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)

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities, as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Parent Corporation for Kal-Mor-USA, LLC.

   None.

2. Publicly held company that owns 10% or more of the party's stock:

   None.

3. Law firms who have appeared or are expected to appear for Kal-Mor-USA, LLC (including proceedings in the district court):

   Kolesar & Leatham and Shea Larsen PC

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I.

ROUTING STATEMENT

Omni's classification of this appeal is incorrect. The District Court did not grant partial summary judgment in favor of Kal-Mor based on Kal-Mor's collateral attack of the First 100 Settlement (as defined below), but rather based on Kal-Mor's status as the owner of the real properties in which Omni claimed security interests as collateral for its loan to First 100. Specifically, Kal-Mor successfully argued that the First 100 Settlement explicitly and unequivocally discharged and replaced First 100's loan obligation to Omni with the materially different obligations set forth therein. As such, the First 100 Settlement was a novation of First 100's loan obligation that extinguished any security interest Omni could claim in the real properties at issue as collateral for that loan. Novation is not an issue of first impression for Nevada, nor are the effects of novation on the underlying security of the original agreement. *Williams v. Crusader Disc. Corp.*, 75 Nev. 67, 334 P.2d 843 (1959). As such, this appeal does not carry with it the presumptive retention by the Nevada Supreme Court as claimed in the Opening Brief.

II.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Did the District Court properly grant Kal-Mor's Motion for Partial Summary Judgment seeking judgment as a matter of law on Kal-Mor's fourth cause

of action for declaratory relief and fifth cause of action for quiet title based on the fact that the settlement agreement between Omni Financial, LLC and First 100, LLC was a novation of a loan obligation owed by First 100 that resulted in the discharge and release any security interest Omni Financial, LLC could claim in the real properties at issue as collateral for that loan obligation;

B. Whether Kal-Mor's Motion for Partial Summary Judgment was adequately supported;

C. Whether the District Court correctly denied Omni Financial, LLC's request to conduct discovery pursuant to NRCP 56(d);

D. Whether any errors alleged by Omni Financial, LLC were harmless based on Kal-Mor's independent alternative argument that Nevada's one-action rule precluded Omni Financial, LLC from enforcing any security interest or lien in the real properties at issue.

III.

STATEMENT OF THE CASE

This matter arises from Respondent Kal-Mor-USA, LLC's ("Kal-Mor") purchase of nine (9) single-family residential properties (as further defined below, the "Kal-Mor Properties") from First 100, LLC's ("First 100") in 2015. First 100 frequently purchased and resold residential properties acquired through homeowner association ("HOA") assessment lien foreclosure sales conducted pursuant to NRS

Chapter 116. [JA Vol. VI, 001310]. Kal-Mor purchased dozens of such properties from First 100, including the Kal-Mor Properties at issue here, which were purchased in or around April 2015. [JA Vol. III, 000592-603]. In selling the Kal-Mor Properties, however, First 100 concealed from Kal-Mor that it had previously pledged the Kal-Mor Properties as collateral for a loan (as further defined below, the "Omni Note") First 100 received from Appellant Omni Financial, LLC ("Omni") in 2014.[1] [*Id.*].

In late 2015, First 100 defaulted on its obligations under the Omni Note. [JA Vol. VI, 001438]. As a result, Omni attempted to foreclose on certain personal property, which First 100 had also pledged as collateral, through a sale conducted pursuant to the applicable provisions of the Uniform Commercial Code (the "UCC") as set forth in NRS Chapter 104. [JA Vol. IV, 000821; JA Vol. V, 001147-1149]. In early 2016, First 100 filed a complaint against Omni (as further defined below, the "First 100 Action") seeking to obtain an injunction to prevent Omni from completing this sale. [JA Vol. III, 000603]. Omni later counterclaimed against First 100 seeking to enforce its rights as a secured creditor under the Omni Note. [JA Vol. III, 000727]. Omni was eventually allowed to complete its UCC sale and, after

[1] Kal-Mor does not concede that Omni held valid security interests in the Kal-Mor Properties at the time of purchase. However, for the purposes of this Answering Brief, it is assumed that the Omni Note was secured by the Kal-Mor Properties.

several months of additional litigation, entered into a settlement agreement with First 100 (as further defined below, the "First 100 Settlement") under which, among other things, First 100 and Omni (1) waived and released all claims relating to the First 100 Action, including all claims based on First 100's breach of its obligations under the Omni Note, (2) replaced approximately $4.1 million in claimed indebtedness owed by First 100 under the Omni Note with new and substantially higher obligations of at least $4.8 million plus a revenue sharing arrangement under which Omni received a 50% interest in the proceeds of the remaining collateral for the Omni Note, up to an additional $1.2 million, and a 5% interest in such proceeds thereafter, and (3) agreed to the entry of a stipulated final judgment in the amount of $4.8 million against First 100 in favor of Omni, which was later entered by the federal district court to resolve the First 100 Action. [JA Vol. III, 000738-772].

Following the execution of the First 100 Settlement and entry of the final stipulated judgment against First 100, Omni attempted to foreclose on its claimed security interests in the Kal-Mor Properties under the Deeds of Trust that secured the Omni Note. [JA Vol. III, 000697-724]. In response, Kal-Mor filed its Complaint against Omni in the underlying action, Case No. A-17-757061-C in the Eighth Judicial District Court (the "Action") on June 19, 2017 through which Kal-Mor asserted claims for declaratory relief and quiet title, seeking an order from the District Court holding that Omni's alleged security interests in the Kal-Mor

Properties were unenforceable as a result of either (1) the novation that occurred through the First 100 Settlement or (2) Omni obtaining a final monetary judgment against First 100 in violation of NRS 40.430, Nevada's one-action rule. [JA Vol. I, 000001-24].

On October 2, 2018, the District Court entered its Findings of Fact, Conclusion of Law, and Order Granting Kal-Mor's Motion for Partial Summary Judgment (the "MPSJ Order"), finding that the First 100 Settlement constituted a novation of the Omni Note that rendered Omni's security interests in the Kal-Mor Properties unenforceable. [JA Vol. VI, 001307-1317]. The Court did not reach the issue of whether the one-action rule also prevented Omni from enforcing its security interest in the Kal-Mor Properties. [JA Vol. VI, 001307-1317]. Omni filed a motion for reconsideration asking the District Court to change its decision, but Omni's motion was denied. [JA Vol. VI, 001331-1355; JA Vol. VI, 001387-1393]. On September 30, 2020, the Court entered an order certifying the MPSJ Order as final pursuant to NRCP 54(b). [JA Vol. VII, 001726-1729]. On October 27, 2020, Omni filed its notice of appeal. [JA Vol. VII, 001737-1739].

IV.

STATEMENT OF FACTS

A. The Omni Loan Transaction

On or about May 27, 2014, First 100 and Omni entered into a Loan Agreement under which Omni agreed to loan up to $5 million to First 100. [JA Vol. I 000002; 000158]. In connection therewith, First 100 executed a Promissory Note dated May 27, 2014 in favor of Omni (the "Omni Note"). [JA Vol. III 000738-739; JA Vol. IV, 000819]. The Omni Note was secured by a Security Agreement dated May 27, 2014 (the "Security Agreement") under which First 100 pledged substantially all of its personal property as collateral for the Omni Note. [JA Vol. III, 000738-739]. First 100 also pledged certain real properties as collateral for the Omni Note as evidenced by (i) a Deed of Trust dated May 27, 2014 (the "May 2014 Deed of Trust"), (ii) a Deed of Trust dated June 17, 2014 (the "June 2014 Deed of Trust"), and (iii) a Deed of Trust dated August 21, 2014 (the "August 2014 Deed of Trust" and together with the May 2014 Deed of Trust and June 2014 Deed of Trust, the "Deeds of Trust"). [JA Vol. III, 000569].

The May 2014 Deed of Trust was recorded in the official records of Clark County, Nevada Recorder (the "Official Records") as instrument number 20140529-0001342. [JA Vol. III, 000569-570]. Under the May 2014 Deed of Trust, First 100 purported to pledge various real properties as collateral for the Omni Note, including

but not limited to: (i) real property commonly known as 1217 Neva Ranch Avenue, North Las Vegas, Nevada 89081, Clark County Assessor Parcel Number ("APN") 124-26-311-029 (the "Neva Ranch Property"); (ii) real property commonly known as 230 East Flamingo Road #330, Las Vegas, Nevada 89169, APN 162-16-810-355 (the "East Flamingo Property"); (iii) real property commonly known as 2615 West Gary Avenue #1065, Las Vegas, Nevada 89123, APN 177-20-813-127 (the "West Gary Property"); and (iv) real property commonly known as 6575 Shining Sand Avenue, Las Vegas, Nevada 89142, APN 161-10-511-072 (the "Shining Sand Property"). [*Id.*].[2]

The June 2014 Deed of Trust was recorded in the Official Records as instrument number 20140718-0001253. [JA Vol. II, 000200]. 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: (i) real property commonly known as 4921 Indian River Drive #112, Las Vegas, Nevada 89103, APN 163-24-612-588 (the "4921 Indian River Property"); (ii) real property commonly known as 5009 Indian River Drive #155, Las Vegas, Nevada 89103, APN 163-24-612-639 (the "5009 Indian River Property"); (iii) real property commonly known as 5295

[2] Besides these citations to the record, the Court may take judicial notice of recorded documents. *See, e.g.*, *Bank of N.Y. Mellon v. Ckvc Invs.*, No. 76888, No. 77495, 2020 Nev. Unpub. LEXIS 395 (Nev. Apr. 16, 2020); NRS 47.130.

Indian River Drive #314, Las Vegas, Nevada 89103, APN 163-24-612-798 (the "5295 Indian River Property"); and (iv) real property commonly known as 4400 Sandy River Drive #16, Las Vegas, Nevada 89103, APN 163-24-612-500 (the "Sandy River Property"). [JA Vol. III, 000570-571].

The August 2014 Deed of Trust was recorded in the Official Records as instrument number 20140826-0001916. [*Id.*]. Under the August 2014 Deed of Trust, First 100 purported to pledge as collateral for the Omni Note real property commonly known as 5782 Camino Ramon Avenue, Las Vegas, Nevada 89156, APN 140-21-611-018 (the "Camino Ramon Property" and together with the Neva Ranch Property, the East Flamingo Property, the West Gary Property, the Shining Sand Property, the 4921 Indian River Property, the 5009 Indian River Property, the 5295 Indian River Property, and the Sandy River Property, the "Kal-Mor Properties"). [*Id.*].

Kal-Mor was not a party to the Omni loan transaction and was not involved in any way in the negotiation or origination of the loan. [JA Vol. III, 000571]. Further, Kal-Mor did not receive any proceeds from the Omni Note and owed no indebtedness to Omni at any time in connection with the Omni Note or otherwise. [JA Vol. III, JA00592].

B. The PrenPoinciana Transactions

On or around February 2, 2015 and with Omni's consent, First 100 entered into a Proceeds Purchase Sharing Agreement ("PPSA") with PrenPoincianca, LLC ("PrenPoinciana") under which PrenPoinciana purchased certain rights to share in the proceeds of certain accounts receivable First 100 had previously pledged as collateral for the Omni Note. [JA Vol. III, 000738-739]. First 100 also granted PrenPoinciana a junior security interest in such accounts receivables. [*Id.*]. On or around April 20, 2015, PrenPoinciana affiliate, Prentice Lending II, LLC ("Prentice"), loaned $150,000 (the "Prentice Loan") to First 100 and received a junior security interest in certain accounts receivable First 100 had also previously pledged as collateral for the Omni Note. [*Id.*]. The accounts receivable subject to the PPSA and the Prentice Loan were not in any way connected to the Kal-Mor Properties. [*Id.*]. Neither PrenPoinciana nor Prentice received, or at any time held, any security interest in any of the Kal-Mor Properties. [*Id.*]. Kal-Mor was not involved in any way in the negotiation of the PPSA or the Prentice Loan, received no proceeds from either transaction, and owed no indebtedness at any time to either PrenPoinciana or Prentice. [JA Vol. III, 000571-572].

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

First 100 frequently purchased and sold residential real properties in Clark County, Nevada that it acquired through HOA assessment lien foreclosure sales

conducted pursuant to NRS Chapter 116. [JA Vol. III, 000572; JA Vol. VI, 001310]. First 100 purchased each of the Kal-Mor Properties in separate transactions either through nonjudicial foreclosure sales based on liens arising under NRS 116.3116 or directly from an HOA that had previously acquired the properties through nonjudicial foreclosure sales. [JA Vol. III, 000592-602]. Kal-Mor purchased dozens of such properties from First 100, including the nine Kal-Mor Properties that are the subject of this appeal, which First 100 sold to Kal-Mor in or around April 2015. [*Id.*].

During First 100's marketing and sale of the Kal-Mor Properties, First 100 misrepresented to Kal-Mor that First 100 was transferring the same rights, title, and interests in the Kal-Mor Properties that First 100 had acquired in purchasing the same. [JA Vol. III, 000572; JA Vol. III, 000592-602]. First 100 did not disclose to Kal-Mor that First 100 had previously pledged any interest in any of the Kal-Mor Properties as collateral for the Omni Note or that any of the Kal-Mor Properties were subject to any of the Deeds of Trust.[3] [*Id.*]. Kal-Mor had no actual knowledge or notice of Omni's claimed security interest under the Deeds of Trust when it purchased the Kal-Mor Properties. [*Id.*]. As a result, Kal-Mor became an

[3] While First 100 is not a party to this appeal, Kal-Mor has asserted claims for fraud, breach of contract, and other relief against First 100 in the underlying action.

involuntary guarantor of the Omni Note to the extent of its interests in the Kal-Mor Properties. [JA Vol. VI, 001363].

D. The First 100 Action

In late 2015, First 100 defaulted in its obligations under the Omni Note. [JA Vol. IV, 000820]. On January 8, 2016, Omni, acting jointly with PrenPoinciana, issued a Notification of Disposition of Collateral in which it identified the personal property Omni believed to be subject to its security interest and scheduled a sale of such collateral to take in accordance with NRS Chapter 104 on January 21, 2016 (the "UCC Sale"). [JA Vol. IV, 000821; JA Vol. V, 001147-1149]. On January 15, 2016, First 100 filed a complaint in the Eighth Judicial District Court, Case No. A-16-730374-C (the "First 100 Action") in which First 100 asserted various claims against Omni and sought to an injunction to stop Omni from proceeding with the UCC Sale. [JA Vol. III, 000603].

On or about January 16, 2016, Kal-Mor filed a separate complaint against Omni in the Eighth Judicial District Court, Case No. A-16-730447-C (the "Kal-Mor Action") in which Kal-Mor claimed a competing security interest in certain accounts receivable (the "Disputed Receivables") on which Omni sought to foreclose through the UCC Sale.[4] [JA Vol. III, 000573]. Omni promptly removed both the First 100

[4] The Kal-Mor Action did not involve or in any way pertain to the Kal-Mor Properties.

Action and the Kal-Mor Action to federal district court (Case Nos. 2:16-cv-00099 and 2:16-cv-00101, respectively) where the cases were partially consolidated for the limited purpose of resolving certain motions affecting both cases (the "Consolidated Motions"). [*Id.*].

After several months of litigation, Omni completed the UCC sale on May 25, 2016 and successfully credit bid to purchase the personal property that had been pledged as collateral for the Omni Note. [JA Vol. III, 000603]. In connection with its completion of the UCC Sale, Omni paid $800,000 to PrenPoinciana and Prentice to purchase their respective interests under the PPSA and the Prentice Loan. [JA Vol. III, 000739]. Thereafter, additional disputes arose and continued to be litigated between First 100 and Omni after the UCC Sale 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, First 100's liability for the remaining balance of the Omni Note, and First 100's liability to Omni for amounts owed under the PPSA and the Prentice Loan. [JA Vol. I, 000070]. In a counterclaim filed against First 100 on June 15, 2016, Omni claimed that the unpaid balance of the Omni Note "including principal, interest, and fees" was "approximately $4.1 million." [JA Vol. III, 000586].

Following the UCC Sale, Kal-Mor and Omni's competing claims to the Disputed Receivables also remained unresolved and continued to be litigated. [JA

Vol. III, 000734]. On or about November 13, 2016, however, Kal-Mor and Omni entered into a settlement agreement (the "Kal-Mor Settlement") by which they resolved the Kal-Mor Action and their respective claims to the Disputed Receivables, which effectively ended Kal-Mor's involvement in the First 100 Action. [JA Vol. IV, 000966-976]. Under the Kal-Mor Settlement, both Kal-Mor and Omni expressly reserved all rights with respect to the Kal-Mor Properties as such rights were never at issue in the Kal-Mor Action and were not affected in anyway by the Kal-Mor Settlement. [JA Vol. IV, 00966-976; JA Vol. VIII, 001750-1751]. A stipulated judgment resolving Kal-Mor and Omni's competing claims to the Disputed Receivables was filed in the Kal-Mor Action on December 1, 2016, and an order approving such stipulated judgment was entered in the Kal-Mor Action on January 2, 2017. [JA Vol. III, 000733-736].

On or about January 16, 2017, more than two months after the execution of the Kal-Mor Settlement, Omni and First 100 entered into a separate Settlement and Mutual General Release Agreement (the "First 100 Settlement") to resolve the First 100 Action. [JA Vol. III, 000738-772]. Kal-Mor was not involved in any way in the negotiation or drafting of the First 100 Settlement and was not a party to the First 100 Settlement. [JA Vol. VIII, 001743]. Under the First 100 Settlement, First 100 and Omni expressly released all claims related to the First 100 Action, including all claims based on First 100's breach of its obligations under the Omni Note, reserving

only the rights of the parties to enforce the First 100 Settlement. [JA Vol. III, 000604]. Specifically, the First 100 Settlement provides:

> 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 Actions[5] undertaken by Omni with respect to the Omni Loan (including without limitation the UCC Sale and exercise of the assignment of rents).
>
> …
>
> 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.[6]

[JA Vol. IV, 000753].

In addition to releasing Omni's claims based on First 100's breach of the Omni Note, the First 100 Settlement (i) replaced the indebtedness originally owed

[5] 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." [JA Vol. III, 000740].

[6] Section 2 of the First 100 Settlement further states that First 100 and Omni entered into the First 100 Settlement "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." [JA Vol. III, 000741].

under the Omni Note, which Omni alleged was "approximately $4.1 million" as of June 15, 2016 [JA Vol. III, 000586], with a new and substantially higher payment obligation of $4.8 million, (ii) merged the indebtedness First 100 owed under the Omni Note with the indebtedness First 100 owed under the PPSA and the Prentice Loan, and (iii) created a new revenue sharing arrangement under which Omni received a 50% interest in the proceeds of the remaining collateral for the Omni Note, up to an additional $1.2 million (after payment of the initial $4.8 million), plus an additional 5% interest in all such proceeds thereafter. [JA Vol. III, 000741].

Notwithstanding this substantial increase and fundamental change in the obligations First 100 owed to Omni, the First 100 Settlement purports to preserve and maintain Omni's security interests in essentially all of the collateral for Omni Note.[7] [JA Vol. III, 000749-750]. Under this new arrangement, however, there is no limit to First 100's payment obligations to Omni nor any specific amount payable to Omni to release of its claimed security interests. [*Id.*]. In place of the specific indebtedness owed under the Omni Note, Omni received an ongoing interest in the proceeds of the remaining collateral that continues indefinitely regardless of how much Omni is paid. [JA Vol. III, 000750; JA Vol. IV, 000751].

[7] Omni's security interests in certain personal property that is not relevant to this appeal or the underlying action (e.g., First 100's office furniture) were released under the First 100 Settlement.

In connection with the First 100 Settlement, the parties filed a Stipulation and Order for Entry of Final Judgment in the First 100 Action on February 16, 2017 [ECF No. 240],[8] and the federal district court entered a corresponding Stipulated Judgment by which final judgment in the amount of $4.8 million was awarded against First 100 in favor of Omni (the "First 100 Judgment"). [JA Vol. 1, 000157-161]. The First 100 Judgment included the remaining balance of the Omni Note combined with additional indebtedness First 100 owed to Omni in connection with the PPSA and the Prentice Loan. [JA Vol. VI, 001251; JA Vol. VIII, 001773-1775]. The First 100 Judgment further dismissed the First 100 Action with prejudice, including "and any and all Disputes, Claims, Counterclaims, and Third-Party Claims." [JA Vol. IV, 000777]. The term "Disputes" as used in the First 100 Judgment is defined in the recitals to the First 100 Judgment to include "numerous disputes … between Plaintiffs, Defendants, and Guarantors[9]" 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;

[8] Although Kal-Mor was not a party to or involved in the negotiation of the First 100 Settlement, Kal-Mor signed this stipulation because it had previously appeared in the First 100 Action in connection with the Consolidated Motions and Local Rule 7-1 of the Local Rules of Practice of the United States District Court for the District of Nevada requires that stipulations be signed by all parties that have appeared.

[9] Kal-Mor is not included as a Plaintiff, a Guarantor, or a Defendant as in the First 100 Judgment.

… 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." [JA Vol. IV, 000774-775].

E. Omni's Attempts to Enforce the Deeds of Trust

Since acquisition, Kal-Mor has maintained and operated the Kal-Mor Properties as residential rental properties and has paid all property taxes, HOA assessments, and other expenses associated with the Kal-Mor Properties. [JA Vol. III, 000604]. Beginning on or about September 29, 2016, Omni made demands on the tenants occupying the Kal-Mor Properties for payment of rent that Omni claimed to be entitled to collect based on the language in the Deeds of Trust.[10] [*Id.*]. Following the execution of the First 100 Settlement and entry of the First 100 Judgment, Omni continued to make such demands on Kal-Mor's tenants. 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 in the Official Records against the Kal-Mor Properties as instrument number 20170515-0000474 through which Omni sought to

[10] The Kal-Mor Settlement expressly reserved all claims related to Kal-Mor and Omni's competing claims to the Kal-Mor Properties, which were never at issue in the Kal-Mor Action.

complete a nonjudicial foreclosure sale. [JA Vol. III, 000605; 703-707].

Based on Omni's improper attempts to foreclose on the Kal-Mor Properties, on June 19, 2017, Kal-Mor filed its complaint initiating the underlying action that is currently on appeal before this Court (District Court Case No. A-17-757061-C). [JA Vol. I, 000001-30]. Therein, Kal-Mor asserted several causes of action, including quiet title and declaratory relief, claiming Omni no longer held any security interest in the Kal-Mor Properties and had no power to foreclose on the Kal-Mor Properties under the Deeds of Trust. [JA Vol. I, 000018-20].

On July 26, 2017, Kal-Mor filed a motion for partial summary judgment arguing that Omni's security interest was discharged either through novation of the Omni Note or under Nevada's one-action rule as a result of the entry of the First 100 Judgment, [JA Vol. III, 000566-590]. Kal-Mor's motion was supported by the Declaration of Kal-Mor's member Greg Darroch. [JA Vol. III-IV, JA000591-784]. Rather than respond to Kal-Mor's motion, Omni improperly removed the action to federal district court where Kal-Mor promptly filed a motion for remand. On July 12, 2018, the federal district court entered an order remanding the underlying action to the District Court. [JA Vol. III, 000560-565]. On July 26, 2018, Kal-Mor filed a renewed for partial summary judgment again arguing that any security interest Omni might have held in the Kal-Mor Properties was discharged either through novation or under Nevada's One-Action Rule. [JA Vol. III, 000566-590]. On October 2,

2018, the District Court Entered the MPSJ Order from which Omni now appeals, finding that no genuine issue of material fact existed and that a novation of the First 100 Note unequivocally occurred when Omni entered into the First 100 Settlement. [JA Vol. VI, 001307-1317]. Omni subsequently obtained NRCP 54(b) certification of MPSJ Order, and this appeal followed. [JA Vol. VII, 001730-1736].

V.

SUMMARY OF THE ARGUMENT

Through the obvious and unmistakable language of the First 100 Settlement and First 100 Judgment, Omni forever waived and released its right to enforce the Omni Note against its borrower and substituted in place of the Omni Note a new and materially different agreement under which both First 100's payment obligations and Omni's rights in the remaining collateral for the Omni Note changed substantially. This unequivocal substitution of the new obligations and rights arising under First 100 Settlement in place of the indebtedness owed under the Omni Note was a novation. As a result of this novation, the Deeds of Trust that previously stood as security for the Omni Note were extinguished as to the Kal-Mor Properties in which First 100 then held no interest.

Contrary to Omni's suggestions, Kal-Mor does not dispute the validity or enforceability of the First 100 Settlement or claim any right to enforce the terms of the First 100 Settlement as an intended beneficiary or otherwise. Likewise, Kal-Mor

has never argued Omni intended to release its security interests in the Kal-Mor Properties when it entered into the First 100 Settlement, which explicitly extinguished and replaced First 100's obligations under the Omni Note with the new and materially different obligations. The release and discharge of such securities interests was the consequence of the novation that occurred through the First 100 Settlement regardless of Omni's intent.

Omni does not dispute that First 100's obligations under the Omni Note were discharged. Indeed, nowhere in its Opening Brief or its filings in the District Court does Omni argue that it retained the right to enforce the Omni Note against First 100 after entering into the First 100 Settlement. Accordingly, the District Court correctly construed the plain language of the First 100 Settlement as clear and convincing evidence of novation. [JA Vol. III, 000584-588]. As a consequence of that novation, Omni's security interests in the Kal-Mor Properties as collateral for the Omni Note were extinguished.

The District Court did not abuse its discretion in denying Omni's request for discovery pursuant to NRCP 56(d). All of the issues on which Omni professed a need for discovery are either undisputed or irrelevant as no amount of discovery will change the plain language of the First 100 Settlement. Moreover, Omni made no effort whatsoever to conduct discovery during the year that passed between the initial filing of Kal-Mor's motion for partial summary judgment prior to removal

and the renewal of that motion after the underlying action was remanded to the District Court.

Lastly, to the extent the District Court erred in finding a novation occurred, any such error was harmless because Omni is similarly barred from foreclosing on the Kal-Mor Properties under the one-action rule as Omni has already obtained a final monetary judgment against its borrower First 100.

VI.

ARGUMENT

A. The District Court Correctly Found that the First 100 Settlement Constituted a Novation of the Omni Note.

i. *Kal-Mor Had Standing to Challenge Omni's Claimed Security Interest in the Kal-Mor Properties.*

Omni's arguments attacking Kal-Mor's standing to challenge enforcement of the Deeds of Trust [Opening Brief, p. 25] are sorely misplaced. As owner of the Kal-Mor Properties, Kal-Mor clearly had standing to assert claims for quiet title and declaratory relief against Omni notwithstanding the fact that Kal-Mor was not a party to the First 100 Settlement. "It is well established that a quiet title action may be advanced by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim." *See Bank of N.Y. Mellon v. Stone Canyon W. Homeowners*

Ass'n, No. 2:16-cv-01904; 2019 U.S. Dist. LEXIS 44484, *12 (D. Nev. Mar. 19, 2019).

Through the underlying action, Kal-Mor sought a declaration that the First 100 Settlement replaced the indebtedness owed under the Omni Note with the new obligations set forth in the First 100 Settlement to which Kal-Mor never agreed to be bound and, as a result, any security interest Omni held in the Kal-Mor Properties as collateral for the Omni Note was extinguished. *See Walker v. Shrake*, 75 Nev. 241, 339 P.2d 124 (1959) (holding that the replacement of a judgment with a new promissory note extinguished the ability of the judgment creditor to later foreclose on its judgment lien); *In re Fricke*, No. L-90-01056W, 1991 Bankr. LEXIS 2237, *10-13 (Bankr. N.D. Iowa Oct. 22, 1991) (finding that because novation occurred, the court was required to find that the security interest under the original agreement was extinguished). In essence, Kal-Mor sought a determination from the District Court as to the legal effect upon its interests in the Kal-Mor Properties of the wholesale replacement of the Omni Note with the First 100 Settlement.

While Kal-Mor was not a party to the First 100 Settlement, it was not a stranger to matters addressed therein. As a result of First 100's fraudulent sale of the Kal-Mor Properties, Kal-Mor took title to the Kal-Mor Properties subject to the Deeds of Trust. The extinguishment of the Omni Note through the First 100 Settlement destroyed Omni's ability to enforce the Deeds of Trust against the Kal-

Mor Properties. As the owner of those properties, Kal-Mor had every right to seek a determination from the District Court to that effect. "An action may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim." NRS 40.010; *see also Howell v. Ricci*, 124 Nev. 1222, 1224, 197 P.3d 1044, 1046 n.1 (2008) (a quiet title action is the proper method by which to adjudicate disputed ownership of real property rights).

Contrary to Omni's suggestions, Kal-Mor did not (i) allege any breach of the First 100 Settlement, (ii) claim any right to enforce the First 100 Settlement against either First 100 or Omni as a third-party beneficiary or otherwise, (iii) attack the validity or enforceability of the First 100 Settlement, (iv) dispute Omni's intent in entering into the First 100 Settlement, or (v) advance any interpretation of the First 100 Settlement beyond its plain and obvious meaning. Moreover, the District Court's finding that the First 100 Settlement was a novation was not based on any of the foregoing. Rather, the District Court based its decision squarely on the plain and unambiguous language of the First 100 Settlement.

ii. *The First 100 Settlement Was a Novation of the Omni Note.*

The intentional and unmistakable substitution of the First 100 Settlement for the Omni Note 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 Co. v. Remote Energy Solutions, LLC*, 403 P.3d 683, 133 Nev. 1016, *5-6 (2017) (unpublished).

> 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). "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. McLelland*, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989). Novation of a contract absolves sureties or guaranties of their liability under the original contract. *Williams v. Crusader Disc. Corp.*, 75 Nev. 67, 334 P.2d 843 (1959); *Ewing v. Smith*, 1986 Tenn. App. LEXIS 2803, *16-17 (Tenn. App. Feb. 26, 1986) ("A material change in a promissory note after it has been executed will invalidate the promissory note and the deed of trust securing it."). Here, the District Court properly found all four elements were established by clear and convincing evidence. [JA Vol. VI, 001307-1317].

There is no question that the parties to the Omni Note are the same as the parties to the First 100 Settlement. Accordingly, the second element of novation is clearly satisfied. Similarly, there is no dispute as to the validity of the First 100

Settlement, which satisfies the fourth element. [JA Vol. VI, JA001314]. This leaves only the first and third elements to address.

As to the first element, that the Omni Note was an existing valid contract, Omni made no effort to dispute this fact until after entry of the MPSJ Order when it filed its motion to reconsider in which it attempted to argue that First 100's failure to pay amounts due and owing under the Omni Note somehow resulted in the Omni Note not being a valid and existing contract. [Compare JA Vol. IV, 000810-812 with JA Vol. VI, 001349]. Omni rehashes this argument on appeal but is plainly incorrect in claiming a prior breach precludes a finding of novation. *See, e.g.*, *Williams*, 75 Nev. at 71, 334 P.2d at 846. In *Williams*, this Court stated:

> 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.

Id. (emphasis supplied). The Court's decision in *Walker v. Shrake*, 75 Nev. 241, 339 P.2d 124 (1959) provides another 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 on its judgment lien against the borrower's real property. *Id*. at 247. This 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*. at 247-48. *See also Intersal, Inc. v. Hamilton*, 834 S.E.2d 404 (N.C. 2019) (finding that a 2013 settlement agreement was a novation of a 1998 agreement, despite plaintiff alleging that a breach occurred and bringing a breach of contract claim prior to the novation); *AFT Mich. v. State*, 866 N.W.2d 782, 789-90 (Mich. 2015) ("A refusal to perform in compliance with a valid contract amounts to a breach of contract and may entitle the other party to damages or other forms of relief; however, ***a breach does not affect the contract's fundamental validity***.") (emphasis supplied).

Additionally, it makes absolutely no sense for Omni to allege that the Omni Note is not a valid contract due to First 100's default. If the Omni Note is not a valid contract, Omni would have no right to foreclose on the Kal-Mor Properties under the Deeds of Trust that secure the Omni Note. *See Fidelity & Dep. Co. v. Ticor Title Ins.*, 943 P.2d 710 (Wash. App. 1997) (holding that if a promissory note is unenforceable or invalid, so too is the deed of trust or mortgage securing the same—"If the obligation for which the mortgage was given fails for some reason, the

mortgage is unenforceable."). As such, the first element of novation cannot seriously be disputed.

The third element of Novation, whether the First 100 Settlement extinguished the Omni Note, was also established by clear and convincing evidence before the District Court. In fact, nowhere in any of its filings does Omni claim that it retained the right to enforce the Omni Note against First 100 after the execution of the First 100 Settlement. The reason Omni makes no such claim is obvious. The First 100 Settlement unequivocally released First 100 from its obligations under the Omni Note as properly found by the District Court. In making this finding, District Court did not rely on any disputed or unsupported fact. Rather, the District Court relied on the plain and unambiguous statements set forth in the First 100 Settlement, which "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 under the First 100 Settlement." [JA Vol. VI, 001314-1315]. The plain language of the First 100 Settlement at Sections 1(b) and 15(a) clearly state that it was the intent of the parties to waive any right to assert any claim except those relating to enforcement of the First 100 Settlement under which Omni:

> unconditionally relieve[d], release[d], and acquit[ted] and forever discharge[d] First 100…of and from any and all Liabilities and Claims arising out of, concerning, or in any manner relating to…Enforcement Actions undertaken by Omni with respect to the Omni Loan (including

without limitation the UCC Sale and exercise of the assignment of rents).

[JA Vol. III, 739; JA Vol. IV, 753].

Additionally, it is indisputable that the First 100 Settlement replaced the "approximately $4.1 million" in indebtedness Omni claimed was owed under the Omni Note with the new and materially different obligations owed by First 100 under the First 100 Settlement [JA Vol. III, 000586]. First 100's new obligations included a "Stipulated Judgment Debt" of $4.8 million, which combined the indebtedness owed under the Omni Note with the separate indebtedness owed under the PPSA and Prentice Loan. The First 100 Settlement also created a new "Stipulated Judgment Debt Return" revenue sharing arrangement under which Omni received a 50% interest in the proceeds of the remaining collateral for the Omni Note, up to an additional $1.2 million, and a 5% interest in all such proceeds thereafter. [JA Vol. III, 000741]. This new revenue sharing arrangement granted Omni an ongoing interest in the proceeds of that collateral that continues indefinitely regardless of how much Omni is paid. [JA Vol. III, 000750; JA Vol. IV, 000751].

The material differences between the indebtedness First 100 owed under the Omni Note and the new obligations and rights set forth in the First 100 Settlement are undeniable. The District Court recognized those obvious differences in finding that First 100's payment obligations and the purported scope of Omni's interests in the remaining collateral for the Omni Note were both materially different and

enlarged under the First 100 Settlement. [JA Vol. VI, 001314-1315; JA Vol. VIII, 001775]. There should be no question that a novation occurred.

The First 100 Judgment further supports the inescapable fact that the First 100 Settlement Replaced the Omni Note. The First 100 Judgment dismissed with prejudice all disputed claims related to the Omni Note and Deeds of Trust, reserving only the right to enforce 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.

[JA Vol. IV, 000782]. "Disputes" as used in the First 100 Judgment is defined expansively to include "numerous disputes" between 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." [JA Vol. IV, 000780-781].

The Lost Note Affidavit referenced in the Opening Brief only supports the District Court's finding that a novation occurred. 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 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.

[JA Vol. V, 001027-1028]. 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, it confirms a novation occurred by recognizing that the indebtedness owed under the Omni Note was extinguished and replaced by the substantially higher obligations owed under the First 100 Settlement, which include amounts owed to Omni under the PPSA and Prentice Loan as well as Omni rights to share in the proceeds of the remaining collateral indefinitely. District Court correctly found that a novation occurred based on clear and convincing evidence that Omni expressly waived, released, and dismissed with prejudice all claims it could have asserted relating to enforcement of the Omni Note.

iii. *The First 100 Settlement Is Not an Executory Accord.*

Omni's attempt to argue the First 100 Settlement was an executory accord rather than a novation relies heavily on selective citations from *Cohen v. Treuhold*

Capital Group, LLC, 422 B.R. 350, 373 (E.D.N.Y. 2010) – a bankruptcy court case from the Eastern District of New York. Even a cursory review of *Cohen* shows that the First 100 Settlement is in fact a novation and 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.

This 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 and extinguishment of an antecedent claim is a substituted contract." *Johnson v. Utile*, 86 Nev. 593, 596, 472 P.2d 335, 337 (1970).[11] "If an executory accord is breached, the nonbreaching

[11] Omni's Opening Brief makes no mention whatsoever of *Johnson v. Utile*, 86 Nev. 593, 596, 472 P.2d 335, 337 (1970), which is the only Nevada Supreme Court decision that offers any substantive discussion of executive accords.

party may sue either upon the original obligation or upon the compromise agreement." *Id.*

The *Cohen* court held that the agreement at issue there was an executory accord precisely because that agreement expressly conditioned the release of claims against the debtors upon the debtors' future performance and expressly preserved the creditor's rights to bring claims under the parties' original agreement if there was a failure to perform. 422 B.R. at 373. The bankruptcy court explained:

> The April 2007 Agreement is labeled a "Settlement and Forbearance Agreement," and the language of the Agreement itself contemplates an executory accord. The Agreement provides that "[i]n the event of any default ... all sums due and owing from Cohen and/or Wissak ... shall be deemed accelerated and immediately due and owing ... and Treuhold's Forbearance shall terminate and expire." The Agreement further provides that "[u]pon the due, timely and complete performance by each of Metropolitan, Cohen and Wissak of his and its respective payment obligations ..., Treuhold shall deliver to each of them, respectively, a 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***.

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

The First 100 Settlement is fundamentally different. Unlike the agreement at issue in *Cohen*, Omni's release of claims under the First 100 Settlement was "effective immediately" and was given "unconditionally." [JA Vol. IV, 000753]. The release was not conditioned on any future performance by First 100.

Furthermore, Omni explicitly agreed that it would not assert any claim against First 100 except with respect to the enforcement of the First 100 Settlement. Any suggestion that Omni retained the right to bring claims against First 100 to enforce the original Omni Note would directly contradict the plain language of both the First 100 Settlement and the First 100 Judgment, which released and dismissed all such claims with prejudice. The First 100 Settlement was clearly a novation of the Omni Note, not an executory accord.

B. Kal-Mor's Motion for Partial Summary Judgment Was Adequately Supported by Admissible Evidence.

Omni incorrectly asserts that the District Court improperly relied on Mr. Darroch's Declaration in granting summary judgment on Kal-Mor's claims for declaratory relief and quiet title. [Opening Brief, p. 29; JA Vol. IV, 000800]. Omni points out that ¶¶ 3, 4, 5, 7, 10, 17, 24, 31, 32, 38, 45, 46, 52, 53, 59, 60, 66, 67, 72, 75, 84, and 87 of Mr. Darroch's Declaration all use the phrase "on information and belief" and therefore are inadmissible by summary judgment standards. [*Id.*].

Omni, however, does not dispute even a single fact stated on information and belief in Mr. Darroch's Declaration. [JA Vol. VI, 001285]. To the contrary, Omni's own version of facts presented to the District Court, which was supported by the Declaration of Martin Boone, actually substantiate and confirm the relevant facts stated in Mr. Darroch's Declaration, including the basic facts relating to the Omni Note, First 100's breach of the Omni Note, and Omni's efforts to enforce its security

interests under the UCC. [*Compare* JA Vol. IV, 000798, ¶ 54, with JA Vol. III, 605, ¶ 87]. Specifically, the facts stated in ¶¶ 3, 4, 5, 72, and 87 of the Darroch Declaration were repeatedly asserted by Omni during both the First 100 Action and the underlying action. [*Compare* JA Vol. III, 000592, ¶¶ 3-5; 603, ¶ 72; and 605, ¶87 *with* JA Vol. VI, 001436-1438, ¶¶ 4-10, and 20-24]. Other statements made on information and belief that were not explicitly confirmed by Omni are irrelevant to the District Court's decision. For example, ¶ 7 speaks only to the nature of First 100's business. Additionally, ¶¶ 10, 17, 24, 31, 32, 38, 45, 46, 52, 53, 59, 60, 66, and 67 serve only to provide background information concerning the acquisition of the Kal-Mor Properties and can be easily confirmed by reference to documents recorded in the Official Records. Finally, ¶¶ 75 and 84 refer to matters that were not argued by Kal-Mor before the District Court or relied upon by the District Court in any way.

Omni's Opening Brief does not point to a single fact from Mr. Darroch's Declaration that it claims is incorrect or was improperly relied upon by the District Court. The facts stated on information and belief in Mr. Darroch's Declaration do not create a genuine issue of material fact as to the Omni Note, First 100's breach of the Omni Note, the First 100 Action, the First 100 Settlement, the First 100 Judgment or any other material fact on which the District Court relied.

The fact that Mr. Darroch's Declaration included facts that were not necessary to the District Court's decision does invalidate the admissible evidence on which the decision was based. Moreover, a dispute as to an irrelevant fact does not preclude summary judgment. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 730, 121 P.3d 1026, 1030 (2005) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

Kal-Mor's arguments before the District Court were properly supported by admissible evidence in the form of Mr. Darroch's declaration and Omni's own filings in the First 100 Action and before the District Court. The District Court could not have relied on any evidence presented by Kal-Mor as to either First 100 or Omni's intent in entering the First 100 Settlement as no such evidence was presented. The District Court's decision was based on the plan language of the First 100 Settlement as to which Omni still fails to identify any ambiguity or offer any alternative interpretation. The District Court's decision was correct and should be upheld.

C. The District Court Did Not Abuse Its Discretion When It Denied Omni's Request to Conduct Additional Discovery Under NRCP 56(d).

Omni contends in its Opening Brief that the District Court abused its discretion in denying Omni's request under Nev. R. Civ. P. 56(f) to conduct discovery regarding "various issues." Opening Brief, p. 28. However, the only specific issue identified in the Opening Brief on which Omni claims discovery

should have been allowed is the subjective intent of Omni and First 100 in entering the First 100 Settlement. *Id.* Such intent is irrelevant. First, Omni's intent to foreclose on the Kal-Mor properties was never disputed. Second, it is entirely unclear why Omni requires discovery to ascertain its own intent or how the deposition of Kal-Mor's principal would shed light of such intent when Kal-Mor does not dispute Omni's intent and had no involvement whatsoever in the negotiation of the First 100 Settlement. Further, Omni fails to explain how it or First 100's subjective intent is relevant in any way to the District Court's decision, which relied exclusively on the express and uncontroverted language of the First 100 Settlement.

Omni's obtuse insistence that the First 100 Settlement cannot be a novation simply because Omni intended to foreclose on the Kal-Mor Properties is plainly wrong. Omni cannot escape the clear language of the First 100 Settlement under which Omni immediately and unconditionally released all claims arising from First 100's breach of the Omni Note and replaced the indebtedness owed under the Omni Note with the new obligations and rights set forth therein. 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 plain language cited herein.

Omni's subjective intent to foreclose on the Kal-Mor Properties is not only irrelevant but also inadmissible. *Frei v. Goodsell*, 129 Nev. 403, 409, (2013) ("Extrinsic or parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument."). Omni has not identified any ambiguity in the First 100 Settlement or offered any alternative interpretation that could justify looking beyond the plain language of the First 100 Settlement to examine the parties' intent. "A contract is ambiguous if it is reasonably susceptible to more than one interpretation." *Margrave v. Dermody Props., Inc.*, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994). The First 100 Settlement simply is not open to interpretation, and no alternative interpretation has been offered by Omni.

Any lingering doubt as to whether discovery was needed should be resolved by the fact that Omni was on notice for nearly a year of the arguments Kal-Mor intended to raise in its motion for partial summary judgment but made no effort whatsoever to conduct discovery. Kal-Mor's initial motion for partial summary judgment was filed on August 25, 2017 after which Omni improperly removed the underlying action to federal district court. Following remand to the District Court

nearly a year later, Kal-Mor filed renewed motion for partial summary judgment in which it raised the same arguments on July 26, 2018. Omni had more than eleven months during which it could have pursued discovery prior to the filing of the renewed motion, but it chose to do nothing. Even now, more than two years after the entry of the MPSJ Order, Omni has conducted no discovery beyond production of its initial disclosures pursuant to Nev. R. Civ. P. 16.1. The relevant facts on which Kal-Mor's arguments and the District Court's decision are based are not subject to dispute. Accordingly, there is no need for discovery concerning those facts.

D. Nevada's One-Action Rule Also Extinguished Any Rights Omni Had Under the Deeds of Trust.

Even if Omni could establish that the District Court erred in finding that a novation occurred, the District Court's MPSJ Order should still be affirmed because Nevada's one-action rule similarly extinguished Omni's ability to enforce any security interest it held under the Deeds of Trust. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 245 P.3d 1198 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

The $4.8 million First 100 Judgment was entered on the unpaid balance of the Omni Note, in addition to other amounts owed under the PPSA and Prentice Loan, on February 16, 2017. Pursuant to Nevada's one-action rule, the entry of the First 100 Judgment released and discharged any security interest Omni could have

claimed against the Kal-Mor Properties under the Deeds of Trust. Consequently, Omni forfeited its security interest in the Kal-Mor Properties and is barred from foreclosing on the Kal-Mor Properties pursuant to NRS 40.430, which is commonly known as Nevada's "one-action rule." *Walters v. Eighth Judicial Dist. Ct.*, 127 Nev. 723, 725, 263 P.3d 231, 232 (2011). "The one-action rule provides that 'there may be but one action for the recovery of any debt, or the enforcement of any right secured by a mortgage or other lien upon real estate." *Hefetz v. Beavor*, 133 Nev. 323, 327, 397 P.3d 472, 475 (2017).

> When applicable, the one-action rule thus requires that "a creditor . . . seek to recover on the property through judicial foreclosure before recovering from the debtor personally." *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 816, 123 P.3d 748, 750 (2005). If a creditor fails to comply with the one-action rule and sues a debtor personally without seeking judicial foreclosure, the debtor may assert the one-action rule as a defense and move to dismiss the action. NRS 40.435.

Id. The purpose behind the one-action rule in Nevada is to prevent harassment by creditors attempting double recovery by seeking a monetary judgment and subsequently seeking to recover real property securing the debt. *McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 816, 123 P.3d 748, 750 (2005). "If the creditor sues the debtor personally on the debt, the debtor may then either assert the one-action rule, forcing the creditor to proceed against the security first before seeking a deficiency from the debtor, or decline to assert the one-action rule, accepting a personal judgment and depriving the creditor of its ability to

proceed against the security." *Hefetz*, 133 Nev. at 327, 397 P.3d at 476. "The right to waive the security is the debtor's, not the creditor's." *Keever v. Nicholas Beers Co.*, 96 Nev. 509, 513, 611 P.2d 1079, 1082 (1980).

Furthermore, the one-action rule applies regardless of whether it is asserted by the actual debtor or a successor in interest. *See Nev. Wholesale Lumber Co. v. Myers Realty, Inc.*, 92 Nev. 24, 30, 544 P.2d 1204, 1208 (1976) ("[F]ailure to assert NRS 40.430 as an affirmative defense [in a separate action brought in violation of NRS 40.430] does not result in a waiver of all protection under that statute and leaves the debtor or his successor in interest free to invoke the sanction aspect of the 'one-action' rule.").

In *Bonicamp v. Vazquez*, 120 Nev. 377, 380, 91 P.3d 584, 586 (2004), for example, the debtors gave a creditor a deed of trust on a real property located in Nevada as collateral for a bail bond obligation in Colorado. *Id.* at 379, 91 P.3d at 585. When the debtors later defaulted on the obligation under the bail bond, the creditor obtained a default judgment against the debtors in Colorado. *Id.* Shortly thereafter, the creditor domesticated the Colorado judgment in Nevada and commenced a separate Nevada action for judicial foreclosure against the real property collateral. *Id.* On these facts, this Court held that, under Nevada's one-action rule, the creditor forfeited its rights in the real property collateral by first obtaining a personal judgment against the debtors. *Id.* at 380, 91 P.3d at 586.

Omni intentionally sought and obtained a final judgment against First 100 for the unpaid balance of the Omni Note. The impact of the one-action rule on such facts is clear. Where a creditor, such as Omni, obtains a final judgment against a borrower on the debt before foreclosing, that creditor forever loses the right to foreclose against real property securing the debt.

i. *The First 100 Judgment Is a Final Judgment.*

Nevada defines a final judgment as "one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." Any suggestion by Omni that the First 100 Judgment was not intended to be a final judgment is absurd. The stipulation prepared by Omni's counsel pursuant to which the First 100 Judgment was entered was titled "STIPULATION AND ORDER FOR ENTRY OF 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 stipulation pursuant to which the First 100 Judgment was entered, and the First 100 Judgment itself.

First, Section 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***." [JA Vol. IV, 000753-754] (emphasis supplied). Additionally, Section 15(d) of the First 100

Settlement states that it is the intention of the parties to the First 100 Settlement to not commence any action against any other party other than to enforce the First 100 Settlement or based on fraud, gross negligence, or willful misconduct. [*Id.*]. Second, the First 100 Stipulation states that the $4.8 million stipulated judgment is to be entered as a "final judgment." [JA Vol. IV, 000777, ¶ 8]. Additionally, the Stipulated Judgment states that "[t]he Lawsuit and any and all Disputes, Claims, Counterclaims, and Third-Party Claims are hereby dismissed with prejudice." JA Vol. IV, 000782, ¶ 6]. The First 100 Judgment is clearly a final judgment under Nevada law. *See Lee v. GNLV Corp*., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (A final judgment "is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs.").

ii. The Entry of the First 100 Judgment Was Undoubtedly "an Action" under NRS 40.430.

The First 100 Judgment was entered based on the indebtedness First 100 owed under the Omni Note. [JA Vol. IV, 000774-775, 000780-781]. Obtaining a final judgment on a promissory note is the very essence of "an action" under Nevada's one-action rule. In fact, Nevada's one-action rule was purposely designed to prevent a creditor like Omni from obtaining a judgment on a promissory note, as Omni did in obtaining the First 100 Judgment, only to then attempt to double its recovery by foreclosing on the real property collateral, as Omni attempted to do. "The one-action

rule was enacted to prevent double recovery by creditors … The purpose of the rule is to relieve debtors of harassment by creditors seeking to recover both possession of the property securing the debt, and a full money judgment on the debt." *Hart v. Hart*, 50 B.R. 956, 960 (Bankr. D. Nev 1985) (citation omitted).

In *Bonicamp*, this Court firmly rejected the creditor's argument that a default judgment obtained in Colorado was not "an action" for purposes of NRS 40.430, finding that the act of seeking and obtaining a default judgment in Colorado was undoubtedly "an action" under the statute notwithstanding the fact that the creditor had made no previous effort to collect. *Bonicamp,* 120 Nev. at 380-81, 91 P.3d at 586. This Court also chose to narrowly construe the exceptions to the one-action rule set forth in NRS 40.430(6), finding such exceptions applied only to the acts specifically enumerated therein. *Id*.

The fact that the First 100 Judgment was entered by stipulation is irrelevant. In the case of *In re Pajaro Dunes Rental Agency, Inc.*, 156 B.R. 263 (N.D.Cal.1993), *aff'd*, 46 F.3d 1143 (9th Cir.1995), a secured note holder attempted to argue that a final judgment entered by stipulation did not trigger California's one-action rule. That argument was firmly rejected. The note holder in *Pajaro* obtained "a stipulated personal money judgment" against two co-makers of a note that was secured by an office building. *Id*., at 265. That office building had originally been pledged as collateral by the two co-makers against whom the stipulated judgment was entered;

however, those two co-makers had transferred ownership the office building to a third co-maker of the note shortly after default but before the entry of the stipulated judgment. *Id*. When the note holder later attempted to foreclose on the office building, the third co-maker objected on the basis that the security interest in the office building had been extinguished as a result of the stipulated judgment against the other two co-makers pursuant to the one-action rule set forth at California Civil Procedure Code § 726.[12] *Id*.

The *Pajaro* court held that the one-action rule was triggered by the entry of the stipulated judgment (i) regardless of the fact that the stipulated judgment was entered against only two of the three co-makers and (ii) regardless of the fact that the third co-maker asserting the one-action rule was not the original owner or pledger of the office building. *Id*., at 266-69. In reaching this conclusion, the court noted that the one-action rule did not require any showing of prejudice by the party seeking the rule's projection. *Id*., at 267 ("The language of § 726 makes no reference to a requirement that a co-maker of a note must show prejudice before asserting his or her rights under the statute."). The court further observed that the one-action rule applies "regardless of whether the waived security is owned by the debtor or his

[12] Similar to NRS 40.430, the relevant portion of § 726 provided: "[t]here can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter."

successor in interest." *Id*., at 268 (quoting *Walker v. Community Bank*, 10 Cal.3d 729, 740, 111 Cal.Rptr. 897, 518 P.2d 329 (1974)).

Accordingly, regardless of whether the First 100 Settlement effected a novation of the Omni Note, Omni's ability to foreclose on the Kal-Mor Properties was extinguish under the one-action rule as a consequence of the entry of the final $4.8 million First 100 Judgment.

VII.

CONCLUSION

Based on the foregoing, Kal-Mor requests that the District Court's MPSJ Order be affirmed.

Dated this 24th day of May 2021.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman Font, double spaced, with page margins of 1 inch on all four sides.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 11234 words.

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to a page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24th day of May 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2021, a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** was served by electronic means by electronically filing and serving with the court's vendor pursuant to NRAP 14(f).

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