applicant and other reports, warnings and verifications on and about applicant, which may include, but not be limited to, criminal background checks, reports on unlawful detainers, bad checks, fraud warnings, employment and tenant history. Applicant further authorizes Landlord or Manager or Agent to disclose information to prior or subsequent owners and/or agents.

If application is not fully completed, or received without the screening fee: (i) the application will not be processed, and (ii) the application and any screening fee will be returned.

Applicant _____ Date _____ Time _____

Return your completed application and any applicable fee not already paid to: **Omni Financial, LLC**

Address **1260 41st Ave., Suite O** City **Capitola** State **CA** Zip **95010**

II. SCREENING FEE

THIS SECTION TO BE COMPLETED BY LANDLORD, MANAGER OR AGENT.

Applicant Social Security Number: _____ Applicant has paid a nonrefundable screening fee of \$ _____, applied as follows: (The screening fee may not exceed \$30.00, adjusted annually from 1-1-98 commensurate with the increase in the Consumer Price Index. A CPI inflation calculator is available on the Bureau of Labor Statistics website, www.bls.gov. The California Department of Consumer Affairs calculates the applicable screening fee amount to be \$44.50 as of 2012.)

\$ _____ for credit reports prepared by _____;
 \$ _____ for _____ (other out-of-pocket expenses); and
 \$ _____ for processing.

The undersigned has read the foregoing and acknowledges receipt of a copy.

Applicant Signature _____ Date _____

The undersigned has received the screening fee indicated above.

Landlord or Manager or Agent Signature _____ CalBRE Lic. # _____
 Date _____

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Reviewed by _____ Date _____

LRA REVISED 12/15 (PAGE 2 OF 2)

APPLICATION TO RENT/SCREENING FEE (LRA PAGE 2 OF 2)

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Omni Nevada



JA001652

Howard & Howard

law for business®

Ann Arbor

Chicago

Detroit

Las Vegas

Peoria

direct dial: 702.667.4842

Mark Gardberg
Attorney / Partner

email: mgardberg@howardandhoward.com

September 30, 2016

BY EMAIL (jag@mgalaw.com) and CERTIFIED MAIL

First 100, LLC
c/o Joseph A. Gutierrez
MAIER GUTIERREZ AYON
400 S. Seventh Street, # 400
Las Vegas, NV 89101

RE: **Enforcement of Assignment of Rents**

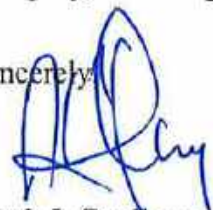
Dear Mr. Gutierrez:

As you know, this law firm represents Omni Financial, LLC ("*Omni*"). As required under a loan granted by Omni to your client, First 100, LLC ("*First 100*"), First 100, as beneficiary, signed and consented to the recording of various Deeds of Trust encumbering real property in the State of Nevada (the "*Deeds of Trust*"), with Omni being the beneficiary thereof. Under Nevada law, whenever a trustor grants a deed of trust over real property, it automatically grants the beneficiary a security interest in rents arising from therefrom. (NRS 107A.230(1)). Thus, Omni holds a security interest in the rents from Nevada properties subject to a deed of trust in its favor (the "*Properties*"). Under Omni's records, the Properties are those listed in Attachment A.

As you also know, First 100 is in default of the various loan documents between First 100 and Omni dated May 27, 2014, including those Deeds of Trust.

Omni has begun notifying the third party tenants to make rental payments directly to Omni, bypassing First 100 (or the other relevant owner). (NRS 107A.280). In the event a third party tenant disregards that notice, Omni hereby notifies you that it is exercising its right to receive all such rents. (NRS 107A.270(1).) First 100 must "pay over the proceeds of any rents that the assignee [i.e., First 100] is entitled to collect under NRS 107A.250." (*Id.*) If First 100 disregards this notice Omni, reserves all of its rights and remedies in law or in equity, including a receivership over the Properties.

Sincerely,



Mark J. Gardberg

CC	Wynn Realty Group Attention: Marc Gisi 7495 W. Azure Ave., # 214 Las Vegas NV 89130	Bart K. Larsen KOLESAR & LEATHAM 400 S. Rampart Boulevard, # 400 Las Vegas, Nevada 89145
----	--	---

Attachment A

LIST OF REAL PROPERTIES

[See attached.]

Address	APN	County
17745 Sapphire Canyon Court, Reno, NV	56611012	Washoe, NV
7522 7533 Lintwhite Street, North Las Vegas, NV	124-17-313-075	Clark, NV
1217 Neva Ranch Avenue, North Las Vegas, NV	124-26-311-029	Clark, NV
5520 Hidden Rainbow Street, North Las Vegas, NV	124-34-512-057	Clark, NV
101 Luna Way #145, Las Vegas, NV	138-27-413-052	Clark, NV
7708 Himilayas Ave, Unit 204, Las Vegas, NV	138-28-513-128	Clark, NV
1204 Observation Dr. #102, Las Vegas, NV	138-28-613-007	Clark, NV
220 Mission Newport Ln, #201, Las Vegas, NV	138-36-515-301	Clark, NV
5782 Camino Ramon Ave., Las Vegas, NV	140-21-611-018	Clark, NV
6800 E. Lake Mead #1033, Las Vegas, NV	140-23-217-065	Clark, NV
30 Strada Di Villaggio #321, Henderson, NV	160-22-817-093	Clark, NV
30 Strada Di Villaggio #323, Henderson, NV	160-22-817-095	Clark, NV
6575 Shining Sand Avenue, Las Vegas, NV	161-10-511-072	Clark, NV
2080 Karen Ave. #93, Las Vegas, NV	162-11-511-093	Clark, NV
210 E. Flamingo Road #209-[229] Las Vegas, NV	162-16-810-067	Clark, NV
230 E. Flamingo Road #330, Las Vegas, NV	162-16-810-355	Clark, NV
4636 Bountiful Way, Las Vegas NV 89121	162-24-712-003	Clark, NV
2200 S. Fort Apache Rd. #1204, Las Vegas, NV	163-05-415-200	Clark, NV
4400 Sandy River Dr. #16, Las Vegas, NV	163-24-612-500	Clark, NV
4921 Indian River Dr. #112, Las Vegas, NV	163-24-612-588	Clark, NV
5009 Indian River Dr. #155, Las Vegas, NV	163-24-612-639	Clark, NV
5295 Indian River Dr. #314, Las Vegas, NV	163-24-612-798	Clark, NV
2615 W. Gary Avenue #1065, Las Vegas, NV	177-20-813-127	Clark, NV
601 Cabrillo Cir Unit #644, Henderson, NV	179-17-611-044	Clark, NV
601 Cabrillo Cir Unit #1076, Henderson, NV	179-17-611-076	Clark, NV
601 Cabrillo Cir Unit #1291, Henderson, NV	179-17-611-091	Clark, NV
665 Monument Point Street, Henderson NV	179-31-714-007	Clark, NV

EXHIBIT 3



RESIDENTIAL LEASE AGREEMENT



for

4921 INDIAN RIVER DR. #112 LAS VEGAS NV 89103
(Property Address)

1. This AGREEMENT is entered into this 14th day of March, 2017 between
OWNER'S Name: KAL-MOR-USA, OWNER'S Name: _____
(collectively hereinafter, "OWNER" and/or "LANDLORD") legal owner(s) of the property and
TENANT's Name: _____ TENANT's Name: _____
TENANT's Name: _____ TENANT's Name: _____
(collectively, "TENANT"), which parties hereby agree to as follows:

2. PREMISES: LANDLORD hereby leases to TENANT and TENANT hereby leases from LANDLORD, subject to
the terms and conditions of the lease, the Premises known and designated as 4921 INDIAN RIVER DR. #112
LAS VEGAS NV 89103 ("the Premises"). Premises Mail Box # 112,
Parking Space # QL, Storage Unit # _____, Other _____.

3. TERM: The term hereof shall commence on 03/14/17 and continue until 02/28/18, with
a total rent of \$ 8,467.94, then on a month-to-month basis thereafter, until either party shall terminate
the same by giving the other party thirty (30) days written notice delivered by US mail or electronic mail. (All
calculation based on 30 day month), as governed by paragraph 23 herein

4. RENT: TENANT agrees to pay, without demand, to LANDLORD as rent for the Premises the total sum of
730.00 per month on the first day of each calendar month,
at WYNN REALTY GROUP, 7495 W. AZURE DR. #214, LAS VEGAS, NV 89130 or at such other place as
LANDLORD may designate in writing.

5. SUMMARY: The initial rents, charges and deposits are as follows:

	Total	Received	Balance Due
Rent: From <u>03/14/17</u> , To <u>03/31/17</u>	\$ <u>437.94</u>	\$ _____	\$ <u>437.94</u>
Security Deposit	\$ <u>730.00</u>	\$ _____	\$ <u>730.00</u>
Key Deposit	\$ <u>40.00</u>	\$ _____	\$ <u>40.00</u>
Admin/Credit App Fee (non-refundable)	\$ <u>150.00</u>	\$ <u>150.00</u>	\$ _____
Pet Deposit	\$ _____	\$ _____	\$ _____
Cleaning Deposit	\$ <u>250.00</u>	\$ _____	\$ <u>250.00</u>
Cleaning Fee (non-refundable)	\$ _____	\$ _____	\$ _____
Additional Security	\$ _____	\$ _____	\$ _____
Utility Proration	\$ _____	\$ _____	\$ _____
Sewer/Trash Proration	\$ _____	\$ _____	\$ _____
Pre-Paid Rent	\$ _____	\$ _____	\$ _____
Pro-Rated Rent for _____	\$ _____	\$ _____	\$ _____
Other _____	\$ _____	\$ _____	\$ _____
Other _____	\$ _____	\$ _____	\$ _____
Other _____	\$ _____	\$ _____	\$ _____
TOTAL	\$ <u>1607.94</u>	\$ <u>150.00</u>	\$ <u>1457.94</u>

6. ADDITIONAL MONIES DUE:

N/A

Property 4921 INDIAN RIVER DR. #112 DS
Owner's Name KAL-MOR-USA DS
Tenant _____ Initials _____
Tenant _____ Initials _____
Owner's Name _____
Tenant _____ Initials _____
Tenant _____ Initials _____

1
2 **7. ADDITIONAL FEES:**

3
4 **A. LATE FEES:** In the event TENANT fails to pay rent when due, TENANT shall pay a late fee of
5 \$ 75.00 plus \$ 20.00 per day for each day after 4 days that the sum was due. Such amounts shall
6 be considered to be rent.

7
8 **B. DISHONORED CHECKS:** A charge of \$ 150.00 shall be imposed for each dishonored check made by
9 TENANT to LANDLORD. TENANT agrees to pay all rents, all late fees, all notice fees and all costs to honor a
10 returned check with certified funds. After TENANT has tendered a check which is dishonored, TENANT hereby
11 agrees to pay all remaining payments including rent due under this Agreement by certified funds. Any payments
12 tendered to LANDLORD thereafter, which are not in the form of certified funds, shall be treated as if TENANT
13 failed to make said payment until certified funds are received. LANDLORD presumes that TENANT is aware of the
14 criminal sanctions and penalties for issuance of a check which TENANT knows is drawn upon insufficient funds
15 and which is tendered for the purpose of committing a fraud upon a creditor.

16
17 **C. ADDITIONAL RENT:** All late fees and dishonored check charges shall be due when incurred and shall
18 become additional rent. **Payments will be applied to charges which become rent in the order accumulated.** All
19 unpaid charges or any fees owed by TENANT, including but not limited to notice fees, attorney's fees, repair bills,
20 utility bills, landscape/pool repair and maintenance bills and CIC fines will become additional rent at the beginning
21 of the month after TENANT is billed. TENANT'S failure to pay the full amount for a period may result in the
22 initiation of eviction proceedings. LANDLORD'S acceptance of any late fee or dishonored check fee shall not act as
23 a waiver of any default of TENANT, or as an extension of the date on which rent is due. LANDLORD reserves the
24 right to exercise any other rights and remedies under this Agreement or as provided by law.

25
26 **8. SECURITY DEPOSITS:** Upon execution of this Agreement,

27 TENANT's Name: _____ TENANT's Name: _____
28 TENANT's Name: _____ TENANT's Name: _____

29 shall deposit with LANDLORD as a Security Deposit the sum stated in paragraph 5. **TENANT shall not apply the**
30 **Security Deposit to, or in lieu of, rent.** At any time during the term of this Agreement and upon termination of the
31 tenancy by either party for any reason, the LANDLORD may claim, from the Security Deposit, such amounts due
32 LANDLORD under this Agreement. Any termination prior to the initial term set forth in paragraph 3, or failure of
33 TENANT to provide proper notice of termination, is a default in the payment of rent for the remainder of the lease
34 term, which may be offset by the Security Deposit. Pursuant to NRS 118A.242, LANDLORD shall provide
35 TENANT with a written, itemized accounting of the disposition of the Security Deposit within thirty (30) days of
36 surrender of premises. TENANT agrees, upon termination of the tenancy, to provide LANDLORD with a
37 forwarding address to prevent a delay in receiving the accounting and any refund. At the termination of this
38 agreement, the TENANT identified in this paragraph will be refunded the remaining security deposit (if any). In the
39 event of damage to the Premises caused by TENANT or TENANT's family, agents or visitors, LANDLORD may
40 use funds from the deposit to repair, but is not limited to this fund and TENANT remains liable for any remaining
41 costs. (In addition to the above, to be refundable, property must be professionally cleaned to include carpets and all
42 hard surface flooring including tile and grout.) Upon request by Landlord, Tenant must furnish receipts for
43 professional cleaning services.

44
45 **9. CONDITION OF PREMISES:** TENANT agrees that TENANT has examined the Premises, including the
46 grounds and all buildings and improvements, and that they are, at the time of this Lease, in good order, good
47 repair, safe, clean, and rentable conditions.

Property 4921 INDIAN RIVER DR. #112 CD DS LAS VEGAS NV 89103
Owner's Name KAL-MOR-USA Owner's Name _____
Tenant _____ Tenant _____ Initials _____
Tenant _____ Tenant _____ Initials _____

10. **TRUST ACCOUNTS:** BROKER shall retain all interest earned, if any, on security deposits to offset administration and bookkeeping fees.

11. **EVICTON COSTS:** TENANT shall be charged an administrative fee of \$ 275.00 per eviction attempt to offset the costs of eviction notices and proceedings. TENANT shall be charged for service of legal notices and all related fees according to actual costs incurred.

12. **CARDS AND KEYS:** Upon execution of the Agreement, TENANT shall receive the following:

<u>1</u> Door key(s)	<u> </u> Garage Transmitter/Fob(s)	<u>1</u> Pool Key(s)	<u>MAILROOM KEY</u>
<u>1</u> Mailbox key(s)	<u>1</u> Gate Card/Fob(s)	<u> </u> Other(s)	<u> </u>
<u> </u> Laundry Room key(s)	<u> </u> Gate Transmitter/Fob(s)	<u> </u> Other(s)	<u> </u>

TENANT shall make a key deposit (if any) in the amount set forth in paragraph 2 upon execution of this Agreement. The key deposit shall be refunded within 30 days of TENANT's return of all cards and/or keys to LANDLORD or LANDLORD's BROKER/DESIGNATED PROPERTY MANAGER.

13. **CONVEYANCES AND USES:** TENANT shall not assign, sublet or transfer TENANT'S interest, nor any part thereof, without prior written consent of LANDLORD. The Premises shall be used and occupied by TENANT exclusively as a private single-family residence. Neither the Premises nor any part of the Premises or yard shall be used at any time during the term of this Lease for any purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than as a private single-family residence. TENANT shall comply with all the health and sanitary laws, ordinances, rules and orders of appropriate governmental authorities and homeowners associations, if any, with respect to the Premises. TENANT understands and acknowledges that they are not permitted to access the attic crawl space, roof or under the home or any other area of the property that is not considered living space. TENANT shall not commit waste, cause excessive noise, create a nuisance or disturb others.

14. **OCCUPANTS:** Occupants of the Premises shall be limited to 2 persons and shall be used solely for housing accommodations and for no other purpose. TENANT represents that the following person(s) will live in the Premises:
MARK MEDINA, BOBBY TOWNSEND

15. **GUESTS:** The TENANT agrees to pay the sum of \$ 50.00 per day for each guest remaining on the Premises more than 14 days. Notwithstanding the foregoing, in no event shall any guest remain on the Premises for more than 28 days.

16. **UTILITIES:** TENANT shall immediately connect all utilities and services of premises upon commencement of lease. TENANT is to pay when due all utilities and other charges in connection with TENANT's individual rented premises. Responsibility is described as (T) for TENANT and (O) for Owner:

Electricity <u>T</u>	Trash <u>O</u>	Trash Can Rental: <u>T</u>	Phone <u>T</u>
Gas <u>T</u>	Sewer <u>O</u>	Cable <u>T</u>	Other <u> </u>
Water <u>O</u>	Septic <u>N/A</u>	Association Fees <u>O</u>	Other <u> </u>

a. TENANT is responsible to connect the following utilities in TENANT'S name: EVERYTHING LISTED IN SECTION 16 OF LEASE AGREEMENT MARKED WITH A "T"

Property <u>4927</u>	<u>INDIAN RIVER DR. #112</u>	<u>DS</u>	<u>LAS VEGAS</u>	<u>NV</u>	<u>89103</u>
Owner's Name	<u>KAL-MOR-USA</u>		Owner's Name		
Tenant		Initials <u> </u>	Tenant		Initials <u> </u>
Tenant		Initials <u> </u>	Tenant		Initials <u> </u>

b. LANDLORD will maintain the connection of the following utilities in LANDLORD's name and bill TENANT for connection fees and use accordingly for the entire term of the lease: N/A

c. No additional phone or cable lines or outlets or satellite dishes shall be obtained for the Premises without the LANDLORD's written consent. In the event of LANDLORD's consent, TENANT shall be responsible for all costs associated with the additional lines, outlets or dishes. TENANT shall also remove any satellite dishes and restore the subject property to its original condition at the termination of this Agreement.

d. If an alarm system exists on the Premises, TENANT may obtain the services of an alarm services company and shall pay all costs associated therewith.

e. TENANT shall not default on any obligation to a utility provider for utility services at the Property. Owner does not pay for any utilities, excluding any such UTILITIES THAT ARE INCLUDED IN HOME OWNER'S ASSOCIATION DUES. TENANT must show all utilities giving service to said property have a zero balance upon move out.

f. Other: N/A

17. **PEST NOTICE:** TENANT understands that various pest, rodent and insect species (collectively, "pests") exist in Southern Nevada. Pests may include, but are not limited to, scorpions (approximately 23 species, including bark scorpions), spiders (including black widow and brown recluse), bees, snakes, ants, termites, rats, mice and pigeons. The existence of pests may vary by season and location. Within thirty (30) days of occupancy, if the Premises has pests, LANDLORD, at TENANT's written request, will arrange for and pay for the initial pest control spraying. TENANT agrees to pay for the monthly pest control spraying fees. For more information on pests and pest control providers, TENANT should contact the State of Nevada Division of Agriculture.

18. **PETS:** No pet shall be on or about the Premises at any time without written permission of LANDLORD. In the event TENANT wishes to have a pet, TENANT will complete an Application for Pet Approval. Should written permission be granted for occupancy of the designated pet, an additional security deposit in the amount of \$ 300.00 will be required and paid by TENANT in advance subject to deposit terms and conditions aforementioned. In the event written permission shall be granted, TENANT shall be required to procure and provide to LANDLORD written evidence that TENANT has obtained such insurance as may be available against property damage to the Premises and liability to third party injury. Said policy shall name LANDLORD and LANDLORD'S AGENT as additional insureds. A copy of said policy shall be provided to LANDLORD or LANDLORD'S BROKER/DESIGNATED PROPERTY MANAGER prior to any pets being allowed within the Premises. If TENANT obtains a pet without written permission of LANDLORD, such will be an event of default under paragraph 21. TENANT further agrees to pay an immediate fine of \$ 750.00. TENANT agrees to indemnify LANDLORD for any and all liability, loss and damages which LANDLORD may suffer as a result of any animal in the Premises, whether or not written permission was granted.

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Property # <u>4921</u>	<u>INDIAN RIVER DR. #112</u>	<u>DS</u>	<u>DS</u>	<u>LAS VEGAS</u>	<u>NV</u>	<u>89103</u>
Owner's Name <u>KAL-MOR-USA</u>				Owner's Name		
Tenant		Initials		Tenant		Initials
Tenant		Initials		Tenant		Initials

19. **RESTRICTIONS:** TENANT shall not keep or permit to be kept in, on, or about the Premises: waterbeds, boats, campers, trailers, mobile homes, recreational or commercial vehicles or any non-operative vehicles except as follows:

NO SMOKING INSIDE THE DWELLING.

TENANT shall not conduct nor permit any work on vehicles on the premises without the express written consent of the Owner.

20. **ALTERATIONS:** TENANT shall make no alterations to the Premises without LANDLORD's written consent. Unless otherwise agreed in writing between TENANT and LANDLORD, all alterations or improvements to the Premises become the property of LANDLORD, shall remain upon the Premises, and shall constitute a fixture permanently affixed to the Premises. Unless otherwise agreed in writing between TENANT and LANDLORD, TENANT shall be responsible for restoring the Premises to its original condition and removing any alterations or improvements if requested by LANDLORD or LANDLORD's BROKER/DESIGNATED PROPERTY MANAGER.

21. **DEFAULT:** Failure by TENANT to pay rent, perform any obligation under this Agreement, or comply with any Association Governing Documents (if any), or TENANT's engagement in activity prohibited by this Agreement, or TENANT's failure to comply with any and all applicable laws, shall be considered a default hereunder. Upon default, LANDLORD may, at its option, terminate this tenancy upon giving proper notice. Upon default, LANDLORD shall issue a proper itemized statement to TENANT noting the amount owed by TENANT, including any and all fees related to eviction and reletting of the subject property. LANDLORD may pursue any and all legal and equitable remedies available.

a. **FORFEITURE OF SECURITY DEPOSIT - DEFAULT.** It is understood and agreed that TENANT shall not attempt to apply or deduct any portion of any security deposit from the last or any month's rent or use or apply any such security deposit at any time in lieu of payment of rent. If TENANT fails to comply, such security deposit shall be forfeited and LANDLORD may recover the rent due as if any such deposit had not been applied or deducted from the rent due. For the purpose of this paragraph, it shall be conclusively presumed that a TENANT leaving the premises while owing rent is making an attempted deduction of deposits. Furthermore, any deposit shall be held as a guarantee that TENANT shall perform the obligations of the Lease and shall be forfeited by the TENANT should TENANT breach any of the terms and conditions of this Lease. In the event of default, by TENANT, of any obligation in this Lease which is not cured by TENANT within five (5) days' notice from LANDLORD, then in addition to forfeiture of the Security Deposit, LANDLORD may pursue any other remedy available by law, equity or otherwise.

b. **TENANT PERSONAL INFORMATION UPON DEFAULT.** TENANT understands and acknowledges that if TENANT defaults on lease, LANDLORD or Owner may engage the services of an Attorney or a Collection Agency. TENANT understands and acknowledges that LANDLORD/Owner may give an Attorney or a Collection Agency, TENANT's personal information, including but not limited to, TENANT's social security number or any other information to aid in collection efforts and holds LANDLORD, Broker, and Owner harmless from any liability in relation to the release of any personal information to these entities.

22. **ENFORCEMENT:** Any failure by LANDLORD to enforce the terms of this Agreement shall not constitute a waiver of said terms by LANDLORD. Acceptance of rent due by LANDLORD after any default shall not be construed to waive any right of LANDLORD or affect any notice of termination or eviction.

Property 4921 INDIAN RIVER DR. #112 ^{DS} CD ^{DS} LAS VEGAS NV 89103
 Owner's Name KAL-MOR-USA Owner's Name _____
 Tenant _____ Tenant _____ Initials _____ Initials _____
 Tenant _____ Tenant _____ Initials _____ Initials _____

a. ABANDONMENT. LANDLORD is entitled to presume per NRS 118A.450 that TENANT has abandoned the Premises if the TENANT is absent from the premises for a period of time equal to one-half the time for periodic rental payments, unless the rent is current or the TENANT has in writing notified the landlord of an intended absence.

b. If at any time during the term of this Lease, TENANT abandons the Premises, LANDLORD shall have the following rights: LANDLORD may, at LANDLORD's option, enter the Premises by any means without liability to TENANT for damages and may relet the Premises, for the whole or any part of the then unexpired term, and may receive and collect all rent payable by virtue of such reletting. At LANDLORD's option, LANDLORD may hold TENANT liable for any difference between the rent that would have been payable under this Lease during the balance of the unexpired term, if this Lease had continued in force, and the net rent for such period realized by LANDLORD by means of such reletting.

LANDLORD also may dispose of any of TENANT's abandoned personal property, pursuant to Nevada law as LANDLORD deems appropriate, without liability to TENANT.

23. **NOTICE OF INTENT TO VACATE:** TENANT shall provide notice of TENANT's intention to vacate the Premises. Such notice shall be in writing and shall be provided to LANDLORD prior to the first day of the last month of the lease term set forth in Section 3 of this Agreement. In no event shall notice be less than 30 days prior to the expiration of the term of this Agreement. In the event TENANT fails to provide such notice, TENANT shall be deemed to be holding-over on a month-to-month basis until 30 days after such notice. During a holdover not authorized by LANDLORD, rent shall increase by 25 %.

24. **TERMINATION:** Upon termination of the tenancy, TENANT shall surrender and vacate the Premises and shall remove any and all of TENANT'S property. TENANT shall return keys, personal property and Premises to the LANDLORD in good, clean and sanitary condition, normal wear excepted.

25. **EMERGENCIES:** The name, address and phone number of the party who will handle maintenance or essential services emergencies on behalf of the LANDLORD is as follows: MARC GISI, 7495 W. AZURE DR. #214, LAS VEGAS, NV 89130, 702-672-6544

26. **MAINTENANCE:** TENANT shall keep the Premises in a clean and good condition. TENANT shall immediately report to the LANDLORD any defect or problem on the Premises. TENANT agrees to notify LANDLORD of any water leakage and/or damage within 24 hours of the occurrence. TENANT understands that TENANT may be held responsible for any water and/or mold damage, including the costs of remediation of such damage. TENANT shall be responsible for any MINOR repairs necessary to the Premises up to and including the cost of \$ 75.00. TENANT agrees to pay for all repairs, replacements and maintenance required by TENANT's misconduct or negligence or that of TENANT's family, pets, licensees and guests, including but not limited to any damage done by wind or rain caused by leaving windows open and/or by overflow of water, or stoppage of waste pipes, or any other damage to appliances, carpeting or the Premises in general. At LANDLORD's option, such charges shall be paid immediately or be regarded as additional rent to be paid no later than the next monthly payment date following such repairs. TENANT acknowledges any minor repairs made to the Property must be done by an active, licensed and insured contractor.

a. TENANT shall change filters in the heating and air conditioning systems at least once every month, at TENANT's own expense. LANDLORD shall maintain the heating and air conditioning systems and provide for major repairs. However, any repairs to the heating or cooling system caused by dirty filters due to TENANT neglect will be the responsibility of TENANT.

Property	<u>4921 INDIAN RIVER DR. #112</u>	City	<u>LAS VEGAS</u>	State	<u>NV</u>	Zip	<u>89103</u>
Owner's Name	<u>KAL-MOR-USA</u>	Owner's Name					
Tenant		Tenant		Initials			
Tenant		Tenant		Initials			

b. TENANT shall replace all broken glass, regardless of cause of damage, at TENANT's expense.

c. LANDLORD shall be responsible for all systems including heating, cooling, electrical, plumbing and sewer lines. LANDLORD shall be responsible for all major heating, cooling electrical, plumbing and sewer problems that are not caused by TENANT.

d. There _____ is **-OR-** _____ is not a landscape contractor whose name and phone number are as follows:
N/A

In the case of landscaping being maintained by a contractor, TENANT agrees to cooperate with the landscape contractor in a satisfactory manner. LANDLORD-provided landscaping is not to be construed as a waiver of any responsibility of the TENANT to keep and maintain landscaping and/or shrubs, trees and sprinkler system in good condition.

In the event the landscaping is not being maintained by a contractor, TENANT shall maintain lawns, shrubs and trees. TENANT shall water all lawns, shrubs and trees, mow the lawns on a regular basis, trim the trees and fertilize lawns, shrubs and trees. If TENANT fails to maintain the landscaping in a satisfactory manner, LANDLORD may have the landscaping maintained by a landscaping contractor and charge TENANT with the actual cost. Said costs shall immediately become additional rent.

e. There _____ is **-OR-** _____ is not a pool contractor whose name and phone number are as follows:
N/A

In the case of pool maintenance being maintained by a contractor, TENANT agrees to cooperate with the pool maintenance contractor in a satisfactory manner. LANDLORD-provided pool maintenance is not to be construed as a waiver of any responsibility of the TENANT to keep and maintain the pool in good condition.

In the event the pool is not being maintained by a Contractor, TENANT agrees to maintain the pool, if any. TENANT agrees to maintain the water level, sweep, clean and keep in good condition. If TENANT fails to maintain the pool in a satisfactory manner, LANDLORD may have the pool maintained by a licensed pool service and charge TENANT with the actual cost. Said costs shall become additional rent.

f. Smoking _____ will or ☒ will not be permitted in or about the Premises. TENANT will be charged any costs incurred for the abatement of any damages by unauthorized smoking in the Premises.

27. ACCESS: TENANT agrees to grant LANDLORD the right to enter the Premises at all reasonable times and for all reasonable purposes including showing to prospective lessees, buyers, appraisers, insurance agents, periodic maintenance reviews and business therein as requested by LANDLORD. If TENANT fails to keep scheduled appointments with vendors to make necessary/required repairs, TENANT shall pay for any additional charges incurred which will then become part of the next month's rent and be considered additional rent. TENANT shall not deny LANDLORD his/her rights of reasonable entry to the Premises. LANDLORD shall have the right to enter in case of emergency and other situations as specifically allowed by law. LANDLORD agrees to give TENANT twenty-four (24) hours notification for entry, except in case of emergency.

Property #	4921	INDIAN RIVER DR. #112	DS	DS	LAS VEGAS	NV	89103
Owner's Name	KAL-MOR-USA			Owner's Name			
Tenant				Tenant			
Tenant				Tenant			

a. **DISPLAY OF SIGNS.** During the last thirty (30) days of this Lease, LANDLORD or LANDLORD's agent may display For Sale or For Rent or similar signs on or about the Premises and enter to show the Premises to prospective purchasers or tenants. TENANT also authorizes Broker to use an electronic keybox to show the Premises during the last 30 days of lease. TENANT further agrees to execute any and all documentation necessary to facilitate the use of a lockbox.

28. ASSOCIATIONS: Should the Premises described herein be a part of a common interest community, homeowners association planned unit development, condominium development ("the Association") or such, TENANT hereby agrees to abide by the Governing Documents (INCLUDING Declarations, Bylaws, Articles, Rules and Regulations) of such community and further agrees to be responsible for any fines or penalties levied as a result of failure to do so by TENANT, TENANT's family, licensees or guests. Noncompliance with the Governing Documents shall constitute a violation of this Agreement. Unless billed directly to TENANT by the Association, such fines shall be considered as additional rent and shall be due along with the next monthly payment of rent. By initialing this paragraph, TENANT acknowledges receipt of a copy of the applicable Governing Documents. LANDLORD, at LANDLORD's expense, shall provide TENANT with any additions to such Governing Documents as they become available. LANDLORD may, at its option, with 30 days' notice to TENANT, add additional rules and regulations governing use of the Premises and of the common areas (if any). []

29. INVENTORY: It is agreed that the following inventory is now on said premises. (Check if present; cross out if absent.)

<input checked="" type="checkbox"/> Refrigerator	<input type="checkbox"/> Intercom System	<input type="checkbox"/> Spa Equipment
<input checked="" type="checkbox"/> Stove	<input type="checkbox"/> Alarm System	<input type="checkbox"/> Auto Sprinklers
<input checked="" type="checkbox"/> Microwave	<input type="checkbox"/> Trash Compactor	<input type="checkbox"/> Auto Garage Openers
<input checked="" type="checkbox"/> Disposal	<input checked="" type="checkbox"/> Ceiling Fans	<input type="checkbox"/> BBQ
<input checked="" type="checkbox"/> Dishwasher	<input type="checkbox"/> Water Conditioner Equip.	<input type="checkbox"/> Solar Screens
<input checked="" type="checkbox"/> Washer	<input checked="" type="checkbox"/> Dryer	<input type="checkbox"/> Pool Equipment
<input type="checkbox"/> Garage Opener	<input type="checkbox"/> Gate Remotes	<input checked="" type="checkbox"/> Carpet
<input type="checkbox"/> Trash Can(s) (circle one) owner provided / trash service provided		
<input type="checkbox"/> Floor Coverings (specify type) _____		
<input type="checkbox"/> Window Coverings (specify type) <u>BLINDS</u>		
_____	_____	_____
_____	_____	_____

TENANT acknowledges that any appliances that are on the premises are for TENANT's use and convenience; however, in the event of a breakdown of said appliance(s) TENANT acknowledges that property manager, LANDLORD and or the owners are not responsible for any damages caused to TENANT's personal property, to include spoilage of food, beverage or clothing etc. as a result of said appliance break down.

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Property <u>4925</u>	<u>INDIAN RIVER DR. #112</u>	<u>DS</u>	<u>DS</u>	<u>LAS VEGAS</u>	<u>NV</u>	<u>89103</u>
Owner's Name	<u>KAL-MOR-USA</u>	Initials <u>CD</u>	Owner's Name	Initials	Tenant	Initials
Tenant	Initials	Tenant	Initials	Tenant	Initials	Initials

30. **INSURANCE:** TENANT X is ~~OR~~ is not required to purchase renter's insurance. LANDLORD BROKERAGE, and DESIGNATED PROPERTY MANAGER shall be named as additional insureds on any such policy. LANDLORD shall not be liable for any damage or injury to TENANT, or any other person, to any property occurring on the Premises or any part thereof, or in common areas thereof. TENANT agrees to indemnify, defend and hold LANDLORD harmless from any claims for damages. TENANT understands that LANDLORD's insurance does not cover TENANT's personal property. If the Premises, or any part of the Premises, shall be partially damaged by fire or other casualty not due to TENANT's negligence or willful act, or that of TENANT's family, agent, or visitor, there shall be an abatement of rent corresponding with the time during which, and the extent to which, the Premises is uninhabitable. If LANDLORD shall decide not to rebuild or repair, the term of this Lease shall end and the rent shall be prorated up to the time of the damage.

TENANT hereby acknowledges that the OWNER of the subject property does X or does not have homeowner's insurance. TENANT agrees to cooperate with homeowner and homeowner's insurance company in all relevant matters. TENANT further agrees, upon written notice, to cease any and all actions that may adversely impact OWNER's insurance coverage under said policy.

31. **ILLEGAL ACTIVITIES PROHIBITED:** TENANT is aware of the following: It is a misdemeanor to commit or maintain a public nuisance as defined in NRS 202.450 or to allow any building or boat to be used for a public nuisance. Any person, who willfully refuses to remove such a nuisance when there is a legal duty to do so, is guilty of a misdemeanor. A public nuisance may be reported to the local sheriff's department. A violation of building, health or safety codes or regulations may be reported to the government entity in our local area such as the code enforcement division of the county/city government or the local health or building departments. In addition continuing violations of HOA rules and regulations will be considered a public nuisance and TENANT hereby agrees that such continuing HOA violations shall be grounds for eviction.

32. **ADDITIONAL RESPONSIBILITIES:**

a. TENANT may install or replace screens at TENANT's own expense. Solar screen installation requires written permission from LANDLORD. LANDLORD is not responsible for maintaining screens.

b. With the exception of electric cooking devices, outdoor cooking with portable barbecuing equipment is prohibited within ten (10) feet of any overhang, balcony or opening, unless the Premises is a detached single family home. The storage and/or use of any barbecuing equipment is prohibited indoors, above the first floor and within five (5) feet of any exterior building wall. Adult supervision is required at all times the barbecue equipment is generating heat.

c. The Premises will ~~OR~~ X will not be freshly painted before occupancy. If not freshly painted, the Premises will ~~OR~~ X will not be touched up before occupancy. TENANT will be responsible for the costs for any holes or excessive dirt or smudges that will require repainting.

d. TENANT agrees to coordinate transfer of utilities to LANDLORD or BROKER/DESIGNATED PROPERTY MANAGER no less than 7 business days of vacating the Premises.

e. Locks may be replaced or re-keyed at the TENANT'S expense provided TENANT informs LANDLORD and provides LANDLORD with a workable key for each new or changed lock. TENANT further agrees to be responsible for any and all such rekey expenses should TENANT fail to notify LANDLORD in advance of any such replacement.

Property	<u>4221 INDIAN RIVER DR. #112</u>	<u>DS</u>	<u>LAS VEGAS</u>	<u>NV</u>	<u>89103</u>
Owner's Name	<u>KAL-MOR-USA</u>	<u>DS</u>	Owner's Name		
Tenant		Initials	Tenant		Initials
Tenant		Initials	Tenant		Initials

f. TENANT may conduct a risk assessment or inspection of the Premise for the presence of lead-based paint and/or lead-based paint hazards at the TENANT's expense for a period of ten days after execution of this agreement. Such assessment or inspection shall be conducted by a certified lead based paint professional. If TENANT for any reason fails to conduct such an assessment or inspection, then TENANT shall be deemed to have elected to lease the Premises "as is" and to have waived this contingency. If TENANT conducts such an assessment or inspection and determines that lead-based paint deficiencies and/or hazards exist, TENANT will notify LANDLORD in writing and provide a copy of the assessment/inspection report. LANDLORD will then have ten days to elect to correct such deficiencies and/or hazards or to terminate this agreement. In the event of termination under this paragraph, the security deposit will be refunded to TENANT. (If the property was constructed prior to 1978, refer to the attached Lead-Based Paint Disclosure.)

g. TENANT may display the flag of the United States, made of cloth, fabric or paper, from a pole, staff or in a window, and in accordance with 4 USC Chapter 1. LANDLORD may, at its option, with 30 days' notice to TENANT, adopt additional reasonable rules and regulations governing the display of the flag of the United States.

h. TENANT may display political signs subject to any applicable provisions of law governing the posting of political signs, and, if the Premises are located within a CIC, the provisions of NRS 116 and any governing documents related to the posting of political signs. All political signs exhibited must not be larger than 24 inches by 36 inches. LANDLORD may not exhibit any political sign on the Premises unless the TENANT consents, in writing, to the exhibition of the political sign. TENANT may exhibit as many political signs as desired, but may not exhibit more than one political sign for each candidate, political party or ballot question.

i. DANGEROUS MATERIALS. TENANT shall not keep or have on or around the Premises any article or thing of a dangerous, flammable, or explosive character that might unreasonably increase the danger of fire on or around the Premises or that might be considered hazardous.

33. CHANGES MUST BE IN WRITING: No changes, modifications or amendment of this Agreement shall be valid or binding unless such changes, modifications or amendment are in writing and signed by each party. Such changes shall take effect after thirty days' notice to TENANT. This Agreement constitutes the entire agreement between the Parties and supersedes any prior understanding or representation of any kind preceding the date of this Agreement. There are no other promises, conditions, understandings or other agreements, whether oral or written, relating to the subject matter of this Agreement.

34. CONFLICTS BETWEEN LEASE AND ADDENDUM: In case of conflict between the provisions of an addendum and any other provisions of this Agreement, the provisions of the addendum shall govern.

35. ATTORNEY'S FEES: In the event of any court action, the prevailing party shall be entitled to be awarded against the losing party all costs and expenses incurred thereby, including, but not limited to, reasonable attorney's fees and costs.

36. NEVADA LAW GOVERNS: This Agreement is executed and intended to be performed in the State of Nevada in the county where the Premises are located and the laws of the State of Nevada shall govern its interpretation and effect.

37. WAIVER: Nothing contained in this Agreement shall be construed as waiving any of the LANDLORD's or TENANT's rights under the laws of the State of Nevada.

Property	4901 INDIAN RIVER DR. #112	DS	LAS VEGAS	NV	89103
Owner's Name	KAL-MOR-USA	DS	Owner's Name		
Tenant		Initials	Tenant		Initials
Tenant		Initials	Tenant		Initials

38. **PARTIAL INVALIDITY:** In the event that any provision of this Agreement shall be held invalid or unenforceable, such ruling shall not affect in any respect whatsoever the validity or enforceability of the remainder of this Agreement.

39. **VIOLATIONS OF PROVISIONS:** A single violation by TENANT of any of the provisions of this Agreement shall be deemed a material breach and shall be cause for termination of this Agreement. Unless otherwise provided by the law, proof of any violation of this Agreement shall not require criminal conviction but shall be by a preponderance of the evidence.

40. **SIGNATURES:** The Agreement is accepted and agreed to jointly and severally. The undersigned have read this Agreement and understand and agree to all provisions thereof and further acknowledge that they have received a copy of this Agreement. This Agreement may be executed in any number of counterparts, electronically pursuant to NRS Chapter 719, and by facsimile copies with the same effect as if all parties to this agreement had signed the same document and all counterparts and copies will be construed together and will constitute one and the same instrument.

41. **LICENSEE DISCLOSURE OF INTEREST:** Pursuant to NAC 645.640, N/A is a licensed real estate agent in the State(s) of N/A, and has the following interest, direct or indirect, in this transaction: ☐ Principal (LANDLORD or TENANT) -OR- ☐ family relationship or business interest: N/A

42. **CONFIRMATION OF REPRESENTATION:** The Agents in this transaction are:

TENANT's Brokerage: ZIP REALTY Broker's Name: _____
DESIGNATED PROPERTY MANAGER _____
Agent's Name: TERRI D. GILL Agent's License # _____
Address: _____
Phone: 702-255-1145 Fax: _____ Email: RAREFINDREALTY@GMAIL.COM

LANDLORD's Brokerage: Wynn Realty Group Broker's Name: RAY CROSBY
DESIGNATED PROPERTY MANAGER MARC GISI
Agent's Name: Marc A Gisi Agent's License # 42295
Address: 7495 W Azure Ave Ste 214 Las Vegas NV 89130
Phone: 702-672-6544 Fax: 702-489-3336 Email: marcgisi@cox.net

43. **NOTICES:** Unless otherwise required by law, any notice to be given or served upon any party hereto in connection with this Agreement must be in writing and mailed by certificate of mailing to the following addresses:

BROKERAGE: WYNN REALTY GROUP BROKER RAY CROSBY
DESIGNATED PROPERTY MANAGER MARC GISI
Address: 7495 W. AZURE DR. #214 LAS VEGAS NV 89130
Phone: 702-953-4999 Fax: 702-489-3336 Email: _____

TENANT:
Address: _____
Phone: _____ Fax: _____ Email: HAEZ

Property 4521 INDIAN RIVER DR. #112 LAS VEGAS NV 89103
Owner's Name KAL-MOR-USA Owner's Name _____
Tenant _____ Initials _____ Tenant _____ Initials _____
Tenant _____ Initials _____ Tenant _____ Initials _____

44. **MILITARY PROVISION:** IN THE EVENT the TENANT is, or hereafter becomes, a member of the United States Armed Forces on extended active duty and hereafter the TENANT receives permanent change of station orders to depart from the area where the Premises are located, or is relieved from active duty, retires or separates from the military, or is ordered into military housing, then in any of these events, the TENANT may terminate this lease upon giving thirty (30) days written notice to the LANDLORD. The TENANT shall also provide to the LANDLORD a copy of the official orders or a letter signed by the TENANT's commanding officer, reflecting the change, which warrants termination under this clause. The TENANT will pay prorated rent for any days (he/she) occupy the premises past the first day of the month. The security deposit will be promptly returned to the TENANT, provided there are no damages to the premises, as described by law.

45. **ADDENDA ATTACHED:** Incorporated into this Agreement are the following addenda, exhibits and other information:

- A. ☒ Lease Addendum for Drug Free Housing
- B. ☒ Lease Addendum for Illegal Activity
- C. ☒ Smoke Detector Agreement
- D. ☐ HOA Rules and Regulations
- E. ☐ Other: _____
- F. ☐ Other: _____
- G. ☐ Other: _____
- H. ☐ Other: _____

46. **ADDITIONAL TERMS AND CONDITIONS:**

TENANT SHALL PAY RENT IN ADVANCE ON THE 1ST DAY OF EVERY MONTH AND DELINQUENT AFTER THE 5TH. THERE IS NO GRACE PERIOD. TENANT SHALL MAKE ALL PAYMENTS PAYABLE TO WYNN REALTY GROUP BY MONEY ORDER, CASHIERS CHECK OR ELECTRONIC DEPOSIT. TENANT SHALL MAIL SUCH PAYMENTS TO 7495 W. AZURE DR. #214, LAS VEGAS, NV 89130 OR MAY HAND DELIVER SUCH PAYMENTS TO 7495 W. AZURE DR., LAS VEGAS, NV 89130 DURING NORMAL BUSINESS HOURS.

NO SMOKING INSIDE THE INTERIOR OF THE DWELLING.

AFTER 30 CALENDAR DAYS OF OCCUPYING THE PROPERTY, TENANT IS AWARE AND AGREES TO PAY ANY AND ALL HOME WARRANTY SERVICE CALL FEES AT TIME OF SERVICE. NO EXCEPTIONS WILL BE MADE OR NEGOTIATED.

TENANT IS AWARE AND AGREES TO ALERT PROPERTY MANAGEMENT COMPANY AND/OR LANDLORD OF ANY DEFICIENCIES OR REPAIRS TENANT DISCOVERS WITHIN 48 HOURS. TENANT IS AWARE AND AGREES IF ANY REPAIRS REQUIRE ALTERNATIVE HOUSING, TENANT WILL VACATE THE HOME UNTIL SAID REPAIRS ARE COMPLETED.

TENANT IS AWARE AND AGREES TO CURE ANY HOA VIOLATION NOTICES BY THE DETERMINED DUE DATE. IF ANY HOA VIOLATION MATURES INTO A FINE BEING LEVIED, TENANT AGREES TO PAY FINE IN FULL BY THE DETERMINED DUE DATE.

NO FEEDING OF BIRDS, STRAY CATS, OR OTHER WILD ANIMALS ALLOWED ON THE PROPERTY.

NO PARKING OR STORING OF VEHICLES WITH EXPIRED REGISTRATION IS ALLOWED ON THE PROPERTY UNLESS KEPT IN THE GARAGE AND OUT OF VIEW.

Property #	8921	INDIAN RIVER DR. #112	DS	LAS VEGAS	NV	89103
Owner's Name	KAL-MOR-USA			Owner's Name		
Tenant	_____			Tenant	_____	
Tenant	_____			Tenant	_____	

IT IS THE PROTOCOL OF THE LANDLORD/AGENT TO SERVE A FIVE DAY NOTICE ON THE 6TH OF THE MONTH FOR NON PAYMENT OF RENT.

NON EMERGENCY REPAIR REQUESTS ARE TO BE PHONED TO THE FOLLOWING NUMBER: 702-515-4039. ALLOW 24 HOURS FOR REQUESTS TO BE PROCESSED AND A VENDOR DISPATCHED.

EMERGENCY REPAIR REQUESTS ARE TO BE PHONED TO THE FOLLOWING NUMBER: 702-672-6544. A VENDOR WILL BE DISPATCHED AS SOON AS POSSIBLE.

TEXTING OF REPAIR REQUESTS OF ANY NATURE WILL NOT BE RECOGNIZED.

Landlord agrees to rent the Premises on the above terms and conditions.

DocuSigned by:

Greg Darroch

3/14/2017

LANDLORD/OWNER

DATE

LANDLORD/OWNER

DATE

OR Authorized Signatory

OR Authorized Signatory

KAL-MOR-USA

PRINT NAME

PRINT NAME

Tenant agrees to rent the Premises on the above terms and conditions.

03/14/2017

DATE

TENANT'S SIGNATURE

DATE

PRINT NAME

PRINT NAME

TENANT'S SIGNATURE

DATE

TENANT'S SIGNATURE

DATE

PRINT NAME

PRINT NAME

Real Estate Brokers and Designated Property Managers:

A. Real estate brokers, licensees, agents, and Designated Property Managers who are not also disclosed as a party to the transaction under paragraph 41 are not parties to this Agreement between Landlord and Tenant.

B. Agency relationships are confirmed in paragraph 42.

Property 4921 INDIAN RIVER DR. #112 CD NS

Owner's Name KAL-MOR-USA

Owner's Name

LAS VEGAS

NV

89103

Tenant

Tenant

Initials

Tenant

Tenant

Initials



FORECLOSURE ADDENDUM TO RESIDENTIAL LEASE AGREEMENT

for
 4921 INDIAN RIVER DR. #112 LAS VEGAS NV 89103
 (Property Address)

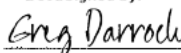
In reference to the Residential Lease Agreement ("Lease Agreement") executed by
 OWNER'S Name: KAL-MOR-USA, OWNER'S Name: _____ and
 TENANT's Name: _____ TENANT's Name: _____
 TENANT's Name: _____ TENANT's Name: _____
 dated 3/14/2017 covering the above-referenced real property, the parties hereby agree that the Lease Agreement be amended as follows:

1. NOTICE OF DEFAULT/FORECLOSURE. Tenant(s) is notified that Owner has agreed to notify Broker/Designated Property Manager of any defaults on any loans, mortgages, assessments or trust deeds. The filing of a Notice of Default by a lender or other lien holder commences a foreclosure period which lasts, at a minimum, three months plus 21 days. Tenant(s) is further notified that Owner has authorized Broker/Designated Property Manager to notify Tenant(s) and make arrangements to terminate the Lease Agreement if Broker/Designated Property Manager receives any notice indicating that Owner is any one of the following situations: (1) default of any loan, mortgage, assessments or trust deed; (2) any stage of the foreclosure process including a deed-in-lieu of foreclosure; (3) default in making any payments associated with this property; or (4) acceptance of a short sale contract. In such event, Owner has authorized Broker/Designated Property Manager to negotiate termination of the Lease Agreement.

2. TERMS OF LEASE AGREEMENT. During any foreclosure period, the Tenant(s) shall **honor ALL CONDITIONS of the current Lease Agreement** including the timely payment of rent as stated in the Lease Agreement. Nevada law grants the Owner a redemption period, and the Owner remains as the legal owner of record until the actual time of the foreclosure sale.

3. RETURN OF SECURITY DEPOSITS. Once the Tenant(s) vacates the property, the Owner has authorized Broker/Designated Property Manager to release ALL security deposits (including non-refundable deposits) back to the Tenant(s) with no further obligations from the Tenant(s) or Broker/Designated Property Manager. The 30-day period required by Nevada law for the return of the security deposits still applies. The property must be returned in the same general condition as the Tenant(s) occupied the property. Upon Tenant(s)'s request, Broker/Designated Property Manager will attempt to find a new home to rent/lease/purchase for Tenant(s).

When executed by both parties, this Addendum is made an integral part of the aforementioned Lease Agreement. **WHEN PROPERLY COMPLETED, THIS IS A BINDING CONTRACT. IF YOU DO NOT FULLY UNDERSTAND ITS CONTENTS, YOU SHOULD SEEK COMPETENT LEGAL COUNSEL BEFORE SIGNING.**

DocuSigned by:		3/14/2017	
 LANDLORD/OWNER OR Authorized Signatory KAL-MOR-USA	_____ LANDLORD/OWNER OR Authorized Signatory _____ PRINT NAME		
_____ 03/14/2017 DATE	_____ 03/14/2017 DATE		
_____ PRINT NAME	_____ PRINT NAME		
_____ TENANT'S SIGNATURE _____ PRINT NAME	_____ TENANT'S SIGNATURE _____ PRINT NAME		



LEASE ADDENDUM FOR DRUG FREE HOUSING



for

4921 INDIAN RIVER DR. #112

LAS VEGAS

NV

89103

(Property Address)

In consideration of the execution or renewal of a lease of the dwelling unit identified in the lease, Landlord and Tenant agree as follows:

1. Tenant, any member of Tenant's household, or a guest or other person under Tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near the subject leasehold premises, "Drug-related criminal activity" means the illegal manufacture, sale distribution, use or possession with intent to manufacture, sell, distribute, or use, of controlled substance (as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. §802).
2. Tenant, any member of the Tenant's household, or a guest or other person under Tenant's control, shall not engage in any act intended to facilitate criminal activity, including drug-related criminal activity, on or near the subject leasehold premises.
3. Tenant or members of the household will not permit the dwelling unit to be used for or to facilitate criminal activity, including drug-related criminal activity, regardless of whether the individual engaging in such activity is a member of the household or a guest.
4. Tenant or member of the household will not engage in the manufacture, sale or distribution of illegal drugs at any location, whether on or near the subject leasehold premises or otherwise.
5. Tenant, any member of the Tenant's household, or a guest or other person under Tenant's control shall not engage in acts of violence, including, but not limited to the unlawful discharge of firearms, on or near the subject leasehold premises.
6. VIOLATION OF THE ABOVE PROVISIONS SHALL BE A MATERIAL VIOLATION OF THE LEASE AND GOOD CAUSE FOR TERMINATION OF TENANCY. A single violation of any of the provisions of the addendum shall be deemed a serious violation and a material noncompliance with the lease. It is understood and agreed that a single violation shall be cause for termination of the lease. Unless otherwise provided by law, proof of violation shall not require criminal conviction, but shall be by a preponderance of the evidence.
7. In case of conflict between the provisions of this addendum and any other provisions of the lease, the provisions of the addendum shall govern.
8. This addendum is incorporated into the lease executed or renewed this day between Landlord and Tenant.

DocuSigned by:

Greg Darroch

3/14/2017

LANDLORD/OWNER

DATE

OR Authorized Signatory

KAL-MOR-USA

PRINT NAME

LANDLORD/OWNER

DATE

OR Authorized Signatory

PRINT NAME

03/14/2017

RE

DATE

PRINT NAME

03/14/2017

DATE

PRINT NAME

TENANT'S SIGNATURE

DATE

PRINT NAME

TENANT'S SIGNATURE

DATE

PRINT NAME

Lease Addendum for Drug Free Housing Rev. 10.2016

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This form presented by Marc A Gisi | Wynn Realty Group |
702-953-4999 | marcgisi@cox.net

InstantFORAS
JA001672



LEASE ADDENDUM FOR ILLEGAL ACTIVITY FOR



4921 INDIAN RIVER DR. #112 LAS VEGAS NV 89103
Property Address

In consideration of the execution or renewal of a lease of the Property, Landlord and Tenant hereby agree that the Residential Lease Agreement dated 03/14/17 be amended as follows:

1. Tenant and any member of Tenant's household or any guest shall not engage in any criminal or illegal activity, including but not limited to, illegal drug related activity, gang related activity or acts of violence on or near the subject Premises (as defined in the above-referenced Residential Lease Agreement). "Drug-related criminal activity" means the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute, or use, of controlled substance (as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. §802). "Acts of violence" includes, but is not limited to, the unlawful discharge of firearms, on or near the Premises. Any and all firearms on the Premises must be stored properly pursuant to Nevada law.
2. Tenant, any member of the Tenant's household, or a guest or other person under Tenant's control, shall not engage in any act intended to facilitate criminal activity, including drug-related criminal activity, on or near the subject Premises.
3. Tenant or members of the household will not permit the Premises to be used for or to facilitate criminal activity, including drug-related criminal activity, regardless of whether the individual engaging in such activity is a member of the household or a guest.
4. VIOLATION OF THE ABOVE PROVISIONS SHALL BE A MATERIAL BREACH OF THE LEASE AGREEMENT AND GOOD CAUSE FOR TERMINATION OF TENANCY. A single violation of any of the provisions of the addendum shall be deemed a serious violation and a material noncompliance with the lease. It is understood and agreed that a single violation shall be cause for termination of the lease. Unless otherwise provided by law, proof of violation shall not require criminal conviction, but shall be by a preponderance of the evidence.
5. In case of conflict between the provisions of this addendum and any other provisions of the Lease Agreement, the provisions of the addendum shall govern. This lease addendum is incorporated into the lease executed or renewed this day between Landlord and Tenant.

DocuSigned by:

Greg Darroch

3/14/2017

LANDLORD/OWNER
OR Authorized Signatory

DATE

KAL-MOR-USA
PRINT NAME

LANDLORD/OWNER
OR Authorized Signatory

DATE

PRINT NAME

03/14/17
DATE

PRINT NAME

03/14/17
DATE

PRINT NAME

TENANT'S SIGNATURE

DATE

PRINT NAME

TENANT'S SIGNATURE

DATE

PRINT NAME



SMOKE DETECTOR AGREEMENT FOR



4921 INDIAN RIVER DR. #112 LAS VEGAS NV 89103
Property Address

In reference to the Residential Lease Agreement ("Lease Agreement") executed by

OWNER'S Name: KAL-MOR-USA, OWNER'S Name: _____ and

TENANT's Name: _____ TENANT's Name: _____

TENANT's Name: _____ TENANT's Name: _____

dated 03/14/2017 covering the above-referenced real property, the parties hereby agree that the Lease Agreement be amended as follows:

Landlord and Tenant agree that the premises are equipped with smoke detection devise(s). Tenant shall agree as follows:

1. It is agreed that Tenant will test the smoke detector(s) within twenty four (24) hours after occupancy and inform Landlord or his/her Agent immediately if detector(s) is not working properly.
2. It is agreed that Tenant will be responsible for testing smoke detector(s) weekly by pushing the "push to test" button on the detector for about five (5) seconds. To be operating properly, the alarm will sound when the button is pushed.
3. Tenant understands that said smoke detector(s) is a battery operated unit and it shall be Tenant's responsibility to insure that the battery is in operating condition at all times. If after replacing battery, any smoke detector(s) will not operate or has no sound, Tenant must inform Landlord or his/her Agent immediately in writing.
4. Landlord and his/her Agent recommend that Tenant provide and maintain a fire extinguisher on the premises.
5. The undersigned have read the above agreement and understand and agree to all provisions thereof and further acknowledge that they have received a copy of said agreement.
6. Tenant shall not under any circumstances remove, disable or tamper with any smoke detection device(s).

DocuSigned by:

Greg Darroch

3/14/2017

LANDLORD/OWNER

DATE

LANDLORD/OWNER

DATE

Print Name: _____

Print Name: _____

03/14/2017

DATE

03/14/2017

DATE

TENANT'S SIGNATURE

DATE

TENANT'S SIGNATURE

DATE

Print Name: _____

Print Name: _____

DUTIES OWED BY A NEVADA REAL ESTATE LICENSEE*This form does not constitute a contract for services nor an agreement to pay compensation.*

In Nevada, a real estate licensee is required to provide a form setting forth the duties owed by the licensee to:

- a) Each party for whom the licensee is acting as an agent in the real estate transaction, and
- b) Each unrepresented party to the real estate transaction, if any.

Licensee: The licensee in the real estate transaction is Marc A Gisi
 whose license number is 42295. The licensee is acting for [client's name(s)] KAL-MOR-USA
 who is/are the ☒ Seller/Landlord; ☐ Buyer/Tenant.
Broker: The broker is RAY CROSBY, whose company is Wynn Realty Group.
 Are there additional licensees involved in this transaction? ☐ Yes ☒ No If yes, Supplemental form 525A is required.

Licensee's Duties Owed to All Parties:

A Nevada real estate licensee shall:

1. Not deal with any party to a real estate transaction in a manner which is deceitful, fraudulent or dishonest.
2. Exercise reasonable skill and care with respect to all parties to the real estate transaction.
3. Disclose to each party to the real estate transaction as soon as practicable:
 - a. Any material and relevant facts, data or information which licensee knows, or with reasonable care and diligence the licensee should know, about the property.
 - b. Each source from which licensee will receive compensation.
4. Abide by all other duties, responsibilities and obligations required of the licensee in law or regulations.

Licensee's Duties Owed to the Client:

A Nevada real estate licensee shall:

1. Exercise reasonable skill and care to carry out the terms of the brokerage agreement and the licensee's duties in the brokerage agreement;
2. Not disclose, except to the licensee's broker, confidential information relating to a client for 1 year after the revocation or termination of the brokerage agreement, unless licensee is required to do so by court order or the client gives written permission;
3. Seek a sale, purchase, option, rental or lease of real property at the price and terms stated in the brokerage agreement or at a price acceptable to the client;
4. Present all offers made to, or by the client as soon as practicable, unless the client chooses to waive the duty of the licensee to present all offers and signs a waiver of the duty on a form prescribed by the Division;
5. Disclose to the client material facts of which the licensee has knowledge concerning the real estate transaction;
6. Advise the client to obtain advice from an expert relating to matters which are beyond the expertise of the licensee; and
7. Account to the client for all money and property the licensee receives in which the client may have an interest.

Duties Owed By a broker who assigns different licensees affiliated with the brokerage to separate parties.

Each licensee shall not disclose, except to the real estate broker, confidential information relating to client.

Licensee Acting for Both Parties:

The Licensee

MAY / **OR** MAY NOT /

in the future act for two or more parties who have interests adverse to each other. In acting for these parties, the licensee has a conflict of interest. Before a licensee may act for two or more parties, the licensee must give you a "Consent to Act" form to sign.

I/We acknowledge receipt of a copy of this list of licensee duties, and have read and understand this disclosure.

Seller/Landlord: Greg Darroch Date: 3/14/2017 Time:
KAL-MOR-USA

Seller/Landlord: Date: Time:
61AC2CE836C40B

OR
 Buyer/Tenant: Date: 03/14/2017 Time: 10 AM

Buyer/Tenant: Date: 03/14/2017 Time: 10 AM

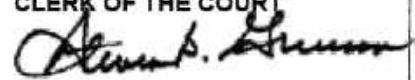
Approved Nevada Real Estate Division
 Replaces all previous versions

525
 Revised 11/7/16

This form presented by Marc A Gisi | Wynn Realty Group | 702-
 953-4999 | marcgisi@cox.net

JA001675

EXHIBIT 4



BART K. LARSEN, ESQ.
Nevada Bar No. 8538
ERIC D. WALTHER, ESQ.
Nevada Bar No. 13611
KOLESAR & LEATHAM
400 South Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145
Telephone: (702) 362-7800
Facsimile: (702) 362-9472
E-Mail: blarsen@klnevada.com
ewalther@klnevada.com

Attorneys for Plaintiff
Kal-Mor-USA, LLC

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X;
and ROE ENTITIES I through X, inclusive,

Defendants.

CASE NO. A-17-757061-C

DEPT. NO. 2

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: August 27, 2018

Time: 10:30 a.m.

Plaintiff Kal-Mor-USA, LLC's ("Kal-Mor") Motion for Partial Summary Judgment (the "Motion") against Defendant Omni Financial, LLC ("Omni") as to Kal-Mor's fourth cause of action for declaratory relief and Kal-Mor's fifth cause of action for quiet title came on for hearing before the Court on August 27, 2018 (the "Hearing"). Kal-Mor appeared through its counsel of record, Bart K. Larsen, Esq. of the law firm of Kolesar & Leatham. Omni appeared through its counsel of record, Robert W. Hernquist, Esq. and Brian J. Pezzillo, Esq. of the law firm of Howard & Howard.

KOLESAR & LEATHAM
400 S. Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145
Tel: (702) 362-7800 / Fax: (702) 362-9472

1 Having duly considered all arguments and evidence presented by both Kal-Mor and
2 Omni, including the arguments made by counsel at the Hearing, and finding good cause for the
3 relief requested in the Motion, the Court makes the following Findings of Fact and Conclusions
4 of Law:

5 **FINDINGS OF FACT**

6 **A. The Omni Loan Transaction**

7 1. On May 27, 2014, First 100 and Omni entered into a Loan Agreement under
8 which Omni agreed to loan up to \$5,000,000 to First 100 (the "Omni Loan Agreement"). In
9 connection therewith, First 100 executed a Promissory Note dated May 27, 2014 in favor of
10 Omni (the "Omni Note"). First 100 and Omni also entered into a Security Agreement dated May
11 27, 2014 (the "Security Agreement" and together with the Omni Loan Agreement, the Omni
12 Note, and other loan documents, the "Omni Loan") under which First 100 pledged certain real
13 and personal property as collateral for the Omni Note.

14 2. Among other things, the collateral purportedly pledged pursuant to the Security
15 Agreement was evidenced by (i) a Deed of Trust dated May 27, 2014 (the "May 2014 Deed of
16 Trust"), (ii) a Deed of Trust dated June 17, 2014 (the "June 2014 Deed of Trust"), and a Deed of
17 Trust dated August 21, 2014 (the "August 2014 Deed of Trust" and together with the May 2014
18 Deed of Trust and June 2014 Deed of Trust, including any subsequent amendments thereto, the
19 "Omni Deeds of Trust").

20 3. The May 2014 Deed of Trust was recorded in the official records of the Clark
21 County, Nevada Recorder (the "Official Records") as instrument number 20140529-0001342 on
22 May 29, 2014. Under the May 2014 Deed of Trust, First 100 purported to pledge various real
23 properties as collateral for the Omni Note, including, but not limited to:

24 a. The property commonly known as 1217 Neva Ranch Avenue, North Las
25 Vegas, Nevada 89081, also designated as Clark County Assessor Parcel
26 Number ("APN") 124-26-311-029 (the "Neva Ranch Property");

27 b. The property commonly known as 230 East Flamingo Road #330, Las Vegas,
28 Nevada 89169, also designated as APN 162-16-810-355 (the "East Flamingo");

Property”);

c. The property commonly known as 2615 West Gary Avenue #1065, Las Vegas, Nevada 89123, also designated as APN 177-20-813-127 (the “West Gary Property”); and

d. The property commonly known as 6575 Shining Sand Avenue, Las Vegas, Nevada 89142, also designated as APN 161-10-511-072 (the “Shining Sand Property”).

4. The June 2014 Deed of Trust was recorded in the Official Records as instrument number 20140718-0001253 on July 18, 2014. Under the June 2014 Deed of Trust, First 100 purported to pledge certain additional real properties as collateral for the Omni Note, including, but not limited to:

a. The property commonly known as 4921 Indian River Drive #112, Las Vegas, Nevada 89103, also designated as APN 163-24-612-588 (the (“4921 Indian River Property”);

b. The property commonly known as 5009 Indian River Drive #155, Las Vegas, Nevada 89103, also designated as APN 163-24-612-639 (the “5009 Indian River Property”);

c. The property commonly known as 5295 Indian River Drive #314, Las Vegas, Nevada 89103, also designated as APN 163-24-612-798 (the “5295 Indian River Property”); and

d. The property commonly known as 4400 Sandy River Drive #16, Las Vegas, Nevada 89103, also designated as APN 163-24-612-500 (the “Sandy River Property”).

5. The August 2014 Deed of Trust was recorded in the Official Records as instrument number 20140826-0001916 on August 26, 2014. Under the August 2014 Deed of Trust, First 100 purported to pledge as collateral for the Omni Note the real property commonly known as 5782 Camino Ramon Avenue, Las Vegas, Nevada 89156, also designated as APN 140-21-611-018 (the “Camino Ramon Property” and together with the Neva Ranch Property, the

1 East Flamingo Property, the West Gary Property, the Shining Sand Property, the 4921 Indian
2 River Property, the 5009 Indian River Property, the 5295 Indian River Property, and the Sandy
3 River Property, the "Kal-Mor Properties").

4 6. On October 5, 2016, Omni re-recorded the August 2014 Deed of Trust in the
5 Official Records as instrument number 20161005-0002287.

6 7. On April 24, 2017, Omni re-recorded the May 2014 Deed of Trust in the Official
7 Records as instrument number 20170424-0000178.

8 8. On April 24, 2017, Omni re-recorded the June 2014 Deed of Trust in the Official
9 Records as instrument number 20170424-0000179.

10 **B. The PrenPoinciana Transactions**

11 9. On or around February 2, 2015 and with Omni's consent, First 100 entered into a
12 Proceeds Purchase Sharing Agreement ("PPSA") with PrenPoinciana, LLC ("PrenPoinciana")
13 under which PrenPoinciana purchased certain rights to share in the proceeds of certain
14 receivables, and First 100 granted PrenPoinciana a junior security interest in such receivables,
15 which had previously been pledged as collateral for the Omni Note.

16 10. On or around April 20, 2015, PrenPoinciana affiliate, Prentice Lending II, LLC
17 ("Prentice"), loaned \$150,000 (the "Prentice Loan") to First 100 and also received a junior
18 security interest in certain receivables that had previously been pledged as collateral for the
19 Omni Note.

20 **C. Kal-Mor's Purchase of the Kal-Mor Properties**

21 11. First 100's business operations include, among other things, the purchase and sale
22 of residential real properties in Clark County, Nevada that are acquired by First 100 as a result of
23 homeowner association ("HOA") assessment lien foreclosure sales conducted pursuant to the
24 provisions of Chapter 116 of Nevada Revised Statutes. During 2014 and 2015, Kal-Mor
25 purchased several such real properties from First 100, including the nine (9) Kal-Mor Properties
26 that First 100 had previously pledged as collateral for the Omni Note under the Omni Deeds of
27 Trust.

D. The First 100 Action

12. During 2015, First 100 failed to pay amounts due and owing under the Omni Note and failed to perform other obligations required of it in connection with the Omni Loan. First 100 similarly failed to perform as agreed in connection with the PPSA. As a result, Omni and PrenPoinciana issued a joint Notification of Disposition of Collateral on January 8, 2016 in which they identified certain personal property subject to their security interests and scheduled a sale of such collateral to take place in accordance with NRS Chapter 104 on January 21, 2016 (the "UCC Sale").

13. On January 15, 2016, First 100 filed a complaint in the Eighth Judicial District Court in Clark County, Nevada (Case No. A-16-730374-C) (the "First 100 Action") in which it asserted various claims against Omni and PrenPoinciana, and sought an injunction to prevent Omni and PrenPoinciana from proceeding with the UCC Sale. On January 18, 2016, Omni removed the First 100 Action to the United States District Court for the District of Nevada (the "District Court") (Case No. 2:16-cv-00099).

14. After several months of litigation in the First 100 Action, Omni completed the UCC Sale on May 25, 2016 and purchased certain First 100 personal property that had been pledged as collateral for the Omni Note under the Security Agreement through a successful credit bid.

15. On or about May 31, 2016, Omni paid \$800,000 to PrenPoinciana and Prentice to purchase their respective interests under the PPSA and the Prentice Loan.

16. Various disputes subsequently arose between First 100 and Omni as to, among other things, the outstanding balance of the Omni Note, the reasonableness of the UCC Sale, the value of the personal property purchase by Omni through the UCC Sale, possession and control of the personal property purchase by Omni through the UCC Sale, First 100's liability for the remaining balance of the Omni Note, First 100's liability to Omni for amounts owed in connection with the PPSA and the Prentice Loan, and Omni's rights and interests under the Omni Deeds of Trust.

1 17. Omni filed a counterclaim against First 100 and others in the First 100 Action in
2 which it alleged, among other things, that the unpaid balance of the Omni Note was \$4.1 million
3 as of June 15, 2016.

4 **E. The First 100 Settlement**

5 18. After several additional months of litigation in the First 100 Action, Omni and
6 First 100 reached an agreement to resolve their various disputes and entered into a written
7 settlement agreement (the "First 100 Settlement") on January 16, 2017.¹

8 19. Section 15(a) of the First 100 Settlement provides in part:

9 Omni Release. Except for the rights and obligations of the Parties under this
10 Agreement, and effective immediately upon the exchange of fully executed
11 counterparts of this Agreement ... Omni hereby unconditionally relieves, releases,
12 acquits and forever discharges First 100 ... of and from any and all Liabilities²
13 and Claims³ arising out of, concerning, or in any manner relating to ... the
14 Parties' prior settlement efforts and negotiations, and Enforcement Actions⁴
15 undertaken by Omni with respect to the Omni Loan (including without limitation
16 the UCC Sale and exercise of the assignment of rents).

17 20. At the time the First 100 Settlement was executed, First 100 held no legal or
18 equitable interest of any kind in any of the Kal-Mor Properties.

19 21. Pursuant to § 15(e) the First 100 Settlement, the District Court entered a
20 Stipulated Judgment on February 16, 2017 (the "First 100 Judgment") in the First 100 Action
21 through which it entered judgment in favor of Omni and against First 100 in the amount of \$4.8

22 ¹ A copy of the First 100 Settlement is attached to Omni's Opposition to Plaintiff's Motion for Partial Summary
23 Judgment as "Exhibit A-4."

24 ² Section 14(a) of the First 100 Settlement defines "Liabilities" as "any and all liabilities, losses, promises,
25 obligations, agreements, compensation, damages, accounts, liens, fines, assessments, indebtedness, costs, charges, or
26 other expenses, including, but not limited to, reasonable attorney fees and costs, including but not limited to any
27 claims that may be brought by Prentice Lending or PrenPoinciana or their respective positions, and whether of any
28 kind or nature, liquidated or unliquidated, suspected or unsuspected, or fixed or contingent."

³ Section 14(a) of the First 100 Settlement defines and defines "Claims" as "claims, controversies, causes of action,
lawsuits, choses in action, arbitrations, administrative actions or proceedings, judgments, order, and remedies."

⁴ Section 1(b) of the First 100 Settlement defines "Enforcement Actions" as "Omni letters dated April 8, 2015 and
November 2, 2015 claiming First 100 to be in default of the Omni Loan; Omni asserting that it had accelerated that
Loan; Omni commencing foreclosure actions which are the subject of this dispute; and Omni's response to the filing
of lawsuits related to its claims."

1 million, but which amount could increase by a specific sum if certain conditions subsequent are
2 not met.⁵

3 22. Among other things, the First 100 Judgment provides that the First 100 Action
4 "and any and all Disputes, Claims, Counterclaims, and Third-Party Claims are hereby dismissed
5 with prejudice. This judgment shall not preclude or otherwise impair any claim or defense that
6 may exist or arise between or among the Parties with respect to a breach of the Settlement
7 Agreement."⁶

8 23. The term "Disputes" as used in the First 100 Judgment is defined in the recitals to
9 the First 100 Judgment to include "numerous disputes ... between Plaintiffs, Defendants, and
10 Guarantors⁷" regarding, among other things: "(a) First 100's default on a line of credit loan
11 extended by Omni pursuant to a loan agreement and other transaction documents dated May 27,
12 2014; ... and (f) Omni's first-priority security interest, as beneficiary, under deeds of trust in
13 various real properties previously or currently owned by First 100."

14 CONCLUSIONS OF LAW

15 1. Summary judgment is proper under Nev. R. Civ. P. 56(c) when there is no
16 genuine issue of material fact and the moving party is entitled to judgment as to all or some part
17 of its claims as a matter of law. *See Cuzze v. Univ. and Comm. College Sys. of Nev.*, 123 Nev.
18 598, 172 P.3d 131, 134 (2007). To defeat a motion for summary judgment, the non-moving
19 party must introduce specific evidence, through affidavit or otherwise, that demonstrates the
20 existence of a genuine issue of material fact. *Id.*

21 2. "The substantive law controls which factual disputes are material and will
22 preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine
23 when the evidence is such that a rational trier of fact could return a verdict for the nonmoving
24 party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

25
26 ⁵ A copy of the First 100 Judgment is attached to Omni's Opposition to Plaintiff's Motion for Partial Summary
Judgment as "Exhibit D."

27 ⁶ First 100 Judgment, ¶¶ 5 and 6.

28 ⁷ Kal-Mor is not identified as either a Plaintiff, a Guarantor, or a Defendant in the First 100 Judgment.

3. In considering a motion for summary judgment, the court must view the evidence presented in a light most favorable to the non-moving party. *Fire Ins. Exchange v. Cornwell*, 120 Nev. 303, 305 (2004).

4. "A novation, or substituted contract, 'is a contract that is itself accepted ... in satisfaction of [an] existing duty' which 'discharges the original duty.'" *Granite Construction Company v. Remote Energy Solutions, LLC*, 2017 WL 2334516 (Nev. May 25, 2017) (citing Restatement (Second) of Contracts § 279 (Am. Law Inst. 1981)).

5. "A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989). "If all four elements exist, a novation occurred." *Id.*

6. A novation must be established by clear and convincing evidence. *Id.* at 509.

7. "Whether a novation occurred is a question of fact if the evidence is such that reasonable persons can draw more than one conclusion." *Id.* at 508.

8. Novation can be determined as a matter of law "when the agreement and consent of the parties are unequivocal." *Lazovich & Lazovich v. Harding*, 86 Nev. 434, 470 P.2d 125 (1970).

9. The proper interpretation of a contract is a question of law. *Dickenson v. State, Dept. of Wildlife*, 110 Nev. 934, 877 P.2d 1059 (1994). If no ambiguity exists, the words of the contract must be taken in their usual and ordinary significance. *Parsons Drilling, Inc. v Polar Resources*, 98 Nev. 374, 376, 649 P.2d 1360, 1362 (1982).

10. It is undisputed that the Omni Note constituted a valid contract between First 100 and Omni. Likewise, it is undisputed that the First 100 Settlement constitutes a valid, new contract between First 100 and Omni. Accordingly, to determine whether a novation occurred, the Court must determine whether the First 100 Settlement extinguished the Omni Note.

11. The undisputed facts set forth in the record unequivocally demonstrate that the First 100 Settlement expressly and unambiguously extinguished and discharged the Omni Note and substituted in place of the Omni Note the new and materially different obligations owed by

1 First 100 under the First 100 Settlement. As a matter of law, the substitution of one agreement
2 for another constitutes a novation. *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 780 P.2d
3 193 (1989).

4 12. The extinguishment and discharge of the Omni Note logically extinguished and
5 discharged the Omni Deeds of Trust, which stood as the security for the Omni Note. *See, e.g.*,
6 *Walker v. Shrake*, 75 Nev. 241, 247 (1959) (holding that the satisfaction of a judgment destroyed
7 the security incidental to the judgment obligation).

8 13. Furthermore, the plain and unambiguous language of sections 1(b), 14(a), and
9 15(a) of the First 100 Settlement clearly provides that, upon execution of the First 100
10 Settlement, Omni unconditionally waived, released, and discharged all liabilities, claims, and
11 remedies arising out of, concerning, or in any manner relating to First 100's default under the
12 Omni Loan. Thus, the claims and remedies expressly discharged and released under the First
13 100 Settlement included Omni's rights to enforce payment of the Omni Note through foreclose
14 under the Omni Deeds of Trust.

15 14. The terms of the First 100 Settlement are clear and unambiguous. The subjective
16 intent of Omni and First 100 and their prior dealings are irrelevant. The Court cannot consider
17 extrinsic evidence to construe the unambiguous terms of a contract. "[W]hen a contract is clear
18 on its face, it will be construed from the written language and enforced as written." *Canfora v.*
19 *Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776 (2005) (internal quotation marks and citation
20 omitted).

21 15. Furthermore, § 20(b) of the First 100 Settlement contains a standard merger
22 clause that provides that the First 100 Settlement is the entire agreement of the parties and
23 replaces all prior agreements. The parol evidence rule precludes the admission of extrinsic
24 "evidence that would change the contract terms when the terms of a written agreement are clear,
25 definite, and unambiguous." *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004).

26 16. Through its Motion and the evidence and arguments presented in support thereof,
27 Kal-Mor has demonstrated by clear and convincing evidence that the First 100 Settlement was a
28 novation of the Omni Loan. As such, Kal-Mor is entitled, as a matter of law, to the relief

1 requested in connection with its fourth cause of action for declaratory relief and fifth cause of
2 action for quiet title.

3 17. Omni has failed to demonstrate the existence of any genuine issue of material fact
4 that would prevent this Court from granting partial summary judgment in favor of Kal-Mor as to
5 Kal-Mor's fourth cause of action for declaratory relief and fifth cause of action for quiet title.

6 18. The Court makes no determination concerning Kal-Mor's alternative argument
7 that the Omni Deeds of Trust were discharged and released under Nevada's one action rule⁸ as a
8 result of the entry of the First 100 Judgment.

9 19. If any Conclusion of Law set forth herein is determined to properly constitute a
10 Finding of Fact (or vice versa), such shall be treated as if appropriately identified and designated.

11 **ORDER**

12 Based on the foregoing Findings of Fact and Conclusions of Law, THE COURT
13 HEREBY ORDERS AS FOLLOWS:

14 1. Kal-Mor's Motion for Partial Summary Judgment against Omni as to Kal-Mor's
15 fourth cause of action for declaratory relief and Kal-Mor's fifth cause of action for quiet title is
16 GRANTED;

17 2. Omni's request for relief pursuant to Nev. R. Civ. P. 56(f) is DENIED as Omni
18 has failed to demonstrate the existence of or need for discovery concerning any genuine issue of
19 material fact that would prevent this Court from granting partial summary judgment as requested
20 in Kal-Mor's Motion;

21 3. The execution of the First 100 Settlement on or about January 16, 2017 satisfied
22 and discharged the Omni Note;

23 4. The satisfaction and discharge of the Omni Note pursuant to the First 100
24 Settlement satisfied and discharged the Omni Deeds of Trust as to the Kal-Mor Properties;


25
26
27
28 ⁸ Nev. Rev. Stat. §§ 40.430 and 435.

5. Kal-Mor's rights, title, and interests in each of the Kal-Mor Properties exist free and clear of any lien, mortgage, security interest, or other encumbrance that might be claimed under the Omni Deeds of Trust; and

6. A certified copy of this Order may be recorded in the Official Records as proof and confirmation that any lien, mortgage, security interest, or other encumbrance that might be claimed against any of the Kal-Mor Properties under any of the Omni Deeds of Trust has been fully released and discharged.


IT IS SO ORDERED.

DATED this 26 day of September, 2018.


DISTRICT JUDGE

Submitted by:

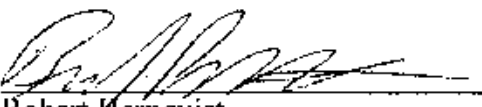
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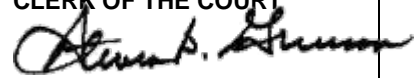
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DISTRICT COURT

CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X; and
ROE ENTITIES I through X, inclusive,

Defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10,

Counter-defendants.

Case No.: A-17-757061-C

Dept. No.: II

**FIRST 100, LLC'S LIMITED
OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Hearing Date: July 20, 2020

Hearing Time: 9:00 a.m.

1 OMNI FINANCIAL, LLC, a foreign limited
2 liability company,

3 Cross-Claimant,

4 vs.

5 FIRST 100, LLC, a Nevada limited liability
6 company; DOES 11 – 20, ROE ENTITIES 11 –
7 20.

8 Cross-Defendants

9 Defendant First 100, LLC (“First 100”), by and through its attorneys of record, the law firm
10 MAIER GUTIERREZ & ASSOCIATES, hereby files this limited opposition to plaintiff Kal-Mor-USA,
11 LLC’s (“Kal-Mor”) motion for partial summary judgment against defendant Omni Financial, LLC
12 (“Omni”) as to Kal-Mor’s sixth cause of action for unjust enrichment against Omni, seventh cause of
13 action for conversion against Omni, and ninth cause of action for intentional interference with
14 contractual relations against Omni. This limited opposition is supported by the following
15 Memorandum of Points and Authorities, the pleadings and papers on file in this case, and any oral
16 argument the Court may choose to consider.

17 DATED this 30th day of June, 2020.

18 Respectfully submitted,

19 **MAIER GUTIERREZ & ASSOCIATES**

20 /s/ Danielle J. Barraza

21 JOSEPH A. GUTIERREZ, ESQ.

22 Nevada Bar No. 9046

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25 8816 Spanish Ridge Avenue

26 Las Vegas, Nevada 89148

27 Attorneys for Defendant First 100, LLC

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. LEGAL ARGUMENT**

3 Plaintiff Kal-Mor has filed a motion for partial summary judgment as to certain causes of
4 action it has set forth against defendant Omni. None of the causes of action at issue in the motion for
5 summary judgment are against First 100.

6 Through this limited opposition, First 100 seeks to clarify that while it does not have any
7 objection to the Court determining whether as a matter of law, Kal-Mor is entitled to partial summary
8 judgment against Omni, First 100 opposes any purported “undisputed facts” set forth in the briefs on
9 this motion which go against (and are therefore in dispute with) First 100’s positions set forth in its
10 Answers to the Complaint and to the Cross-Claim, *on file*.

11 For example, First 100 disputes the contention in Kal-Mor’s motion for summary judgment
12 that “First 100 failed to disclose to Kal-Mor that it had previously pledged its interest in the Kal-Mor
13 Properties as partial collateral for a loan made by Omni to First 100.” Mot. at p. 3.

14 First 100 asserts that the contractual documents at issue speak for themselves and the Court
15 may be able to rule on Kal-Mor’s motion based on the actual evidence, but First 100 expressly denies
16 any factual allegations of wrongdoing on First 100’s part, pursuant to its Answers on file.

17 **II. CONCLUSION**

18 Based on the foregoing, First 100 submits this limited opposition to Kal-Mor’s motion for
19 summary judgment, in which First 100 disputes any factual allegations which contradict First 100’s
20 Answers on file.

21 DATED this 30th day of June, 2020.

22 Respectfully submitted,

23 **MAIER GUTIERREZ & ASSOCIATES**

24 /s/ Danielle J. Barraza

25 JOSEPH A. GUTIERREZ, ESQ.

26 Nevada Bar No. 9046

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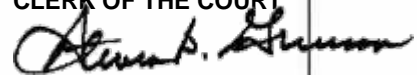
Attorneys for Defendant First 100, LLC

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Date: July 20, 2020

Time: 9:00 a.m.

Defendant Omni Financial, LLC ("Omni") submits the following Opposition to the Motion for Partial Summary Judgment ("Motion") filed by Kal-Mor-USA, LLC ("Kal-Mor") on June 16, 2020.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Kal-Mor's Motion for Partial Summary Judgment must be denied for a variety of reasons. First, although Omni filed its Answer and Counterclaim on August 12, 2019, Kal-Mor has failed to comply with the mandatory requirements of NRCP 16.1 in that it has failed to schedule and conduct an early case conference and thereby denied Omni the opportunity to conduct discovery.

The Motion is premised upon the entry of an interlocutory order granting partial summary judgment to Kal-Mor. [Motion, Ex. 4]. Omni has previously sought to certify this order pursuant to NRCP 54(b) as final for purposes of appeal. As indicated at the recent status check held by the Court on June 17, 2020, Omni is renewing that Motion, as Defendant First 100 has now appeared in the action and refuted “facts” upon which that prior Order was based, namely that the settlement agreement entered into between Omi and First 100 was intended to replace all prior existing obligations between the parties.¹

II. STATEMENT OF FACTS

As the Court is aware from the various pleadings, Omni extended real estate-backed loans. [Opposition to Motion for Summary Judgment (“Opposition”) filed on August 15, 2018, Ex. A, 100, LLC (“First 100”) to finance the purchase and enforcement of homeowner association (“HOA”) receivables (the “Loan”). (Opposition, Ex. A, ¶4; Ex. B, Court Order, Case No. 2:16-cv-00099, 3:23-4:9). On May 27, 2014, (i) the two entered into a Loan Agreement; (ii) First 100 executed a Promissory Note, Security Agreement, and multiple Deeds of Trust in Omni’s favor; and (iii) certain First 100 principals issued Guarantees in Omni’s favor. (*Id.*, at 3:23-4:9)).

The Security Agreement granted Omni a security interest in all of First 100’s present and future-acquired personal property, ranging from HOA Receivables to cash accounts to equipment and so forth. (Opposition, Ex. B, 3:25-4:5; 16:26-17:5). Not a single type or item of personalty was excluded. (*Id.*). Omni recorded UCC-1 financing statements in Nevada and Florida evidencing its security interest in First 100’s personalty. (Opposition, Ex. A; Ex. A-2). That was the first UCC filing on record, pre-dating UCC-1s and tax liens filed by; (i) PrenPoinciana, LLC, an unrelated third party; (ii) Mr. Darroch, Kal-Mor’s principal and affiant, and (iii) the I.R.S. (Opposition, Ex. A-8, A-9 and A-10). Kal-Mor has acknowledged that, First 100 also executed multiple deeds of trust in Omni’s favor (the “Deeds of Trust”). (Motion for Partial Summary Judgment (“Motion”), p. 4, ¶3; Ex. A, ¶7); Order, ¶(A)(2). Those Deeds of Trust encumbered, as

¹ These issues are further described in Omni’s renewed Motion to Certify Order Granting Partial Summary Judgment as Final, filed concurrently with this Opposition and the contents of which are incorporated herein by reference.

1 security for the Loan, approximately thirty properties in the State of Nevada. (Opposition, Ex. A,
2 ¶7). This action arises from Kal-Mor's contention it subsequently purchased and owns nine of
3 those thirty parcels (the "Kal-Mor Real Properties"). (Motion, p. 7, ¶15).

4 Kal-Mor alleges that:

5 First 100 did not disclose to Kal-Mor that it had previously pledged any interest in
6 any of the Kal-Mor Properties as collateral for a loan made by Omni to First 100.

7 (Motion, p. 3, lns. 9 - 11). First 100 denies that it ever failed to disclose to Kal-Mor that it had
8 pledged the properties at issue to Omni to secure the relevant Deed of Trust. [First 100 Answer
9 filed November 26, 2019 ("First 100 Answer"), ¶¶ 23, 24, 30, 31, 37, 38, 44, 45, 51, 52, 58, 59,
10 65, 66, 72, 73, 79, 80, 58, 65, 108, 114, 118 and 120]. Likewise, First 100 expressly denied that
11 Omni's Loan "was satisfied in full through the UCC Sale, the First 100 Settlement, and/or the
12 First 100 Judgment." [First 100 Answer, ¶127]. First 100, in contrast, represented to Omni that it
13 "in transferring the Real Properties...to third parties, [First 100] provided all of those third parties,
14 prior to closing the transfer transaction, with actual notice of the existence of Omni's first-priority
15 security interest in those Real Properties." (Opposition, Exhibit A-4, Omni / First 100 Settlement
16 Agreement at §8(c)).

17 In 2013, 2014 and 2015, Kal-Mor purchased several properties from First 100, including
18 the Kal-Mor Properties at issue here. (Opposition, Ex. A, ¶10; Motion, p. 7, ¶15). On May 13,
19 2015, Mr. Darroch filed a UCC-1 financing statement against First 100, claiming he loaned money
20 to First 100 and was granted a security interest in certain HOA receivables. (Opposition, Ex. A,
21 ¶11; Ex. A-9). Based on his filing date, Mr. Darroch's interest was at best fourth in priority,
22 behind the interests of Omni, the IRS, and PrenPoinciana, respectively. (*Id.*)

23 Prior to Kal-Mor's purchases and loan, First 100 committed the first of its numerous
24 breaches of the Omni Loan. (Opposition, Ex. B, 4:10-14). Among other things, it failed to: (i)
25 pay principal and interest when due; (ii) cure the defects in Omni's Deeds of Trust; (iii) properly
26 prosecute and enforce the HOA receivables; and (iv) provide Omni with required monthly,
27 quarterly, and annual financial statements. (Opposition, Ex. A, ¶12); Order, ¶(D)(12). Omni
28

1 issued a notice of default on April 8, 2015. (Ex. A-11). It is unclear if Kal-Mor knew or did not
2 know about that default, given Mr. Darroch's equity interest in First 100.

3 On November 2, 2015, Omni sent First 100 a second notice of default, categorizing First
4 100's breaches in more detail. (Opposition, Ex. A-12). That notice accelerated the Loan and
5 demanded payment in full. (*Id.*). Throughout November 2015, First 100 and Kal-Mor repeatedly
6 promised Omni that Kal-Mor would buy out the Omni Loan at full face value. (Ex. A, ¶14). At
7 times, First 100 and Kal-Mor promised Omni that a \$4 million pay-off would be wired within
8 hours. (*Id.*) Kal-Mor's counsel delivered a draft loan assignment agreement to Omni on
9 November 20, 2015, and Omni responded with a revised draft a few days later. (*Id.*) Negotiations
10 continued into early December, until Kal-Mor's counsel simply "went dark" declining to
11 respond to any email or phone messages. (*Id.*) Omni believes Kal-Mor's entire loan payoff
12 proposals were a ruse to buy First 100 more time. (*Id.*)

13 Omni and First 100 entered into a Forbearance Agreement dated December 18, 2015, and
14 a related Addendum three days later. (Opposition, Ex. B, 4:8-27; Ex. A-13). Omni agreed to
15 forego foreclosure over First 100's personalty in exchange for various First 100 promises,
16 including (i) delivery of financial statements by December 18th and (ii) a \$270,500 payment by
17 December 28th. (*Id.*) Both deadlines came and went with no performance: First 100 eventually
18 violated virtually every single forbearance term. (Opposition, Ex. B, 13:11-22). Given First 100's
19 then year-old payment default, Omni noticed a UCC sale pursuant to NRS Chapter 104, by issuing
20 a "Notification of Disposition of Collateral" in January 2016 (the "1st UCC Notice"). (Opposition,
21 Ex. A-14).

22 In response, First 100 filed suit and sought an emergency, *ex parte* TRO to stop the sale.
23 (Case No. 2:16-cv-00099, ECF 1-1 (Complaint)). Kal-Mor filed a virtually identical suit and
24 emergency, *ex parte* TRO request (Case No. A-16-730447-C). Omni removed the two cases to
25 federal court, and they were consolidated into one case. Giving First 100 and Kal-Mor the benefit
26 of the doubt, the U.S. District Court granted a TRO and postponed Omni's foreclosure sale. (Case
27 No. 2:16-cv-00099, ECF 21). However, several months later, after three days of evidentiary
28

1 hearings and extensive briefings and oral arguments, the U.S. District Court held that: (i) the
 2 original TRO was wholly unwarranted; (ii) Omni could proceed with the foreclosure sale; and
 3 (iii) Omni was entitled to Kal-Mor's TRO bond. (Opposition, Ex. B).²

4 Kal-Mor based its Motion, in part, on Nevada's One Action Rule. The Court denied the
 5 Motion with regard to this issue. See Order dated October 2, 2018. Not only was Kal-Mor a party
 6 to the federal proceedings, but its disputes with Omni were resolved in an agreement specifically
 7 addressing the Kal-Mor Real Properties and anticipating Omni's future real-property foreclosure
 8 actions. In documents dated November 23, 2016, Omni and Kal-Mor agreed to a (i) "Settlement
 9 and Mutual General Release Agreement" (the "Kal-Mor Settlement") (Ex. A-3); and (ii)
 10 "Stipulation and Order for Entry of Final Judgment" (the "Kal-Mor SAO") (Ex. J). Critically, the
 11 former states:

12 W. The Parties now desire to resolve all differences, disputes and disagreements
 13 between them relating to the 2014-2015 Receivables and the ACR Receivables.
 14 ***This Agreement, however, is not intended to address or resolve any dispute***
 15 ***between the Parties as to the Kal-Mor Real Properties.***

16 Notwithstanding the terms provided herein, ***Omni reserves all rights to assert***
 17 ***claims and conduct Enforcement Actions relating to any asset or property*** other
 18 than the 2013 Receivables, 2014-2015 Receivables, and/or ACR Receivables,
 19 whether owned (previously, currently, or in the future) by GFY or a third party,
 20 including but not limited to the Kal-Mor Real Properties, associated proceeds, rents,
 21 and/or other assets.

22 (Ex. A-3, p. 4, Recital W); §4(a)) (emphasis added). This language was included because during
 23 settlement negotiations, both Omni and Kal-Mor recognized and agreed that they would not be
 24 able to resolve their competing claimed interests in real property that had been granted to both of
 25 them by First 100. (Opposition, Ex. A).

26 1. The Kal-Mor SAO states:

27 The entry final judgment by the Court pursuant to this Stipulation shall not preclude
 28 or otherwise impair any claim or defense that may exist between the Parties other
 than those expressly stated in the Complaint or the Counterclaim.

² This U.S. District Court also expressed grave concerns regarding Kal-Mor's withholding of critical evidence, which was exposed during the cross-examination of Mr. Darroch, Kal-Mor's principal. (Opposition, Ex. B, 25:23-28.)

(Ex. J, ¶4).

Several weeks later, Omni and First 100 entered into a similar agreement (defined in the Motion and herein as the “First 100 Settlement”). (Opposition, Ex. A-4). The Court has ruled that the settlement agreement that was entered into between Omni and First 100 constituted a novation of the original agreement.

While Kal-Mor asserts in the introduction to the Motion that First 100 did not provide notice of Omni’s interest in the Properties at issue and that Omni and First 100 entered into settlement agreement that resulted in a new agreement and extinguished all prior obligations, Kal-Mor fails to inform the Court that both Omni and First 100 deny this allegation. [First 100 Answer, ¶127].

III. LEGAL STANDARD

The standard for granting summary judgment is well established. *See* NRCP 56(c)(summary judgment appropriate only if no material issues of fact exist); see also *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). When reviewing a motion for summary judgment, the evidence, and all reasonable inferences drawn from the evidence, must be viewed in a light most favorable to the non-moving party. *See Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 137, 206 P.3d 572, 575 (2009); *Waldman v. Maini*, 124 Nev. 1121, 1136, 195 P.3d 850, 860 (2008); *Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 61, 128 P.3d 452, 458 (2006); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *Kahn v. Morse & Mowbray*, 121 Nev. 464, 473–74, 117 P.3d 227, 234 (2005); *Weiner v. Beatty*, 121 Nev. 243, 246, 116 P.3d 829, 830 (2005). Moreover, a motion for summary judgment must be supported by facts which would be admissible in evidence. NRCP 56(c); *see also Henry Products v. Tarmu*, 114 Nev. 1017, 967 P.2d 444 (1998)(evidence introduced in support of motion for summary judgment must be admissible evidence).

A party opposing summary judgment does not need to prove that an issue of material fact will be resolved conclusively in its favor; rather, the nonmoving party must simply present “sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to

1 resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477
 2 U.S. 242, 250 (1986). Thus, the judge reviewing a summary judgment motion does not weigh
 3 conflicting evidence of a disputed material fact or make credibility determinations with respect to
 4 statements made in affidavits, answers to interrogatories, admissions, or depositions. *Id.* at 255-
 5 56. Rather, at the summary judgment stage, the judge is asked to review whether direct evidence
 6 produced by the moving party conflicts with direct evidence produced by the nonmoving party.
 7 If a rational trier of fact might resolve the issue in favor of the nonmoving party, summary
 8 judgment must be denied. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,
 9 587 (1986). Inferences must be drawn in the light most favorable to the nonmoving party and
 10 may be drawn from underlying facts that are not in dispute, such as background or contextual
 11 facts, and from underlying facts on which there is conflicting direct evidence but which the judge
 12 must assume may be resolved at trial in favor of the nonmoving party. *See Anderson*, 477 U.S.
 13 at 253-55; *Matsushita*, 475 U.S. at 587.

14 **IV. LAW AND ARGUMENT**

15 **A. KAL-MOR'S MOTION IS PREMATURE AND IMPROPER**

16 Courts routinely deny motions for summary judgment when they are made before any
 17 opportunity for discovery has been afforded:

18 Though Rule 56 allows a party to move for summary judgment 'at any time,' the
 19 granting of summary judgment is limited until after adequate time for discovery.
 20 A grant of summary judgment is premature and improper when basic discovery
 has not been completed, particularly when the moving party has exclusive access
 to the evidence necessary to support the nonmoving party's claims.

21 *Ferm v. Crown Equity Holdings, Inc.*, 2011 U.S. Dist. LEXIS 84433 at *8 (D. Nev. 2011)(quoting
 22 *Phongsavane v. Potter*, 2005 U.S. Dist. LEXIS 12439, 2005 WL 1514091, at *5 (W.D. Tex. 2005)
 23 (internal citation omitted)). Kal-Mor's Motion is similarly premature here. When Kal-Mor filed
 24 its Motion, the parties had not even discussed discovery and discovery deadlines under NRCP
 25 16.1 and thus no discovery had occurred in this matter. The Court is aware of this fact as the
 26 Court conducted a status check on June 17, 2020 at which time it was acknowledged that no early
 27

1 case conference had been held and that Kal-Mor anticipated the filing of a joint case conference
2 shortly. [Court Minutes, attached hereto as Exhibit A]. As of the filing of this Opposition, no
3 Early Case Conference has been scheduled and no Joint Case Conference Report has been drafted.
4 Discovery cannot commence until after the filing of a case conference report. *See* NRCP 26(a)

5 The current matter is now subject of dismissal due to Kal-Mor's failure to adhere to the
6 mandatory requirements of NRCP 16.1. As the Court is well-aware, NRCP 16.1(a)(2)(A) requires
7 that an early case conference be schedule within thirty (30) days of service of an Answer. As
8 reflected in the Court's docket, Omni filed its Answer/Counterclaim/Crossclaim on August 12,
9 2019. Absent compelling and extraordinary circumstances the date to conduct the early case
10 conference cannot be extended more than 180 days after service of the first answer that is filed.
11 *See* NRCP 16.1(a)(2)(B). There is no dispute that no early case conference has been held and no
12 motion seeking an extension of the mandatory deadlines has been filed by Kal-Mor. Even if the
13 Court were to allow the matter to proceed forward, Kal-Mor's failure to timely prosecute the
14 pending matter or to conduct the mandatory early case conference to allow discovery to proceed
15 provides grounds to deny the pending Motion.

16 **B. KAL-MOR'S MOTION IS PROCEDURALLY DEFECTIVE**

17 It is well settled that only *admissible* evidence may be relied upon by the Court in ruling
18 upon a summary judgment demand. NRCP56(e); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764,
19 (9th Cir. 2002); *Saka v. Sahara-Nevada Corp.*, 92 Nev. 703, 558 P.2d 535(1976)(Facts asserted
20 in affidavit must be supported by affirmative showing of witnesses competency to testify). The
21 allegation that Omni has caused damages to Kal-Mor is based solely upon the Declaration of Greg
22 Darroch who states that his Declaration is made upon personal knowledge. Mr. Darroch fails to
23 identify how he has personal knowledge of the factual allegations asserted in his Declaration,
24 however. Mr. Darroch claims throughout his Declaration that the tenants of various properties
25 failed to make payments to Kal-Mor because of the actions of Omni, and yet, no basis for such an
26 assertion is made. It is not known how Mr. Darroch would have such knowledge as to why the
27 tenants took any action that they did. Mr. Darroch cannot testify to the state of mind of third
28

parties, none of whom have offered sworn statements or other evidence in support of the Motion.

C. OMNI IS ENTITLED TO DISCOVERY PURSUANT TO RULE 56(D)

NRCP 56(d) gives the court reviewing a motion for summary judgment broad discretion to deny or continue the motion if the nonmoving party needs time to discover essential facts. *California Union Ins. Co. v. American Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990). Although a party may move for summary judgment at any time district courts should grant a Rule 56(d) motion when the nonmoving party has not had a “realistic opportunity to pursue discovery relating to its theory of the case.” *Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003); *Harrison v. Falcon Products, Inc.*, 103 Nev. 558, 746 P.2d 642 (1987)(Summary judgment reversed when not even 2 years had passed in litigation and party sought continuance to take discovery). In fact, where the nonmoving party has not had the opportunity to discover any information essential to its theory of the case, the Supreme Court has “restated the rule as requiring, rather than merely permitting, discovery.” *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)(citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). To be entitled to Rule 56(d) discovery, the nonmoving party must identify facts showing there is a genuine issue for trial. *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986).

Omni is entitled to take discovery under Rule 56(d) to support its defenses. The Declaration of Brian J. Pezzillo demonstrates ample facts that would require discovery. [Exhibit B). Omni has not had the opportunity to engage in any discovery whatsoever regarding any facts of the case. The specific motion seeks judgment on claims of unjust enrichment, interference with contractual relations and conversion. No evidence has been brought before the Court supporting the theory that any of the tenants subject of the lease were actually in possession of the properties on the specific dates that Omni is alleged to have interfered with Kal-Mor’s rights, no checks have been produced indicating the specific dollar figure, if any, of money paid to Omni, no evidence has been submitted which provides any insight as to why the tenants made payments to any party other than Kal-Mor, nor is it even alleged the tenants failed to make payments to Kal-Mor. Omni

1 is entitled to conduct discovery on what payments were or were not made to Kal-Mor as well as
2 the reason for such payments (or lack thereof). In light of that lack of discovery, summary
3 judgment should be denied pursuant to Rule 56(d), with appropriate discovery ordered after Kal-
4 Mor conducts the mandatory early case conference and prepare a Joint Case Conference Report
5 as required by NRCP 16.1.

6 **V. CONCLUSION**

7 For the foregoing reasons, Plaintiff's Motion for Summary Judgment should be denied in
8 its entirety.

9 HOWARD & HOWARD ATTORNEYS PLLC

10 By: /s/ Brian J. Pezzillo

11 Robert Hernquist, Nevada Bar No. 10616

12 Brian J. Pezzillo; Nevada Bar No. 7136

13 *Attorneys for Defendant Omni Financial, LLC*
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 30th day of June 2020, I caused to be served a copy of foregoing *Opposition To Motion For Partial Summary Judgment* in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

Joseph A. Gutierrez
MAIER GUTIERREZ AYON
400 South Seventh Street, Suite 400
Las Vegas, NV 89101

Attorneys for First 100 LLC

Bart K. Larsen
KOLESAR & LEATHAM
400 South Rampart Boulevard, Suite 400
Las Vegas, Nevada 89145

*Attorney for Plaintiff Kal-Mor-USA,
LLC*

/s/ Anya Ruiz
Howard & Howard Attorneys PLLC

EXHIBIT “A”

EXHIBIT “A”

Other Title to Property

COURT MINUTES

June 17, 2020

A-17-757061-C Kal-Mor-USA, Inc., Plaintiff(s)
vs.
Omni Financial, LLC, Defendant(s)

June 17, 2020 09:00 AM Status Check

HEARD BY: Scotti, Richard F. COURTROOM: RJC Courtroom 03B

COURT CLERK: Jacobson, Alice

RECORDER: Berndt, Kaihla

REPORTER:

PARTIES PRESENT:

Bart K. Larsen Attorney for Counter Defendant, Plaintiff

Brian J. Pezzillo Attorney for Counter Claimant, Cross
Claimant, Defendant

Danielle J. Barraza Attorney for Cross Defendant, Defendant

JOURNAL ENTRIES

Mr. Larsen stated this was a several property HOA foreclosure sale case; a Summary Judgement could possibly resolve several issues; will work on a Joint Case Conference Report with counsel and get the case moving along. COURT ORDERED, matter SET for further status check in Chambers 7/15/20.

EXHIBIT “B”

EXHIBIT “B”

DECLARATION OF BRIAN J. PEZZILLO

I, Robert Hernquist, depose and state as follows under penalty of perjury:

1. I am over the age of 18 and mentally competent. I am an attorney with Howard & Howard Attorneys PLLC and counsel of record for Defendant Omni Financial, LLC ("Omni"). I make this declaration in support of Omni's *Opposition To Plaintiff's Motion For Partial Summary Judgment* in this matter. I have personal knowledge of the facts in this matter except for those matters stated upon information and belief, and to those I believe them to be true. If called upon to testify, I could and would do so.

2. Discovery in this case has not even begun. The parties have not scheduled or participated in an NRCP 16.1 early case conference and have not submitted a Joint Case Conference Report.

3. During discovery, Omni will seek deposition testimony of Martin Boone of Omni, Jay Bloom of First 100 and Greg Darroch of Kal-Mor as well as the tenants of the properties which Kal-Mor now claims to have failed to make rental payments to Kal-Mor.

4. This discovery will uncover what agreement were entered into between Kal-Mor and its alleged tenants, the period of the tenancy, the accounting employed by Kal-Mor in determining its alleged damages as well as any action taken or not taken by Kal-Mor in recovering payment from its alleged tenants.

5. Omni will also pursue additional discovery seek an accounting from Kal-Mor regarding all payments collected by it from it tenants.

6. Omni will also pursue discovery of the state of mind of the tenants that Kal-Mor claims re-directed payments from Kal-Mor to Omni and whether any such actions were taken as a result of Omni's actions.

7. At the status check conducted by the Court on June 17, 2020 Kal-Mor represented that a Joint Case Conference Report was going to be submitted to the Court within approximately two weeks. To date no early case conference has been scheduled and a draft Joint Case Conference has yet been circulated.

8. Additionally, since the Court initially entered its Order Granting Partial Summary

1 Judgment on the issue of novation, First 100 has now appeared in the matter and denied certain
2 allegations that were asserted by First 100 and which were relied upon by the Court.
3

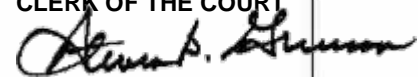
4 I DECLARE UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE
5 STATE OF NEVADA THAT THE FOREGOING IS TRUE AND CORRECT.

6 06/30/20

7 Date

8 /s/ Brian J. Pezzillo

9 Brian J. Pezzillo
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MOT

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Brian J. Pezzillo; Nevada Bar No. 7136
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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**RENEWED MOTION TO CERTIFY
ORDER GRANTING PARTIAL
SUMMARY JUDGMENT AS FINAL
PURSUANT TO NRCP 54(B)**

[Hearing Date Requested]

Defendant Omni Financial, LLC ("Omni") submits the following Renewed Motion to Certify as Final the Court's Order Granting Kal-Mor-USA, LLC ("Kal-Mor") Motion for Partial Summary Judgment ("Order") filed on October 2, 2018¹ as well as the Court's Order Denying Omni's Request for Reconsideration of the Order that was entered on April 19, 2019. This Motion is supported by the following Memorandum of Points and Authorities, the Court's file herein and any argument accepted by the Court at oral argument.

¹ Notice of Entry of the Order was entered on October 3, 2018.

MEMORANDUM OF POINTS AND AUTHORITIES**I. PRELIMINARY STATEMENT****A. PROCEDURAL HISTORY**

As the Court is aware, the pending dispute has been the subject of multiple court proceedings. On June 19, 2017, Kal-Mor commenced this action. Kal-Mor asserted causes of action against Omni and Defendant First 100, LLC ("First 100"). The matter was initially removed to federal court on August 25, 2017. On July 12, 2018 the federal court remanded the matter to this Court. Subsequently, on July 26, 2018, Kal-Mor filed a Motion for Partial Summary Judgment ("Motion"). The Court granted the Motion for Partial Summary Judgment on October 2, 2018 based on the argument that a novation had occurred. Omni subsequently filed a motion for reconsideration of the Court's Order on October 22, 2018. After briefing and oral argument, the Court issued an Order on April 19, 2019 denying the Motion for Reconsideration.

In response to the denial of the Motion for Reconsideration, Omni filed a motion on May 29, 2019 seeking to certify the Court's partial summary judgment order as final for purposes of appeal pursuant to NRCp 54(b). Kal-Mor opposed the Motion. Kal-Mor claimed that the resolution of the issue, which the Court acknowledged was likely to result in an appeal, would serve only to delay the pending action. After briefing the Court denied Omni's Rule 54(b) motion. After entry of the denial, the matter has sat unprosecuted for approximately one year.

In addition, Omni has filed an Answer, Counter-claim and Cross-claim against First 100, LLC ("First 100"). [Cross-claim filed August 12, 2019]. First 100 filed a motion to dismiss the claims of Omni. [Motion to Dismiss filed September 3, 2019]. The Court ordered that Omni's Cross-claim be amended to be pled with additional specificity [Court order dated October 21, 2019]. On October 31, 2019 Omni filed an Amended Cross-claim. At this time First 100 has answered both the claim filed against it by Kal-Mor as well as the claims of Omni. [Answer to Complaint filed November 26, 2019; Answer to Amended Cross-claim filed November 25, 2019]. In doing so First 100 has denied that a novation occurred as alleged by Kal-Mor.

The Court previously ordered a status check for July 29, 2019. At that time the parties appeared and represented that the matter would be proceeding forward. The Court set a further status check on January 27, 2020 at which time Omni appeared, however, no other party was present. Omni expected, and represented to the Court, that it believed that Plaintiff Kal-Mor would be setting an early case conference and the matter would proceed forward. After the status check hearing no early case conference was ever scheduled by Plaintiff Kal-Mor. After a long period of inactivity, the Court set a further status check on June 17, 2020. Since that hearing no early case conference has yet been scheduled, no discovery has taken place and no pretrial scheduling order entered.

B. Factual Background

As the Court is aware from the various pleadings, Omni extended real estate-backed loans. [Opposition to Motion for Summary Judgment (“Opposition”) filed on August 15, 2018, Ex. A, 100, LLC (“First 100”) to finance the purchase and enforcement of homeowner association (“HOA”) receivables (the “Loan”). (Opposition, Ex. A, ¶4; Ex. B, Court Order, Case No. 2:16-cv-00099, 3:23-4:9). On May 27, 2014, (i) the two entered into a Loan Agreement; (ii) First 100 executed a Promissory Note, Security Agreement, and multiple Deeds of Trust in Omni’s favor; and (iii) certain First 100 principals issued Guarantees in Omni’s favor. (*Id.*, at 3:23-4:9)).

The Security Agreement granted Omni a security interest in all of First 100’s present and future-acquired personal property, ranging from HOA Receivables to cash accounts to equipment and so forth. (Opposition, Ex. B, 3:25-4:5; 16:26-17:5). Not a single type or item of personalty was excluded. (*Id.*). Omni recorded UCC-1 financing statements in Nevada and Florida evidencing its security interest in First 100’s personalty. (Opposition, Ex. A; Ex. A-2). That was the first UCC filing on record, pre-dating UCC-1s and tax liens filed by; (i) PrenPoinciana, LLC, an unrelated third party; (ii) Mr. Darroch, Kal-Mor’s principal and affiant, and (iii) the I.R.S. (Opposition, Ex. A-8, A-9 and A-10). Kal-Mor acknowledges that, First 100 also executed multiple deeds of trust in Omni’s favor (the “Deeds of Trust”). (Motion for Partial Summary Judgment (“Motion”), p. 4, ¶3; Ex. A, ¶7); Order, ¶(A)(2). Those Deeds of Trust encumbered, as

1 security for the Loan, approximately thirty properties in the State of Nevada. (Opposition, Ex. A,
2 ¶7). This action arises from Kal-Mor's contention it subsequently purchased and owns nine of
3 those thirty parcels (the "Kal-Mor Real Properties"). (Motion, p. 7, ¶15).

4 Kal-Mor alleges that:

5 First 100 did not disclose to Kal-Mor that it had previously pledged any interest in
6 any of the Kal-Mor Properties as collateral for the Omni Loan or that any of the
7 Kal-Mor Properties was subject to any of the Omni Deeds of Trust.

8 Kal-Mor had no actual knowledge or notice of any of the Omni Deeds of Trust
9 when it purchased the Kal-Mor Properties from First 100 in 2014 and 2015.

10 (Motion, p. 8, ¶¶19, 20). First 100 denies that it ever failed to disclose to Kal-Mor that it had
11 pledged the properties at issue to Omni to secure the relevant Deed of Trust. [First 100 Answer,
12 ¶¶ 23, 24, 30, 31, 37, 38, 44, 45, 51, 52, 58, 59, 65, 66, 72, 73, 79, 80, 58, 65, 108, 114, 118 and
13 120]. Likewise, First 100 expressly denied that Omni's Loan "was satisfied in full through the
14 UCC Sale, the First 100 Settlement, and/or the First 100 Judgment." [First 100 Answer, ¶127].
15 First 100, in contrast, represented to Omni that it "in transferring the Real Properties...to third
16 parties, [First 100] provided all of those third parties, prior to closing the transfer transaction, with
17 actual notice of the existence of Omni's first-priority security interest in those Real Properties."
(Opposition, Exhibit A-4, Omni / First 100 Settlement Agreement at §8(e)).

18 In 2013, 2014 and 2015, Kal-Mor purchased several properties from First 100, including
19 the Kal-Mor Properties at issue here. (Opposition, Ex. A, ¶10; Motion, p. 7, ¶15). On May 13,
20 2015, Mr. Darroch filed a UCC-1 financing statement against First 100, claiming he loaned money
21 to First 100 and was granted a security interest in certain HOA receivables. (Opposition, Ex. A,
22 ¶11; Ex. A-9). Based on his filing date, Mr. Darroch's interest was at best fourth in priority,
23 behind the interests of Omni, the IRS, and PrenPoinciana, respectively. (*Id.*)

24 Prior to Kal-Mor's purchases and loan, First 100 committed the first of its numerous
25 breaches of the Omni Loan. (Opposition, Ex. B, 4:10-14). Among other things, it failed to: (i)
26 pay principal and interest when due; (ii) cure the defects in Omni's Deeds of Trust; (iii) properly
27 prosecute and enforce the HOA receivables; and (iv) provide Omni with required monthly,
28

1 quarterly, and annual financial statements. (Opposition, Ex. A, ¶12); Order, ¶(D)(12). Omni
 2 issued a notice of default on April 8, 2015. (Ex. A-11). It is unclear if Kal-Mor knew or did not
 3 know about that default, given Mr. Darroch's equity interest in First 100.

4 On November 2, 2015, Omni sent First 100 a second notice of default, categorizing First
 5 100's breaches in more detail. (Opposition, Ex. A-12). That notice accelerated the Loan and
 6 demanded payment in full. (*Id.*). Throughout November 2015, First 100 and Kal-Mor repeatedly
 7 promised Omni that Kal-Mor would buy out the Omni Loan at full face value. (Ex. A, ¶14). At
 8 times, First 100 and Kal-Mor promised Omni that a \$4 million pay-off would be wired within
 9 hours. (*Id.*) Kal-Mor's counsel delivered a draft loan assignment agreement to Omni on
 10 November 20, 2015, and Omni responded with a revised draft a few days later. (*Id.*) Negotiations
 11 continued into early December, until Kal-Mor's counsel simply "went dark"—declining to
 12 respond to any email or phone messages. (*Id.*) Omni believes Kal-Mor's entire loan payoff
 13 proposals were a ruse to buy First 100 more time. (*Id.*)

14 Omni and First 100 entered into a Forbearance Agreement dated December 18, 2015, and
 15 a related Addendum three days later. (Opposition, Ex. B, 4:8-27; Ex. A-13). Omni agreed to
 16 forego foreclosure over First 100's personalty in exchange for various First 100 promises,
 17 including (i) delivery of financial statements by December 18th and (ii) a \$270,500 payment by
 18 December 28th. (*Id.*) Both deadlines came and went with no performance: First 100 eventually
 19 violated virtually every single forbearance term. (Opposition, Ex. B, 13:11-22). Given First 100's
 20 then year-old payment default, Omni noticed a UCC sale pursuant to NRS Chapter 104, by issuing
 21 a "Notification of Disposition of Collateral" in January 2016 (the "1st UCC Notice"). (Opposition,
 22 Ex. A-14).

23 In response, First 100 filed suit and sought an emergency, *ex parte* TRO to stop the sale.
 24 (Case No. 2:16-cv-00099, ECF 1-1 (Complaint)). Kal-Mor filed a virtually identical suit and
 25 emergency, *ex parte* TRO request (Case No. A-16-730447-C). Omni removed the two cases to
 26 federal court, and they were consolidated into one case. Giving First 100 and Kal-Mor the benefit
 27 of the doubt, the U.S. District Court granted a TRO and postponed Omni's foreclosure sale. (Case
 28

No. 2:16-cv-00099, ECF 21). However, several months later, after three days of evidentiary hearings and extensive briefings and oral arguments, the U.S. District Court held that: (i) the original TRO was wholly unwarranted; (ii) Omni could proceed with the foreclosure sale; and (iii) Omni was entitled to Kal-Mor's TRO bond. (Opposition, Ex. B).²

Kal-Mor based its Motion, in part, on Nevada's One Action Rule. The Court denied the Motion with regard to this issue. *See* Order dated October 2, 2018. Not only was Kal-Mor a party to the federal proceedings, but its disputes with Omni were resolved in an agreement specifically addressing the Kal-Mor Real Properties and anticipating Omni's future real-property foreclosure actions. In documents dated November 23, 2016, Omni and Kal-Mor agreed to a (i) "Settlement and Mutual General Release Agreement" (the "Kal-Mor Settlement") (Ex. A-3); and (ii) "Stipulation and Order for Entry of Final Judgment" (the "Kal-Mor SAO") (Ex. J). Critically, the former states:

W. The Parties now desire to resolve all differences, disputes and disagreements between them relating to the 2014-2015 Receivables and the ACR Receivables. *This Agreement, however, is not intended to address or resolve any dispute between the Parties as to the Kal-Mor Real Properties.*

Notwithstanding the terms provided herein, *Omni reserves all rights to assert claims and conduct Enforcement Actions relating to any asset or property* other than the 2013 Receivables, 2014-2015 Receivables, and/or ACR Receivables, whether owned (previously, currently, or in the future) by GFY or a third party, including but not limited to the Kal-Mor Real Properties, associated proceeds, rents, and/or other assets.

(Ex. A-3, p. 4, Recital W); §4(a)) (emphasis added). This language was included because during settlement negotiations, both Omni and Kal-Mor recognized and agreed that they would not be able to resolve their competing claimed interests in real property that had been granted to both of them by First 100. (Opposition, Ex. A).

1. The Kal-Mor SAO states:

² This U.S. District Court also expressed grave concerns regarding Kal-Mor's withholding of critical evidence, which was exposed during the cross-examination of Mr. Darroch, Kal-Mor's principal. (Opposition, Ex. B, 25:23-28.)

The entry final judgment by the Court pursuant to this Stipulation shall not preclude or otherwise impair any claim or defense that may exist between the Parties other than those expressly stated in the Complaint or the Counterclaim.

(Ex. J, ¶4).

2. Several weeks later, Omni and First 100 entered into a similar agreement (defined in the Motion and herein as the "First 100 Settlement"). (Opposition, Ex. A-4). The Court has ruled that the settlement agreement that was entered into between Omni and First 100 constituted a novation of the original agreement.

As this issue is essentially dispositive of the underlying case there is no just reason not to certify the Court's Order as final and to allow an appeal to be taken from that Order. The Court anticipated that an appeal would arise from its ruling as discussed below. Additionally, given the fact that no action to prosecute the matter has been taken by the Plaintiff for nearly a full year there is no reason to further prejudice Omni by delaying appellate review of the Order granting partial summary judgement.

II. LEGAL STANDARD

NRCP 54 was amended, effective March 1, 2019, and now expressly allows the Court to certify a judgment to allow for an interlocutory appeal if the judgment does not dispose of all claims raised in the case. The Rule now states as follows:

When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, *the court may direct entry of a final judgment as to one or more, but fewer than all, claims* or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(Emphasis added). The following Advisory Committee Note explains the amendments made to NRCP 54(b):

Subsection (b). From 2004 to 2019, NRCP 54(b) departed from FRCP 54(b), only permitting certification of a judgment to allow an interlocutory appeal if it

1 eliminated one or more parties, not one or more claims. The 2019 amendments
2 add the reference to claims back into the rule, restoring the district court's
3 authority to direct entry of final judgment when one or more, but fewer than all,
4 claims are resolved. The court has discretion in deciding whether to grant Rule
5 54(b) certification; given the strong policy against piecemeal review, an order
6 granting Rule 54(b) certification should detail the facts and reasoning that make
7 interlocutory review appropriate. An appellate court may review whether a
8 judgment was properly certified under this rule.

9 As set forth herein, good cause exists to certify the Court's Order granting partial summary
10 judgment as the Order essentially renders moot the remaining causes of action asserted by Kal-
11 Mor.

12 **III. LAW AND ARGUMENT**

13 **A. The Court Should Certify as final The Order Granting partial Summary Judgment Pursuant to NRCP 54(b)**

14 The Court is aware of Omni's intent to appeal from the Order as indicated in its May 1,
15 2019 Order denying the request to intervene filed by Chersus Holdings, LLC:

16 Chersus' intervention here would either prejudicially interfere with Kal-Mor
17 conclusion of this action despite having been granted summary judgment, or
18 interfere with Omni's rights to commence an appeal from the Order Granting
19 Summary Judgment.

20 Certifying the Court's Order as final and allowing for an interlocutory appeal will allow for the
21 most efficient resolution to the pending disputes. Failure to allow for an interlocutory appeal
22 will unduly delay the matter, as the underlying issue of title to the Kal-Mor Properties was
23 determined by virtue of the Order. Since that time there has been no action taken to prosecute
24 the matter and Omni has been left in the position of being a named Defendant in a lawsuit which
25 has not been pursued by the Plaintiff. This is particularly troubling in the above-captioned matter
26 given the fact that Omni filed its original Motion to certify the Order as final over one-year ago
27 on May 29, 2019. Kal-Mor's primary opposition to the motion was that allowing the
28 interlocutory appeal would delay the prosecution of the matter. To that end Kal-Mor stated:

1 Now that Omni's *Motion for Reconsideration of Order Granting Partial*
2 *Summary Judgment* has been denied under this Court's Order dated April 19,
3 2019, Kal-Mor intends to pursue its remaining claims against Omni. Certifying
4 the Summary Judgment Order as final under NRCP 54(b) would serve no purpose
5 but to interfere in Kal-Mor's efforts to bring this action to a conclusion. Omni's
6 Motion should be denied

7 Opposition to Motion to Certify, p. 3, lns. 9-13. In direct contradiction to this representation
8 Kal-Mor has taken no action to move the matter forward, until the Court set a further status check
9 on June 17, 2020, at which time Kal-Mor filed another Motion for Partial Summary Judgment,
10 despite the fact that a mandatory early case conference has not yet been scheduled as mandated
11 by NRCP 16.1.

12 In addition, while the proceedings have, thus far, focused solely on limited issues between
13 Omni and Kal-Mor, Kal-Mor has also named First 100 as a Defendant. Although Kal-Mor had
14 sued First 100 it took no steps to enter a default against First 100 when First 100 had not appeared
15 in the matter. It was only after Omni named First 100 as a Cross-defendant that First 100 became
16 substantively involved. Critically, First 100 has refuted the factual assertions made by Kal-Mor
17 as noted above.

18 In addition, it will be far more economical and efficient to certify the matter for an
19 interlocutory appeal at this early stage before resources have been spent engaging in discovery
20 regarding the remaining causes of action that include Conversion, Slander of Title, Unjust
21 Enrichment and Intentional Interference with Contractual Relations. See Complaint filed June
22 19, 2017. The Court issued a dispositive ruling on a motion at a time that no answer had been
23 filed by any party. Thus, it would serve the purposes of NRCP 1 to allow that dispositive ruling
24 to be reviewed prior to expensive and time-consuming litigation being engaged in.

25 Additionally, it is submitted that the issue of novation in the context of the facts of this
26 case represents a significant issue of public policy as well as being a case of first impression. No
27 case in Nevada squarely addresses the issue of whether or not novation can occur when it is
28 undisputed that the underlying agreement had been breached prior to the alleged novation.
Likewise, there is no controlling authority in Nevada regarding the situation presented here, in

1 which a third party seeks to collaterally attack the intent of the parties to the agreement that is
2 subject of the alleged novation. Thus, public policy favors having this matter heard.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Omni requests that the Court certify its Order Granting Partial
5 Summary Judgment and its Order Denying Reconsideration of that Order as final for appeal
6 purposes pursuant to NRCP 54(b).

7 HOWARD & HOWARD ATTORNEYS PLLC

8 Dated: June 30, 2020

By: /s/ Brian J. Pezzillo

Robert Hernquist, Nevada Bar No. 10616

Brian J. Pezzillo; Nevada Bar No. 7136

Attorneys for Defendant Omni Financial, LLC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 30th day of June 2020, I caused to be served a copy of foregoing Renewed Motion to Certify Order Granting Partial Summary Judgment as Final in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

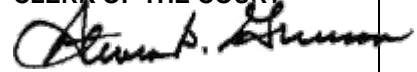
Joseph A. Gutierrez
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Bart K. Larsen
KOLESAK & LEATHAM
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Las Vegas, Nevada 89145

*Attorney for Plaintiff Kal-Mor-USA,
LLC*

/s/ Anya Ruiz
Howard & Howard Attorneys PLLC



OPPS

JOSEPH A. GUTIERREZ, ESQ.

Nevada Bar No. 9046

DANIELLE J. BARRAZA, ESQ.

Nevada Bar No. 13822

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E-mail: jag@mgalaw.com

djb@mgalaw.com

Attorneys for Defendant First 100, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiff,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a Nevada
limited liability company; DOES I through X; and
ROE ENTITIES I through X, inclusive,

Defendants.

OMNI FINANCIAL, LLC, a foreign limited
liability company,

Counter-claimant,

vs.

KAL-MOR-USA, LLC, a Nevada limited
liability company; DOES 1 – 10; ROE
ENTITIES 1 – 10,

Counter-defendants.

Case No.: A-17-757061-C

Dept. No.: II

**FIRST 100, LLC'S LIMITED
OPPOSITION TO OMNI FINANCIAL,
LLC'S RENEWED MOTION TO
CERTIFY ORDER GRANTING PARTIAL
SUMMARY JUDGMENT AS FINAL
PURSUANT TO NRCP 54(B)**

Hearing Date: August 3, 2020

Hearing Time: In Chambers

1 OMNI FINANCIAL, LLC, a foreign limited
2 liability company,

3 Cross-Claimant,

4 vs.

5 FIRST 100, LLC, a Nevada limited liability
6 company; DOES 11 – 20, ROE ENTITIES 11 –
7 20.

8 Cross-Defendants

9 Defendant First 100, LLC (“First 100”), by and through its attorneys of record, the law firm
10 MAIER GUTIERREZ & ASSOCIATES, hereby files this limited opposition to defendant Omni Financial,
11 LLC’s (“Omni”) renewed motion to certify order granting partial summary judgment as final pursuant
12 to NRCP 54(B). This limited opposition is supported by the following Memorandum of Points and
13 Authorities, the pleadings and papers on file in this case, and any oral argument the Court may choose
14 to consider.

15 DATED this 14th day of July, 2020.

16 Respectfully submitted,

17 **MAIER GUTIERREZ & ASSOCIATES**

18 /s/ Danielle J. Barraza

19 JOSEPH A. GUTIERREZ, ESQ.

20 Nevada Bar No. 9046

21 DANIELLE J. BARRAZA, ESQ.

22 Nevada Bar No. 13822

23 8816 Spanish Ridge Avenue

24 Las Vegas, Nevada 89148

25 *Attorneys for Defendant First 100, LLC*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. LEGAL ARGUMENT**

3 Defendant Omni Financial, LLC (“Omni”) has submitted a renewed motion to certify as final
4 the Court’s order granting Kal-Mor USA, LLC’s (“Kal-Mor”) motion for partial summary judgment
5 (“Order”) filed on October 2, 2018, as well as the Court’s order denying Omni’s request for
6 reconsideration of the Order that was entered on April 19, 2019.

7 Through this limited opposition, First 100 seeks to clarify that while it does not specifically
8 object to the legal arguments set forth in Omni’s motion, First 100 opposes and denies any factual
9 arguments set forth in Omni’s motion which go against (and are therefore in dispute with) First 100’s
10 positions set forth in its Answers to the Complaint and to the Cross-Claim filed by Omni, *on file*.

11 First 100 asserts that the contractual documents at issue speak for themselves and the Court
12 may be able to rule on Omni’s motion based on the actual documents, but First 100 expressly denies
13 any factual allegations of wrongdoing or breaches on First 100’s part, along with any allegations as
14 to statements or representations that First 100 purportedly made outside of the executed documents,
15 pursuant to its Answers on file.

16 **II. CONCLUSION**

17 Based on the foregoing, First 100 submits this limited opposition to Omni’s renewed motion
18 to certify order granting partial summary judgment as final pursuant to NRCP 54(B). , in which First
19 100 disputes any factual allegations which contradict First 100’s Answers on file.

20 DATED this 14th day of July, 2020.

21 Respectfully submitted,

22 **MAIER GUTIERREZ & ASSOCIATES**

23 /s/ Danielle J. Barraza

24 JOSEPH A. GUTIERREZ, ESQ.

Nevada Bar No. 9046

25 DANIELLE J. BARRAZA, ESQ.

Nevada Bar No. 13822

26 8816 Spanish Ridge Avenue

Las Vegas, Nevada 89148

27 *Attorneys for Defendant First 100, LLC*

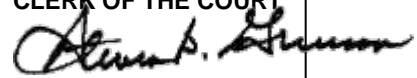
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NOTC

Robert W. Hernquist; Nevada Bar No. 10616
Brian J. Pezzillo; Nevada Bar No. 7136
HOWARD & HOWARD ATTORNEYS PLLC
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Las Vegas, Nevada 89169
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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**NOTICE OF NON-OPPOSITION TO
RENEWED MOTION TO CERTIFY
ORDER GRANTING PARTIAL
SUMMARY JUDGMENT AS FINAL
PURSUANT TO NRCP 54(B)**

Date: August 3, 2020

Time: Chambers

Defendant Omni Financial, LLC (“Omni”) submits the following Notice of Non-
Opposition to its Renewed Motion to Certify as Final the Court’s Order Granting Kal-Mor-USA,
LLC (“Kal-Mor”) Motion for Partial Summary Judgment (“Motion”) filed on October 2, 2018¹
as well as the Court’s Order Denying Omni’s Request for Reconsideration of the Order that was
entered on April 19, 2019. Omni filed the current Motion on June 30, 2020. A limited opposition
was filed by First 100, LLC on July 14, 2020 on the limited basis that it opposes any factual

¹ Notice of Entry of the Order was entered on October 3, 2018.

assertions which are not consistent with its Answer. Kal-Mor-USA, LLC did not file an opposition. Pursuant to EDCR 2.20(e) all opposition were due to be served and filed no later than July 14, 2020 (14 Days from service of the Motion).

HOWARD & HOWARD ATTORNEYS PLLC

Dated: July 20, 2020

By: /s/ Brian J. Pezzillo

Robert Hernquist, Nevada Bar No. 10616

Brian J. Pezzillo; Nevada Bar No. 7136

3800 Howard Hughes Parkway, Suite 1000

Las Vegas, Nevada 89169

Telephone: (702) 257-1483

Facsimile: (702) 567-1568

Email: rwh@h2law.com; bjp@h2law.com

Attorneys for Defendant Omni Financial, LLC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 20th day of July 2020, I caused to be served a copy of foregoing Notice of Non-Opposition to the Renewed Motion to Certify Order Granting Partial Summary Judgment as Final in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

Joseph A. Gutierrez, Esq.
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Las Vegas, NV 89101

Attorneys for First 100 LLC

Bart K. Larsen, Esq.
SHEA & LARSEN
1731 Village Center Circle, Suite 150
Las Vegas, Nevada 89134

*Attorney for Plaintiff Kal-Mor-USA,
LLC*

/s/ Anya Ruiz
Howard & Howard Attorneys PLLC

Howard & Howard Attorneys PLLC
CLERK OF THE COURT

OGM

Robert W. Hernquist; Nevada Bar No. 10616
Brian J. Pezzillo; Nevada Bar No. 7136
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Email: rwh@h2law.com; bjp@h2law.com

Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**ORDER GRANTING RENEWED
MOTION TO CERTIFY ORDER
GRANTING PARTIAL SUMMARY
JUDGMENT AS FINAL PURSUANT
TO NRCP 54(B)**

This matter came before the Court upon Defendant Omni Financial, LLC's ("Omni") Renewed Motion to Certify as Final the Court's Order Granting Kal-Mor-USA, LLC ("Kal-Mor") Motion for Partial Summary Judgment ("Order") filed on October 2, 2018¹ as well as the Court's Order Denying Omni's Request for Reconsideration of the Order that was entered on April 19, 2019. The Court being fully advised and having reviewed the Renewed Motion finds as follows:

1. On June 19, 2017, Kal-Mor commenced this action.
2. The matter was initially removed to federal court on August 25, 2017.

¹ Notice of Entry of the Order was entered on October 3, 2018.

- 1 3. On July 12, 2018 the federal court remanded the matter to this Court.
- 2 4. Subsequently, on July 26, 2018, Kal-Mor filed a Motion for Partial Summary
- 3 Judgment (“Motion”).
- 4 5. The Court granted the Motion for Partial Summary Judgment on October 2, 2018.
- 5 6. Omni subsequently filed a motion for reconsideration of the Court’s Order on
- 6 October 22, 2018.
- 7 7. After briefing and oral argument, the Court issued an Order on April 19, 2019
- 8 denying the Motion for Reconsideration.
- 9 8. In response to the denial of the Motion for Reconsideration, Omni filed a motion
- 10 on May 29, 2019 seeking to certify the Court’s partial summary judgment order as final for
- 11 purposes of appeal pursuant to NRCP 54(b).
- 12 9. After briefing the Court denied Omni’s Rule 54(b) motion.
- 13 10. Omni filed a renewed Motion to Certify the Partial Summary Judgment as final for
- 14 purposes of appeal on June 30, 2020.
- 15 11. No party opposed the Renewed Motion.
- 16 12. There is no reason to delay certification of the Partial Summary Judgment Ruling
- 17 of October 2, 2018 as the issue decided is essentially dispositive of the underlying case and it
- 18 would serve judicial economy and conserve the resources of the party to have any potential appeal
- 19 decided at an early juncture.
- 20 13. Currently no trial date has been set.

21 Based upon the foregoing the Court finds as follows:

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1 It is hereby ORDERED, ADJUDGED and DECREED that Omni Financial, LLC's
2 Renewed Motion To Certify Order Granting Partial Summary Judgment As Final Pursuant To
3 NRCP 54(B) is **GRANTED**.
4

Dated this 30th day of September, 2020

5 Dated: _____


District Court Judge

6 RESPECTFULLY SUBMITTED:
7

CD8 F10 654A E8C2
Richard F. Scotti
District Court Judge

8 HOWARD & HOWARD ATTORNEYS PLLC

9 Dated: September 29, 2020

By: /s/ Brian J. Pezzillo

10 Robert Hernquist, Nevada Bar No. 10616
11 Brian J. Pezzillo; Nevada Bar No. 7136
12 3800 Howard Hughes Pkwy., Ste. 1000
13 Las Vegas, NV 89169
14 Attorneys for Defendant Omni Financial, LLC
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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Kal-Mor-USA, Inc., Plaintiff(s) CASE NO: A-17-757061-C
7 vs. DEPT. NO. Department 2
8 Omni Financial, LLC,
9 Defendant(s)

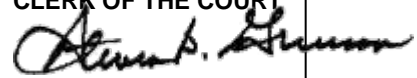
10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 9/30/2020

15 Mark Gardberg mg@h2law.com
16 Robert Hernquist rwh@h2law.com
17 MGA Docketing docket@mgalaw.com
18 Angela Westlake arw@h2law.com
19 Brian Pezzillo bpezzillo@howardandhoward.com
20 Anya Ruiz ar@h2law.com
21 Amber Clayton amc@h2law.com
22 Bart Larsen blarsen@shea.law
23
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Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

NOTICE OF ENTRY OF ORDER

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PLEASE TAKE NOTICE that an Order Granting Renewed Motion to Certify Order Granting Partial Summary Judgment as Final Pursuant to NRCP 54(B) was filed in the above-captioned matter on September 30, 2019. A true and correct copy of said order is attached hereto.

HOWARD & HOWARD ATTORNEYS PLLC

Dated: September 30, 2020

By: /s/ Brian J. Pezzillo

Robert Hernquist, Nevada Bar No. 10616

Brian J. Pezzillo; Nevada Bar No. 7136

3800 Howard Hughes Parkway, Suite 1000

Las Vegas, Nevada 89169

Telephone: (702) 257-1483

Facsimile: (702) 567-1568

Email: rwh@h2law.com; bjp@h2law.com

Attorneys for Defendant Omni Financial, LLC

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 30th day of September 2020, I caused to be served a copy of foregoing Notice of Entry of Order in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

Joseph A. Gutierrez, Esq.
MAIER GUTIERREZ AYON
400 South Seventh Street, Suite 400
Las Vegas, NV 89101

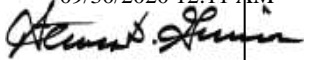
Attorneys for First 100 LLC

Bart K. Larsen, Esq.
SHEA & LARSEN
1731 Village Center Circle, Suite 150
Las Vegas, Nevada 89134

*Attorney for Plaintiff Kal-Mor-USA,
LLC*

/s/ Anya Ruiz
Howard & Howard Attorneys PLLC

4825-2938-7981, v. 1


CLERK OF THE COURT

OGM

Robert W. Hernquist; Nevada Bar No. 10616
Brian J. Pezzillo; Nevada Bar No. 7136
HOWARD & HOWARD ATTORNEYS PLLC
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169
Telephone: (702) 257-1483
Facsimile: (702) 567-1568
Email: rwh@h2law.com; bjp@h2law.com

Attorneys for Defendant Omni Financial, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

Case No.: A-17-757061-C

Dept. 2

**ORDER GRANTING RENEWED
MOTION TO CERTIFY ORDER
GRANTING PARTIAL SUMMARY
JUDGMENT AS FINAL PURSUANT
TO NRCP 54(B)**

This matter came before the Court upon Defendant Omni Financial, LLC's ("Omni") Renewed Motion to Certify as Final the Court's Order Granting Kal-Mor-USA, LLC ("Kal-Mor") Motion for Partial Summary Judgment ("Order") filed on October 2, 2018¹ as well as the Court's Order Denying Omni's Request for Reconsideration of the Order that was entered on April 19, 2019. The Court being fully advised and having reviewed the Renewed Motion finds as follows:

1. On June 19, 2017, Kal-Mor commenced this action.
2. The matter was initially removed to federal court on August 25, 2017.

¹ Notice of Entry of the Order was entered on October 3, 2018.

- 1 3. On July 12, 2018 the federal court remanded the matter to this Court.
- 2 4. Subsequently, on July 26, 2018, Kal-Mor filed a Motion for Partial Summary
- 3 Judgment (“Motion”).
- 4 5. The Court granted the Motion for Partial Summary Judgment on October 2, 2018.
- 5 6. Omni subsequently filed a motion for reconsideration of the Court’s Order on
- 6 October 22, 2018.
- 7 7. After briefing and oral argument, the Court issued an Order on April 19, 2019
- 8 denying the Motion for Reconsideration.
- 9 8. In response to the denial of the Motion for Reconsideration, Omni filed a motion
- 10 on May 29, 2019 seeking to certify the Court’s partial summary judgment order as final for
- 11 purposes of appeal pursuant to NRCP 54(b).
- 12 9. After briefing the Court denied Omni’s Rule 54(b) motion.
- 13 10. Omni filed a renewed Motion to Certify the Partial Summary Judgment as final for
- 14 purposes of appeal on June 30, 2020.
- 15 11. No party opposed the Renewed Motion.
- 16 12. There is no reason to delay certification of the Partial Summary Judgment Ruling
- 17 of October 2, 2018 as the issue decided is essentially dispositive of the underlying case and it
- 18 would serve judicial economy and conserve the resources of the party to have any potential appeal
- 19 decided at an early juncture.
- 20 13. Currently no trial date has been set.

21 Based upon the foregoing the Court finds as follows:

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1 It is hereby ORDERED, ADJUDGED and DECREED that Omni Financial, LLC's
2 Renewed Motion To Certify Order Granting Partial Summary Judgment As Final Pursuant To
3 NRCP 54(B) is **GRANTED**.
4

Dated this 30th day of September, 2020

5 Dated: _____


District Court Judge

6 RESPECTFULLY SUBMITTED:
7

CD8 F10 654A E8C2
Richard F. Scotti
District Court Judge

8 HOWARD & HOWARD ATTORNEYS PLLC

9 Dated: September 29, 2020

By: /s/ Brian J. Pezzillo
Robert Hernquist, Nevada Bar No. 10616
Brian J. Pezzillo; Nevada Bar No. 7136
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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Kal-Mor-USA, Inc., Plaintiff(s) | CASE NO: A-17-757061-C
7 vs. | DEPT. NO. Department 2
8 Omni Financial, LLC,
9 Defendant(s)

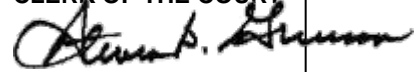
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

KAL-MOR-USA, LLC, a Nevada limited
liability company,

Plaintiffs,

vs.

OMNI FINANCIAL, LLC, a foreign limited
liability company; FIRST 100, LLC, a
Nevada limited liability company; DOES I
through X and ROE ENTITIES I through X;

Defendants.

And all related actions.

Case No.: A-17-757061-C

Dept. 2

NOTICE OF APPEAL

1 Notice is hereby given that Defendant Omni Financial, LLC (“Omni”) hereby appeals to
2 the Supreme Court of Nevada from the Order Granting Partial Summary Judgment entered by the
3 District Court on October 2, 2018. Notice of Entry of the Order Granting Partial Summary
4 Judgment was entered on October 3, 2018. The Court entered an order on September 30, 2020
5 pursuant to NRCP 54(b) certifying the October 2, 2018 order as final for purposes of appeal.
6 Notice of Entry of the September 30, 2020 Order was entered on the same day – September 30,
7 2020.

8
9
10 HOWARD & HOWARD ATTORNEYS PLLC

11 Dated: October 27, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Howard & Howard Attorneys PLLC, and that on the 27th day of October 2020, I caused to be served a copy of foregoing Notice of Appeal in the following manner:

(ELECTRONIC SERVICE). The above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing system:

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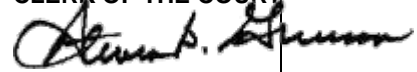
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4825-2938-7981, v. 1



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

KAL-MOR-USA, a Nevada
limited liability company,

Plaintiff,

vs.

OMNI FINANCIAL, a foreign
limited liability company; FIRST
100, LLC, a Nevada limited
liability company; DOES I
through X and ROES ENTITIES
I through X;

Defendants.

CASE#: A-17-757061-C

DEPT. II

BEFORE THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE
MONDAY, AUGUST 27, 2018

RECORDER'S TRANSCRIPT OF HEARING
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

APPEARANCES:

For the Plaintiff:

BART K. LARSEN, ESQ.

For the Defendant:
(Omni Financial, LLC)

ROBERT HERNQUIST, ESQ.
BRIAN J. PEZZILLO, ESQ.

RECORDED BY: DALYNE EASLEY, COURT RECORDER

1 Las Vegas, Nevada, Monday, August 27, 2018

2
3 [Case called at 9:08 a.m.]

4 THE COURT: Kal-Mor, are you even checked in yet? Oh,
5 you know what? That one might be we'll trail that.

6 [Recess taken at 9:08 a.m.]

7 [Proceeding resumed at 10:50 a.m.]

8 THE COURT: --57061.

9 MR. LARSEN: Good morning, Your Honor, Bart Larsen for
10 Plaintiff Kal-Mor-USA, LLC.

11 MR. HERNQUIST: Good morning, Your Honor, Rob
12 Hernquist and my colleague Brian Pezzillo here on behalf of Defendant
13 Omni.

14 THE COURT: All right, so I'll let you all argue this in a
15 moment. This is a lot of material. Thank you. Most of the exhibits, but I
16 had a chance to look at everything.

17 A couple things are concerning me that hopefully you can
18 incorporate into your arguments. The first, the Reply by the Plaintiff on
19 page 6, about line 6 also, it says that the First 100 settlement specifically
20 bars Omni from enforcing any security interest it retained.

21 And I think the implication where it was that if Omni can't
22 enforce it against First 100, then it can't enforce it against Kal-Mor, but
23 when you go to actually look at that First 100 settlement, I think to be
24 more precise, it prohibited Omni from enforcing it unless First 100 was in
25 breach. And I think that's why we're all here is because they are in

1 breach.

2 So, and then, also in the Reply, it says that, you know, Omni
3 attempts to conflate the Kal-Mor settlement with the later First 100
4 settlement, to which Kal-Mor was not a party.

5 I don't think that that was Kal-Mor's position here. Plus, I think
6 when you state that First 100 -- the First 100 settlement was not an
7 agreement to which Kal-Mor was a party, technically, that's true, but the
8 First 100 settlement was the basis for that stipulated judgment. And the
9 stipulated judgment was signed by Kal-Mor.

10 So I think these things that I just mentioned at least raise
11 questions in my mind whether Kal-Mor agreed to the novation or
12 whether Kal-Mor waived the one action rule, or whether, you know, Kal-
13 Mor either implicitly or expressly agreed that the Omni deeds of trust
14 would remain as encumbrances upon the Kal-Mor properties and Kal-
15 Mor perhaps recognized that.

16 So those are questions. I'm not saying that those are issues
17 of fact at this time, just saying those are questions in my mind.

18 So why don't we allow Kal-Mor to present its argument.

19 MR. LARSEN: Okay, thank you, Your Honor. Just to quickly
20 address those two points. The Court's correct in --

21 THE COURT: Well, and when I say -- let me interrupt
22 because I think I misspoke when I said that. I don't think that was Kal-
23 Mor's position about conflating the two agreements. I meant I don't think
24 it was Omni's position.

25 MR. LARSEN: That's what I assumed.

1 THE COURT: Right.

2 MR. LARSEN: Okay.

3 THE COURT: I just misspoke on that. Okay, let's hear your
4 argument.

5 MR. LARSEN: Okay, first of all, with respect to the reference
6 in the reply to the -- to Omni agreeing under the First 100 settlement that
7 it would not enforced its security interests, that is what the settlement
8 agreement says.

9 I don't know that anybody has alleged that First 100 is in
10 breach of that settlement agreement at this point in time. It's not -- we're
11 not a party to the settlement agreement. We have no rights to enforce
12 that settlement agreement. I mean, that was something we mentioned
13 in the Reply, but that's not vital to any of the arguments we're making.

14 So to the extent the Court's looking at that, I don't think know
15 that that's really -- I mean, maybe that's something we shouldn't even
16 raise because I don't think it is relevant to our arguments.

17 THE COURT: Well, I guess it goes to if we're talking about
18 the same deed of trust, it goes to whether the deed of trust is even
19 enforceable.

20 MR. LARSEN: True, but we're not arguing that it's not
21 enforceable because the settlement agreement says it's not enforceable.

22 THE COURT: Okay.

23 MR. LARSEN: That's -- that was an aside that is probably not
24 really even relevant at this point.

25 THE COURT: All right, thank you for explaining that. What

1 else?

2 MR. LARSEN: Okay, and then with respect to Kal-Mor and
3 GFY signing off on the stipulation that was filed in the First 100 action,
4 they signed off on that stipulation for one reason and one reason only.

5 And that's because under Federal Rule 41(a), if an action is
6 going to be dismissed entirely by stipulation, all of the parties that
7 appeared in that action have to sign off on that stipulation.

8 That's the only reason why Kal-Mor and GFY signed the
9 stipulation was to avoid imposing upon Omni and any other parties that
10 need to bring a motion before the Court to get that dismissal.

11 It was -- Kal-Mor and GFY were not at all involved in the
12 negotiation of that settlement. They've not even seen a copy of the
13 settlement agreement when they signed the stipulation.

14 THE COURT: Couldn't you have just have done a separate
15 stip for dismissal, let all parties sign, rather than having them attach their
16 name to a stipulated judgment, which I don't know if it creates some
17 ambiguity, but at least it requires me to look at the issue?

18 MR. LARSEN: I mean, in hindsight, possibly that would have
19 been another way it could have been handled. But at the time, again,
20 Kal-Mor wasn't involved in the settlement discussions when we signed
21 the stipulation as a courtesy because under Rule 41, like I said,
22 everyone who's appeared in the case has to sign a stipulation of that
23 nature. And that's why it was signed.

24 It wasn't signed intending to be bound by the settlement. It
25 was never a party to the settlement agreement.

1 And if you look at the language used in that stipulated
2 judgment, it's worded very carefully, but there are a lot of defined terms,
3 guarantors, plaintiffs, etcetera.

4 THE COURT: Uh-huh.

5 MR. LARSEN: Kal-Mor and GFY are carved out of a lot of
6 that. They're carved out of the disputes that are referenced in that
7 settlement agreement because those disputes are described as disputes
8 between plaintiffs, defendants and guarantors, which are defined terms
9 that do not include Kal-Mor or Omni.

10 THE COURT: Uh-huh.

11 MR. LARSEN: So I don't think that that is a relevant basis to
12 find that Kal-Mor in any way intended to waive any rights that it had in
13 entering in that stipulation.

14 THE COURT: One second. All right, I was reading
15 something. I didn't mean to interrupt your flow.

16 MR. LARSEN: No, and that's fine. And to point the Court to
17 the specific reference, on page 2 of that stipulation, paragraph 5, it
18 describes the disputes that are being handled through the stipulation as
19 disputes between plaintiff, guarantors, and defendants.

20 And again that -- those three defined terms do not include Kal-
21 Mor or its affiliate GFY, who's involved in that litigation. So, again, I --

22 THE COURT: You're talking about the stipulated judgment,
23 not the settlement at that point?

24 MR. LARSEN: Yes, the stipulated judgment.

25 MR. HERNQUIST: I'm sorry to interrupt. Can you give us

1 exhibit numbers because there's a number of stipulations on file in this
2 matter. And it would help me follow along. I'm sorry, Your Honor.

3 THE COURT: So --

4 MR. HERNQUIST: And a better record for all of us.

5 THE COURT: I think what he was just referring to, so I was
6 trying to follow you, was Exhibit 24 of the Kal-Mor -- the Declaration of
7 Greg Darroch, which contains the stipulated judgment.

8 MR. LARSEN: It's --

9 THE COURT: Might be elsewhere, but I know it's in that one
10 place.

11 MR. HERNQUIST: There's one in Exhibit 28 is well. That's
12 why I'm trying to follow along, Your Honor.

13 MR. LARSEN: Yeah, it'd be correct. Exhibit 24, well, that's
14 not going to be --

15 THE COURT: Well, 28 was the stip and order for entry of final
16 judgment, which was unsigned.

17 MR. LARSEN: That was a copy that was attached to the
18 settlement agreement. There's another version of it that's attached
19 Omni's opposition. Maybe it's better to refer to that one. I believe that's
20 Exhibit Number --

21 THE COURT: Let's -- yeah, for a good record, let's make sure
22 we're all on the same --

23 MR. LARSEN: Exhibit J, I believe.

24 MR. HERNQUIST: Thank you and sorry for the interruption,
25 Your Honor.

1 MR. LARSEN: Exhibit J. And I apologize, that's the
2 stipulation in the Kal-Mor action. Let me --

3 THE COURT: So for purposes of a clean record, why don't
4 you reiterate your point that you were making with respect to the
5 stipulated judgment, which we now know is Exhibit 24?

6 MR. LARSEN: The point I was making, I was actually
7 referencing the stipulation and order for entry of final judgment, which is
8 Exhibit E to Omni's Opposition.

9 THE COURT: All right, and what's your point?

10 MR. LARSEN: The point being that it describes certain
11 disputes that are being waived and released, dismissed with prejudice
12 under the stipulation.

13 And it describes those disputes as disputes between plaintiffs,
14 defendants, and guarantors. I mean, those are defined terms that do not
15 include Kal-Mor or its affiliate GFY. So the stipulation was not intended
16 to address anything or any claim or defense that Kal-Mor had any
17 interest in at that point in time.

18 Again, Kal-Mor signed off on the stipulation simply because it
19 had appeared in that action. And as I said under Federal Rule 41, that
20 was a requirement to have the case dismissed by stipulation.

21 THE COURT: Doesn't that mean then by this instrument, the
22 parties weren't waiving Omni's rights to pursue its encumbrance against
23 Kal-Mor to the extent such rights still existed? Because you just said
24 that this settlement did not address that issue.

25 MR. LARSEN: It did not. It did not address -- intentionally

1 address Omni's rights to enforce its deeds of trust against the Kal-Mor
2 properties, that's correct. I would agree with that statement.

3 THE COURT: So that still begs the question, is there anything
4 that indicates a question of fact as to whether Kal-Mor waived its rights
5 to enforce the one action rule? Or did it agree to the novation?

6 MR. LARSEN: Well, one, the novation is the First 100
7 settlement agreement, which Omni's not a party and was not involved in
8 negotiating.

9 So I would say no to that, it did not agree to the novation
10 because it was not a party to those negotiations or party to that new
11 agreement.

12 With respect to the one --

13 THE COURT: But then, it's signed -- the stipulated judgment
14 after it knew of that document and --

15 MR. LARSEN: But it knew that a settlement had been
16 reached. It did not actually have a copy of the settlement agreement --

17 THE COURT: All right.

18 MR. LARSEN: -- till after the fact --

19 THE COURT: All right.

20 MR. LARSEN: -- because again, it was not a party to it. It
21 was not involved in the litigation. In fact, under Kal-Mor's agreement
22 with Omni, it had expressly agreed that it would not participate in that
23 litigation.

24 THE COURT: All right, and then, the other issue is if Kal-Mor
25 knows at the time it signs the stipulated judgment that Omni has

1 preserved its rights against the Kal-Mor property to pursue its deed of
2 trust, and then, Kal-Mor goes ahead and signs that stipulated judgment,
3 can that be interpreted as Kal-Mor agreeing that that deed of trust could
4 still be enforced against them? Or could it be interpreted as a waiver of
5 the one action rule?

6 MR. LARSEN: I mean, I don't see how it possibly could be
7 interpreted as an agreement that the one action rule wouldn't apply.

8 In fact, I mean, the time Kal-Mor signs the stipulation, there
9 was no final judgment at that point. They could have withdrawn
10 everything and not run into a one action rule problem.

11 It wasn't until the final judgment was actually entered by Judge
12 Boulware I believe on February 21st, a week or so after the stipulation
13 was signed, that the one action rule issue arose.

14 It's that final judgment that was entered for \$4.8 million and
15 only that final judgment that creates the one action rule problem in this
16 case.

17 You know, Omni's just, you know, made reference to a UCC
18 sale, to efforts to enforce assignments and rent, and the specific
19 exceptions that are found in NRS 40.340 for those issues.

20 And I agree completely. Those are exceptions to the one
21 action rule. We're not claiming that any of those events --

22 THE COURT: Well, I don't think -- I looked at that. And I don't
23 think that that UCC exception applies here. You know, I mean, basically
24 --

25 MR. LARSEN: So --

1 THE COURT: And this isn't a situation where someone's
2 foreclosing on property pursuant to the UCC, and then after that, tries to
3 collect on a debt.

4 This is a situation where there's a, you know, UCC sale and
5 then the collection on the debt and then, the next step, which is trying to
6 collect on a different lien. I don't think the UCC exemption to the one
7 action rule is intended to cover that situation.

8 MR. LARSEN: Okay.

9 THE COURT: Anyway that -- so you don't need to address
10 that argument.

11 MR. LARSEN: Okay, and then going back to the question
12 about courts or about the party's intent, alongside this First 100 action
13 that was going on in federal court in 2016, the -- Kal-Mor had also filed a
14 complaint against Omni and PrenPonciana and Prentice Lending,
15 claiming that it was also a secured creditor of First 100 and seeking to
16 stop that UCC sale that was noticed up in January 2016.

17 Now there was a -- an attempt to reach a settlement in
18 February of 2016. The parties -- I believe all the parties at least one
19 point in time believed they had a settlement that later fell apart.

20 But as a result of that settlement, Kal-Mor's claims morphed
21 into something else. An affiliate of Kal-Mor, GFY was formed that
22 bought certain accounts from First 100 that Omni would later claim were
23 its collateral under its loan.

24 And that proceeded to be litigated for several months in
25 federal court. By the time we got to the point to November 2016, where

1 GFY and Kal-Mor settled with Omni, really all that was in dispute
2 between the -- those parties at that point in time was who had priority as
3 to certain accounts in Florida that they each claimed.

4 And under that settlement agreement, that Kal-Mor and GFY
5 sign with Omni November of 2016, they essentially agree to split it.
6 Omni would take certain accounts. Kal-Mor and GFY would take other
7 accounts. And that would be the end of that dispute.

8 But in entering into that settlement agreement, they expressly
9 carved out all other disputes Defense has claimed anything else relating
10 to the Kal-Mor properties and anything that was not expressly pled in the
11 pleadings in that case.

12 So when that settlement agreement was signed in November
13 of 2016, both sides had preserved all rights to any claims or defenses
14 that they might make in connection with those properties.

15 THE COURT: So Kal-Mor recognized at least as of November
16 2016 that Omni still had a deed of trust and it retained its rights to
17 pursue that deed of trust against the Kal-Mor properties?

18 MR. LARSEN: Correct, and Omni vice versa had recognized
19 that Kal-Mor had certain defenses to the enforcement of that deed of
20 trust. And those were preserved as well.

21 THE COURT: And so, your client's position is that those
22 rights existed up to and including the date of the First 100 settlement,
23 which then extinguished the deed of trust rights because that was a
24 novation.

25 Or at the very least that the Omni rights were extinguished at

1 the time the stipulated judgment was entered because of the one action
2 rule?

3 MR. LARSEN: Correct, yeah. If Omni had been in a position
4 to foreclose in December of 2016 before either of those events occurred,
5 they would not have had a one action rule problem and we would not
6 have been able to argue novation because we expressly agreed that
7 the -- you know, each side kept its claims and defenses with regard to
8 those issues.

9 It was not until they signed the stipulation or the settlement
10 agreement with First 100, which completely changed the nature of their
11 relationship and in the indebtedness that First 100 owed, and proceeded
12 to have a final judgment entered in the amount of \$4.8 million against
13 First 100 that those arguments arose in Kal-Mor's favor.

14 THE COURT: All right, I got it.

15 Let's go ahead and hear from Omni?

16 MR. HERNQUIST: Thank you, Your Honor. This same
17 motion was denied July 23rd, 2018, a couple months ago by Judge
18 Boulware, as being premature. We attached that order as Exhibit L.

19 THE COURT: Yeah, I saw it. We're in the state court now.

20 MR. HERNQUIST: I understand, but that same reasoning
21 applies. And that's where I'm going. I'm not suggesting it's a binding
22 order.

23 THE COURT: Right.

24 MR. HERNQUIST: But the same issues, the same issues of
25 fact, the same ambiguities that have not been addressed, the same

1 course of dealing between both Omni and Kal-Mor leading up to the Kal-
2 Mor settlement agreement, as well as the course of dealing in
3 communications and mutual intent of Omni and First 100 leading up to
4 that separate First 100 Omni settlement agreement, all those issues of
5 fact remain. They are all unresolved.

6 The record is the same that was before Judge Boulware.
7 You're seeing the same record. This case does have a convoluted and
8 some might say a tortured past.

9 I can appreciate just based on the questions that you posed to
10 Mr. Larsen, it seems like you get it as far as the nature of the dispute
11 and the various actions that led us here today.

12 And as counsel noted out, in that Kal-Mor Omni settlement
13 agreement, Kal-Mor expressly noted, both sides they talked about it. It's
14 in the agreement.

15 We tried to resolve everything. In addition to the personal
16 property that was at issue in that prior case, they knew they had this
17 disagreement as to the real properties.

18 Real properties, First 100 had granted Omni a first deed of
19 trust position in 20-plus real properties on -- Kal-Mor claimed that it then
20 subsequently claimed acquired nine of those.

21 And we knew that this was brewing. We tried to resolve
22 everything. We couldn't.

23 And you look at that settlement agreement, it expressly says
24 both sides reserve the right to litigate this in the future. One action rule's
25 not going to apply. Everyone was on firm ground.

1 THE COURT: It doesn't say that in the document, so the one
2 action rule is not going to apply. It doesn't say that. So.

3 MR. HERNQUIST: It expressly says -- that's the intent the
4 one action rule wasn't going to apply. It both says they reserve the
5 right --

6 THE COURT: Right.

7 MR. HERNQUIST: -- to pursue this litigation to dispute it.
8 They recognized the dispute and said we're saving it for another day.
9 And this document is not going to be an argument or a waiver or an
10 estoppel or any other basis to stop --

11 THE COURT: You're talking about the First 100 settlement
12 now?

13 MR. HERNQUIST: No, I'm talking about the Kal-Mor Omni.

14 THE COURT: Or the Kal-Mor which preceded the --

15 MR. HERNQUIST: Yeah.

16 THE COURT: -- First 100?

17 MR. HERNQUIST: Right, right.

18 THE COURT: All right, so suppose that's true. Then get to
19 the Kal-Mor point that First 100 settlement to which Kal-Mor was not a
20 party was a novation, because it changed the material obligations of all
21 the parties?

22 MR. HERNQUIST: Um --

23 THE COURT: I think that's an important issue that I need to
24 hear more argument on.

25 MR. HERNQUIST: Sure. As we noted in our brief, the United

1 Fire Insurance versus McClelland case, novation is a question of fact.
2 The Nevada Supreme Court stated that it must be proven by clear and
3 convincing evidence.

4 And it's a question of law only when the agreement and the
5 consent of the parties are unequivocal, okay?

6 THE COURT: Uh-huh.

7 MR. HERNQUIST: Here, there was no novation intended by
8 either Omni or First 100 and it's reflected in the settlement agreement. If
9 we look at the settlement agreement, and this is exhibit -- this is the
10 Omni -- let me strike that and be clearer.

11 THE COURT: Yes.

12 MR. HERNQUIST: The Omni First 100 settlement agreement,
13 which is Exhibit 29 to Plaintiff's Motion, or actually, it's Exhibit 29 to the
14 Declaration of Greg Darroch.

15 THE COURT: Well, 29 is the stipulated judgment, which was
16 the -- wait a minute. Yeah, which document do you want me to look at?

17 MR. LARSEN: It's Exhibit 30. I believe we may have
18 misnumbered it.

19 THE COURT: I see.

20 MR. HERNQUIST: Okay, mine says 29. I apologize.

21 MR. LARSEN: I think there were two 29s, so it should be
22 Exhibit 30.

23 THE COURT: Thank you for correcting that.

24 I'm with you now.

25 MR. HERNQUIST: Thank you, sir. Okay, if you turn a couple

1 pages in, it's Bates Number Kal-Mor134, you see in the top real
2 properties. And it's a defined term in the settlement agreement.

3 All parcels for which First 100 was required to record deeds of
4 trust or mortgages under the Omni loan, which properties are listed in
5 Exhibit A.

6 If you look at Exhibit A attached to the settlement agreement,
7 Bates Number Kal-Mor153, we see listed here under the heading sold to
8 third parties each of the nine properties that Kal-Mor is here today to
9 litigate. Okay, so those properties are addressed listed, incorporated in
10 the settlement agreement.

11 Subsection 2 of the settlement agreement states the purpose
12 of the settlement agreement is to settle their disputes regarding the UCC
13 sale. A novation would re-state or replace everything about the
14 underlying loan documents.

15 Here, as the Court noted, the history of this case, we noticed
16 the -- Omni noticed the UCC sale. First 100 filed ex parte applications in
17 state court for an injunction. We removed.

18 Kal-Mor then a couple days later filed a separate suit seeking
19 ex parte injunction to stop the UCC sale. We removed. Preliminary
20 injunction hearing with Judge Boulware, we had a UCC sale. It wasn't
21 turned over.

22 And the purpose of the settlement agreement was returning
23 some assets to First 100 and for both parties to figure out a way for
24 Omni to be repaid. Okay, you look at the debt amount, the \$4.8 million
25 is not a sum certain that can move up or down. That's in Section 3.

1 Section 8 addresses real property.

2 THE COURT: So doesn't -- isn't that a material change in the
3 obligation? I'm assuming at the time First 100 gave a deed of trust to
4 Omni and signed a promissory note that there was a sum certain. So
5 now you're going to from agreement with a sum certain to an agreement
6 with amount to be determined?

7 MR. HERNQUIST: The amount owed to Omni by First 100
8 was one of the disputes in the underlying litigation because during the
9 entire history of the transaction, certain sums were to have been applied
10 to the principal balance owed.

11 Parties have been litigating. One of the issues litigated with
12 Judge Boulware, how much had been applied to the Omni loan, had it
13 been applied to interest or principal, had it been applied properly, et
14 cetera.

15 So my answer to your question, I'm not trying to dodge is --

16 THE COURT: No, it's okay.

17 MR. HERNQUIST: -- maybe.

18 THE COURT: Yeah.

19 MR. HERNQUIST: Like the answer to so many legal
20 questions, maybe.

21 THE COURT: Right.

22 MR. HERNQUIST: Look at Section 8 then of the settlement
23 agreement appearing at Kal-Mor140. And it discusses real property.

24 As part of the agreement, First 100 had maintained title to four
25 real properties under the settlement agreement. Those four real

1 properties were transferred to Omni.

2 It then states that First 100 would have first dibbs or first
3 choice in subsection (b) to pursue foreclosures, et cetera on the
4 remaining properties.

5 THE COURT: Uh-huh.

6 MR. HERNQUIST: The properties that had been transferred
7 to third-parties, which is what we're talking about here.

8 It's not a promise that we will not pursue any of those assets.
9 First 100 had the first ability if they waived it or said go for it. Omni had
10 the choice and the ability and the express right in this agreement to do
11 so.

12 That was the intent of the parties. That was what had been
13 discussed numerous times between Martin Boone, the principal of Omni,
14 and Jay Bloom confusing names that we were mixing up a lot at prior
15 proceeding, Martin Boone and Jay Bloom prior to this.

16 And as discussed in the declaration of Martin Boone, Exhibit A
17 to our Opposition, there were numerous conversations, numerous phone
18 calls, and some emails reflecting that mutual intent that Omni would
19 move forward and foreclose on those additional properties that had been
20 transferred to third-parties such as Kal-Mor.

21 If we look at Exhibits 8E, there's representation that all
22 third-parties to whom First 100 had transferred those properties, they all
23 had notice of the Omni first position deed of trust.

24 Section 8E would be superfluous, if there was no intent for
25 Omni to pursue foreclosures against those real properties as reflected in

1 the written agreement between the parties.

2 And then, if we look at Section 10 of the settlement
3 agreement, Your Honor, it states that Omni neither waives nor
4 relinquishes its existing first priority security interest in all of First 100's
5 current and future assets.

6 That's not just limited to personal property. It includes the real
7 property. So first -- or I'm sorry, Omni did not relinquish its rights to
8 pursue any of its rights or rights on those deeds of trust based on the
9 four corners of this document.

10 THE COURT: So as to that specific proposition, I don't know
11 that Kal-Mor would disagree with you that in this instrument Omni did not
12 waive its or release its security interest against the Kal-Mor properties, at
13 least as of this point in time, right?

14 MR. HERNQUIST: Well --

15 THE COURT: Well, I let him speak to that again in a second.

16 MR. HERNQUIST: Yeah.

17 THE COURT: Just make a note of that.

18 MR. HERNQUIST: You asked me to address their novation
19 argument and I would --

20 THE COURT: Yeah.

21 MR. HERNQUIST: -- contend that it does go to their novation
22 argument.

23 They're saying that this document, this settlement agreement
24 superseded the underlying loan agreement. And that as a result of this
25 settlement, Omni forfeited or relinquished its rights to pursue anything on

1 those deeds of trust that had been granted.

2 And what I'm --

3 THE COURT: Well, relinquished it by operation of loan is
4 what he's saying, because you know, because Kal-Mor didn't agree to
5 this settlement.

6 MR. HERNQUIST: Kal-Mor agreed previously that the
7 resolution of the dispute would not impact Omni's rights or Kal-Mor's
8 rights to litigate the first priority and other interests relating to these real
9 properties.

10 Omni and First 100 took the same position. It's not the
11 expressed language we see in the Kal-Mor settlement. And as we
12 explained in our opposition, we didn't think that was necessary here
13 because First 100 no longer held a right to that.

14 First 100, in the eyes of both sides, it makes sense to include
15 a discussion of First 100 addressing properties that it no longer held an
16 interest in. It was understood by the parties and what I'm trying to --

17 THE COURT: I understand the argument.

18 MR. HERNQUIST: -- help you understand is that it was
19 reflected in their agreement here.

20 At best and as we point out in the papers, the Declaration of
21 Martin Boone and myself, at best, they have an issue of fact that you
22 need to ascertain what the mutual intent of the parties was, whether
23 novation was intended.

24 Because as I noted, the legal burden for novation is very high.
25 The fallback is it's a question of fact. It's like trying to pursue a motion

1 for summary judgment on a negligence claim. It's an issue of fact.

2 And it's a high burden of proof. And it's improper to address it
3 as a question of law unless the consent of the parties are unequivocal.

4 What Kal-Mor's argument, I mean, if -- it really is is that we
5 agreed Omni could maintain its position and its rights regarding these
6 deeds of trust. We signed it. It was expressly noted in our settlement
7 documents.

8 Then, we signed off on a separate settlement agreement. We
9 didn't raise the issue. We didn't include any language in here saying
10 and it addresses some of the questions you asked counsel earlier.

11 It -- their argument is indicative of that faith, where it's a
12 gotcha moment. It's not the intent of the parties. We had a settlement
13 agreement. You can pursue this.

14 Hey, you're settling with this other debtor purely on -- and the
15 settlement agreement goes to the personal property. The whole dispute
16 had been about personal property, not real property. And then, as soon
17 as the judge inks it, it's a gotcha moment.

18 As we discuss also in our opposition, there's no final judgment
19 here. If you look at the case law in Nevada, you don't look at what a
20 document is titled. You look at the content of it.

21 Just as when you're addressing claims on a motion to dismiss,
22 whether somebody calls something a claim for negligence, or tortious
23 breach of the implied covenant, or contractual breach of the implied
24 covenant, and so on, the courts look to the content of the document, not
25 the headings.

1 THE COURT: Wait, it closed the case.

2 MR. HERNQUIST: It closed the case --

3 THE COURT: And purportedly, you know, by principles of
4 collateral estoppel, res judicata, and claim preclusion, it resolved any
5 and all claims that were existing at the time of that conclusion of the
6 case or claims that could have or should have been filed --

7 MR. HERNQUIST: It closed --

8 THE COURT: -- in that action.

9 MR. HERNQUIST: -- the docket. It did not close the case.
10 The court expressly reserved jurisdiction over future disputes between
11 the parties relating to the settlement agreement or for any purpose.

12 It's not an appealable order. And Omni doesn't have the
13 benefit of going out and executing on assets for that \$4.8 million figure.
14 We can't use any of the remedies provided in Chapter 21 of the NRS.
15 It's a loan work out, not a judgment.

16 And you look at the definition of what is and is not a judgment,
17 NRS 40.435, it must be a -- for an amount certain. We don't have that
18 here. We discuss it in the papers. I won't belabor the point.

19 THE COURT: I saw, okay.

20 MR. HERNQUIST: It must impose personal liability. I think
21 that's arguable at best. And it has to be appealable. And you don't have
22 any of that here.

23 It's a situation where the parties resolved a way to have a
24 creditor re-pay to stop this litigation, to stop these ongoing disputes
25 regarding the underlying UCC sale because the nature of the assets that

1 had been sold at that sale, these commercial papers, were note -- none
2 of the parties were able to bring in every -- any revenue at all. It was just
3 everything had been corked, and everyone was hurting, and everyone
4 wanted a seek a resolution to that. Kal-Mor, Omni, and First 100.

5 And under the separate agreements, everyone got a piece of
6 those revenues from that commercial paper.

7 THE COURT: Uh-huh.

8 MR. HERNQUIST: None of this involved real estate.

9 Now I heard the Court's comments, and I'm not trying -- I don't
10 want to belabor the point, but we do believe that that UCC exception
11 does not apply.

12 You made the comment so I'd like to understand instead of
13 me going off on a tangent, maybe it's best for you to kind of help me
14 understand your position on it so I can address it.

15 THE COURT: That's okay. I would just prefer to hear your
16 argument rather than getting into a dialogue of the meaning of the law.

17 MR. HERNQUIST: I wasn't asking to debate, Your Honor.

18 THE COURT: Okay.

19 MR. HERNQUIST: I just want to try to address it on the head
20 so I can move on. This whole dispute was a UCC dispute.

21 THE COURT: Right.

22 MR. HERNQUIST: And it's our position as stated in the
23 opposition that that exception applies.

24 Kal-Mor states in their reply of course it reply -- of course it
25 applies, but in their underlying paper, they have six pages of argument

1 arguing that the one action rule is why we're here today and that
2 whether or not this is a final judgment is a necessary component of their
3 one action rule argument.

4 The Nevada Supreme Court addressed those exceptions in
5 the McDonald [phonetic] case and talked about the reason for these
6 exceptions is to prevent a creditor from a double recovery.

7 There's been no showing of any type of double recovery.
8 Instead, the showing is that these settlement agreements, these two
9 separate settlement agreements, resolved limited set of disputes and
10 claims and the parties reserved the rights.

11 They all knew there was other disagreements fomenting and
12 that they could not and would not be able to resolve those other real
13 property disputes at that time.

14 THE COURT: Is there a risk of double recovery?

15 MR. HERNQUIST: I would argue that that at minimum, that's
16 an issue of fact based on the revenues that are coming in for my client.
17 And I don't want to speak out of turn for Mr. Larsen, but the receivables
18 that his client received, I don't think either Kal-Mor or Omni has any
19 hope of a double recovery.

20 The money coming in from those HOA receivables in Florida
21 for Omni had been quite limited. I understand Kal-Mor's been doing it a
22 bit better, but no. No, we're hoping to get close to that 4.8 someday
23 somehow.

24 And to be candid, Omni's -- that most -- I don't want to say
25 best odds because I don't know. The hope is that the lien granted to

1 Omni and First 100's pending litigation is what gets us there and that we
2 can release all of this stuff. We would rather have that money in hand
3 than be litigating.

4 As the Court knows, I know you've been -- you've heard from
5 Mr. Pezzillo, there are a dozen or two quiet title actions pending right
6 now involving all of these real properties initiatives.

7 So First 100 as a sizeable judgment if they collect on that, but
8 other -- there's no risk of double recovery. It's in the settlement
9 agreement.

10 Once Omni gets that 4.8 plus whatever pluses and minuses
11 might be accounted by the parties, it relinquishes everything and walks
12 away.

13 So there's no risk, not only no risk of a double recovery, but
14 Omni would be in breach and liable if it sought or obtained more than
15 that 4.8.

16 THE COURT: So can we deal with a couple of loose ends
17 here?

18 MR. HERNQUIST: Sure.

19 THE COURT: Whether Kal-Mor had noticed or didn't have
20 notice of the Omni deed of trust at the time it purchased the property, is
21 this really irrelevant to the issues today, right?

22 MR. HERNQUIST: I don't know. That's what they say in the
23 Reply, but in their initial motion, they talked about that and we got the
24 sense that that was one of their bases for the argument. I don't know if
25 it's --

1 THE COURT: I couldn't figure out how that would factor in
2 into my analysis to --

3 MR. LARSEN: And that's not the basis for the motion, Your
4 Honor.

5 THE COURT: Okay.

6 MR. LARSEN: That's background.

7 THE COURT: So he's responding because you mentioned it?

8 MR. LARSEN: Yeah.

9 THE COURT: All right.

10 MR. HERNQUIST: Right.

11 THE COURT: I know I -- you have your argument about
12 whether this most recent dispute -- not this most recent. Whether the
13 efforts by Omni to foreclose should constitute an action for purposes of
14 the one action rule. I believe that was one of the arguments I heard.

15 So there hasn't been a second action?

16 MR. HERNQUIST: No.

17 THE COURT: That's not one of your arguments?

18 MR. HERNQUIST: This --

19 THE COURT: Or that's not one of --

20 MR. HERNQUIST: No.

21 THE COURT: Well, that would have been -- that the party
22 relying on the one action rule has to show that there was a second
23 action. I thought one of the arguments was that there was no second
24 action.

25 MR. HERNQUIST: We argued that to Judge Boulware

1 because there hadn't been a second action, because under both
2 settlement agreement -- both settlement agreements, Omni, First 100,
3 and Kal-Mor all agree that any future disputes relating to these
4 documents would be brought before Judge Boulware. They didn't. They
5 filed a second action rather than complying with their contractual
6 obligations.

7 When we were -- I'm sure you saw that order. I don't want to
8 belabor it, but then, they had a gotcha moment and said, well, we didn't
9 agree to the removal even though we previously stipulated that this
10 Court would have jurisdiction over all disputes and this case was sent
11 back to you based on the removal issue.

12 THE COURT: Okay, all right, thanks for clarifying that. I
13 appreciate that. I mean, you still have the floor. He still has the floor
14 and then take some notes so you remind yourself what to ask me.

15 MR. HERNQUIST: A couple of points I -- again, I at least
16 there aren't a lot of people waiting.

17 THE COURT: No.

18 MR. HERNQUIST: I appreciate the Court's time. The Lamb
19 [phonetic] case also cited in our Opposition states that when a case is
20 retained for further action or when a court retains jurisdiction over a
21 matter, the underlying order or judgment is interlocutory rather than a
22 final judgment.

23 That's what we have here. The federal court retained
24 jurisdiction. The judgment that they're referencing is not a final
25 judgment.

1 THE COURT: Got it.

2 MR. HERNQUIST: I'm just flipping through notes. Let me
3 make sure I hit all the points because I didn't realize it was my last shot.

4 We've cited Mr. Martin Boone's Declaration, Exhibit A, going
5 back to the both issues talks about the intent, the numerous discussions
6 between himself and Kal-Mor and himself and First 100, where all
7 parties knew and understood that Omni would be seeking foreclosure of
8 all real properties at issue.

9 All parties understood it and agreed that that was coming. So
10 their argument that, yeah, we agreed to it in our settlement agreement
11 with you, the Kal-Mor Omni settlement, but now as a result of this
12 separate Omni settlement with First 100, we can grab on to that, latch on
13 to that when they knew -- always knew the intent of all of the parties, we
14 would argue that that's bad faith right there.

15 If that's their position, it should have been raised. They signed
16 off on the document. There was no carve-out that we're only signing off
17 on this pursuant to Rule 41. We don't intend to be bound by any of it.

18 None of that was disclosed. They signed and agreed at that
19 time for a mutual global resolution of the dispute of those disputes.

20 And that's really the critical thing. It resolved those disputes.
21 Everyone knew that there were other issues that would need to be
22 resolved either through further negotiations or in a courtroom
23 somewhere.

24 I think that's all I had, Your Honor. I apologize, I know I've
25 been rambling a bit.

1 THE COURT: Okay.

2 MR. HERNQUIST: I was trying to address your questions so I
3 didn't hit it in the order that I had planned, but --

4 THE COURT: No, you did a --

5 MR. HERNQUIST: -- any other questions that I can address
6 for you, sir?

7 THE COURT: No, you did a great job in answering my
8 questions. I appreciate that. Thank you.

9 MR. HERNQUIST: Thank you.

10 THE COURT: All right.

11 MR. LARSEN: All right, I've got a list of things to tackle here
12 and I'll try to go quickly.

13 THE COURT: No, there's no reason to rush.

14 MR. LARSEN: Okay.

15 THE COURT: Right?

16 MR. LARSEN: With respect to Mr. Hernquist, I think he's
17 mischaracterizing the nature of the settlement agreement in Kal-Mor and
18 Omni.

19 That the carve-outs that were included in that settlement
20 agreement, nobody agreed, okay, Omni, you can go ahead and
21 foreclose or anything of that nature.

22 What was agreed was that that settlement agreement and the
23 dismissal of claims between Omni and Kal-Mor and GFY would have no
24 effect on the parties' rights as to other issues. That's what was agreed.
25 Not that Omni go and ahead and foreclose or that the one action rule

1 wouldn't apply or that novation wouldn't apply.

2 It's that that agreement, which was signed on November 26th,
3 2016 would have no effect on rights outside of that agreement.

4 That's an important distinction because he's arguing that they
5 agreed we could foreclose, well, that's not the case. What we agreed to
6 is that that agreement would not stop them from foreclosing. And we're
7 not here saying anything different today, Your Honor.

8 THE COURT: I think he's saying there's extraneous evidence
9 that would show that that was the intent of the parties.

10 MR. LARSEN: Well, I don't doubt that that was Omni's intent.

11 THE COURT: Yeah.

12 MR. LARSEN: I mean --

13 THE COURT: And it might have been Kal-Mor's intent is what
14 they're saying. At least there's a question of fact as to whether Kal-Mor
15 had the same intent that Omni was allowed to continue to pursue its
16 deed of trust. I mean, is that your position?

17 MR. HERNQUIST: Our position is that both parties reserved
18 their rights to pursue the real properties --

19 THE COURT: Reserved the rights.

20 MR. HERNQUIST: And both parties knew that each other
21 intended to try to foreclose. One was not agreeing to the other when no
22 one was saying you have priority over this property versus that.

23 THE COURT: I got it.

24 MR. HERNQUIST: Everyone reserve their rights to battle in
25 the future. This document is not going to be any sort of a waiver or

1 release --

2 THE COURT: Right.

3 MR. HERNQUIST: -- from anyone's legal rights regarding the
4 real property.

5 THE COURT: So there wasn't an understanding or intent that
6 Omni was going to do it. Just an understanding what you're saying that
7 they reserve the right to do it?

8 MR. HERNQUIST: There was an understanding that both
9 sides would be doing it. Nobody was saying you have priority over me.

10 Mr. Giroux [phonetic] of Kal-Mor and Martin Boone of Omni
11 both let each other know we're going to be foreclosing on the real
12 property. If we can't resolve the issue, we'll save it for another day.

13 THE COURT: All right, thank you for re-explaining or better
14 explaining your position so I understand it better. Thank you.

15 MR. LARSEN: All right, and just to follow up on that, the one
16 action rule defense, the novation defense that we're here raising
17 today --

18 THE COURT: Uh-huh.

19 MR. LARSEN: -- they didn't exist when they settlement
20 agreement was signed. They didn't come into existence until after Omni
21 had settled the First 100 and that final judgment was entered in the First
22 100 case.

23 And Kal-Mor was not a part of those negotiations. That was
24 something that was done without our knowledge. We had agreed, look,
25 the claims between Kal-Mor, GFY, and Omni, they're all dismissed with

1 prejudice.

2 There was a separate stipulation that was filed in the Kal-Mor
3 case, a separate final judgment that was entered in the Kal-Mor case.
4 The result, everything between those parties.

5 And as part of that, Kal-Mor also agreed, hey, we're not going
6 to have any further involvement in the First 100 case either unless we're
7 specifically required to by the Court or by court order or some rule or
8 anything of that nature.

9 And that's the only reason why, again, we signed off on that
10 stipulation to dismiss that case and there was a final judgment is
11 because we had appeared in that case.

12 So I guess the point I'm trying to make is that we're not here
13 arguing that the settlement agreement between Kal-Mor and Omni in
14 any way prevents them from enforcement of deeds of trust at this point.

15 Like I said before, had they tried to do that before they had
16 entered into the settlement agreement with First 100, we wouldn't have
17 these same defenses to raise.

18 But because they entered into that settlement agreement with
19 First 100, that fundamentally changed the nature of their relationship and
20 the obligations at issue, and because they went on and took a final
21 judgment against First 100 for \$4.8 million, actually more than the
22 balance that was owing on Omni loan, that they're prevented by the one
23 action rule from enforcing their deeds of trust against the Kal-Mor
24 properties.

25 Now Mr. Hernquist walked you through some portions of the

1 First 100 settlement agreement that essentially state to the effect that
2 First 100 Omni agreed that First 100 or that Omni's going to retain a
3 security interest in certain properties.

4 Well, First 100 had no interest whatsoever in the Kal-Mor
5 properties at that point in time. Two years prior, First 100 had quit
6 claimed its interest in those properties to Kal-Mor.

7 So First 100 was not in a position to agree that Omni would
8 have any continued security interest in properties it did not own or hold
9 any interest in at point in time.

10 I don't doubt that the intent was that Omni would keep a
11 security interest and that at some point could foreclose if it decided it
12 wanted to do that. But by entering into the settlement agreement, it
13 fundamentally changed the nature of the underlying indebtedness.

14 It went from a borrower-lender relationship where First 100
15 owed Omni approximately \$4.1 million. That's what Omni alleges in the
16 counterclaim it filed in summer of 2016 in federal court to now a
17 minimum of \$4.8 million plus another \$1.2 million if certain things
18 happen, plus whatever additional money Omni has to invest in these
19 assets to get a recovery.

20 So the underlying obligation to which my client was made an
21 unwilling guarantor changed substantially, going from 4.1 million to, you
22 know, a minimum over \$6 million before those deeds of trust could be
23 released.

24 And as to, you know, an actual danger of double recovery, I
25 don't know that's anything that either of us could answer, but I don't think

1 that's relevant to the one action rule.

2 The one action rule doesn't apply only if there's an actual
3 danger of double recovery. It applies when a party takes a final
4 judgment on the underlying indebtedness, which is exactly what
5 happened in this case.

6 THE COURT: No, I understand. I just asked the question
7 because that was one of the public policies behind the adoption of the
8 one action rule here in Nevada.

9 MR. LARSEN: Yeah, and you know, we can't say whether
10 they will or will not actually get double recovery in this case.

11 And the point is somewhat moot, because by entering into that
12 settlement agreement, the Omni loan has been combined with the junior
13 indebtedness that was owed to PrenPoinciana and Prentice Lending.

14 So what we now have is hybrid, that that junior indebtedness
15 that Omni acquired in connection with the UCC sale is now included in
16 the indebtedness that would have be satisfied in order to release deeds
17 of trust.

18 That's the heart of the novation, Your Honor, is that the
19 underlying indebtedness has changed from a note obligation to this sort
20 of joint venture relationship that's been created under that settlement
21 agreement, where Omni gets to invest additional money and the parties
22 split the recovery. And once Omni gets to a certain point, then the
23 deeds of trust might be released.

24 That's fundamentally different than the loan arrangement that
25 existed before the settlement agreement was executed.

1 THE COURT: Is it your position then that the deed of trust at
2 this point in time, it remained on Kal-Mor's properties, that it effectively
3 secures a debt of approximately 4.8 or a nexus of that and is not limited
4 to the 4.1?

5 MR. LARSEN: Under the settlement agreement, yes, that's
6 exactly what the settlement agreement says is that nothing is released
7 until they recover the indebtedness they're owed under the settlement
8 agreement.

9 THE COURT: So that that document that you characterize as
10 a novation effectively increased the risk and the obligations upon Kal-
11 Mor?

12 MR. LARSEN: It is, substantially, yes. And beyond that,
13 again, it fundamentally changed the parties' relationship.

14 If you look at the releases in Section 16 or excuse me Section
15 15 of the First 100 settlement, which is, let's see, Exhibit 30 to the Kal-
16 Mor Motion, specifically states that there -- both sides, both Omni and
17 First 100 are waiving and releasing all claims with the exception if you
18 look at Section 16(d) of the claims to enforce a settlement agreement or
19 claims for fraud, gross negligence, or willful misconduct.

20 So any right that Omni would have had to enforce its note,
21 they've now substituted with the right to enforce a settlement agreement.

22 THE COURT: All right, novation is a very difficult thing to
23 prove. I mean, it's a -- you have to meet a very high standard as
24 counsel said.

25 MR. LARSEN: It is --

1 THE COURT: And is this -- so I'm having trouble seeing that
2 this so clear-cut that it would justify summary judgment. Wouldn't it
3 serve the parties better, both sides, if we didn't grant summary judgment
4 and avoid the risk of it going up and then getting reversed and it delaying
5 resolution of your matter?

6 MR. LARSEN: I think that's a chance my client would be
7 willing to take, Your Honor.

8 THE COURT: Okay. Well, but I want to be -- you know,
9 before I would find as a matter of law that this was novation --

10 MR. LARSEN: And I understand that.

11 THE COURT: -- I need to be crystal clear that -- it needs to be
12 crystal clear to me that this doesn't create an issue of fact here.

13 MR. LARSEN: I mean, what I would point the Court to is,
14 again, Section 615 of the First 100 settlement agreement, which
15 specifically discusses the parties' intent.

16 And beyond that, we have the stipulation and First 100
17 judgment, which again, describes the disputes that are being released.
18 It's Exhibit D to the Omni Opposition.

19 And, again, it's essentially if you look at -- let's see where it
20 starts. The stipulated judgment, Exhibit D, describes disputes between
21 plaintiffs, defendants, and guarantors, again, three defined terms that do
22 not include Kal-Mor or GFY.

23 Those disputes include the default on the First 100 line of
24 credit, the ownership of certain receivables, and the management of
25 personal property, the reasonableness of Omni's UCC's foreclosure

1 sale, and Omni's first priority security interest in certain real properties
2 that were or that were at that time or previously had been owned by First
3 100.

4 So the disputes between those parties as to those items were
5 waived, released, and dismissed with prejudice under that stipulated
6 judgment.

7 If you look at NRS 107.080, which deals with foreclosures
8 under deeds of trust, a prerequisite to enforcing a deed of trust is you
9 have a breach of the underlying loan obligation.

10 Those breaches were all waived when they entered into that
11 settlement agreement and the stipulation to dismiss the First 100 action.

12 No one is alleging any breach of the First 100 settlement
13 agreement at this point. And even if they were, First 100 had no interest
14 in the Kal-Mor properties at that time they could have pledged as
15 collateral under that security agreement or re-affirmed as collateral
16 under that security -- under that settlement agreement.

17 Let's see. Now with regard to Judge Boulware's ruling on the
18 Motion for Summary Judgment in federal court, I don't think it's fair to
19 say that he found that it was -- there were any material question of fact
20 or anything of that nature.

21 He simply refused to consider it. There was no argument on
22 the motion. I think his orders said something to the effect of we only
23 consider motions for summary judgment once under federal practice and
24 we file it again after discovery was complete.

25 And that's essentially what he said in Court. It's not as though

1 there was any analysis or discussion of the motion or any determination
2 made that would be binding on this Court.

3 Let's see. Mr. Hernquist made comments as to Kal-Mor
4 somehow agreeing that it could only pursue claims against Omni in
5 federal court. That's simply not true, Your Honor.

6 The First 100 settlement agreement to which Kal-Mor's not a
7 party includes that provision, that they can only go to federal court in the
8 event there was a dispute.

9 The Kal-Mor settlement agreement and the Kal-Mor stipulated
10 judgment say no such thing. In fact, they may actually say that you have
11 to go back to state court. I don't recall the specific language, but I know
12 for a fact it's different language that does not require that Kal-Mor go to
13 federal court to resolve anything.

14 And Judge Boulware, he did expressly find that he did not
15 have any jurisdiction to -- did not have jurisdiction over this case simply
16 by virtue of the fact that First 100 and Omni had agreed that the Court
17 would retain jurisdiction over their settlement.

18 THE COURT: What about appealability and notifying dollar
19 amount and as reasons why I shouldn't consider there to be a final
20 judgment?

21 MR. LARSEN: Okay, one, I don't think I've seen any authority
22 from Nevada at least that says that a stipulated judgment can't be
23 appealed.

24 There are limited instances in other states where we're -- the
25 courts have said yes, they can or no, it can't. I don't think that's

1 something that was addressed extensively in the briefing, but as I stand
2 here today, as I don't know whether the -- that could have been
3 appealed or not to be completely honest.

4 It makes sense that a stipulated judgment ordinarily wouldn't
5 be appealed. But in all other respects, that stipulated judgment meets
6 the qualifications to be a final judgment. It resolved everything that was
7 at issue in that case, left the parties with essentially the rights just to
8 enforce the settlement agreement.

9 In fact, the Court retained jurisdiction to address matters
10 arising out of the settlement agreement doesn't mean that it wasn't the
11 final judgment.

12 The fact that they try to amend that final judgment to increase
13 it or decrease it depending on what happened in the settlement
14 agreement, I don't think that renders it anything other than a final
15 judgment as well.

16 And, again, if you look at the settlement agreement itself --

17 THE COURT: I'm looking at that.

18 MR. LARSEN: -- and the stipulation, they both refer to that
19 judgment as a final judgment. I don't think that's by mistake.

20 So had there, you know, been some claim or defense that was
21 left unresolved, I would probably agree with it that it wasn't final
22 judgment, but that's not the case. It resolved everything, left them again
23 with just the right to enforce the settlement agreement.

24 THE COURT: So the Exhibit E to the opposition, you know,
25 the stipulated -- sorry, let me have a [indiscernible] here. The stipulation

1 and order for entry of final judgment, this is the one where on page 4,
2 paragraph 5, it referenced the Omni lien, right?

3 MR. LARSEN: It did, yes.

4 THE COURT: And then, Kal-Mor signed this. Shouldn't Kal-
5 Mor -- shouldn't there have been something in here reserving the rights
6 under the one action rule? Or is this kind of a gotcha like Omni claims
7 here?

8 MR. LARSEN: It's not a gotcha. Again, until the judgment
9 was entered a week later, there was no action rule -- no one action rule
10 defense to be had.

11 But this paragraph 5 specifically references liens in pending
12 lawsuits, administrative actions, and arbitrations, and litigation in which
13 First 100 has asserted --

14 THE COURT: It includes the lien that's the subject matter of
15 this proceeding, right?

16 MR. LARSEN: I don't think so, no. This has nothing to do
17 with the --

18 THE COURT: It was ruling to a different lien?

19 MR. LARSEN: Well, it references a -- liens arising under loan
20 documents, but that's not what's addressed in the paragraph. It
21 references liens and pending lawsuits, administrative action, arbitration
22 and litigation, which has nothing to do with the Kal-Mor properties.

23 THE COURT: I'm not sure. I'll have to take a look at that
24 closer.

25 MR. LARSEN: And at that point in time, I mean, as the Court

1 probably knows very well, First 100 has dozens if not hundreds of
2 lawsuits pending in various courts on quiet title claims.

3 THE COURT: Yeah, they've been in front of me on other
4 matters.

5 MR. LARSEN: Yeah, and in addition to that, at the time
6 I'm -- First 100 was also pursuing a multi-billion dollar claim against an
7 individual who had entered into a contract with them, on which they later
8 obtained a default judgment. They're still trying to enforce.

9 So there's a lot more history than the Kal-Mor properties. And
10 I think that's what's been addressed in that paragraph. So --

11 THE COURT: Might be ambiguous.

12 MR. LARSEN: I'm sorry?

13 THE COURT: It might be ambiguous.

14 MR. LARSEN: I don't think it is ambiguous, but --

15 THE COURT: All right, well, I'm going to take another look at
16 that in the context of --

17 MR. LARSEN: Okay.

18 THE COURT: -- the other documents I have. I think that's
19 pretty good. Anything else you needed to add to that?

20 MR. LARSEN: I'm just looking at my notes quickly.

21 THE COURT: All right.

22 MR. LARSEN: One last point. The Court, I think you touched
23 on this already during Mr. Hernquist's arguments, I'm not saying it was
24 Omni's intent to keep your security interest in these properties when
25 they signed the settlement agreement or stipulated to the judgment.

1 In all likelihood, that was the intent, but to come here and say
2 we didn't need to do that, it's not a defense to the one action rule or it
3 doesn't mean there wasn't a novation. And there's no requirement that
4 either novation or a one actual rule violation's intentional.

5 THE COURT: I understand that.

6 MR. LARSEN: I'll leave it at that.

7 THE COURT: So I assume both of you would prefer that I
8 assimilate your arguments today in connection with the briefing that I
9 already have and think about this carefully and then make a ruling from
10 chambers. I don't think it's -- I don't think you would -- let me put it this
11 way. I mean, there's a lot here to digest.

12 MR. LARSEN: Yes.

13 THE COURT: All right, and it would serve both of you better if
14 I have a little more time to think about this.

15 MR. LARSEN: I agree, that's appropriate, Your Honor.

16 THE COURT: All right, so I'll take it under advisement.
17 We'll -- I will do my very best to have a decision out in about a week.

18 MR. LARSEN: Okay.

19 THE COURT: All right?

20 MR. LARSEN: Thank you.

21 THE COURT: All right.

22 MR. HERNQUIST: Than you, Your Honor and thank you
23 everyone for your time. I know this was a long one. We appreciate you.

24 UNIDENTIFIED SPEAKER: No problem.

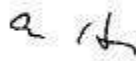
25 THE COURT: All right, thank you, guys. All right, Court is

1 adjourned.

2 [Proceedings concluded at 11:45 a.m.]

3 * * * * *

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5
6 ATTEST: I do hereby certify that I have truly and correctly transcribed the
7 audio/video proceedings in the above-entitled case to the best of my ability.

8 

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11 Chris Hwang
12 Transcriber
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RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

KAL-MOR-USA, a Nevada
limited liability company,

Plaintiff,

vs.

OMNI FINANCIAL, a foreign
limited liability company; FIRST
100, LLC, a Nevada limited
liability company; DOES I
through X and ROES ENTITIES
I through X;

Defendants.

CASE#: A-17-757061-C

DEPT. II

BEFORE THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE
WEDNESDAY, MARCH 20, 2019

RECORDER'S TRANSCRIPT OF HEARING
MOTION FOR RECONSIDERATION OF ORDER GRANTING PARTIAL
SUMMARY JUDGMENT

APPEARANCES:

For the Plaintiff:

BART K. LARSEN, ESQ.

For the Defendant:
(Omni Financial, LLC)

BRIAN J. PEZZILLO, ESQ.
ROBERT HERNQUIST, ESQ.

RECORDED BY: DALYNE EASLEY, COURT RECORDER

1 Las Vegas, Nevada, Wednesday, March 20, 2019

2
3 [Case called at 9:16 a.m.]

4 MR. LARSEN: Good morning, Your Honor, Bart Larsen for
5 Kal-Mor-USA.

6 MR. PEZZILLO: Good morning, Your Honor, Brian Pezzillo,
7 Robert Hernquist for Omni.

8 THE COURT: All right, very good. So this is Omni's Motion
9 for Reconsideration and Order Granting Partial Summary Judgment.
10 Thanks for the papers and the extra exhibits.

11 I did note that there was an additional evidence provided
12 regarding communications between Kal-Mor and Omni prior to the
13 settlement and stipulated judgment. And there's some indications of
14 what their intent was.

15 Let's go ahead and hear argument on this?

16 MR. PEZZILLO: Certainly, Your Honor. It's actually -- it's a
17 very narrow issue.

18 THE COURT: Okay.

19 MR. PEZZILLO: And we're here only on the issue of the --

20 THE COURT: Novation or accord and satisfaction.

21 MR. PEZZILLO: Correct.

22 THE COURT: All right.

23 MR. PEZZILLO: So I would just note that Section I of the
24 opposition of brief notes starts talking about the one action rule. Now,
25 obviously, we're not here for that and no motion's been filed on that.

1 With regard to the --

2 THE COURT: And I made no ruling on that last time on the
3 one action rule.

4 MR. PEZZILLO: Right.

5 THE COURT: Okay.

6 MR. PEZZILLO: Your Honor, basically, there's three reasons
7 that the Motion for Partial Summary Judgment should not have been
8 granted. And we request that you reconsider that decision.

9 THE COURT: Okay.

10 MR. PEZZILLO: First is standing. What standing does Kal-
11 Mor have to come before the Court and even ask for you to look or
12 interpret the agreement between Omni and First 100?

13 This is basically a made-up dispute because no dispute exists.
14 There are only two parties to this agreement, Omni and First 100. Kal-
15 Mor is expressly noted in that agreement as not being a third-party
16 beneficiary and not deriving any benefit, legal or equitable, out of the
17 agreement.

18 So the very first threshold question is how can Kal-Mor come
19 in and attack the agreement collaterally? And the answer is they can't.
20 They don't have any grounds to come in and start asking, well, the intent
21 of Omni, the intent of First 100.

22 They've admitted they never saw the agreement until months
23 after it was signed. They played no role in the negotiations of the
24 settlement agreement that was the basis of their motion. So the simple
25 answer is, Your Honor, they should never been able to bring this motion

1 to begin with.

2 And there's nothing for the Court to rule upon. I mean, this
3 basically goes to the heart of the Court's power and jurisdiction. If
4 there's no actual dispute or controversy to present to the Court, what is
5 there to rule on? Nothing.

6 And so --

7 THE COURT: Well, the -- what there is to rule on is the effect
8 of a settlement whether it discharged the deed of trust on their property.
9 So they have a concern in the effect of the settlement agreement.

10 MR. PEZZILLO: Your Honor, they can have a concern, but
11 what they can't do is collaterally attack the meaning of the agreement.
12 They're not a party to it.

13 We cited a federal court case out of the District of Nevada that
14 says in order to attack an agreement, you either have to be a party to
15 the agreement or you've got to be a third-party beneficiary to the
16 agreement. They're neither.

17 I understand they want the agreement to have an effect upon
18 their rights, but it just doesn't. I mean, they have other remedies and
19 they've pled them.

20 And they -- I'm sure they're going to litigate those, but novation
21 just isn't one of them as a matter of law. They just don't have the right to
22 come in and start collaterally attacking an agreement they know nothing
23 about by their own admission that they weren't a part of, didn't know
24 anything about, and weren't present for the negotiations of it.

25 So right there, we don't even get past that first threshold issue

1 in that they're an improper party to bring this issue before the Court.

2 The second issue, Your Honor, is and I -- well, let me add one
3 more thing to that. They didn't contest that. They don't even address
4 that issue. We brought that up in our motion. It's unaddressed.

5 They really don't deny that that's the state of law in Nevada
6 that you have to be a party or a beneficiary to attack an agreement.

7 If they -- if the reverse were true, the law was still liberal for
8 third-parties from attacking the agreement, talk about the floodgates of
9 litigation.

10 That means any contract between any parties could be
11 attacked by anybody who comes in and says, well, theoretically, that
12 might affect me. That isn't the standard.

13 Second, Your Honor, with novation, it's -- I won't belabor the
14 point. We've got four requirements to show a novation. The very first
15 issue, the very first prong of that analysis is an existing and valid
16 agreement. Well, Your Honor, we don't have an existing and valid
17 agreement.

18 It is undisputed. It's in actually your findings of fact and
19 conclusions of law after the last hearing, which is way back on August
20 the 24th, I think, is when we were here arguing this.

21 And it's also admitted by Kal-Mor in the Motion for Summary
22 Judgment and it's admitted in the Opposition here today that the
23 underlying note, the note between Omni and First 100, was breached.

24 At the time the settlement agreement was entered into, the
25 note was breached. There is no valid and existing agreement upon

1 which a novation can occur. You have to have that first element.

2 And, Your Honor, we cited a number of cases to that effect
3 that directly address that issue. One of them was In re: Cohen
4 [phonetic]--

5 THE COURT: Uh-huh.

6 MR. PEZZILLO: -- which stated where the original contract
7 has already been breached, there cannot be a novation because
8 previously valid obligation did not exist at the time that the new contract
9 was made. A party injured by the breach of a novation may only seek
10 relief under the substitute agreement.

11 And I'm going to come back to that case, because it ties into
12 one of the cases that Kal-Mor cited.

13 THE COURT: Yeah, and I studied all that law and I know that
14 you had a lot of authority on that point. It just seems so inconsistent with
15 what I had learned over the years on novation, that I've been having a
16 very difficult time trying to accept that and trying to determine if there are
17 exceptions to those cases, because it is inconsistent with what I had
18 believed.

19 MR. PEZZILLO: Well, and Your Honor, I'll be honest with you,
20 I -- when I read that for the first time when I was very first looking this
21 over, it struck me as odd because I thought, well, this is if you think
22 about settlement agreements, that sure seems at odds with that.

23 But when you actually look at the law, it's not. It's the
24 difference between an accord and an accord in satisfaction. And those
25 are two different items.

1 Typically, we don't have the factual scenario we have here
2 today. Here, there is no dispute the underlying agreement has been
3 breached. It's a finding of fact you put into your order.

4 THE COURT: Uh-huh.

5 MR. PEZZILLO: Kal-Mor's admitted it. We certainly agree,
6 the underlying note was breached.

7 Normally, that isn't the case. Normally, there's an ongoing
8 dispute that says, well, is there a breach, isn't there a breach? And that
9 determination isn't made.

10 So when parties enter into a later agreement, there very well
11 may be an accord in satisfaction or a novation because there's no
12 dispute there because the -- whether or not the original agreement was
13 breached is still at issue.

14 And as part of the settlement, people don't want to litigate it.
15 Here, we don't have to worry about that because everybody has
16 stipulated to it. It was breached.

17 Nevada has relied on Am.Jur.2nd. And it clearly states if
18 there's a prior agreement and it's been breached, you cannot have a
19 novation.

20 We also cited, and I know you just stated you've seen the
21 Washer Strong [phonetic] case. This is the exact same thing that if you
22 cannot have a novation, if the underlying agreement is breached.

23 I do want to address the two cases that Kal-Mor cited in their
24 opposition. They say, well, the Supreme Court of Nevada has
25 addressed this and said sure you can.

1 But, Your Honor, if you look at those two cases --

2 THE COURT: Uh-huh.

3 MR. PEZZILLO: That is not what either one of them stood for.

4 In fact, not even remotely close do they stand for that proposition.

5 The first case that they cited to, Your Honor, was both cases
6 are actually from 1959. And the first case they cited to dealt with a
7 lender. They had a lending agreement that was personally guaranteed
8 by a third-party.

9 Parties of the first agreement said, well, we want to enter into
10 a new agreement and they did. There was a novation. No breach, no
11 allegation of a breach.

12 The issue in that case is what happens to personal guaranty.
13 And the Supreme Court answered that as you would expect them to say
14 is if you -- contract is the subject of a novation, personal guaranty goes
15 away. It's a brand new agreement. That's all that case stood for.

16 Your Honor, the -- and I would note they cited a block quote
17 out of that and attributed it to the Nevada Supreme Court. If you look at
18 that quote, that's not a Nevada Supreme Court quote. That came from
19 the Supreme Court of Indiana. And it came from the very recent case
20 entered on June 15th of 1888. It's an 1800's case.

21 THE COURT: Okay.

22 MR. PEZZILLO: And Your Honor --

23 THE COURT: Well, they found it important enough to cite it --

24 MR. PEZZILLO: They did for --

25 THE COURT: -- 70 years later.

1 MR. PEZZILLO: They did for the very proposition that a
2 personal guaranty goes away in the event of a novation. It's not the
3 case here. That's not at issue.

4 The second case, Your Honor, dealt -- was the Walker versus
5 Shrake case. And again, counsel stated that, well, after a breach --

6 THE COURT: And in a way, there's some connection here.
7 Kal-Mor's not a personal guarantor, but it is -- its property was pledged
8 to satisfy the debt. It's kind of similar to a guarantor, right?

9 MR. PEZZILLO: It is not. It's not even remotely close.

10 THE COURT: Okay.

11 MR. PEZZILLO: And, Your Honor, the reason being Kal-Mor's
12 property was not pledged. First 100's property was pledged. And
13 then --

14 THE COURT: Well, then, Kal-Mor obtained it, right?

15 MR. PEZZILLO: And then Kal-Mor obtained it --

16 THE COURT: Right.

17 MR. PEZZILLO: -- subject to the deed of trust that was public
18 record. So that's money -- that would mean, Your Honor, that
19 everybody -- I know they tried to argue this involuntary guarantor. So
20 everybody who purchases real property is now an involuntary guarantor
21 of prior debt? Of course not.

22 Your Honor, if you take property, you run a title report. Why?
23 You want to know what you're taking -- what encumbrances on that
24 property that you're taking subject of.

25 So when they went into this, they knew that there was -- that

1 they were going to take it subject of Omni's deed of trusts because
2 Omni's deed of trust were recorded. They were right out there for the
3 public record. They did what you're supposed to do. So it really is not
4 similar to a guarantor really in any way.

5 And in the Shrake case, Your Honor, it was kind of interesting.
6 And the reason I brought up that it was from 1959 is because in Shrake,
7 there was a judgment entered.

8 The person got sued. He really didn't defend. The Court
9 enters money judgment against him. He goes to the judgment creditor
10 or lender in this case and says I'll give you a promissory note for double
11 the judgment if you agree to release it.

12 The Court, sure, we'll release -- we'll record a satisfaction of
13 judgment if you give set note for double. Sure, great deal.

14 They didn't record the satisfaction of judgment. And, Your
15 Honor, the court in a subsequent case, the court said well, that's a
16 novation of the judgment, because you agreed to take the promissory
17 note in lieu of the judgment. There was no breach.

18 The individual who gave the promissory note didn't have an
19 obligation to pay because the other side didn't -- record their satisfaction
20 of judgment like they were supposed to.

21 One other thing I would note in there, Your Honor, being from
22 the 50's, we've got newer cases that actually address novation and set
23 forth the four details or the four prongs of it.

24 The Supreme Court -- I don't think they would use that term
25 again, because they were actually using the term novation and

1 satisfaction of judgment a little bit interchangeably. And I would submit
2 those are different things.

3 But adopting the more modern day case law from Nevada, as
4 well as every other jurisdiction, I don't know that you can consider a
5 judgment a valid agreement. It's not really an agreement. It's the Court
6 making a ruling.

7 So the only authority that exists and has been cited clearly
8 states if the original agreement has been breached, you cannot have a
9 novation.

10 And in this case, there is no dispute. The original note
11 between Omni and First 100 was, in fact, breached. Therefore, you
12 cannot have a novation in this case.

13 And then, Your Honor, the third issue that we get into is if you
14 can get past standing, if you could find that the Court has jurisdiction to
15 issue a ruling, and I would submit that really the Motion for Partial
16 Summary Judgment or the order granting it amounts to an advisory
17 opinion, because the two parties to the agreement don't have the
18 dispute.

19 If you get to the third prong, it's the intent to the parties. And,
20 Your Honor, I would focus on page 13 of the opposition brief, because I
21 thought that that really kind of said it all about what Kal-Mor's position in
22 this is.

23 Here's what they said. Whether Omni intended to foreclose
24 on the Kal-Mor properties after entering into the Kal-Mor settlement or
25 the First 100 settlement is completely irrelevant.

1 Well, Your Honor, as a matter of law, we know that
2 statement's wrong, because intent is everything when you deal with a
3 novation.

4 They continued on and they take a little --

5 THE COURT: Well, I actually agreed with their statement in
6 this respect that if the language and the terms of the four corners of the
7 instrument are clear and unambiguous, then the prior subjective intent of
8 the parties is not relevant, because the best reflection of the parties'
9 intent is what they actually wrote and signed.

10 MR. PEZZILLO: Only in the situation, though, Your Honor,
11 where somebody was affected by that agreement.

12 Let me give you the 9th Circuit in the case of Fanucchi, that
13 we cited, addressed that very squarely and said oftentimes words are an
14 imperfect medium to convey the intent of the parties.

15 THE COURT: Uh-huh.

16 MR. PEZZILLO: If the parties understand what they're talking
17 about, the court should enforce that intent.

18 And that's very clear. Your Honor, this happens all the time, a
19 simple hypothetical. You're a judge. You make the big bucks. We all
20 know that.

21 You decide you want a fancy sports car. I say I've got one.
22 I'm going to sell it to you. You pick the car out. We agree you're going
23 to buy a red Maserati and we enter a new agreement.

24 We go back in and reduce it to a writing. And I put all the
25 terms on there and Judge Scotti purchasing a black Maserati, X number

1 of dollars.

2 You drive off in your red car. Oops, my written agreement
3 said black. Does that mean we don't have an enforceable agreement?
4 Of course not. It would be a mutual mistake. It's an error.

5 The intent of the parties is clear and the contract is
6 enforceable. A third-party couldn't come in and collaterally attack that
7 and say, geez, I really wanted that red car, so I'm going to override the
8 express intent of the parties because there was a drafting error or
9 because it just wasn't done properly.

10 It still comes down to the intent of the parties. I agree with
11 what Your Honor's saying. You absolutely go to the four corners of the
12 document if there's a dispute between the two parties to that agreement.

13 In this case, we don't have that. And what we've got, and in
14 fact, Your Honor, I would submit to you, if you search any of the records,
15 the settlement agreement was entered into in 2017, January, I believe.
16 There's no -- there are no cases pending between Omni and First 100
17 where either party's disputing the meaning of this agreement.

18 And if you look, again referencing that 9th Circuit case, the
19 court went on to say what do you look at? The actions of the parties
20 after the agreement was entered into. That is the best determination of
21 what the intent of the parties was.

22 Now, here, you can look at the intent of the parties.
23 Everybody knows Omni intended to foreclose. In fact, in the opposition,
24 Kal-Mor acknowledges that.

25 Kal-Mor says that they, in fact, Kal-Mor's never argued that

1 Counsel didn't even mention that argument today, Your
2 Honor, and because that argument clearly doesn't apply. The key
3 feature of an executory accord is that the obligated parties release is
4 conditional, that that obligated party is not released until it has performed
5 under the new agreement.

6 And that's clearly not the case here with the First 100
7 settlement agreement. What the First 100 settlement agreement says is
8 that Omni immediately and unconditionally released its claims against
9 First 100.

10 Omni gave up the right to enforce the note. That note is the
11 indebtedness for which the Kal-Mor properties and 20 other properties
12 were pledged as collateral.

13 Without the ability to enforce that note, Omni has no ability to
14 foreclose on any deed of trust that was recorded against any of these
15 properties. And that's the basis on which the Court granted Kal-Mor's
16 Motion for Summary Judgment back in September of last year.

17 The other arguments that counsel's made this morning, those
18 are the same exact arguments they made when we were here last
19 August for the hearing on a Countermotion for Summary Judgment. It's
20 being re-hashed and presented to the Court again.

21 The standing argument, Kal-Mor has never claimed standing
22 to enforce the agreement. We're not attacking the agreement.

23 The agreement has a legal effect as to the relationship
24 between Omni and First 100 that affected that note that existed for which
25 the Kal-Mor properties were pledged as collateral.

1 The settlement agreement replaced that note with this new
2 joint venture that Kal-Mor and First, or excuse me, that Omni and First
3 100 embarked on where Omni may recover a lot more money than it
4 would have recovered under the note. And that was the basis on which
5 the Court found that there was a novation.

6 There's no ambiguity in the First 100 settlement agreement. I
7 mean, Kal-Mor doesn't need to have standing under the settlement
8 agreement in order to have its properties released for missing voluntary
9 guaranty.

10 And if that was the case, I mean, no guarantor would ever,
11 you know, be released under a novation where there's a new agreement
12 between a lender and a borrower.

13 And we also have this argument they made that a novation
14 can't [indiscernible] for a default. Well, that's clearly not the law in the
15 state of Nevada.

16 I mean, we've cited those two cases in which the Nevada
17 Supreme Court clearly found that there was a novation after there had
18 been a default in the original agreement.

19 Yeah, those are old cases granted from 1959, but they've
20 never been overruled. They're still binding precedent. I don't
21 know -- respectfully, I don't know if the Court has discretion to go outside
22 what the Nevada Supreme Court has already said with regard to
23 novation on those issues.

24 THE COURT: Yeah.

25 MR. LARSEN: And the lost note affidavit they brought up,

1 The settlement agreement replaced that note with this new
2 joint venture that Kal-Mor and First, or excuse me, that Omni and First
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20 never been overruled. They're still binding precedent. I don't
21 know -- respectfully, I don't know if the Court has discretion to go outside
22 what the Nevada Supreme Court has already said with regard to
23 novation on those issues.

24 THE COURT: Yeah.

25 MR. LARSEN: And the lost note affidavit they brought up,

1 again, that just confirms that the settlement agreement replaced the
2 indebtedness that was owed under the note with this new joint venture
3 that they've embarked upon.

4 The indebtedness over the note went from 3 and a half million
5 to 4.8 million with an additional 1.2 million they could recover depending
6 on what happened with properties in Florida and what not.

7 And it's a completely different agreement than what was
8 originally placed when the Kal-Mor properties were pledged as collateral
9 by First 100.

10 So, again, I -- the Court got it right the first time, Your Honor.
11 There was clearly novation. The settlement agreement is not in way
12 ambiguous.

13 This evidence of intent that they're talking about, again, is
14 extrinsic evidence. It's not appropriate for consideration on these
15 issues.

16 They haven't identified any term in the settlement agreement
17 that's actually ambiguous. Unless the Court has questions, I will leave it
18 at that.

19 THE COURT: So ordinarily when you have an obligor and
20 obligee that are arguing over the effect or the validity of a contract, the
21 Rule's pretty clear, you can't look to, you know, the subjective intent of
22 the parties prior to the execution of the contract unless you believe that
23 there's some ambiguity. And then, you can look at that, you know, the
24 prior negotiations to resolve the ambiguity, all right.

25 Is it different here where you don't have one of the parties to

1 the contract? You have a third-party that is arguing that the contract has
2 a different meaning than what's written in the papers. Can that
3 third-party -- is it right for that third-party to ignore the negotiations
4 leading up to the contract?

5 Because there, the issue really isn't what are the obligations
6 and rights of the two parties to the contract. The issue is is it novation or
7 is it accord, right?

8 So what I'm -- I guess what I'm leading up to is what is the
9 Court's focus in determining whether it's a novation and accord? Is it still
10 what's in the four corners of the instrument? Or does the Court also
11 need to look at the negotiations leading up to that contract?

12 MR. LARSEN: It's still the four corners of the agreement,
13 Your Honor and I'll tell you why. It's because nobody is saying that the
14 agreement means anything other than what it says.

15 What Omni is saying is we didn't anticipate the legal effect of
16 that agreement when we signed it. It's not that there's any ambiguity in
17 the agreement or that anybody meant something other than what they
18 wrote down on paper and signed.

19 I mean, they spent three months negotiating this contract.

20 THE COURT: Uh-huh.

21 MR. LARSEN: It's 20-some-odd pages long. They were both
22 represented by perfectly competent law firms. They spent a lot of time
23 and effort on this matter.

24 And, again, nobody's saying it means anything other than
25 exactly what it says. I mean, we're almost two years into this case.

1 They've never identified any ambiguity in that contract.

2 All they said is, well, you know, we didn't expect it would have
3 the legal effect that it did when we signed it, which isn't grounds to open
4 the door to considering extrinsic evidence and negotiations and all of
5 that would bring in to play in the case. The terms of the contract are
6 perfectly clear.

7 THE COURT: Yeah.

8 MR. LARSEN: The Court has already held they're not
9 ambiguous.

10 THE COURT: The one issue I don't remember us addressing
11 was this issue of whether the novation cannot exist because there is no
12 longer an existing valid contract.

13 And Omni has taken the position that if there's a claim for
14 breach, then you no longer have an existing valid contract. I think that's
15 what your argument -- or at least where the parties have agreed that
16 there was a breach, there's no longer an existing valid contract.

17 So in looking at that element for novation, number one, there
18 must be an existing valid contract. Does that mean that there have not
19 been any claims for a breach? Or does that mean the parties have not
20 agreed there was a breach? What's your -- what would be your
21 definition of an existing valid contract?

22 MR. LARSEN: Right, in this case, the note clearly was an
23 existing and valid contract at one point. That note didn't cease to exist
24 or become invalid because it was breached.

25 I mean, Omni has rights to enforce note. And its rights didn't

1 go away when First 100 defaulted under the note. I mean, the contract
2 remains valid and enforceable notwithstanding the fact that it's been
3 breached.

4 THE COURT: Yeah.

5 MR. LARSEN: So --

6 THE COURT: But you do acknowledge there are cases out
7 there, a lot of cases, that say that you don't have an existing valid
8 contract if the contract has been breached?

9 MR. LARSEN: There are cases to that effect --

10 THE COURT: I thought those were really strange cases, but
11 that's what several of them have said.

12 MR. LARSEN: There are cases from other jurisdictions to that
13 effect. And it may be that Nevada is somewhat of an outlier on that
14 issue, but we have clear Nevada Supreme Court precedent in which the
15 Court has found that there was a novation after there was a breach.

16 And again --

17 THE COURT: Right.

18 MR. LARSEN: -- I think it's controlling precedent. It's from
19 1959, but it has not been overruled. There are no newer cases that
20 follow this line of reasoning that there can't be novation if there had been
21 a breach.

22 THE COURT: Thank you.

23 Let's have reply. And answer counsel's question on if this is
24 not a novation, and it's not an executory accord, what is it?

25 MR. PEZZILLO: Your Honor, it would be an accord. It's not

1 an accord in satisfaction. It doesn't replace the prior agreement. It's a
2 settlement agreement. It's an accord.

3 And the difference between the two, and this has been
4 articulated in both the Nevada Supreme Court cases. It's dealt with at
5 length in the In re: Cohen case, the difference between the two is if it's
6 an accord in satisfaction, then it's essentially that's the same as a
7 novation. The first agreement ceases to exist.

8 And if there's a breach of the second agreement, then you're
9 limited to enforcing the terms of that second agreement that has been
10 breached.

11 In an accord, you have a settlement agreement. And if it's
12 been breached, you have an option. You can enforce the terms of the
13 original agreement or the terms of the second agreement that you've
14 entered into.

15 I've had that happen numerous times where somebody enters
16 into a settlement agreement and you're actually -- you get two options.
17 And they breach the settlement, but it wasn't meant as a novation, so
18 you actually still have your rights under the original contract. It happens
19 every day. And so, that there's very clear difference.

20 I want to really focus, Your Honor, on the facts of these two
21 cases that counsel just said.

22 THE COURT: Right.

23 MR. PEZZILLO: The Supreme Court has clearly said.

24 THE COURT: Right.

25 MR. PEZZILLO: Your Honor, the fact -- he didn't talk about

1 the facts of the case. And that's because neither case stands for the
2 proposition that you can have a novation after a breach.

3 In the Shrake case, which is the second case they cited, there
4 was no breach. It was undisputed. There was no breach of the original
5 agreement, which was the judgment in that case.

6 It was the second, the new agreement that was breached.
7 That has no effect on a novation. If you breach the second agreement in
8 a novation, you sue for breach of contract. It does not affect the
9 formation of a novation. Not even remotely similar to our cases here.

10 And the first case, Your Honor, dealt with that scenario of what
11 happens to a personal guarantor? That's what the court focused on.
12 The court made absolutely no finding regarding what happens, can you
13 have a novation if the first agreement's breached because in that case,
14 again, there wasn't a breach. So they had no reason to address it and
15 they didn't.

16 Honestly, it would be a case of first impression of that. I
17 looked. There -- I saw those two cases. They talk about novation, but
18 they do not reach the issue we have.

19 There's precious few cases that actually do. However, when
20 you look at the bankruptcy case, when you look at the Am.Jur., those
21 cases squarely address the issue.

22 Can a novation exist when you the original contract is
23 breached? The answer is no. You can have an accord. You cannot
24 have an accord in satisfaction because the original agreement's already
25 been breached. You have the right to breach of contract rights at that

1 time, but the contract had already been breached.

2 With regard to the -- this notion, Your Honor, of intent, he
3 keeps saying subjective intent, subjective intent. Your Honor, I'm not
4 even -- number one, I'm not even worried about subjective intent.

5 Objective intent, what have the parties done? When it came
6 time for Omni to foreclose on deeds of trust, First 100 helped them. If
7 the second agreement was intended to replace the first, they wouldn't
8 have done that.

9 And second, Your Honor, we've talked a lot about and
10 counsel's talked a lot about what's in the settlement agreement. What's
11 not in it?

12 Perhaps that speaks much louder. Is there anywhere in that
13 settlement agreement a waiver of Omni's rights to enforce its deeds of
14 trust? No.

15 There's nothing that prohibits them from doing that and there
16 wouldn't be. Omni, or I'm sorry, First 100 had already deeded away the
17 properties Kal-Mor has. It would have been superfluous to have thrown
18 that into the settlement agreement. And so, that's not in there. There's
19 no waiver.

20 And, additionally, Your Honor, the statute of fraud would come
21 into play with that as well on the release of those -- of real property in
22 that we don't have that here. The object of intent is very clear from the
23 actions of the parties.

24 And I go back, Your Honor, because you asked a very
25 pertinent question, what do you look at? Do you look at the four corners

1 of the document or do you look at the intent of the parties?

2 Well, Your Honor, when it's the parties to the agreement who
3 have a dispute, you look to the four corners of the document because
4 that's the best evidence.

5 When the two parties don't have a dispute, when they're not
6 arguing about what the contract means, you look to their intent because
7 if they use the wrong word, you don't overrule their intent simply
8 because of whatever the case might be. Inartful drafting, they made a
9 mistake.

10 In my hypothetical, Your Honor, do we not have an agreement
11 that I sold you a car because I wrote the wrong word down? No, we can
12 fix that. The intent of the parties is clear. Under counsel's theory, you
13 and I don't have an agreement.

14 Now what court would ever hold that we don't have an
15 agreement where there's no dispute? You bought a red car. I sold you
16 a red car. We agreed on all the terms. We just didn't write it down
17 properly.

18 That's this case, Your Honor. And would a third-party be -- in
19 my hypothetical, could a third-party come in and attack or sale
20 agreement? Of course not.

21 Any more than Kal-Mor can come in and attack this
22 agreement. And I go back, Your Honor, to the 9th Circuit. And they said
23 and I'll wrap up here very quickly.

24 THE COURT: No, it's okay.

25 MR. PEZZILLO: This rule of practical construction is

1 predicated on the common sense concept that actions speak louder than
2 words. Words are frequently, but an imperfect medium to convey
3 thought and intention.

4 When the parties to a contract perform under it and
5 demonstrate by their conduct they know what they are talking about, the
6 court should enforce that intent. That's this case, Your Honor.

7 THE COURT: Which 9th Circuit case are we referring to? I'm
8 looking at your brief.

9 MR. PEZZILLO: It's on page 14, line 7, Fanucchi versus Limi
10 Farms.

11 THE COURT: Uh-huh.

12 MR. PEZZILLO: It's from 2003.

13 THE COURT: Yeah, I have that here. All right, thank you.

14 MR. PEZZILLO: And, Your Honor, counsel stated one
15 other -- one additional fact that there's never been an issue of ambiguity.
16 Your Honor, actually, back in August, ambiguity was briefed extensively
17 on the Motion for Summary Judgment and the opposition to it.

18 And examples were shown, and in fact, we did a Rule 56
19 request to resolve any ambiguity. So that is before the Court. It was
20 before the Court.

21 THE COURT: Uh-huh.

22 MR. PEZZILLO: So to say that we've never claimed that, I
23 mean, frankly, I don't know you could not find there to be an ambiguity if
24 the two parties to the contract agree it means one thing and a third-party
25 says it's something else.

1 Well, even if you look at it, flip Rule 56 around. Look at all of
2 the facts in the light most favorable to Kal-Mor as the opposite of what
3 you should be doing.

4 But if you do that, what do you end up with? A question of
5 fact. They have their opinion. It differs from the two parties to the
6 contract. It differs from their actions.

7 They didn't bring any evidence of -- from First 100 or Omni
8 that would support their claim or that they think the agreement means
9 something other than how they've acted according to it. You'd be left
10 with a question of fact that would be subject to discovery.

11 So at a minimum, you -- even if you wanted to look at this and
12 say, well, I think the words say one thing. The action might say
13 something else. First 100 thinks it's something else. That's a question
14 of fact.

15 It should go to discovery. It should be flushed out and then
16 brought back before you, but it certainly cannot be ruled as a matter of
17 law that by clear and convincing evidence the intent of the parties has
18 been shown by a third-party.

19 And just to hammer one thing home on that, Your Honor, the
20 agreement specifically says except as expressly set forth herein, nothing
21 in the agreement shall be construed to give any person or entity, e.g.
22 Kal-Mor, other than the parties and their permitted successors and
23 assigns any legal or equitable right, remedy, or claim under or with
24 respect to this agreement.

25 Your Honor, that was originally submitted as Exhibit A-4. It's

1 on page 20, Section 20F of our original Opposition. And that brings me
2 to one point and I'll wrap up for you.

3 THE COURT: Uh-huh.

4 MR. PEZZILLO: Counsel made a very interesting statement
5 and I really want to pick up on it. He said that --

6 THE COURT: Well, let me just -- well, there's obviously a
7 difference between whether a party can step in and enforce the terms of
8 an agreement and whether the legal effect of the agreement has, you
9 know, exonerated a deed of trust on your property. So those are two
10 separate issues.

11 MR. PEZZILLO: There is, Your Honor, but --

12 THE COURT: I mean, obviously, if the parties had agreed
13 that, you know, we're doubling the size of the note and the deed of trust
14 would still be liable or we're changing, you know, the term from you have
15 to pay over 10 years, you have to pay in two weeks, you know, I think
16 the obligor or the, you know, the holder of the property would have an
17 argument on what the legal effect is, even though he can't come in and
18 change the terms of the agreement.

19 MR. PEZZILLO: They couldn't. And Your Honor, obviously,
20 that's happened here. And I know you know that, because you did so
21 much construction law and that has happened in the past.

22 THE COURT: Yeah.

23 MR. PEZZILLO: That doesn't mean the deed of trust would
24 go away. It means arguably, the new party could say they're only prime
25 to a certain extent. And you can -- and those types of arguments have

1 been raised that it hasn't raised here in any detail. It still wouldn't wipe
2 out the deeds of trust.

3 And I think it's very important that when counsel said they've
4 never claimed to have any standing to enforce or attack the agreement,
5 well, that's what they're doing, Your Honor. They're trying to enforce this
6 agreement in a manner that benefits them.

7 They're enforcing it. That's what this is. And they've just said
8 --

9 THE COURT: Okay.

10 MR. PEZZILLO: -- they're not claiming to have standing to do
11 that. So at this point, they can't really go with a novation argument.
12 They've got a lot of arguments, Judge.

13 THE COURT: Okay.

14 MR. PEZZILLO: I mean, counsel's very good. He's got a lot
15 of other arguments.

16 THE COURT: Yeah.

17 MR. PEZZILLO: But not novation.

18 THE COURT: All right.

19 MR. PEZZILLO: Thank you.

20 THE COURT: Thank you. No, I appreciate that. I can't rule
21 right now. I'm going to take it under advisement, counsel. If I want
22 further argument, I'll -- I might ask for more briefing on a couple issues,
23 but I'll let you know.

24 MR. PEZZILLO: Okay.

25 THE COURT: All right?

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MR. LARSEN: Certainly.

MR. PEZZILLO: Thank you, Your Honor.

THE COURT: Thank you, appreciate it. Yeah, especially in light of the argument, I want to take a closer look at those Nevada Supreme Court cases. Thank you.

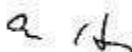
MR. LARSEN: Thank you, Your Honor.

THE COURT: Thank you.

[Proceedings concluded at 9:52 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Chris Hwang
Transcriber