IN THE SUPREME COURT OF NEVADA

AMERICA FIRST FEDERAL CREDIT UNION, a federally chartered credit union, Appellant, v. FRANCO SORO, an individual; MYRA TAIGMAN-FARRELL, an individual; ISAAC FARRELL, an individual; KATHY ARRINGTON, an individual; and AUDIE EMBESTRO, an individual; Respondents.	Supreme Court No. 64130

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JERRY A. WIESE, District Judge
District Court Case No. A-13-679511-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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.

Appellant America First Credit Union is a federally regulated credit union. Appellant has no parent company and no stock.

Stanley W. Parry and Timothy R. Mulliner of BALLARD SPAHR LLP appeared on appellant's behalf before the district court. Stanley W. Parry, Timothy R. Mulliner, and Matthew D. Lamb are expected to appear on appellant's behalf in this Court.

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By: /s/ Matthew D. Lamb
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JURISDICTIONAL STATEMENT

This is an appeal from a district court order dismissing a deficiency action for lack of subject matter jurisdiction. Appellant America First Federal Credit Union ("AFCU") filed its Complaint in the district court on April 4, 2013. See Joint Appendix at JA001-JA005 ("JA 001-005"). Respondents Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro ("Borrowers") filed a motion to dismiss the Complaint pursuant to N.R.C.P. 12(b)(1) on July 29, 2013. See JA 017-038. AFCU filed an opposition, see JA 039-065, and Borrowers filed a reply, see JA 066-073. The district court entered an order granting the motion on September 9, 2013. See JA 075-080. Borrowers served notice of entry of the order on September 10, 2013. See JA 081-089. AFCU then filed its timely notice of appeal on September 27, 2013. See JA 090-091. Accordingly, the Court has jurisdiction over AFCU's appeal pursuant to NRAP 3A(b)(1).

STATEMENT OF THE ISSUES

1. Where the parties to a contract agree to "submit themselves to the jurisdiction of" another state's courts, but the parties do not use any compulsory or exclusive language with respect to the specified forum, is the provision a mandatory forum selection clause or a permissive consent to jurisdiction clause?

2. Where the borrower and lender under a loan secured by Nevada real property agree that the loan will be governed by another jurisdiction's law, but the other jurisdiction's deficiency statutes, by their own terms, do not apply extraterritorially to a trustee's sale of Nevada real property, is a subsequent deficiency action by the lender subject to Nevada's statute of limitations or the other jurisdiction's statute of limitations?

STATEMENT OF THE CASE

This appeal arises from a lawsuit by AFCU to recover a deficiency judgment from Borrowers. In April 2002, Borrowers obtained a commercial loan from AFCU for approximately $2.9 million. The loan was secured by real property located in Mesquite, Nevada. Borrowers defaulted, and AFCU caused a trustee's sale of the property to be held on October 4, 2012. After the proceeds of the sale were applied to the balance of the loan, there remained a deficiency of approximately $2.4 million. On April 4, 2013, AFCU sued Borrowers in the Eighth Judicial District Court to recover the deficiency.

Borrowers moved to dismiss the deficiency action, arguing that AFCU could not sue to recover the deficiency in a Nevada court. To support this argument, Borrowers cited clauses in the note and loan agreement executed by AFCU and Borrowers. The clause in the loan agreement states that the parties "agree and submit themselves to the jurisdiction of the courts of the State of Utah…." The clause in the note states that Borrowers (and only Borrowers) "agree to submit to the jurisdiction of" the courts of Utah. Neither clause contains any mandatory or exclusive language indicating that suit may only be brought in Utah. Nevertheless, the district court accepted Borrowers' argument that the provision was a mandatory forum selection clause, rather than a permissive consent to jurisdiction clause. As a result, the district court granted the motion to dismiss.

At the hearing on the motion, the district court also inquired whether this case is governed by Nevada law or Utah law, due to a choice of law provision contained in the loan agreement. The order granting the motion to dismiss states that AFCU's deficiency action is governed by Utah law. Borrowers argue that AFCU's lawsuit is thus governed by Utah's three-month statute of limitations for deficiency actions, rather than Nevada's six-month limitations period. Accordingly, Borrowers contend that the lawsuit is time-barred.

AFCU filed a timely notice of appeal of the district court's dismissal order, and this appeal followed.

STATEMENT OF FACTS

On April 11, 2002, nine borrowers obtained a commercial loan from AFCU in the principal amount of $2,900,000 (the "Loan"). The Loan is evidenced by a Business Loan Agreement (the "Loan Agreement"), see JA 026-032, and a Commercial Promissory Note (the "Note"), see JA 034-038. The nine borrowers under the Loan are Mesquite Jabez, LLC; Clifford Redekop; Joey Bowler; Charles Weiner; and the five Borrowers named as defendants in this action. JA 037. Borrowers agreed to be jointly and severally liable for all amounts due under the Loan. See id. The Loan was secured by a Trust Deed that encumbered real property at 820 West Mesquite Boulevard, Mesquite, Nevada (the "Property"). See JA 046-065.

Borrowers defaulted in their obligations under the loan. JA 003 (Complaint ¶ 15). As a result, AFCU caused a trustee's sale of the Property to be held on October 4, 2012. JA 004 (Complaint ¶ 17). At the time of the sale, the total amount owed from Borrowers to AFCU was approximately $3,628,010.34. JA 004 (Complaint ¶ 20). AFCU purchased the Property with a credit bid of $1,215,000.00, leaving a deficiency of approximately $2,413,010.34. JA 004 (Complaint ¶¶ 18, 22).

On April 4, 2013 – within Nevada's six-month statute of limitations for the filing of a deficiency action – AFCU sued Borrowers in the Eighth Judicial District

Court. See JA 001-005. AFCU sought to recover the deficiency owed by Borrowers pursuant to NRS 40.455. See id. On July 29, 2013, Borrowers responded to AFCU's Complaint by filing a motion to dismiss for lack of subject matter jurisdiction. See JA 017-038. Borrowers argued that AFCU could not sue to recover the deficiency in a Nevada court because of clauses contained in the Loan Agreement and Note consenting to jurisdiction in Utah. See JA 019-023. The relevant clause in the Loan Agreement provides:

> **Jurisdiction.** The parties agree and submit themselves to the jurisdiction of the courts of the State of Utah with regard to the subject matter of this agreement.

JA 031. The relevant provision in the Note states:

> If there is a lawsuit, Borrower(s) agrees to submit to the jurisdiction of the court in the county in which Lender is located.

JA 036.[1]

On August 20, 2013, AFCU filed an opposition to the motion to dismiss in which it explained the distinction between mandatory forum selection clauses, on one hand, and permissive consent to jurisdiction clauses, on the other hand. See JA 039- 044. AFCU further explained that the two clauses at issue in this case are

[1] AFCU's main offices are located in Riverdale, Utah. JA 002 (Complaint ¶ 1).

permissive, rather than mandatory. See id. Borrowers filed a reply on August 27, 2013. See JA 066-073.

On August 29, 2013, the district court heard arguments from AFCU and Borrowers regarding these two provisions. At the hearing, Judge Wiese noted that the Loan Agreement includes a choice of law provision in favor of Utah law. See JA 094-095 (Settled and Approved Statement of Proceedings from Hearing on Defendants' Motion to Dismiss ¶ 5). As a result, he solicited argument from counsel as to whether Nevada or Utah law governs this case. See id. In response, counsel for AFCU argued that Nevada's laws control the deficiency action related to the non-judicial foreclosure of a loan secured by Nevada real property, which foreclosure was conducted pursuant to Nevada law. See id. After further arguments, Judge Wiese took Borrowers' motion to dismiss under advisement. See JA 096 (Settled and Approved Statement of Proceedings from Hearing on Defendants' Motion to Dismiss ¶ 7).

On September 9, 2013, the district court entered an order granting the motion to dismiss. See JA 075-080. The district court held that "while the language of [the Loan Agreement and Note] could have more clearly made such forum selection 'exclusive,' nonetheless, the language clearly enough identifies Utah as the forum which [the parties] selected for purposes of subject matter jurisdiction." JA 078. Thus, the district court found that a consent to jurisdiction

clause with no mandatory or exclusive language functions as a mandatory forum selection clause.[2]

The district court went on to state that "[w]hether or not the Plaintiff has a valid claim for a deficiency judgment in the State of Utah, under the laws of the State of Utah … is for a Utah court to decide." JA 078. Thus, the district court erroneously also held that the case is governed by Utah law, presumably including Utah's statute of limitations for deficiency actions.

In addition to their forum selection clause argument, Borrowers argue that this case is subject to dismissal under Utah's three-month statute of limitations. To support their argument, Borrowers point to a choice of law provision in the Loan Agreement in favor of Utah law. See JA 031 ("This Agreement (and all loan documents in connection with this transaction) shall be governed by and construed in accordance with the laws of the State of Utah."). However, this Court's binding precedent forecloses Borrowers' statute of limitations argument because, by its terms, Utah's statute of limitations does not apply extraterritorially. This case is

[2] The district court did not address whether the clause in the Loan Agreement or the clause in the Note was controlling. As explained below, however, the Court does not have to resolve this issue because neither of the two provisions is a mandatory forum selection clause. Both provisions are permissive consent to jurisdiction clauses, meaning that AFCU is entitled to sue in Nevada court regardless of which provision controls.

governed by Nevada's six-month statute of limitations – under which AFCU's complaint is timely – and not by Utah's three-month statute.

AFCU filed a timely notice of appeal of the district court's dismissal order on September 27, 2013. See JA 090-091.

SUMMARY OF ARGUMENT

This Court has previously noted the distinction between mandatory forum selection clauses and permissive consent to jurisdiction clauses. The federal courts, the California courts, and the courts of at least twenty other states have also recognized this distinction. Consent to jurisdiction clauses authorize jurisdiction and venue in a designated forum, but do not prohibit litigation elsewhere. The purpose of such a clause is to prevent either party from contesting the personal jurisdiction of the chosen forum (here, Utah) if and only if a lawsuit is brought in that forum. In contrast, mandatory forum selection clauses contain clear language indicating that jurisdiction and venue are appropriate only in the designated forum.

Federal and state courts have almost unanimously held that when the parties to a contract "consent to jurisdiction" in a given state, but the parties do not include any mandatory or exclusive language making such jurisdiction exclusive, the clause is permissive. AFCU has found no reported case law from any jurisdiction to support Borrowers' argument that consent to jurisdiction language, by itself, requires the parties to litigate solely in the designated forum. Furthermore, this Court strongly suggested in a previous case that it rejects Borrowers' position. Since the consent to jurisdiction clauses in this case do not contain mandatory or exclusive language, they are clearly permissive. Therefore, AFCU may sue in a Nevada court to recover the deficiency owed by Borrowers.

Borrowers also argue that AFCU's deficiency action is time-barred because it is governed by Utah's three-month statute of limitations, rather than Nevada's six-month statute of limitations. Borrowers base this argument on a choice of law provision in the Loan Agreement which states that the agreement is governed by Utah law. However, this Court explicitly held in Key Bank of Alaska v. Donnels, 106 Nev. 49, 53, 787 P.2d 382, 384-85 (1990), that a choice of law provision does not incorporate the designated jurisdiction's deficiency statutes if the designated jurisdiction's statutes, by their own terms, do not apply extraterritorially to a trustee's sale held in Nevada. Since the real property in this case is located in Nevada, and since Utah's deficiency statutes do not purport to apply extraterritorially to a Nevada trustee's sale, AFCU's deficiency action is governed by Nevada's six-month limitations period. Accordingly, AFCU's lawsuit is timely.

For these reasons and others discussed herein, the Court should reverse the district court's order dismissing AFCU's complaint and instruct the district court to apply the six-month statute of limitations of NRS 40.455(1).

STANDARD OF REVIEW

"This court reviews a district court's decision regarding subject matter jurisdiction *de novo*." Holdaway-Foster v. Brunell, 130 Nev. Adv. Op. 51, 2014 WL 2893194, at *2 (2014); accord Ogawa v. Ogawa, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) ("Subject matter jurisdiction is a question of law subject to de novo review."). The interpretation of a contract is also a question of law which this Court reviews *de novo*. Benchmark Ins. Co. v. Sparks, 127 Nev. Adv. Op. 33, 254 P.3d 617, 620 (2011).

ARGUMENT

I. Since the consent to jurisdiction clauses in the Loan Agreement and Note are permissive, AFCU may sue in Nevada court to obtain a deficiency judgment.

A plaintiff in a contract dispute is generally entitled to sue in any jurisdiction the plaintiff chooses. Cf. Mountain View Rec., Inc. v. Imperial Comm. Cooking Equipment Co., 129 Nev. Adv. Op. 45, 305 P.3d 881, 885 (2013) (noting, in context of forum non conveniens doctrine, that "a plaintiff's selected forum choice may only be denied under exceptional circumstances strongly supporting another forum."). One exception from this rule is that Nevada courts will generally enforce a mandatory forum selection clause contained in the contract. In their briefing before the district court, Borrowers focused almost entirely on state and federal case law which discusses the enforceability of mandatory forum selection clauses as a general matter. See JA 021-022 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); The M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); and Tandy Computer Leasing v. Terina's Pizza, Inc., 105 Nev. 841, 784 P.2d 7 (1989)).

However, this case law is completely inapposite because it does not address the issue raised in this case. This case does not involve the enforceability of mandatory forum selection clauses as a general matter. Instead, this case involves the distinction between a mandatory forum selection clause, on one hand, and a

permissive consent to jurisdiction clause, on the other. Before a court decides whether to enforce a purported forum selection clause, the court must resolve this predicate issue.

As explained below, neither of the two provisions in this case is a mandatory forum selection clause. The two clauses state that the parties consent to jurisdiction in Utah, but they do not include any mandatory or exclusive language making this jurisdiction exclusive. In other words, they are permissive consent to jurisdiction clauses. Since neither provision requires AFCU to sue in Utah, the district court's dismissal should be reversed.[3]

A. A forum selection clause requires that all litigation be brought in the designated forum, whereas a consent to jurisdiction clause does not.

Before addressing the enforceability of a forum selection clause, a court must determine whether the clause is mandatory or merely permissive. 14D Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3803.1 (3d ed. 2007). Permissive forum selection clauses – frequently

[3] AFCU will analyze the scope and enforceability of the two clauses under Nevada law, since the parties only referenced Nevada law in briefing this issue before the district court. However, even if the Court believes that Utah law governs this issue due to the choice of law provision in the Loan Agreement, see JA 031, the outcome of the case will be the same. Reported decisions from the Utah courts indicate they would follow this Court in recognizing the distinction between mandatory forum selection clauses and permissive consent to jurisdiction clauses. See infra note 5. Since the clauses in this case contain no mandatory or exclusive language, they are clearly permissive regardless of whether they are governed by Nevada or Utah law.

described as consent to jurisdiction clauses—authorize jurisdiction and venue in a designated forum, but do not prohibit litigation elsewhere. Id. In contrast, mandatory forum selection clauses contain clear language indicating that jurisdiction and venue are appropriate exclusively in the designated forum. Id.

A clause which states that a particular court or state has jurisdiction over a contract, but which says nothing about it being exclusive jurisdiction, is permissive, not mandatory. Kachal, Inc. v. Menzie, 738 F. Supp. 371, 373 (D. Nev. 1990). "The effect of the language is merely that the parties consent to the jurisdiction of that particular court or state. Such consent does not preclude the action from being litigated in another court." Id. In contrast, mandatory forum selection clauses contain language such as "exclusive" or "only," which mandates that the designated courts are the only ones which have jurisdiction. Id. at 373-74.

Although a consent to jurisdiction clause does not force the parties to litigate only in the designated forum, there are still compelling reasons to include such a provision:

> A permissive forum selection clause in a negotiated contract between sophisticated actors is a risk management tool. With such a clause, a defendant is more strongly deterred from challenging personal jurisdiction in a suit that is filed in the consented-to-jurisdiction than he or she would be if such a clause were absent. This is the case even if it is later determined that jurisdiction would have been proper in the consented-to jurisdiction under a traditional minimum contacts analysis. The presence of the clause avoids the need to

> rely solely on the traditional minimum contacts analysis by providing a second, stronger basis for jurisdiction thereby minimizing the risk that anything more than a frivolous challenge to jurisdiction may arise.

Dunne v. Libbra, 330 F.3d 1062, 1064 (8th Cir. 2003). This is precisely the reason for the permissive consent to jurisdiction clause in this case. AFCU, located in Utah, contracted to eliminate any argument by the Borrowers that they could not be sued in Utah should AFCU choose to file an action there. However, nothing in the contracts required AFCU to sue Borrowers in Utah.

1. This Court has previously noted the distinction between mandatory forum selection clauses and permissive consent to jurisdiction clauses.

This Court has previously noted and discussed the distinction between mandatory forum selection clauses and permissive consent to jurisdiction clauses. In Tuxedo Int'l Inc. v. Rosenberg, 127 Nev. Adv. Rep. 2, 251 P.3d 690 (2011), the Court addressed a dispute between an investor and two defendants who allegedly misrepresented to the investor that they owned casinos in Peru. When the investor sued, the defendants moved to dismiss the case, arguing that any lawsuit arising from their dealings had to be brought in Peru. Id. at 692. Defendants based their argument on three separate forum selection clauses contained in three separate agreements between the investor and the defendants. Id.

The district court granted the defendants' motion to dismiss, finding the clauses were both enforceable and mandatory. Id. The Nevada Supreme Court

reversed the judgment and remanded the case for further proceedings. Id. at 699. Among other things, the Supreme Court instructed the district court to determine which of the three forum selection clauses controlled the dispute. Id. at 699-700. In doing so, the Supreme Court noted significant differences between the three clauses. The three clauses provided, in order:

> Any arising dispute will be submitted to arbitration in Peru by an arbitration tribunal to be set according to what the Parties may agree and lacking such agreement, pursuant to the General Law of Arbitration of Peru in force at the time the dispute arises.

Id. at 691.

> The parties hereto hereby consent to jurisdiction in Lima, Peru.

Id.

> Each party hereby consents to personal jurisdiction in the Country of Peru and acknowledges that venue is proper in any court in the Country of Peru and agrees that any action related to this Addendum must be brought in a court in the Country of Peru and waives any objection that may exist, now or in the future, with respect to jurisdiction, governing law and venue as set out in this paragraph.

Id. at 692.

In discussing the second clause, which merely provided that the parties "consent to jurisdiction in Lima, Peru," the Supreme Court noted:

> It can be argued…that there is no requirement contained in this clause that Peru is the exclusive forum for

> jurisdiction over any dispute between the parties. See, e.g., Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76-77 (9th Cir. 1987) (distinguishing between exclusive and nonexclusive forum selection clauses). If it is determined that the parties did not intend for the clause to act as an exclusive forum selection clause, then arguably, there is no contractual bar to Tuxedo bringing its tort claims in the Nevada district court.

Id. at 698.[4]

The Supreme Court then analyzed the third forum selection clause, which stated that each party "agrees that any action related to this Addendum must be brought in a court in the Country of Peru and waives any objection that may exist, now or in the future, with respect to jurisdiction, governing law and venue as set out in this paragraph." Id. at 692 (emphasis added). Based on this mandatory language, the Court stated that the third provision was "the provision that most closely resembles a traditional exclusive forum selection clause." Id. at 698.

Hence, the Rosenberg case recognizes the distinction between mandatory forum selection clauses and permissive consent to jurisdiction clauses. See id. Furthermore, Rosenberg strongly suggests that a provision with "consent to jurisdiction" language, and nothing more (like the two clauses at issue in this case)

[4] The Hunt Wesson case is discussed in detail in Part I.B.2 infra.

is permissive. See id. Finally, Rosenberg suggests that a clause with compulsory language, such as "must," is mandatory. Id.[5]

2. The distinction between mandatory forum selection clauses and permissive consent to jurisdiction clauses is also well-established in the federal courts, the California courts, and the courts of at least twenty other jurisdictions.

Like the Nevada Supreme Court in Rosenberg, the federal courts have also recognized the distinction between mandatory forum selection clauses and permissive consent to jurisdiction clauses. See De Energia Electrica De P.R. v. Ericsson Inc., 201 F.3d 15, 16 (1st Cir. 2000) ("A clause that simply consents to jurisdiction in one court does not by its terms exclude jurisdiction in another

[5] Utah's case law strongly indicates that its courts would also recognize the mandatory/permissive distinction. In decisions where the Utah courts have enforced a purported forum selection clause, the clause included clear language indicating that the chosen forum was the only place where litigation could be brought. See Innerlight, Inc. v. Matrix Group, LLC, 2009 UT 31, P3, 214 P.3d 854, 855 (2009) (enforcing clause providing that "This Agreement shall be construed and interpreted under the laws of the State of Florida and the parties agree that any action or proceeding brought concerning this Agreement may be brought only in the courts of Palm Beach County, Florida, and each party hereto hereby consents to the jurisdiction of such courts.") (emphasis added); Jacobsen Constr. Co. v. Teton Builders, 2005 UT 4, P6, 106 P.3d 719, 722 (2005) (enforcing clause providing that "all arbitration proceedings and litigation shall take place within Salt Lake County, State of Utah.") (emphasis added); Coombs v. Juice Works Dev., Inc., 2003 UT App 388, P2, 81 P.3d 769, 771, (2003) (enforcing clause entitled "EXCLUSIVE JURISDICTION" which provided, "FRANCHISEE and the COMPANY agree that any action arising out of or relating to this Agreement…shall be instituted and maintained only in a state or federal court of general jurisdiction in Pulaski County, Arkansas, and FRANCHISEE irrevocably submits to the jurisdiction of such court and waives any objection FRANCHISEE may have either to the jurisdiction or venue of such court.") (emphasis added).

court."); John Boutari & Son v. Attiki Importers & Distributors, Inc., 22 F.3d 51, 52 (2d Cir. 1994) ("[W]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive.") (internal citations and quotation marks omitted); City of New Orleans v. Municipal Admin. Servs., 376 F.3d 501, 504 (5th Cir. 2004) ("For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties' intent to make that jurisdiction exclusive."); Muzumdar v. Wellness Int'l Network, Ltd., 438 F.3d 759, 762 (7th Cir. 2006) ("We have said that where venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive."); Dunne at 1063 (discussing distinction between mandatory and permissive clauses); Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987) ("[T]he forum selection clause in this case is permissive rather than mandatory."); K & V Scientific Co. v. Bayerische Moteren Werke Aktiengesellschaft (BMW), 314 F.3d 494, 498 (10th Cir. 2002) ("This court and others have frequently classified forum selection clauses as either mandatory or permissive.") (internal citations and quotation marks omitted); Slater v. Energy Servs. Group Int'l, 634 F.3d 1326, 1330 (11th Cir. 2011) ("A permissive clause

authorizes jurisdiction in a designated forum but does not prohibit litigation elsewhere, whereas a mandatory clause dictates an exclusive forum for litigation under the contract.") (internal citations and quotation marks omitted).

The courts of California have also recognized the distinction between mandatory forum selection clauses and permissive consent to jurisdiction clauses. See Berg v. Mtc Elec. Techs. Co., 61 Cal. App. 4th 349, 359, 71 Cal. Rptr. 2d 523, 529 (Cal. App. 2d Dist. 1998) ("Clauses that grant jurisdiction to a particular forum without expressly making that forum the mandatory situs for resolution of disputes are considered permissive only."); Cal-State Bus. Prods. & Servs., Inc. v. Ricoh, 12 Cal. App. 4th 1666, 1672 n. 4, 16 Cal. Rptr. 2d 417, 420 n.4 (1993) (enforcing clause providing that "any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York shall have exclusive jurisdiction over any case of controversy arising under or in connection with this Agreement") (emphasis added); Furda v. Superior Court 161 Cal.App.3d 418, 422 n. 1, 207 Cal. Rptr. 646, 648 n.1 (1984) (enforcing clause providing that "[a]ny controversy or claim arising out of or relating to this Agreement…shall be litigated either in a state court for Ingham County, Michigan, or in the U.S. District Court for the Western District of Michigan") (emphasis added).

The mandatory/permissive distinction has also been recognized in at least twenty other American jurisdictions.[6]

B. The consent to jurisdiction clause in the Loan Agreement is permissive, and therefore, it does not prevent AFCU from suing in a Nevada court.

The authorities above establish two broad guidelines for determining whether a provision is mandatory or permissive. First, mandatory forum selection clauses use compulsory terms such as "shall," "must," or "will" or exclusive terms such as "any," "all," or "exclusively" when describing the designated forum. In

[6] See Ostrem v. Prideco Secure Loan Fund, LP, 841 N.W.2d 882, 901-02 (Iowa 2014); In re Fisher, No. 12-0163, 57 Tex. Sup. J. 281, 2014 Tex. LEXIS 164, at *21-26 (2014); Boland v. George S. May Int'l Co., 81 Mass. App. Ct. 817, 824, 969 N.E.2d 166, 172 (2012); Beverly Enters.-Tex. v. Devine Convalescent Care Ctr., 2012 OK CIV APP 16, ¶ 18, 273 P.3d 890, 894 (2012); Ashall Homes Ltd. v. ROK Entm't Group Inc., 992 A.2d 1239, 1250-51 (Del. Ch. 2010); Caperton v. A.T. Massey Coal Co., 225 W. Va. 128, 143, 690 S.E.2d 322, 337 (2009); Town of Homer v. United Healthcare of La., Inc., 948 So. 2d 1163, 1167 (La. App. 2007); Polk Cnty. Rec. Ass'n v. Susquehanna Patriot Commer. Leasing Co., 273 Neb. 1026, 1036, 734 N.W.2d 750, 758 (2007); Converting/Biophile Labs., Inc. v. Ludlow Composites Corp., 296 Wis. 2d 273, 291, 722 N.W.2d 633, 642 (Wis. App. 2006); Ex parte Bad Toys Holdings, Inc., 958 So. 2d 852, 856-57 (Ala. 2006); EI UK Holdings, Inc. v. Cinergy UK, Inc., 2005-Ohio-1271, (Ohio Ct. App. 2005); Mueller v. Sample, 135 N.M. 748, 751, 93 P.3d 769, 772, (N.M. Ct. App. 2004); Titan Indem. Co. v. Hood, 895 So. 2d 138, 146 (Miss. 2004); Carbo v. Colonial Pac. Leasing Corp., 264 Ga. App. 785, 786-87, 592 S.E.2d 445, 447 (2003); Mark Group Int'l, Inc. v. Still, 151 N.C. App. 565, 568, 566 S.E.2d 160, 162 (2002); Vanderbeek v. Vernon Corp., 25 P.3d 1242, 1247 (Colo. App. 2000); Whirlpool Corp. v. Certain Underwriters at London, 278 Ill. App. 3d 175, 178-80, 662 N.E.2d 467, 469-71 (1996); Columbia Casualty Co. v. Bristol-Myers Squibb Co., 215 A.D.2d 91, 96, 635 N.Y.S.2d 173, 176 (1995); Thompson v. Founders Grp. Int'l, 20 Kan. App. 2d 261, 886 P.2d 904, 911 (1994); Granados Quinones v. Swiss Bank Corp. (Overseas) S.A., 509 So. 2d 273, 274-75 (Fla. 1987).

contrast, a clause which states that the parties submit to jurisdiction in a given forum, with no mandatory or exclusive language, is permissive.

In this case, the district court's order does not specify whether it relied upon the provision in the Note or the provision in the Loan Agreement to find that AFCU waived its right to file a lawsuit in all jurisdictions but Utah. However, since neither clause is mandatory, neither clause requires AFCU to bring its deficiency action in a Utah court. Accordingly, the district court's dismissal should be reversed.

1. Mandatory forum selection clauses – unlike the provision in the Loan Agreement – use compulsory or exclusive language.

As noted above, to be mandatory, a forum selection clause must use compulsory or exclusive language which clearly indicates that the parties intended to bind themselves to litigate exclusively in the designated forum.

Here, the provision in the Loan Agreement includes no mandatory or exclusive language whatsoever. See JA 031 ("The parties agree and submit themselves to the jurisdiction of the courts of the State of Utah with regard to the subject matter of this agreement."). The provision does not state that any lawsuit under the Loan Agreement "shall" or "must" be brought in the courts of Utah. Nor does it provide that "any" or "all" litigation must be held in Utah. Since the text of

the clause includes no evidence that the parties agreed to litigate in Utah court, and nowhere else, the clause is permissive.

2. A clause which merely states that the parties submit to jurisdiction in a given forum does not require the parties to litigate solely in that forum.

Federal and state courts have overwhelmingly held that where contracting parties "consent to jurisdiction" in a given forum, the clause is permissive as long as the parties do not use any mandatory or exclusive language in reference to the forum. The Ninth Circuit Court of Appeals has gone even further by holding that "consent to jurisdiction" language is always permissive, even if it is supplemented by compulsory or exclusive terms such as "shall" or "any." In Hunt Wesson, the governing clause stated that "[t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract." Hunt Wesson at 76. As noted above, this Court cited Hunt Wesson when it stated that the consent to jurisdiction clause in the Rosenberg case appeared to be permissive. See Rosenberg at 698.

In Hunt Wesson, the Ninth Circuit held as follows:

> A primary rule of interpretation is that "[t]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it." 4 S. Williston, A Treatise on the Law of Contracts Sec. 618 (W. Jaeger 3d ed. 1961). Here, the plain meaning of the language is that the Orange County courts shall have jurisdiction over this action. The language

> says nothing about the Orange County courts having exclusive jurisdiction. The effect of the language is merely that the parties consent to the jurisdiction of the Orange County courts. Although the word "shall" is a mandatory term, here it mandates nothing more than that the Orange County courts have jurisdiction. Thus, [defendant] cannot object to litigation in the Orange County Superior Court on the ground that the court lacks personal jurisdiction. Such consent to jurisdiction, however, does not mean that the same subject matter cannot be litigated in any other court. In other words, the forum selection clause in this case is permissive rather than mandatory.

Hunt Wesson at 77; accord K & V Scientific at 496 (10th Cir. 2002) (clause stating that "[j]urisdiction for all and any disputes arising out of or in connection with this agreement is Munich" was permissive); Animal Film, LLC v. D.E.J. Productions, Inc., 193 Cal. App. 4th 466, 471-72, 123 Cal. Rptr. 3d 72, 76-77 (Cal. App. 2d Dist. 2011) (clause providing "the parties hereto submit and consent to the jurisdiction of the courts present in the State of Texas in any action brought to enforce (or otherwise relating to) this agreement" was permissive).

Not all courts have followed the Ninth Circuit's view that "consent to jurisdiction" language is categorically permissive, regardless of what other language is included in the provision. However, where the consent to jurisdiction language is not supplemented with any mandatory or exclusive terms, the clause is always considered permissive. See De Energia Electrica at 18-19 (describing provision that "the parties agree to submit to the jurisdiction of the courts of the

Commonwealth of Puerto Rico" as "an affirmative conferral of personal jurisdiction by consent, and not a negative exclusion of jurisdiction in other courts."); John Boutari & Son at 52 ("The general rule in cases containing forum selection clauses is that when only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive.") (internal citations and quotation marks omitted); City of New Orleans at 504 ("For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties' intent to make that jurisdiction exclusive."); Kachal, Inc. at 373 ("A forum selection clause providing a particular court or state has jurisdiction, but [saying] nothing about it being exclusive jurisdiction, is permissive rather than mandatory."); Utah Pizza Service, Inc. v. Heigel, 784 F. Supp. 835, 838 (D. Utah 1992) ("Clauses in which a party agrees to 'submit' to jurisdiction are not necessarily mandatory. Such language means that the party agrees to be subject to that forum's jurisdiction if sued there. It does not prevent the party from bringing suit in another forum.").

As noted above, the Nevada Supreme Court strongly suggested it agreed with this position when it analyzed the second of the three clauses at issue in the Rosenberg case. The clause stated that "[t]he parties hereto hereby consent to jurisdiction in Lima, Peru." Rosenberg at 691. The Court noted that "[i]t can be

argued…that there is no requirement contained in this clause that Peru is the exclusive forum for jurisdiction over any dispute between the parties." Id. at 698 (citation omitted). "If it is determined that the parties did not intend for the clause to act as an exclusive forum selection clause, then arguably, there is no contractual bar to Tuxedo bringing its tort claims in the Nevada district court." Id. The Supreme Court did not definitively resolve this issue in Rosenberg, since it remanded the case to the district court to determine which of the three clauses at issue governed the parties' dispute. Still, the Court strongly indicated that, under Nevada law, "consent to jurisdiction" language standing alone does not function as a mandatory forum selection clause.

Like the clause in Rosenberg, the clause in the Loan Agreement states that the parties submit to jurisdiction in Utah, and nothing more. See JA 031 ("The parties agree and submit themselves to the jurisdiction of the courts of the State of Utah with regard to the subject matter of this agreement."). The clause includes no indication that the parties intended to make jurisdiction in Utah exclusive. Therefore, the clause is permissive and does not prevent AFCU from suing in Nevada.

C. The clause in the Note is even more permissive than the clause in the Loan Agreement, and therefore, it also does not prevent AFCU from suing in a Nevada court.

Borrowers also point to a second (alleged) forum selection clause contained in the Note. However, the provision in the Note is even more permissive than the one in the Loan Agreement. The clause in the Note provides that "[i]f there is a lawsuit, Borrower(s) agrees to submit to the jurisdiction of the court in the county in which Lender is located." JA 036 (emphasis added).[7] Like the provision in the Loan Agreement, the provision in the Note includes no mandatory or exclusive language. See generally Part I.B.1 supra. Rather, the provision only contains "consent to jurisdiction" language—and nothing more—which renders it permissive. See generally Part I.B.2 supra.

Finally, and just as importantly, the clause in the Note is only binding on Borrowers, and not on AFCU. It states that "Borrower(s) agree to the jurisdiction of the court in the county in which Lender is located." JA 036 (emphasis added). Since the clause is phrased unilaterally, it does not limit AFCU's choice of forum in any way. Instead, this clause merely forces Borrowers to consent to personal jurisdiction in Utah if AFCU chooses to sue there.

Since the clauses in the Loan Agreement and Note are both permissive, AFCU is not required to litigate disputes under the Loan in Utah. AFCU is entitled to sue to collect the deficiency owed by Borrowers in a Nevada court. Therefore,

[7] AFCU's main offices are located in Riverdale, Utah. JA 002 (Complaint ¶ 1).

the district court's order dismissing this case for lack of jurisdiction should be reversed.

II. AFCU's deficiency action is timely because Utah's three-month statute of limitations does not apply as the district court indicated.

At the hearing on Borrowers' motion to dismiss, the district court raised the issue of whether this case is governed by Nevada law or Utah law. See JA 094-095. The district court based its dismissal of the case partly on its belief that the case is governed by Utah law. See JA 078 ("Whether or not the Plaintiff has a valid claim for a deficiency judgment in the State of Utah, under the laws of the State of Utah … is for a Utah court to decide."). Partly for this reason, Borrowers argue that AFCU's deficiency action is time-barred under Utah's three-month statute of limitations for deficiency actions. See Utah Code § 57-1-32. Nevada, in contrast, has a six-month statute of limitations for deficiency actions. See NRS 40.455(1). For the reasons explained below, the choice of law provision in the Loan Agreement does not incorporate Utah's three-month statute of limitations for deficiency actions. Instead, AFCU's deficiency action is governed by Nevada's six-month statute.

If the Court reverses the district court's dismissal order without addressing this additional issue, it is likely the district court will (again) dismiss AFCU's complaint based on Borrowers' statute of limitations argument. Therefore, if the

Court reverses the district court's order, it should also reverse the district court's failure to apply Nevada's six-month statute of limitations.

A. Utah's three-month statute of limitations is inapplicable under Key Bank of Alaska v. Donnels because Utah's deficiency statutes, by their own terms, do not apply extraterritorially to Nevada trustee's sale.

The case of Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382 (1990), disposes of Borrowers' statute of limitations argument. In Donnels, lender Key Bank made a commercial loan to a corporate borrower. The loan was secured by real property in Reno, Nevada and by two personal guarantees. Id. at 51, 787 P.2d at 383. The note and guarantees contained choice of law provisions in favor of Alaska law. Id. When the corporate borrower defaulted, Key Bank foreclosed against the Reno property and later brought a deficiency action against the guarantors. Id.

Under Alaska law, a lender cannot recover a deficiency judgment from a borrower or guarantor after a trustee's sale. See id. at 51-52, 787 P.2d at 384 ("When a sale is made by a trustee under a deed of trust, as authorized by AS 34.20.070-34.20.130, no other or further action or proceeding may be taken nor judgment entered against the maker or the surety or guarantor of the maker, on the obligation secured by the deed of trust for a deficiency.") (citing Alaska Stat. § 34.20.100). The guarantors argued that Key Bank's lawsuit was prohibited by this anti-deficiency statute. See id.

The Nevada Supreme Court noted that, as a general matter, an action to recover a deficiency is an action on the underlying debt. See id. at 52, 787 P.2d at 384. Therefore, a choice of law provision contained in a note generally governs a deficiency action by the lender. See id. However, the Court squarely rejected guarantors' argument that Key Bank's action was barred by Alaska's anti-deficiency statute. This is because Alaska's deficiency statutes, by their own terms, do not apply extraterritorially to a trustee's sale held in another state. See id. The Alaska statute which prohibits lenders from obtaining a deficiency only applies to trustee's sales "as authorized by [Alaska Stat. §§] 34.20.070-34.20.130." Id. at 52 n.1, 787 P.2d at 384 n.1 (citing Alaska Stat. § 34.20.100). Therefore, the Court concluded, the Alaska anti-deficiency statute did not apply extraterritorially to a trustee's sale of Nevada real property. Since the sale in Donnels was conducted pursuant to Nevada law – not Alaska law – Nevada's statute of limitations applied.[8] Thus, the central holding of Donnels is that a choice of law provision does not incorporate another jurisdiction's statutes governing deficiency judgments if those statutes, by their own terms, do not apply extraterritorially to a Nevada trustee's sale.

[8] The Court also noted that anti-deficiency statutes must be narrowly construed because they derogate from the common law. See Donnels at 53, 787 P.2d at 385.

In the instant case, the relevant provision of the Loan Agreement states, "[t]his Agreement (and all loan documents in connection with this transaction) shall be governed by and construed in accordance with the laws of the State of Utah." JA 031. Borrowers claim that this provision incorporates Utah's three-month statute of limitations for deficiency actions. See Utah Code § 57-1-32 ("At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security.") (emphasis added).

Under Donnels, Utah Code § 57-1-32 does not govern this case if, by its own terms, it does not apply extraterritorially to a Nevada trustee's sale. Clearly, the Utah statute of limitations does not apply extraterritorially. Instead, it only applies after a "sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27…" Id. It is undisputed that the trustee's sale of the Nevada property in this case was conducted pursuant to Nevada law, not pursuant to Utah Code §§ 57-1-23, 57-1-24, and 57-1-27. By its own terms, the 3-month limitations period of Utah Code § 57-1-32 does not apply here. Therefore, AFCU's deficiency action is subject to Nevada's 6-month statute of limitations, and the Court should instruct the district court to apply the Nevada limitations period on remand.

B. In contrast to Utah's three-month statute of limitations, Nevada's six-month statute of limitations expressly applies to a Nevada trustee's sale.

Borrowers' statute of limitations argument is also foreclosed by the plain language of Nevada's deficiency statutes. In contrast to Utah's statute of limitations, which by its own terms does not apply to a Nevada trustee's sale, Nevada's statute of limitations does apply to a Nevada sale:

> [U]pon application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively, and after the required hearing, the court shall award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively.

NRS 40.455. Under the plain language of this statute, Nevada's six-month limitations period applies after any "trustee's sale held pursuant to NRS 107.080…." In other words, Nevada's limitations period always governs a deficiency action arising from a trustee's sale of Nevada real property conducted pursuant to Nevada law. In this case, Borrowers do not dispute that the Property securing the Loan was located in Nevada, or that the trustee's sale of the Property was held pursuant to NRS 107.080. Therefore, AFCU's deficiency action is clearly governed by Nevada's six-month limitations period.

C. General choice of law principles also require that Nevada's statute of limitations govern this case.

If the Court agrees with AFCU that Donnels precludes application of Utah's statute of limitations, then the Court's inquiry is finished and its should instruct the district court to apply Nevada's statute of limitations on remand. However, even if Donnels does not foreclose Borrowers' argument, general choice of law principles also support AFCU's position.

At common law, a civil lawsuit is governed by the statute of limitations of the forum state. This principle, known as the rule of *lex fori*, has been followed in Nevada since the nineteenth century. See Wilcox v. Williams, 5 Nev. 206, 211 (1869) ("[T]he law of the forum always governs the remedy in England and this country; and the statute of limitations applies only to a remedy, and not to a right or obligation."); accord Sierra Diesel Injection Serv. v. Burroughs Corp., 648 F. Supp. 1148, 1152 (D. Nev. 1986) ("[T]he local law of the forum governs whether an action is barred by the statute of limitations.") (applying Nevada law). The Ninth Circuit Court of Appeals recently reaffirmed the *lex fori* approach in a diversity case governed by Nevada's choice of law rules. See Asian Am. Ent. Corp. v. Las Vegas Sands, Inc., 324 Fed. Appx. 567, 568-69 (9th Cir. 2009) (noting that Nevada Supreme Court "has not abrogated Wilcox's *lex fori* approach to statute-of-limitations conflicts….").

Furthermore, under the *lex fori* approach, a contractual choice of law provision does not incorporate the designated jurisdiction's statute of limitations. The statute of limitations is always supplied by the law of the forum state. See Portfolio Recovery Assocs. LLC v. King, 14 N.Y.3d 410, 416, 927 N.E.2d 1059 (2010) ("Choice of law provisions typically apply to only substantive issues, and statutes of limitations are considered procedural because they are deemed as pertaining to the remedy rather than the right.") (internal citations omitted); Cole v. Mileti, 133 F.3d 433, 437 (6th Cir. 1998) ("[C]ontractual choice-of-law clauses incorporate only substantive law, not procedural provisions such as statutes of limitations."); Gluck v. Unisys Corp., 960 F.2d 1168, 1179-80 (3d Cir. 1992) ("Choice of law provisions in contracts do not apply to statutes of limitations, unless the reference is express."); Sierra Diesel at 1152 (D. Nev. 1986) (holding that choice of law clause in favor of Michigan law did not incorporate Michigan's statute of limitations); Fed. Deposit Ins. Corp. v. Petersen, 770 F.2d 141, 142 (10th Cir. 1985) ("Choice of law provisions in contracts are generally understood to incorporate only substantive law, not procedural law such as statutes of limitation."); Des Brisay v. Goldfield Corp., 637 F.2d 680, 682 (9th Cir. 1981) ("Limitations periods are usually considered to be related to judicial administration and thus governed by the rules of local law, even if the substantive law of another jurisdiction applies.").

With regard to another procedural matter – the award of attorney's fees – this Court has also held that a choice of law provision does not incorporate the procedural law of the designated jurisdiction. See Tipton v. Heeren, 109 Nev. 920, 922 n.3, 859 P.2d 465, 466 n.3 (1993) ("[T]he Note contained a choice of law provision—Wyoming law governs. We agree with the parties' assessment that Wyoming law applies to the substantive issues in the case…while Nevada law governs the procedural query.").

Therefore, a lawsuit brought in a Nevada court is governed by the relevant statute of limitations imposed by Nevada law. The presence of a contractual choice of law clause does not alter this result. For these reasons, AFCU's deficiency action against Borrowers is governed by Nevada's six-month limitations period. Accordingly, AFCU's action is timely, and the district court should be instructed to apply Nevada's statute of limitations on remand.

D. Even if the choice of law provision could theoretically incorporate Utah's deficiency statutes, this would be contrary to the public policy of Nevada.

Even if the choice of law provision in the Loan Agreement could theoretically incorporate Utah's deficiency statutes, it would be contrary to Nevada's public policy to allow this result. In Nevada, a choice of law provision cannot be enforced if doing so would be "contrary to the public policy of the forum." Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortgage

Investors, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979). The public policy limitation on choice of law clauses reflects the reality that "the parties' expectations [are] not the only value in contract law; regard must also be had for state interests and for state regulation." Restatement (Second) of Conflict of Laws § 187 cmt. g. "The chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties." Id.

Allowing parties to contract around Nevada's deficiency statutes would skirt the protections for borrowers and guarantors provided by Nevada law. Cf. Keever v. Nicholas Beers Co., 96 Nev. 509, 512, 611 P.2d 1079, 1082 (1980) ("Chapter 40 of the Nevada Revised Statutes provides a comprehensive scheme of creditor and debtor protection with respect to the foreclosure and sale of real property subject to security interests."). It would also inappropriately allow other states to exercise jurisdiction over Nevada real property. And finally, it would undermine the certainty and predictability which are critical to the law of land transactions. See Gramercy Inv. Trust v. Lakemont Homes Nev., Inc., 198 Cal. App 4th 903, 909, 130 Cal. Rptr. 3d 496, 501 (2011) (holding that New York's deficiency statutes did not apply to sale of California real property, despite choice-of-law provision in favor of New York law); see also Cal. Fed. Sav. and Loan Ass'n v. Bell, 6 Haw

App. 597, 606-07, 735 P.2d 499, 506 (1987) ("If such matters as deficiency judgments arising from land transactions were not to be determined by the laws of this jurisdiction, the laws of nearly every other state as well as a number of foreign countries relating to that issue might be cited by parties as controlling their rights and liabilities."); Kelly v. Am. Fed. Sav. Loan Ass'n, 178 Ga. App. 542, 343 S.E.2d 755 (1986) (holding that Georgia's statutory requirement of confirmation proceedings as prerequisite to award of deficiency judgment did not apply to sale of Mississippi real property).

Accordingly, allowing the choice of law provision in the Loan Agreement to incorporate Utah's deficiency statutes would be contrary to the public policy of Nevada. For this additional reason, the district court should be instructed to apply Nevada's six-month limitations period on remand.

CONCLUSION

For the foregoing reasons, AFCU respectfully requests that the Court reverse the district court's order dismissing AFCU's complaint and instruct the district court to apply the six-month statute of limitations of NRS 40.455(1).

Dated October 13, 2014.

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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 requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 8,389 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

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 the 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 that the accompanying brief is not in conformity with the requirements of Nevada Rules of Appellate Procedure.

/ / /

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