

JOINT APPENDIX PART 2

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(b) All monthly payments mentioned in the preceding subsection (a) of this paragraph 1. and all payments to be made under the note secured hereby shall be added together, and the aggregate amount thereof shall be paid by the Trustor each month on the date specified in said note for the payment of monthly installments in a single payment to be allocated by the Beneficiary to the following items in the order set forth:

- i. Taxes, assessments, fire and other hazard insurance premiums;
- ii. Interest on said indebtedness secured hereby;
- iii. Amortization of the principal of said indebtedness secured hereby.

Any deficiency in the amount of any such aggregate monthly payment shall constitute an event under this Trust Deed.

2. If the Total of the payments made under (a) of paragraph 1 preceding shall exceed the amount of payments actually made by Beneficiary for taxes, assessments, or insurance premiums, as the case may be released, applied on any indebtedness secured hereby, or be credited by Beneficiary on subsequent payments to be made by Trustor. If, however, the monthly payments made under (a) of paragraph 1 preceding shall not be sufficient to pay taxes, and assessments, and insurance premiums, as the case may be, when the same shall become due and payable, then Trustor shall pay to Beneficiary any amount necessary to make up the deficiency on or before the date when payment of such taxes, assessments, or insurance premiums shall be due. If there shall be a default under any of the provisions of this Trust Deed and thereafter a sale of the premises in accordance with the provisions thereof, or if the Beneficiary acquires the property otherwise after default, Beneficiary at its option may apply, at the time of commencement of such proceedings, or at the time the property is otherwise acquired, the balance then remaining in the funds accumulated under (a) of paragraph 1 preceding, as a credit against the amount of principal then remaining unpaid under said note.

TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES:

3. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

- (a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and
- (b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

4. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In the event that the Trustor shall fail to provide satisfactory hazard insurance within thirty days prior to the expiration of any expiring policy, the Beneficiary may procure, on the Trustor's behalf, insurance in favor of the Beneficiary alone. If insurance cannot be secured by the Trustor to provide the required coverage, this will constitute an active default under the terms of this Trust Deed. In the event of the foreclosure of this Trust Deed or other Transfer of title to the granted property in extinguishment, in whole or in part, of the debt secured hereby, all right, title, and interest of the Trustor in and to any insurance policy then in force shall pass to the purchaser or grantee.

5. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

6. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

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7. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances, charges, and lien with interest on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

8. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation thereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights of powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgement of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employment of counsel, and payment of reasonable counsel fees.

9. That the Beneficiary shall have the right to inspect said property at any and all times during usual business hours.

10. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee with Interest from date of expenditure at the Credit Union's maximum rate for unsecured loans until paid, and the repayment thereof shall be secured hereby.

IT IS MUTUALLY AGREED THAT:

11. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

12. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) grant any extension or modification of the terms of this loan; (e) reconvey, without warranty, all or any part of said property; (f) take other or additional security for the payment thereof. The grantee in any reconveyance may be described as "the person or persons entitled thereto," and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

13. As additional security, Trustor hereby assigns to Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

14. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expense of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

15. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release

thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or validate any action pursuant to such notice.

16. Failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default or acceptance of payment of any sum secured hereby after its due date shall not constitute a waiver of any other subsequent default.

17. In the event of the passage, after the date of this Trust Deed, of any law deducting from the value of the property for the purposes of taxation, any lien thereon, or changing in any way the laws now in force for the taxation of trust deeds or debts secured by trust deed, or the manner of the collection of any such taxes, so as to affect this Trust Deed, the indebtedness secured hereby shall immediately become due and payable at the option of the Beneficiary.

18. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder or in the event a receiver or a trustee is appointed for Trustor or Trustor's property, or Trustor makes an assignment for benefit of creditors, or Trustor becomes insolvent, or a petition is filed by or against Trustor pursuant to any of the United States Bankruptcy Act, as amended, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligation hereof, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

19. After the lapse of such time as may then be required by law following the recordation of said notice of default, and notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every such case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at the Credit Union's maximum rate for unsecured loans from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

20. Trustor agrees to surrender possession of the hereinabove described Trust property to the Purchaser at the aforesaid sale, immediately after such sale, in the event such possession has not previously been surrendered by Trustor.

21. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceedings all costs and expenses incident thereto, including a reasonable attorney's fees in such amount as shall be fixed by the court.

22. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

23. This Trust Deed shall apply to, inure to the benefit of and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledge, of the note secured hereby. In this Trust Deed, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

24. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

25. This Trust Deed shall be construed according to the laws of the State of NV.

26. Notwithstanding any provision herein or in said note, the total liability for payments in the nature of interest shall not exceed the limits now imposed by the applicable laws of the State of NV.

27. If any provision hereof should be held unenforceable or void, then such provision shall be deemed separable from the remaining provisions and shall in no way affect the validity of this Trust Deed.

28. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

Signature of Trustor:

BY: MESQUITE, JABEZ LLC

By: [Signature]
Clifford Redekop, Managing Member

By: [Signature]
Isaac Farrell, Managing Member

By: [Signature]
Franco Soro, Managing Member

By: [Signature]
Kathy Arrington, Managing Member

LLC ACKNOWLEDGMENT

STATE OF NEVADA

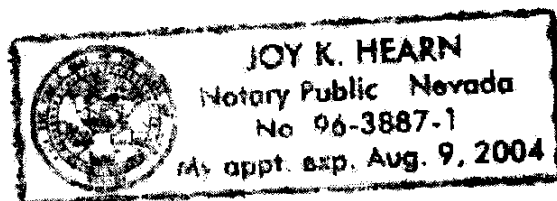
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COUNTY OF

on the 10 day of April A.D., 2003 personally appeared before me Clifford Redekop
Isaac Farrell, Franco Soro, Kathy Arrington
the signer(s) of the above instrument, who duly acknowledged to me that he/she is a member of Mesquite
Jabez LLC, L.L.C. and that he/she executed the same.

Residing at:

My Commission Expires:



[Signature]
Notary Public

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REQUEST FOR FULL RECONVEYANCE

(To be used only when indebtedness secured hereby has been paid in full)

TO: Trustee.

The undersigned is the legal owner and holder of the note and all other indebtedness secured by the within Trust Deed. Said note, together with all other indebtedness secured by said Trust Deed has been fully paid and satisfied; and you are hereby requested and directed, on payment to you of any sums owing to you under the terms of said Trust Deed, to cancel said note above mentioned, and all other evidences of indebtedness, secured by said Trust Deed delivered to you herewith, together with the said Trust Deed, and to reconvey, without warranty, to the parties designated by the terms of said Trust Deed, all of the estate now held by you thereunder.

Dated _____, 20__

20020411
Order Number: 02-0100088-SPC

EXHIBIT "A"
LEGAL DESCRIPTION

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF
SECTION 18, TOWNSHIP 13 SOUTH, RANGE 71 EAST, M.D.M., CLARK COUNTY, NEVADA,
MORE PARTICULARLY DESCRIBED AS FOLLOWS:

LOT TWO (2) AS SHOWN ON FILE IN FILE 100 OF PARCEL MAPS, PAGE 84, IN THE OFFICE OF
THE COUNTY RECORDER, CLARK COUNTY, NEVADA.

CLARK COUNTY, NEVADA
JUDITH A. VANDEVER, RECORDER
RECORDED AT REQUEST OF:

NEVADA TITLE COMPANY

04-11-2002 08:01 STX 7
OFFICIAL RECORDS

BOOK: 20020411 INST: 00069

FEE: 20.00 RPTT: .00

20020411
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001-18-702-018

WHEN RECORDED, MAIL TO:
AMERICA FIRST CREDIT UNION
ATTN: BUSINESS SERVICES
P.O. Box 9339 Ogden, Utah 84409-0339

REFERENCE: MESQUITE JABEZ, LLC #718299-1.1

Mail Statement
Mesquite Jabez LLC
28 Anthem Creek Circle
Henderson NV 89052

SPACE ABOVE THIS LINE FOR RECORDER'S USE

3

DUE - ON - TRANSFER RIDER

Notice: This rider adds a provision to the Security Instrument allowing the Lender to require repayment of the Note in full upon transfer of the property.

This Due-On Transfer is made this April 10th 2004, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Deed to Secure Debt (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to America First Credit Union (the "Lender") of the same date (the "Note") and covering the property described in the Security Instrument and located at:

See Exhibit "A" for exact legal description of the property.

LIQUOR STORE/MINI MART AND EIGHT ACRE LAND PARCEL

APPROXIMATELY: 820 WEST MESQUITE BOULEVARD, MESQUITE, NEVADA

AMENDED COVENANT. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or an interest therein is sold or transferred by Borrower (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person or persons but is a corporation, partnership, trust or other legal entity) without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Security Instrument which does not relate to a transfer of rights of occupancy in the property, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, decent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Security Instrument to be immediately due and payable.

If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by the Trust Deed for collection, possession and foreclosure.

Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

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IN WITNESS WHEREOF, Borrower has executed this Due-On-Transfer Rider.

BY: MESQUITE JABEZ, LLC

By: [Signature]
Clifford Redekop, Managing Member

By: [Signature]
Isaac Farrell, Managing Member

By: [Signature]
Franco Soro, Managing Member

By: [Signature]
Kathy Arrington, Managing Member

LLC ACKNOWLEDGMENT

STATE OF NEVADA

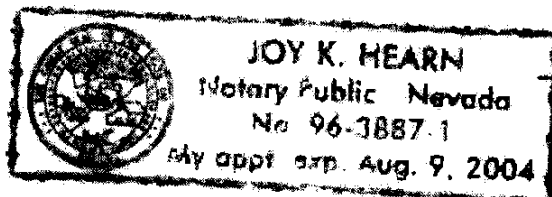
:SS

COUNTY OF

on the 11 day of April 3 A.D., 2002, personally appeared before me Clifford Redekop
Isaac Farrell Franco Soro Kathy Arrington
the signer(s) of the above instrument, who duly acknowledged to me that he/she is a member of
Mesquite Jabez, L.L.C. and that he/she executed the same.

Residing at:

My Commission Expires:



[Signature]
Notary Public

20020411
Order Number: 02-0100070-SPC

EXHIBIT "A"
LEGAL DESCRIPTION

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF
SECTION 18, TOWNSHIP 13 SOUTH, RANGE 71 EAST, M.D.M., CLARK COUNTY, NEVADA,
MORE PARTICULARLY DESCRIBED AS FOLLOWS:

LOT TWO (2) AS SHOWN ON FILE IN FILE 100 OF PARCEL MAPS, PAGE 84, IN THE OFFICE OF
THE COUNTY RECORDER, CLARK COUNTY, NEVADA.

CLARK COUNTY, NEVADA
JUDITH A. VANDEVER, RECORDER
RECORDED AT REQUEST OF:

NEVADA TITLE COMPANY

04-11-2002 08:01 STX 3

OFFICIAL RECORDS

BOOK: 20020411 INST: 00070

FEE: 16.00 RPTT: .00

001-18-702 018

WHEN RECORDED, MAIL TO:
AMERICA FIRST CREDIT UNION
4646 SO. 1500 W. STE 130
OGDEN, UTAH 84405

ATTN: BUSINESS SERVICES

Mail Tax Statement
Mesquite Jabez LLC
28 Anthem Creek Circle
Henderson NV 89052

SPACE ABOVE THIS LINE FOR RECORDER'S USE

TRUST DEED
With Assignment of Rents

THIS TRUST DEED, made this April 11, 2002, between MESQUITE JABEZ, LLC, as TRUSTOR, whose address is 28 ANTHEM CREEK CIRCLE, HENDERSON, NEVADA 89052, TIMOTHY W. BLACKBURN, ATTORNEY, as TRUSTEE, and AMERICA FIRST CREDIT UNION a Utah Corporation, as BENEFICIARY.

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described properties, situated in CLARK County, State of Nevada:

SEE ATTACHED "EXHIBIT A" FOR LEGAL DESCRIPTION

LIQUOR STORE/MINI MART AND EIGHT ACRE LAND PARCEL
APPROXIMATELY: 820 WEST MESQUITE BOULEVARD, MESQUITE, NEVADA

Together with all the estate, right, title, and interest, including insurance, which trustor now has or may hereafter, acquire, either in law or inequity, in and to said premises; to have and to hold the same, together with the buildings and improvements thereon and all alterations, additions or improvements now or hereafter made thereto, including all machinery, equipment, material, appliances, and fixtures now or hereafter installed or placed in said buildings or on said real property for the generation or distribution of air, water, heat, electricity, light, fuel or refrigeration or for ventilating or air conditioning purposes or for sanitary or drainage purposes, for the removal of dust, refuse or garbage and including stoves, ranges, cabinets, laundry equipment, all elevators, awnings, window shades, Venetian blinds, drapery rods and brackets, screens, floor coverings, including all rugs and carpets attached to floors, lobby furnishings and incinerators and all other similar items and things; all to the items and things so specified and all other similar items or things, whether now or hereafter placed on the property, being hereby declared to be, and in all circumstances, shall be construed to be, for and in connection with the purposes and powers of this trust deed, things affixed to and a part of the realty described herein; the specific enumerations herein not excluding the general, and together with all singular lands, tenements, hereditaments, reversion and reversions, remainder and remainders, rents, issues, profits, privileges, water rights and appurtenances of every kind and nature thereunto belonging to or in any way appertaining, or which may be hereafter acquired and used or enjoyed with said property, or any part thereof, SUBJECT HOWEVER, to the right, power and authority hereinafter given to and conferred upon beneficiary to collect and apply such rents, issues, and profits. FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$ TWO MILLION NINE HUNDRED THOUSAND AND NO/100 DOLLARS, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

1. Upon request of the Beneficiary and from and after the date of such request, Trustor agrees to pay to Beneficiary in addition to the monthly payments of principal and interest payable under the terms of said note, monthly until said note is fully paid, the following sums:

(a) An installment of the taxes and assessments levied or to be levied against the premises covered by this Trust Deed and an installment of the premium or premiums that will become due and payable to renew the insurance of the premises covered hereby against loss by fire or such other hazard as may reasonably be required by the Beneficiary in amounts, and in a company or companies, satisfactory to the Beneficiary. Such installments shall be equal, respectively, to the estimated premium or premiums for such insurance, and taxes and assessments, next due (as estimated by the Beneficiary) less all installments already paid therefor, divided by the number of months that are to elapse before one month prior to the date when such premium or premiums and taxes and assessments will become due. Such added payments shall not be, nor be deemed to be, trust funds but may be commingled with the general funds of the Beneficiary, and no interest shall be payable in respect thereof. The said Beneficiary shall use such monthly payments to the extent they will suffice to pay such premium or premiums and taxes and assessments when due.

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(b) All monthly payments mentioned in the preceding subsection (a) of this paragraph 1. and all payments to be made under the note secured hereby shall be added together, and the aggregate amount thereof shall be paid by the Trustor each month on the date specified in said note for the payment of monthly installments in a single payment to be allocated by the Beneficiary to the following items in the order set forth:

- i. Taxes, assessments, fire and other hazard insurance premiums;
- ii. Interest on said indebtedness secured hereby;
- iii. Amortization of the principal of said indebtedness secured hereby.

Any deficiency in the amount of any such aggregate monthly payment shall constitute an event under this Trust Deed.

2. If the Total of the payments made under (a) of paragraph 1 preceding shall exceed the amount of payments actually made by Beneficiary for taxes, assessments, or insurance premiums, as the case may be released, applied on any indebtedness secured hereby, or be credited by Beneficiary on subsequent payments to be made by Trustor. If, however, the monthly payments made under (a) of paragraph 1 preceding shall not be sufficient to pay taxes, and assessments, and insurance premiums, as the case may be, when the same shall become due and payable, then Trustor shall pay to Beneficiary any amount necessary to make up the deficiency on or before the date when payment of such taxes, assessments, or insurance premiums shall be due. If there shall be a default under any of the provisions of this Trust Deed and thereafter a sale of the premises in accordance with the provisions thereof, or if the Beneficiary acquires the property otherwise after default, Beneficiary at its option may apply, at the time of commencement of such proceedings, or at the time the property is otherwise acquired, the balance then remaining in the funds accumulated under (a) of paragraph 1 preceding, as a credit against the amount of principal then remaining unpaid under said note.

TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES:

3. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore promptly and in good workmanlike manner any building which may be constructed, damaged or destroyed thereon; to comply with all laws, covenants and restrictions affecting said property; not to commit or permit waste thereof; not to commit, suffer or permit any act upon said property in violation of law; to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general; and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

- (a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and
- (b) To allow Beneficiary to inspect said property at all times during construction.

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

4. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Beneficiary instead of to Trustor and Beneficiary jointly, and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to the reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged. In the event that the Trustor shall fail to provide satisfactory hazard insurance within thirty days prior to the expiration of any expiring policy, the Beneficiary may procure, on the Trustor's behalf, insurance in favor of the Beneficiary alone. If insurance cannot be secured by the Trustor to provide the required coverage, this will constitute an active default under the terms of this Trust Deed. In the event of the foreclosure of this Trust Deed or other Transfer of title to the granted property in extinguishment, in whole or in part, of the debt secured hereby, all right, title, and interest of the Trustor in and to any insurance policy then in force shall pass to the purchaser or grantee.

5. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

6. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee; and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

7. To pay at least 10 days in arrears all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property; to pay, when due, all encumbrances, charges, and lien with interest on said property or any part thereof, which at any time appear to be prior or superior hereto; to pay all costs, fees, and expenses of this Trust.

8. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation thereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights of powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgement of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employment of counsel, and payment of reasonable counsel fees.

9. That the Beneficiary shall have the right to inspect said property at any and all times during usual business hours.

10. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee with Interest from date of expenditure at the Credit Union's maximum rate for unsecured loans until paid, and the repayment thereof shall be secured hereby.

IT IS MUTUALLY AGREED THAT:

11. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

12. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) grant any extension or modification of the terms of this loan; (e) reconvey, without warranty, all or any part of said property; (f) take other or additional security for the payment thereof. The grantee in any reconveyance may be described as "the person or persons entitled thereto," and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

13. As additional security, Trustor hereby assigns to Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

14. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expense of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

15. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of said property, and the application or release

thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

16. Failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default or acceptance of payment of any sum secured hereby after its due date shall not constitute a waiver of any other subsequent default.

17. In the event of the passage, after the date of this Trust Deed, of any law deducting from the value of the property for the purposes of taxation, any lien thereon, or changing in any way the laws now in force for the taxation of trust deeds or debts secured by trust deed, or the manner of the collection of any such taxes, so as to affect this Trust Deed, the indebtedness secured hereby shall immediately become due and payable at the option of the Beneficiary.

18. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder or in the event a receiver or a trustee is appointed for Trustor of Trustor's property, or Trustor makes an assignment for benefit of creditors, or Trustor becomes insolvent, or a petition is filed by or against Trustor pursuant to any of the United States Bankruptcy Act, as amended, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligation hereof, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

19. After the lapse of such time as may then be required by law following the recordation of said notice of default, and notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every such case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale; provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at the Credit Union's maximum rate for unsecured loans from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

20. Trustor agrees to surrender possession of the hereinabove described Trust property to the Purchaser at the aforesaid sale, immediately after such sale, in the event such possession has not previously been surrendered by Trustor.

21. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceedings all costs and expenses incident thereto, including a reasonable attorney's fees in such amount as shall be fixed by the court.

22. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

23. This Trust Deed shall apply to, inure to the benefit of and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledge, of the note secured hereby. In this Trust Deed, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

24. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

25. This Trust Deed shall be construed according to the laws of the State of NV. *Ka J F S*

26. Notwithstanding any provision herein or in said note, the total liability for payments in the nature of interest shall not exceed the limits now imposed by the applicable laws of the State of NV. *Ka J F S*

27. If any provision hereof should be held unenforceable or void, then such provision shall be deemed separable from the remaining provisions and shall in no way affect the validity of this Trust Deed.

28. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

Signature of Trustor:

BY: MESQUITE, JABEZ LLC

By: *[Signature]*
Clifford Redekop, Managing Member

By: *[Signature]*
Isaac Farrell, Managing Member

By: *[Signature]*
Franco Soro, Managing Member

By: *[Signature]*
Kathy Arrington, Managing Member

LLC ACKNOWLEDGMENT

STATE OF NEVADA

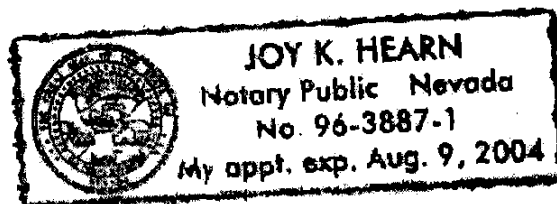
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COUNTY OF

on the 10 day of April A.D., 2007 personally appeared before me Clifford Redekop
Isaac Farrell, Franco Soro, Kathy Arrington
the signer(s) of the above instrument, who duly acknowledged to me that he/she is a member of Mesquite
Jabez LLC, L.L.C. and that he/she executed the same.

Residing at:

My Commission Expires:



[Signature]
Notary Public

REQUEST FOR FULL RECONVEYANCE

(To be used only when indebtedness secured hereby has been paid in full)

TO: Trustee.

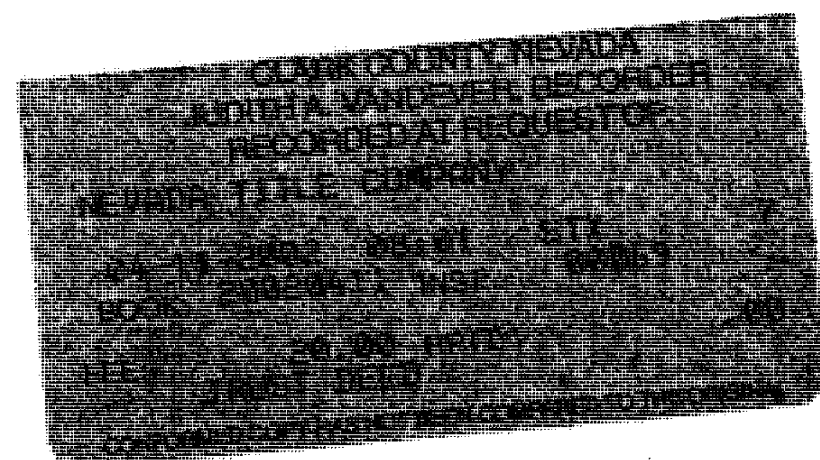
The undersigned is the legal owner and holder of the note and all other indebtedness secured by the within Trust Deed. Said note, together with all other indebtedness secured by said Trust Deed has been fully paid and satisfied; and you are hereby requested and directed, on payment to you of any sums owing to you under the terms of said Trust Deed, to cancel said note above mentioned, and all other evidences of indebtedness, secured by said Trust Deed delivered to you herewith, together with the said Trust Deed, and to reconvey, without warranty, to the parties designated by the terms of said Trust Deed, all of the estate now held by you thereunder.

Dated _____, 20__

EXHIBIT "A"
LEGAL DESCRIPTION

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 18, TOWNSHIP 13 SOUTH, RANGE 71 EAST, M.D.M., CLARK COUNTY, NEVADA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

LOT TWO (2) AS SHOWN ON FILE IN FILE 100 OF PARCEL MAPS, PAGE 84, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA.



001-18-702-018
WHEN RECORDED, MAIL TO:
AMERICA FIRST CREDIT UNION
ATTN: BUSINESS SERVICES
P.O. Box 9339 Ogden, Utah 84409-0339

REFERENCE: MESQUITE JABEZ, LLC #718299-1.1

Mail Statement
Mesquite Jabez LLC
28 Anthem Creek Circle
Henderson NV 89052

SPACE ABOVE THIS LINE FOR RECORDER'S USE

DUE - ON - TRANSFER RIDER

Notice: This rider adds a provision to the Security Instrument allowing the Lender to require repayment of the Note in full upon transfer of the property.

This Due-On Transfer is made this April 10th 2004, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Deed to Secure Debt (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to America First Credit Union (the "Lender") of the same date (the "Note") and covering the property described in the Security Instrument and located at:

See Exhibit "A" for exact legal description of the property.

LIQUOR STORE/MINI MART AND EIGHT ACRE LAND PARCEL

APPROXIMATELY: 820 WEST MESQUITE BOULEVARD, MESQUITE, NEVADA

AMENDED COVENANT. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or an interest therein is sold or transferred by Borrower (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person or persons but is a corporation, partnership, trust or other legal entity) without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Security Instrument which does not relate to a transfer of rights of occupancy in the property, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Security Instrument to be immediately due and payable.

If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by the Trust Deed for collection, possession and foreclosure.

Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

IN WITNESS WHEREOF, Borrower has executed this Due-On-Transfer Rider.

BY: MESQUITE JABEZ, LLC

By: [Signature]
Clifford Redekop, Managing Member

By: [Signature]
Isaac Farrell, Managing Member

By: [Signature]
Franco Soro, Managing Member

By: [Signature]
Kathy Arrington, Managing Member

LLC ACKNOWLEDGMENT

STATE OF NEVADA

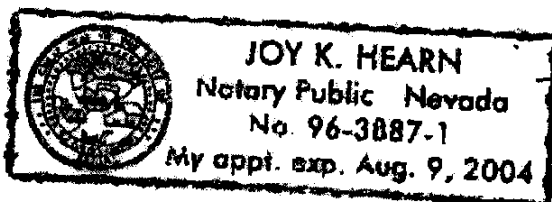
:SS

COUNTY OF

on the 11 day of April A.D., 2002, personally appeared before me Clifford Redekop
Isaac Farrell Franco Soro Kathy Arrington
the signer(s) of the above instrument, who duly acknowledged to me that he/she is a member of
Mesquite Jabez, L.L.C. and that he/she executed the same.

Residing at:

My Commission Expires:

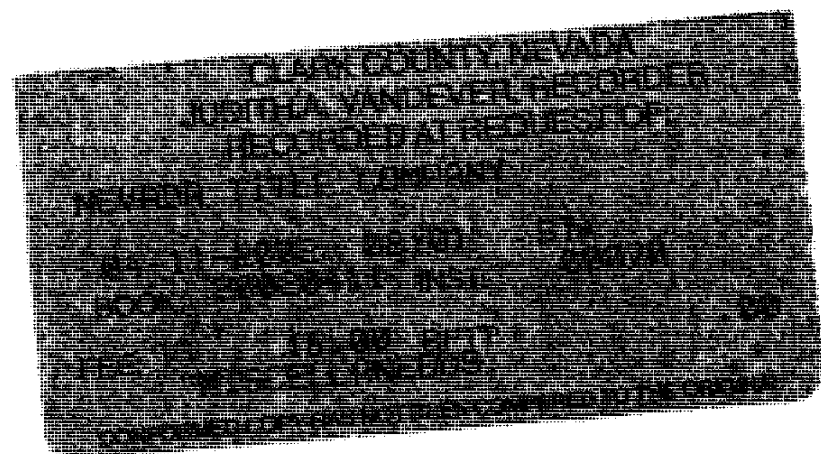


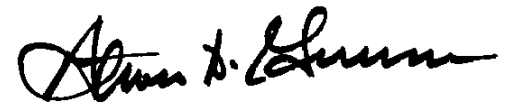
[Signature]
Notary Public

EXHIBIT "A"
LEGAL DESCRIPTION

THAT PORTION OF THE NORTH HALF (N ½) OF THE SOUTHEAST QUARTER (SE ¼) OF SECTION 18, TOWNSHIP 13 SOUTH, RANGE 71 EAST, M.D.M., CLARK COUNTY, NEVADA, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

LOT TWO (2) AS SHOWN ON FILE IN FILE 100 OF PARCEL MAPS, PAGE 84, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA.





CLERK OF THE COURT

RPLY

Bogatz Law Group

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cvlasic@isbnnv.com

Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

AMERICA FIRST FEDERAL CREDIT
UNION, a federally chartered credit union,

Plaintiff,

vs.

FRANCO SORO, an individual; MYRA
TAIGMAN-FARRELL, an individual;
ISAAC FARRELL, an individual; KATHY
ARRINGTON, an individual; AUDIE
EMBESTRO, an individual; DOES 1
through 10; ROE ENTITIES I through X,

Defendants.

Case No.: A-13-679511-C

Dept. No.: XXX

Date: August 29, 2013

Time: 9:00 a.m.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants, FRANCO SORO, MYRA TAIGMAN-FARRELL, ISAAC FARRELL,
KATHY ARRINGTON, and AUDIE EMBESTRO (hereinafter collectively referred to as
"Defendants"), through their attorneys of record, the law firm of Bogatz Law Group, hereby
respectfully files this Reply in Support of Motion to Dismiss. This Reply is made and based
upon all the papers, pleadings and records on file herein, together with the following points and

...

...

authorities, and any oral argument entertained by the Court at the time of the hearing in this matter.

Dated this 27th day of August, 2013.

BOGATZ LAW GROUP

By: /s/ Charles M. Vlasic III
I. Scott Bogatz, Esq.
Nevada Bar No. 3367
Charles M. Vlasic III, Esq.
Nevada Bar No. 11308
3800 Howard Hughes Parkway, Suite 1850
Las Vegas, Nevada 89169
Attorneys for Defendants

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION¹

There is no dispute that the parties hereto expressly agreed that any dispute arising under the loan documents in question would be adjudicated by a Utah court. In its Opposition, America First offers just two reasons why this Court should deny the pending Motion to Dismiss. First, America First mistakenly argues that the forum selection clauses contained in the loan documents can be ignored because its right to seek a deficiency judgment did not arise from the loan documents themselves, but rather from Nevada statutes. Second, America First improperly suggests that the forum selection clauses contained in the loan documents can be ignored because they are permissive, rather than mandatory in nature. For a variety of reasons set forth in more detail below, however, neither of these arguments survive scrutiny. In fact, nothing contained in the Opposition filed by America First requires, let alone allows this Court to deny the pending Motion to Dismiss. Accordingly, because the loan documents at the center of this dispute mandate that *only* a Utah court has jurisdiction to entertain the claims brought by America First

¹ Unless otherwise stated herein, the capitalized terms herein have the same meanings ascribed to them in the underlying Motion to Dismiss filed by the Defendants on July 29, 2013.

1 in its Complaint, this case must be dismissed pursuant to Nevada Rules of Civil Procedure
2 12(b)(1) and 12(h)(3).

3 **II. LEGAL ARGUMENT**

4 **A. AMERICA FIRST IS ATTEMPTING TO ENFORCE AND RECOVER**
5 **UPON AN OBLIGATION CREATED BY A PROMISSORY NOTE, NOT**
6 **NEVADA’S STATUTES.**

7 In its Opposition, America First argues that its “right to seek a deficiency judgment did
8 not arise from any provision of the Loan Documents themselves, but rather from Nevada
9 statute.”² Based upon this erroneous supposition, America First suggests that the Court should
10 simply ignore the applicable law and jurisdiction selection clauses contained in the underlying
11 Loan Documents. This argument is demonstrative of either a fundamental misunderstanding of
12 basic contract and real property law, or a transparent attempt to confuse and mislead the Court
13 with semantics. In either case, this argument lacks merit.

14 “In Nevada, promissory notes on real estate loans are typically secured by deeds of trust
15 on the property.” Edelstein v. Bank of New York Mellon, 286 P.3d 249, 254 (2012). “**The note**
16 **represents the right to the repayment of the debt**, while the [deed of trust] . . . represents the
17 security interest in the property that is being used to secure the note.” Id. (emphasis added)
18 (quoting Robert E. Dordan, *Mortgage Electronic Registration Systems (MERS), Its Recent Legal*
19 *Battles, and the Chance for a Peaceful Existence*, 12 Loy. J. Pub. Int. L. 177, 180 (2010)).

20 “When the grantor defaults on the note, the deed-of-trust beneficiary can select the
21 judicial process for foreclosure pursuant to NRS 40.430 or the “nonjudicial” foreclosure-by-
22 trustee’s sale procedure under NRS Chapter 107.” Id. (citing Nev. Land & Mtge. v. Hidden
23 Wells, 83 Nev. 501, 504, 435 P.2d 198, 200 (1967)). Moreover, “a party can bring an action **on**
24 **the note** for a deficiency judgment” Nev. Land & Mortgage Co., 83 Nev. at 504, 435 P.2d
25 at 200 (emphasis added); see Welburn v. Eighth Judicial Dist. Court of State of Nev. In & For
26 Cnty. of Clark, 107 Nev. 105, 106, 806 P.2d 1045, 1046 (1991). The Supreme Court of Nevada
27 explained this concept long ago:

28 ² See August 20, 2013 Opposition to Motion to Dismiss at p. 3 : ¶¶ 14 – 15.

1 Where a default has occurred, a beneficiary, under a deed of trust, can select the
2 judicial process for foreclosure pursuant to NRS 40.430, or the procedure under
3 NRS ch. 107, of foreclosure by a trustee's sale *and then bring an action on the*
promissory note for any deficiency which may occur.

4 Nev. Land & Mortgage Co., 83 Nev. at 504, 435 P.2d at 200 (emphasis added).

5 Put simply, Nevada's statutes, in and of themselves, do not grant any independent rights
6 to creditors, nor do they create any independent obligations upon borrowers or guarantors.
7 Rights to receive payments and obligations to make payments arise under contracts between
8 parties. Nevada's statutes, and particularly NRS 40.455 merely sets forth the *processes* and
9 *procedures* for enforcing these rights and obligations and for obtaining a deficiency judgment
10 following a default on the underlying loan documents. See NRS 40.451 *et al.*; Carrillo v. Valley
11 Bank of Nev., 103 Nev. 157, 160 n.1, 734 P.2d 724, 726 n.1 (1987) (noting "[t]he proper
12 procedure . . . to follow in seeking a deficiency judgment is set forth in NRS 40.455."); Verreaux
13 v. D'Onofrio, 108 Nev. 142, 144, 824 P.2d 1021, 1022 (1992) (internal citations omitted)
14 (stating "'NRS Chapter 40 'provides a comprehensive scheme of creditor and debtor protection
15 with respect to the foreclosure and sale of real property subject to security interests.'").
16 Accordingly, the argument that America First's "right to seek a deficiency judgment did not arise
17 from any provision of the Loan Documents themselves, but rather from Nevada statute[s]" must
18 be rejected by this Court.

19
20 **B. AMERICA FIRST IS ATTEMPTING TO AVOID ITS CONTRACTUAL**
OBLIGATIONS UNDER THE LOAN DOCUMENTS.

21 America First's mischaracterization of the applicable jurisdiction selection clauses
22 contained in the Loan Documents as merely permissive, represents a disingenuous attempt to
23 avoid its contractual obligations under the Loan Documents.³

24 America First manages to cite just two cases in support of its argument that the language
25 contained in the Loan Documents was *inserted by them* merely to suggest that Utah *might* have
26 jurisdiction over any dispute in connection with the Loan at issue herein - City of New Orleans v.

27
28 ³ See August 20, 2013 Opposition to Motion to Dismiss at pp. 3 - 5.

1 Mun. Admin. Servs., Inc., 376 F.3d 501 (5th Cir. 2004) and Hunt Wesson Foods, Inc. v.
2 Supreme Oil Co., 817 F.2d 75 (9th Cir. 1987).⁴ First, it is important to note that neither of these
3 cases were decided under Nevada law, so neither case is binding upon this Court.⁵ It is also
4 important to note that neither of these cases analyzed the same language contained in the
5 underlying Loan Documents.⁶ Most importantly, it is important to note that in both of these
6 cases, the respective courts noted that the contracts in question should be construed against the
7 drafter.⁷ Ironically, that is exactly what the Defendants have asked the Court to do in this case, as
8 set forth in more detail below.

9 Indeed, it is well settled in Nevada that “[p]arties are free to contract, and the courts will
10 enforce their contracts if they are not unconscionable, illegal, or in violation of public policy.”
11 Rivero v. Rivero, 125 Nev. 410, 429, 216 P.3d 213, 226-227 (2009) (citing NAD, Inc. v. Dist.
12 Ct., 115 Nev. 71, 77, 976 P.2d 994, 997 (1999) (explaining that “parties are free to contract in
13 any lawful matter”)). In fact, the Supreme Court of Nevada has specifically held:

14
15 It is not a proper function of the court to re-write or distort a contract under the
16 guise of judicial construction. **The law will not make a better contract for parties**
17 **than they themselves have seen fit to enter into, or alter it for the benefit of one**
party and to the detriment of the other. The judicial function of a court of law is
to enforce the contract as it is written.

18 Pioneer Title Ins. & Trust Co. v. Cantrell, 71 Nev. 243, 245-246, 286 P.2d 261, 263 (1955)
19 (internal citations omitted) (emphasis added). It is also well settled that any ambiguity in a
20 contract will be construed against the drafter. Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212,
21 215-16, 163 P.3d 405, 407 (2007) (citing Mullis v. Nev. Nat’l Bank, 98 Nev. 510, 513, 654 P.2d
22 533, 535 (1982)).

23
24 ⁴ See August 20, 2013 Opposition to Motion to Dismiss at p. 5.

25 ⁵ City of New Orleans, 376 F.3d 501 (interpreting Louisiana law); Hunt Wesson Foods, Inc., 817 F.2d 75
26 (interpreting California law).

27 ⁶ City of New Orleans, 376 F.3d at 504-05; Hunt Wesson Foods, Inc., 817 F.2d at 76.

28 ⁷ City of New Orleans, 376 F.3d at 505; Hunt Wesson Foods, Inc., 817 F.2d at 78.

1 Importantly, the Supreme Court of Nevada also holds that as long as a forum selection
2 clause has been “obtained through ‘freely negotiated’ agreements and [is] not ‘unreasonable and
3 unjust,’” it should be enforced. Tandy Computer Leasing, a Div. of Tandy Electronics, Inc. v.
4 Terina’s Pizza, Inc., 105 Nev. 841, 843, 784 P.2d 7, 8 (1989) (*quoting* Burger King Corp. v.
5 Rudzewicz, 471 U.S. 462, 472 n. 14 (1985)) (holding that a forum selection clause stating
6 “jurisdiction would be in Texas and venue in Fort Worth, Texas” would have been enforceable if
7 the parties had negotiated the clause); *see* The M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1,
8 12 (1972).⁸ Moreover, the Supreme Court of Nevada expressly held that forum selection clauses
9 should not be “rendered meaningless by allowing parties to disingenuously back out of their
10 contractual obligations through attempts at artful pleading.” Tuxedo Int’l Inc. v. Rosenberg, 127
11 Nev. ___, 251 P.3d 690, 693 (2011).

12 In this case, as set forth in the underlying Motion, the parties entered into a Loan
13 Agreement which expressly and unambiguously provided that “[t]he parties agree and submit
14 themselves to the jurisdiction of the courts of the State of Utah with regard to the subject
15 matter of th[at] agreement.”⁹ Similarly, the Note evidencing the loan at issue in this litigation
16 provided that *if* “there is a lawsuit, [Defendants] agree[] to submit to the jurisdiction of the
17 court in the county in which Lender is located” – which is in the State of Utah.¹⁰

18 America First drafted these Loan Documents. As the drafter, America First could have
19 left the applicable jurisdiction selection clauses out the Loan Documents completely, or they
20 could have identified and inserted Nevada, or any other state[s] they wanted. For whatever

21 ⁸ It is important to note that America First mischaracterizes the holding from the United States Supreme
22 Court in Bremen.⁸ In its Opposition, America First incorrectly suggests that Bremen stands for the
23 proposition that *only* forum selection clauses which contain exclusive or “mandatory” language can be
24 enforced. *See* August 20, 2013 Opposition to Motion to Dismiss at p. 5 : ¶ 10 - 17. A closer reading of
25 Bremen, however, actually reveals the importance that the United States Supreme Court placed on
26 enforcing forum selection clauses in general, a sentiment clearly shared by Nevada Courts. Bremen, 407
27 U.S. at 12; Tandy, 105 Nev. at 843, 784 P.2d at 8.

28 ⁹ *See* July 29, 2013 Motion to Dismiss at Exhibit A at p. 6 (emphasis added).

¹⁰ *See* July 29, 2013 Motion to Dismiss at Exhibit B at p. 3 (emphasis added). The Defendants did not
reference the Deed of Trust at issue, which does contain a Nevada choice of law provision, because the
Deed of Trust merely represents the security interest in the property, not the underlying obligation upon
which America First is suing. *See* Edelstein, 286 P.3d at 254.

1 reason, however, when it drafted these agreements, America First deliberately and specifically
2 chose to only identify Utah as the state which would have subject matter over this dispute, and
3 specifically as the state in which any lawsuit between the parties would be brought. This is what
4 the parties bargained for and agreed to. America First has not alleged that these Loan
5 Documents were unconscionable, illegal, or in violation of public policy. Furthermore, America
6 First has not alleged that the Loan Documents were not freely negotiated, unreasonable or unjust.
7 Accordingly, this Court should not, and cannot allow this express, deliberate jurisdiction
8 selection language to be ignored and rendered meaningless by America First now simply because
9 it apparently believes that doing so would convenient or advantageous to its case against the
10 Defendants. See Tuxedo, 127 Nev. at ___, 251 P.3d at 693; Cantrell, 71 Nev. at 245-246, 286
11 P.2d at 263.

12 **III. CONCLUSION**

13 Given the foregoing, and as set forth more fully in the underlying Motion to Dismiss, this
14 case must be dismissed because this Court does not have subject matter jurisdiction over this
15 dispute. Pursuant to the express terms of the Loan Documents freely entered into by the parties
16 hereto, only a Utah court has jurisdiction to entertain the claims brought by America First in its
17 Complaint. For these reasons, the underlying Complaint must be dismissed pursuant to NRCP
18 12(b)(1) and 12(h)(3).

19 Dated this 27th day of August, 2013.

20 BOGATZ LAW GROUP

21
22 By: /s/ Charles M. Vlasic
23 I. Scott Bogatz, Esq.
24 Nevada Bar No. 3367
25 Charles M. Vlasic III, Esq.
26 Nevada Bar No. 11308
27 3800 Howard Hughes Parkway, Suite 1850
28 Las Vegas, Nevada 89169
Attorneys for Defendants

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of August, 2013, I served a copy of the foregoing
DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS upon each of the
parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las
Vegas, Nevada, First-Class Postage fully prepaid, and addressed to:

Stanley W. Parry, Esq.
Timothy R. Mulliner, Esq.
BALLARD SPAHR LLP
100 North City Parkway, Suite 1750
Las Vegas, NV 89106
Attorneys for Plaintiff

and that there is a regular communication by mail between the place of mailing and the place(s)
so addressed.

/s/ Mike Li
An employee of Bogatz Law Group

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

August 29, 2013

A-13-679511-C America First Federal Credit Union, Plaintiff(s)
vs.
Franco Soro, Defendant(s)

August 29, 2013 9:00 AM Motion to Dismiss

HEARD BY: Wiese, Jerry A **COURTROOM:** RJC Courtroom 14A

COURT CLERK: Alice Jacobson

RECORDER:

REPORTER: Kristy Clark

PARTIES

PRESENT:	Mulliner, Tim	Attorney
	Vlasic, Charles	Attorney

JOURNAL ENTRIES

- Mr. Vlasic argued the case should be in the State of Utah and this Court did not have jurisdiction. Opposition by Mr. Mulliner. COURT ORDERED, matter taken UNDER ADVISEMENT and will issue an Order from Chambers.

CLERK'S NOTE: Refer to Order filed 9/9/13

Alan D. Quinn

CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

**AMERICA FIRST FEDERAL CREDIT
UNION, a federally chartered credit union,**

Plaintiff,

vs.

**FRANCO SORO, an individual; MYRA
TAIGMAN-FARRELL, an individual;
ISAAC FARRELL, an individual; KATHY
ARRINGTON, an individual; AUDIE
EMBESTRO, an individual; DOES 1 through
10; ROE ENTITIES I through X,**

Defendants.

Case No.: A679511

Dept. No.: XXX

**ORDER RE:
DEFENDANTS' MOTION
TO DISMISS**

INTRODUCTION AND FINDINGS OF FACT.

This matter stems from a business agreement, entered into in approximately 2002. At that time, America First apparently entered into a Business Loan Agreement whereby America First agreed to lend and Defendants agreed to borrow, approximately \$2,900,000.00 for business purposes. On or about the same date, a Commercial Promissory Note was executed, and it was secured by a Trust Deed with Assignment of Rents.

America First apparently went through the process of a non-judicial foreclosure of the subject Clark County, Nevada, property, and now seeks a deficiency judgment for the remaining amount which is allegedly owing.

On 7/29/13, the Defendants filed a Motion to Dismiss before this Court, arguing that this court does not have subject matter jurisdiction over this matter, due to the parties' agreement, which stipulates to the jurisdiction of the State of Utah. Plaintiff filed an Opposition on 8/20/13, and the Defendants filed a Reply on 8/27/13. This matter

<input type="checkbox"/> Voluntary Dis	<input type="checkbox"/> Slip Dis	<input type="checkbox"/> Sum Jdgmt
<input type="checkbox"/> Involuntary (stat) Dis	<input type="checkbox"/> Slip Jdgmt	<input type="checkbox"/> Non-Jury Trial
<input type="checkbox"/> Judgment on Arb Award	<input type="checkbox"/> Default Jdgmt	<input type="checkbox"/> Jury Trial
<input checked="" type="checkbox"/> Aff'd to Dis (by def)	<input type="checkbox"/> Transferred	

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CLERK OF THE COURT

JA 075

1 came on before this Court on August 29, 2013. Plaintiff was represented by Tim
2 Mulliner, Esq., and Defendant was represented by Charles Vlasic, Esq. The Court heard
3 oral argument, but took the matter under advisement because the Court had not had the
4 opportunity to review the Defendant's Reply brief prior to the hearing, as a copy had not
5 been provided to chambers and Odyssey did not show a copy, even at the time of the
6 hearing. The Court has now had an opportunity to review all of the pleadings, and enters
7 the following Order.

8 The Defendants' Motion to Dismiss is based on NRCP 12(b)(1) and NRCP
9 12(h)(3). Those Rules read in pertinent part as follows:

10
11 ... the following defenses may at the option of the pleader be made by motion:
12 (1) lack of jurisdiction over the subject matter.¹

13 Whenever it appears by suggestion of the parties or otherwise that the court
14 lacks jurisdiction of the subject matter, the court shall dismiss the action.²

15 The Business Loan Agreement in this case contained language as follows:

16 **Applicable Law.** This Agreement (and all loan documents in connection with
17 this transaction) shall be governed by and construed in accordance with the
18 laws of the State of Utah.

19 **Jurisdiction.** The parties agree and submit themselves to the jurisdiction of
20 the courts of the State of Utah with regard to the subject matter of this
21 agreement.³

22 The Commercial Promissory Note contained language as follows:

23 If there is a lawsuit, Borrower(s) agrees to submit to the jurisdiction of the
24 court in the county in which Lender is located.⁴

25
26
27 ¹ NRCP 12(b)(1).

² NRCP 12(h)(3).

³ See Business Loan Agreement at pg. 6.

⁴ See Commercial Promissory Note at pg. 3.

1 The Trust Deed contained language as follows:

2 This Trust Deed shall be construed according to the laws of the State of NV.
3 Notwithstanding any provision herein or in said note, the total liability for
4 payments in the nature of interest shall not exceed the limits now imposed by
the applicable laws of the State of NV.⁵

5 Although the Trust Deed includes language indicating that Nevada law applies,
6 the Trust Deed is simply security for the Promissory Note.⁶

7 Plaintiff's attempt to obtain a deficiency judgment is an action based upon the
8 Business Loan Agreement and the Commercial Promissory Note, not based on the Trust
9 Deed. The Plaintiff has already foreclosed on the subject property.

10 Plaintiffs argue that the language contained in the Loan Agreement and in the
11 Promissory Note constitutes a "consent" to jurisdiction in Utah, but does not indicate that
12 "exclusive jurisdiction" is in Utah. Plaintiff cites to a 5th Circuit case for the proposition
13 that, "For a forum selection clause to be exclusive, it must go beyond establishing that a
14 particular forum will have jurisdiction and must clearly demonstrate the parties' intent to
15 make that jurisdiction exclusive."⁷

16 Defendants argue that "forum selection clauses should not be rendered
17 meaningless by allowing parties to disingenuously back out of their contractual
18 obligations through attempts at artful pleading."⁸ Defendants argue that the Loan
19 Agreement and the Note contain a forum selection clause, which is fully enforceable.

20 In Defendant's Reply, they argue that, "In Nevada, promissory notes on real
21 estate loans are typically secured by deeds of trust on property," and that "The note
22 represents the right to the repayment of the debt, while the [deed of trust] . . . represents
23

24
25 ⁵ See Trust Deed, paragraphs 25-26, at pg. 5.

26 ⁶ See pg. 2 of the Commercial Promissory Note.

27 ⁷ See pgs. 4-5 of Plaintiff's Opposition, citing to *City of New Orleans v. Municipal Admin. Services*, 376
28 F.3d 501, 504 (5th Cir. 2004). Note that Plaintiff also cites to *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817
F.2d 75 (9th Cir. 1987), for the same proposition.

⁸ See Defendant's Motion at pg. 5, citing to *The M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-15
(1972); *Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. ___, 251 P.3d 690, 693 (2011).

1 the security interest in the property that is being used to secure the note.”⁹

2 Defendants further argue that in Nevada, “parties are free to contract, and the
3 courts will enforce their contracts if they are not unconscionable, illegal, or in violation of
4 public policy.”¹⁰ Further, the Nevada Supreme Court has held that as long as a forum
5 selection clause has been “obtained through ‘freely negotiated’ agreements and [is] not
6 ‘unreasonable and unjust,’ it should be enforced.”¹¹

7 CONCLUSIONS OF LAW.

8 This Court concludes, based upon the evidence presented, that the Loan
9 Agreement and the Promissory Note contain language which clearly expresses the
10 parties’ intent to submit litigation relating to the Agreement and the Note, to the
11 jurisdiction of the State of Utah. This Court finds that while the language of such
12 documents could have more clearly made such forum selection “exclusive,” nonetheless,
13 the language clearly enough identifies Utah as the forum which they selected for
14 purposes of subject matter jurisdiction. Because the property which provided security for
15 the loan, was already foreclosed upon, the language contained in the Trust Deed is no
16 longer relevant. This Court will not attempt to second guess the intent of the parties, or
17 the clear language of the contract, but will instead enforce the contract as written.
18 Whether or not the Plaintiff has a valid claim for a deficiency judgment in the State of
19 Utah, under the laws of the State of Utah, and pursuant to the Loan Agreement and the
20 Promissory Note, is for a Utah court to decide.

21

22

23

24

25 ⁹ See Defendant’s Reply at pg. 3, citing *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 254
26 (2012).

27 ¹⁰ See Defendant’s Reply at pg. 5, citing *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226-227
(2009).


28 ¹¹ See Defendant’s Reply at pg. 6, citing *Tandy Computer Leasing, a Div. of Tandy Electronics, Inc. v. Terina’s Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8, (1989).

1 **ORDER.**

2 Based upon the foregoing, and good cause appearing,

3 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss is hereby
4 **GRANTED.**

5 DATED this 6 day of September, 2013.

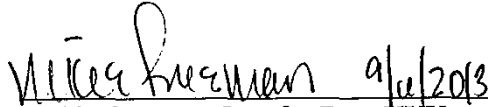
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8 JERRY A. WIESE II
9 DISTRICT COURT JUDGE, DEPT. XXX
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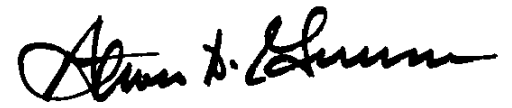
CERTIFICATE OF SERVICE

I hereby certify that on or about this the 6th day of September, 2013, the forgoing was e-served, mailed, faxed or a copy was **placed in the attorney's folder** to the following:

I. Scott Bogatz, Esq., Bogatz Law Group

Stanley Warren Parry, Esq., Ballard Spahr

 9/6/2013
Vickie Freeman, JEA for Dept XXX



CLERK OF THE COURT

1 **NOED**
2 **Bogatz Law Group**
3 I. SCOTT BOGATZ, ESQ.
Nevada Bar No. 3367
4 CHARLES M. VLASIC III, ESQ.
Nevada Bar No. 11308
3800 Howard Hughes Parkway, Suite 1850
Las Vegas, Nevada 89169
5 Telephone: (702) 776-7000
Facsimile: (702) 776-7900
6 sbogatz@isbmv.com
cvlasic@isbmv.com
7 *Attorneys for Defendants*

8
9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 AMERICA FIRST FEDERAL CREDIT
12 UNION, a federally chartered credit union,

13 Plaintiff,

14 vs.

15 FRANCO SORO, an individual; MYRA
16 TAIGMAN-FARRELL, an individual;
ISAAC FARRELL, an individual; KATHY
17 ARRINGTON, an individual; AUDIE
EMBESTRO, an individual; DOES 1
through 10; ROE ENTITIES I through X,

18 Defendants.

Case No.: A-13-679511-C

Dept. No.: XXX

19 **NOTICE OF ENTRY OF DECISION AND ORDER GRANTING DEFENDANTS'**
20 **MOTION TO DISMISS**

21 YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that a Decision and Order
22 Granting Defendants, FRANCO SORO, MYRA TAIGMAN-FARRELL, ISAAC FARRELL,
23 KATHY ARRINGTON, and AUDIE EMBESTRO (hereinafter collectively referred to as
24 "Defendants")'s Motion to Dismiss was filed in the above-entitled matter on the 9th day of
25 September, 2013, a copy of which is attached hereto as **Exhibit A**.

26 ...

27 ...

28 ...

1 Dated this 10th day of September, 2013.

2 BOGATZ LAW GROUP

3 By: /s/ Charles M. Vlasic
4 I. Scott Bogatz, Esq.
5 Nevada Bar No. 3367
6 Charles M. Vlasic III, Esq.
7 Nevada Bar No. 11308
8 3800 Howard Hughes Parkway, Suite 1850
9 Las Vegas, Nevada 89169
10 *Attorneys for Defendants*

11 **CERTIFICATE OF MAILING**

12 I hereby certify that on the 10th day of September, 2013, I served a copy of the foregoing
13 **NOTICE OF ENTRY OF DECISION AND ORDER GRANTING DEFENDANTS'**
14 **MOTION TO DISMISS** upon each of the parties by depositing a copy of the same in a sealed
15 envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, and
16 addressed to:

17 Stanley W. Parry, Esq.
18 Timothy R. Mulliner, Esq.
19 BALLARD SPAHR LLP
20 100 North City Parkway, Suite 1750
21 Las Vegas, NV 89106
22 *Attorneys for Plaintiff*

23 and that there is a regular communication by mail between the place of mailing and the place(s)
24 so addressed.

25 /s/ Jaimie Stilz-Outlaw
26 An employee of Bogatz Law Group
27
28

EXHIBIT A

EXHIBIT A

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Alvin D. Johnson

CLERK OF THE COURT
CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA
CLARK COUNTY, NEVADA**

**AMERICA FIRST FEDERAL CREDIT
UNION, a federally chartered credit union,**

Plaintiff,

vs.

**FRANCO SORO, an individual; MYRA
TAIGMAN-FARRELL, an individual;
ISAAC FARRELL, an individual; KATHY
ARRINGTON, an individual; AUDIE
EMBESTRO, an individual; DOES 1 through
10; ROE ENTITIES I through X,**

Defendants.

Case No.: A679511

Dept. No.: XXX

**ORDER RE:
DEFENDANTS' MOTION
TO DISMISS**

INTRODUCTION AND FINDINGS OF FACT.

This matter stems from a business agreement, entered into in approximately 2002. At that time, America First apparently entered into a Business Loan Agreement whereby America First agreed to lend and Defendants agreed to borrow, approximately \$2,900,000.00 for business purposes. On or about the same date, a Commercial Promissory Note was executed, and it was secured by a Trust Deed with Assignment of Rents.

America First apparently went through the process of a non-judicial foreclosure of the subject Clark County, Nevada, property, and now seeks a deficiency judgment for the remaining amount which is allegedly owing.

On 7/29/13, the Defendants filed a Motion to Dismiss before this Court, arguing that this court does not have subject matter jurisdiction over this matter, due to the parties' agreement, which stipulates to the jurisdiction of the State of Utah. Plaintiff filed an Opposition on 8/20/13, and the Defendants filed a Reply on 8/27/13. This matter

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<input type="checkbox"/> Involuntary (stat) Dis	<input type="checkbox"/> Slip Jdgmt	<input type="checkbox"/> Non-Jury Trial
<input type="checkbox"/> Judgment on Ad Award	<input type="checkbox"/> Default Jdgmt	<input type="checkbox"/> Jury Trial
<input checked="" type="checkbox"/> Motion to Dis (by def)	<input type="checkbox"/> Transferred	

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SEP 9 2013

CLERK OF THE COURT

1 came on before this Court on August 29, 2013. Plaintiff was represented by Tim
2 Mulliner, Esq., and Defendant was represented by Charles Vlastic, Esq. The Court heard
2 Mulliner, Esq., and Defendant was represented by Charles Vlastic, Esq. The Court heard
3 oral argument, but took the matter under advisement because the Court had not had the
4 opportunity to review the Defendant's Reply brief prior to the hearing, as a copy had not
5 been provided to chambers and Odyssey did not show a copy, even at the time of the
6 hearing. The Court has now had an opportunity to review all of the pleadings, and enters
7 the following Order.

8 The Defendants' Motion to Dismiss is based on NRCP 12(b)(1) and NRCP
9 12(h)(3). Those Rules read in pertinent part as follows:

10
11 . . . the following defenses may at the option of the pleader be made by motion:
12 (1) lack of jurisdiction over the subject matter.¹

13 Whenever it appears by suggestion of the parties or otherwise that the court
14 lacks jurisdiction of the subject matter, the court shall dismiss the action.²

15 The Business Loan Agreement in this case contained language as follows:

16
17 **Applicable Law.** This Agreement (and all loan documents in connection with
18 this transaction) shall be governed by and construed in accordance with the
19 laws of the State of Utah.

20 **Jurisdiction.** The parties agree and submit themselves to the jurisdiction of
21 the courts of the State of Utah with regard to the subject matter of this
22 agreement.³

23 The Commercial Promissory Note contained language as follows:

24 If there is a lawsuit, Borrower(s) agrees to submit to the jurisdiction of the
25 court in the county in which Lender is located.⁴

26
27 ¹ NRCP 12(b)(1).

² NRCP 12(h)(3).

³ See Business Loan Agreement at pg. 6.

⁴ See Commercial Promissory Note at pg. 3.

1 The Trust Deed contained language as follows:

2 This Trust Deed shall be construed according to the laws of the State of NV.

2 This Trust Deed shall be construed according to the laws of the State of NV.

3 Notwithstanding any provision herein or in said note, the total liability for
4 payments in the nature of interest shall not exceed the limits now imposed by
the applicable laws of the State of NV.⁵

5 Although the Trust Deed includes language indicating that Nevada law applies,
6 the Trust Deed is simply security for the Promissory Note.⁶

7 Plaintiff's attempt to obtain a deficiency judgment is an action based upon the
8 Business Loan Agreement and the Commercial Promissory Note, not based on the Trust
9 Deed. The Plaintiff has already foreclosed on the subject property.

10 Plaintiffs argue that the language contained in the Loan Agreement and in the
11 Promissory Note constitutes a "consent" to jurisdiction in Utah, but does not indicate that
12 "exclusive jurisdiction" is in Utah. Plaintiff cites to a 5th Circuit case for the proposition
13 that, "For a forum selection clause to be exclusive, it must go beyond establishing that a
14 particular forum will have jurisdiction and must clearly demonstrate the parties' intent to
15 make that jurisdiction exclusive."⁷

16 Defendants argue that "forum selection clauses should not be rendered
17 meaningless by allowing parties to disingenuously back out of their contractual
18 obligations through attempts at artful pleading."⁸ Defendants argue that the Loan
19 Agreement and the Note contain a forum selection clause, which is fully enforceable.

20 In Defendant's Reply, they argue that, "In Nevada, promissory notes on real
21 estate loans are typically secured by deeds of trust on property," and that "The note
22 represents the right to the repayment of the debt, while the [deed of trust] . . . represents
23

24
25 ⁵ See Trust Deed, paragraphs 25-26, at pg. 5.

26 ⁶ See pg. 2 of the Commercial Promissory Note.

27 ⁷ See pgs. 4-5 of Plaintiff's Opposition, citing to *City of New Orleans v. Municipal Admin. Services*, 376
28 F.3d 501, 504 (5th Cir. 2004). Note that Plaintiff also cites to *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817
F.2d 75 (9th Cir. 1987), for the same proposition.

⁸ See Defendant's Motion at pg. 5, citing to *The M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-15
(1972); *Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. ___, 251 P.3d 690, 693 (2011).

1 the security interest in the property that is being used to secure the note.”⁹

2 Defendants further argue that in Nevada, “parties are free to contract, and the
2 Defendants further argue that in Nevada, “parties are free to contract, and the
3 courts will enforce their contracts if they are not unconscionable, illegal, or in violation of
4 public policy.”¹⁰ Further, the Nevada Supreme Court has held that as long as a forum
5 selection clause has been “obtained through ‘freely negotiated’ agreements and [is] not
6 ‘unreasonable and unjust,’ it should be enforced.”¹¹

7 **CONCLUSIONS OF LAW.**

8 This Court concludes, based upon the evidence presented, that the Loan
9 Agreement and the Promissory Note contain language which clearly expresses the
10 parties’ intent to submit litigation relating to the Agreement and the Note, to the
11 jurisdiction of the State of Utah. This Court finds that while the language of such
12 documents could have more clearly made such forum selection “exclusive,” nonetheless,
13 the language clearly enough identifies Utah as the forum which they selected for
14 purposes of subject matter jurisdiction. Because the property which provided security for
15 the loan, was already foreclosed upon, the language contained in the Trust Deed is no
16 longer relevant. This Court will not attempt to second guess the intent of the parties, or
17 the clear language of the contract, but will instead enforce the contract as written.
18 Whether or not the Plaintiff has a valid claim for a deficiency judgment in the State of
19 Utah, under the laws of the State of Utah, and pursuant to the Loan Agreement and the
20 Promissory Note, is for a Utah court to decide.

21

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26 ⁹ See Defendant’s Reply at pg. 3, citing *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 254 (2012).

27 ¹⁰ See Defendant’s Reply at pg. 5, citing *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226-227 (2009).

28 ¹¹ See Defendant’s Reply at pg. 6, citing *Tandy Computer Leasing, a Div. of Tandy Electronics, Inc. v. Terina’s Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8, (1989).

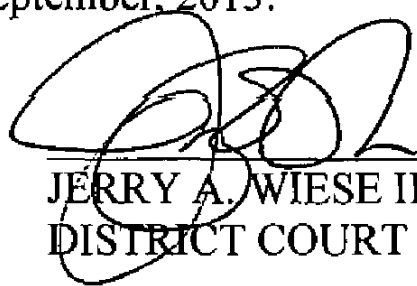
1 **ORDER.**

2 Based upon the foregoing, and good cause appearing,

2 Based upon the foregoing, and good cause appearing,

3 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss is hereby
4 **GRANTED.**

5 DATED this 6 day of September, 2013.

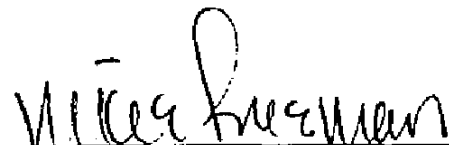
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8 JERRY A. WIESE II
9 DISTRICT COURT JUDGE, DEPT. XXX
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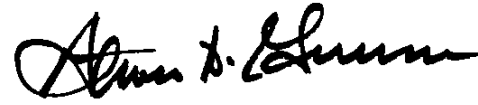
CERTIFICATE OF SERVICE

I hereby certify that on or about this the 6th day of September, 2013, the forgoing was e-served, mailed, faxed or a copy was **placed in the attorney's folder** to the following:

I. Scott Bogatz, Esq., Bogatz Law Group

Stanley Warren Parry, Esq., Ballard Spahr

 9/6/2013
Vickie Freeman, JEA for Dept XXX



CLERK OF THE COURT

NOAS
Stanley W. Parry, Esq.
Nevada Bar No. 1417
Timothy R. Mulliner
Nevada Bar No. 10692
BALLARD SPAHR LLP
100 North City Parkway, Suite 1750
Las Vegas, Nevada 89106-4617
Telephone: (702) 471-7000
Facsimile: (702) 471-7070
Email: parrys@ballardspahr.com
Email: mullinert@ballardspahr.com
Attorneys for Plaintiff/Appellant

DISTRICT COURT

CLARK COUNTY, NEVADA

AMERICA FIRST FEDERAL CREDIT
UNION, a federally chartered credit union,

Plaintiff,

v.

FRANCO SORO, and individual; MYRA
TAIGMAN-FARRELL, an individual; ISAAC
FARRELL, an individual; KATHY
ARRINGTON, an individual; and AUDIE
EMBESTRO, an individual; DOE Individuals 1
to 10; and ROE Business Entities 1 to 10.

Defendants.

Case No.: A-13-679511-C

Dept. No.: XXX

NOTICE OF APPEAL

Notice is given that America First Federal Credit Union appeals to the Supreme Court of Nevada from the Order Re: Defendants' Motion to Dismiss entered by the district court on September 9, 2013¹.

BALLARD SPAHR LLP

By: /s/ Timothy R. Mulliner

Stanley W. Parry
Nevada Bar No. 1417
Timothy R. Mulliner
Nevada Bar No. 10692
100 North City Parkway, Suite 1750
Las Vegas, Nevada 89106
Attorneys for Plaintiff/Appellant

¹ Notice of Entry was served on September 10, 2013.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that on the 27th day of September, 2013, a true and correct copy of the foregoing **NOTICE OF APPEAL** was served to the following in the manner set forth below:

I. Scott Bogatz, Esq.
BOGATZ LAW GROUP
3800 Howard Hughes Parkway, Suite 1850
Las Vegas, NV 89169

☐ Facsimile Transmission

☒ U.S. Mail, Postage Prepaid

☐ E-mail

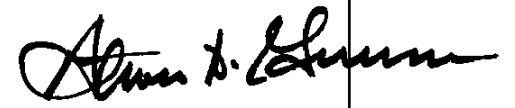
☐ Certified Mail, Receipt No. _____, return receipt requested


an Employee of Ballard Spahr LLP

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**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

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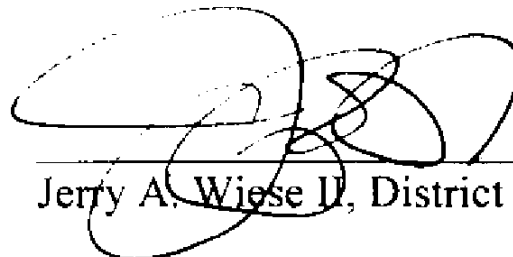
CLERK OF THE COURT

America First Federal Credit Union, Plaintiff(s) vs. Franco Soro, Defendant(s)	CASE NO.: A-13-679511-C DEPARTMENT 30
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CERTIFICATION OF STATEMENT OF APPEAL

I hereby certify the following to be the accurate statement of the above case.

Witness my hand this 15th day of: September, 2014.



Jerry A. Wiese II, District Court Judge

1 Stanley W. Parry
Nevada Bar No. 1417
2 Timothy R. Mulliner
Nevada Bar No. 10692
3 Matthew D. Lamb
Nevada Bar No. 12991
4 BALLARD SPAHR LLP
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7 mullinert@ballardspahr.com
lambm@ballardspahr.com

8 *Attorneys for Plaintiff*

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 AMERICA FIRST FEDERAL CREDIT
13 UNION, a federally chartered credit
union,

14 Plaintiff,

15 v.

16 FRANCO SORO, an individual; MYRA
TAIGMAN-FARRELL, an individual;
17 ISAAC FARRELL, an individual;
KATHY ARRINGTON, an individual;
18 and AUDIE EMBESTRO, an individual;

19 Defendants.

Case No. A-13-679511-C

Dept. No. XXX

20 SETTLED AND APPROVED STATEMENT OF PROCEEDINGS FROM HEARING
21 ON DEFENDANTS' MOTION TO DISMISS

22 Pursuant to NRAP 9(c), in the absence of a transcript or recording of the
23 August 29, 2013 hearing on defendants/respondents' Motion to Dismiss, counsel for
24 plaintiff/appellant served a statement of proceedings from the hearing, counsel for
25 defendants/respondents served his objections to the same, and the Court settled and
26 approved the statement and objections of counsel to prepare the following statement
27 of proceedings for the August 29, 2013 hearing:
28

1 1. The parties stated their appearances. Timothy Mulliner appeared on
2 behalf of AFCU. Charles Vlastic appeared on behalf of defendants. Mr. Mulliner
3 requested that the hearing be recorded. Judge Wiese stated that his department
4 does not record hearings and that, if the parties wanted a record, the hearing would
5 need to be reported. Mr. Mulliner requested that the hearing be reported.

6 2. Judge Wiese stated that he was in receipt of the Motion to Dismiss and
7 AFCU's opposition, but that he had not received a reply brief from the defendants.
8 Mr. Vlastic stated that he had filed and served a reply, but that the courtesy copy to
9 the judge's chambers might have been delivered to the wrong department or
10 otherwise delivered in error. Mr. Vlastic offered to provide the court with a courtesy
11 copy of defendants' reply brief after the hearing.

12 3. As counsel for the movant, Mr. Vlastic made his arguments first,
13 tracking essentially the same arguments made in defendants' briefing. Specifically,
14 Mr. Vlastic argued that the loan documents deprive the court of subject matter
15 jurisdiction and require AFCU to bring their action for a deficiency judgment in
16 Utah. Mr. Vlastic argued that the case law set forth in his motion should compel
17 this result.

18 4. Mr. Mulliner argued that the contract language relied upon by
19 Defendants acted merely as the parties' consent to jurisdiction in Utah, should
20 AFCU choose to file an action there, but did not deprive courts outside of Utah of
21 jurisdiction. Mr. Mulliner further argued that applicable case law draws a
22 distinction between a voluntary consent to jurisdiction and an exclusive forum
23 selection clause, and that the latter requires clear and express language making a
24 particular venue the only venue in which a lawsuit can be filed. Mr. Mulliner
25 argued that there is no such language in the contracts at issue here.

26 5. Judge Wiese raised the issue that the Loan Agreement includes a
27 choice of law provision applying Utah law, while the Deed of Trust includes a choice
28 of law provision applying Nevada law, then asked which clause should control here.

1 Mr. Mulliner argued that the choice of law provision and forum selection clause
2 were two separate issues and that the Utah choice of law provision would have no
3 effect on AFCU's right to choose jurisdiction and venue in Nevada. Additionally,
4 Mr. Mulliner argued that, because the real property securing the loan was located
5 in Nevada, Nevada law would necessarily apply to the resulting deficiency action.
6 Mr. Mulliner argued that allowing the parties to contract around this result would
7 allow lenders to avoid Nevada's anti-deficiency laws and other protections to
8 guarantors in Nevada by choosing the laws of a state that are more favorable to
9 lenders. Mr. Mulliner argued that, among other reasons, public policy would
10 preclude this result.

11 6. In closing, Mr. Vlasic argued that this deficiency action was an action
12 based upon an alleged breach of the Loan Agreement and Promissory Note, not the
13 Deed of Trust, and that the forum selection clauses contained within the Loan
14 Agreement and the Promissory Note should therefore apply. Mr. Vlasic further
15 argued that the case law cited by AFCU was distinguishable, in part because
16 neither case cited by AFCU was decided under Nevada law, and also because both
17 cases actually stood for the proposition that contracts should be interpreted
18 according to their plain meaning and any ambiguity in the contracts should be
19 construed against the drafter. Mr. Vlasic argued that the loan documents in this
20 case plainly required AFCU to bring any action on the loan documents in Utah, and
21 that because AFCU was the drafter of the loan documents in question, any
22 ambiguity in the loan documents should be construed against them. Mr. Vlasic
23 argued that the case law cited in his reply brief supported this result.

24 ///

25 ///

26 ///

27 ///

28 ///

1 7. Judge Wiese concluded the hearing by stating that he was inclined to
2 deny the motion, but that he would take the matter under advisement and defer his
3 ruling until after reviewing defendants' reply.

4 Respectfully submitted per the Court's
5 instructions,

6 BALLARD SPAHR LLP

7 By: /s/ Timothy R. Mulliner

8 Stanley W. Parry

9 Nevada Bar No. 1417

10 Timothy R. Mulliner

11 Nevada Bar No. 10692

12 Matthew D. Lamb

13 Nevada Bar No. 12991

14 100 North City Parkway, Suite 1750

15 Las Vegas, Nevada 89106

16 *Attorneys for Plaintiff*

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

Electronically Filed
Oct 13 2014 09:13 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

APPEAL

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

JOINT APPENDIX

Stanley W. Parry, Nevada Bar No. 1417
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Matthew D. Lamb, Nevada Bar No. 12991
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Attorneys for America First Federal Credit Union

ALPHABETICAL INDEX

Acceptance of Service.....	JA 016
Affidavit of Service – Audie Embestro	JA 014-015
Affidavit of Service – Franco Soro	JA 008-009
Affidavit of Service – Isaac Farrell	JA 010-011
Affidavit of Service – Kathy Arrington.....	JA 006-007
Affidavit of Service – Myra Taigman-Farrell.....	JA 012-013
Complaint	JA 001-005
Court Minutes	JA 074
Defendants’ Reply in Support of Motion to Dismiss.....	JA 066-073
Motion to Dismiss.....	JA 017-038
Notice of Appeal.....	JA 090-091
Notice of Entry of Decision and Order Granting Defendants’ Motion to Dismiss.....	JA 081-089
Opposition to Defendants’ Motion to Dismiss	JA 039-065
Order re: Defendants’ Motion to Dismiss	JA 075-080
Settled and Approved Statement of Proceedings from Hearing on Defendants’ Motion to Dismiss.....	JA 092-096

CHRONOLOGICAL INDEX

Complaint	JA 001-005
Affidavit of Service – Kathy Arrington.....	JA 006-007
Affidavit of Service – Franco Soro	JA 008-009
Affidavit of Service – Isaac Farrell	JA 010-011
Affidavit of Service – Myra Taigman-Farrell.....	JA 012-013
Affidavit of Service – Audie Embestro	JA 014-015
Acceptance of Service.....	JA 016
Motion to Dismiss.....	JA 017-038
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Notice of Appeal.....	JA 090-091
Settled and Approved Statement of Proceedings from Hearing on Defendants’ Motion to Dismiss.....	JA 092-096

CERTIFICATE OF SERVICE

I certify that on October 13, 2014, I served a copy of the foregoing **Joint**

Appendix to the following via U.S. Mail:

I. Scott Bogatz, Esq.
Charles M. Vlasic III, Esq.
BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169

Attorneys for Respondents

/s/ Sarah Walton
An Employee of Ballard Spahr

CIVIL COVER SHEET A - 1 3 - 6 7 9 5 1 1 - C

- County, Nevada

X X X

Case No.

(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone): America First Federal Credit Union

Attorney (name/address/phone): Timothy R. Mulliner, Esq., Ballard Spahr LLP, 100 North City Parkway, Suite 1750, Las Vegas, NV 89101

Defendant(s) (name/address/phone): Franco Soro, Myra Taigman-Farrell, Issac Farrell, Kathy Arrlington, Audie Embestro, DOE Individuals 1 - 10 and ROE Business Entites 1 - 10

Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)☐ **Arbitration Requested****Civil Cases**

Real Property	Torts	
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> Negligence <input type="checkbox"/> Negligence – Auto <input type="checkbox"/> Negligence – Medical/Dental <input type="checkbox"/> Negligence – Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence – Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
Estimated Estate Value: _____ <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input checked="" type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input checked="" type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Civil Petition for Judicial Review <input type="checkbox"/> Foreclosure Mediation <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment – Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

- | | | |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88 | <input type="checkbox"/> Investments (NRS 104 Art. 8) | <input type="checkbox"/> Enhanced Case Mgmt/Business |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90) | <input type="checkbox"/> Trademarks (NRS 600A) | |

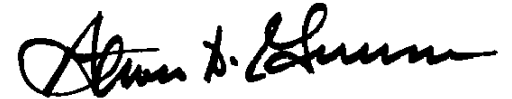
4-4-13

Date



Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

COMP

Stanley W. Parry, Esq.
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mullinert@ballardspahr.com

Attorneys for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

AMERICA FIRST FEDERAL CREDIT
UNION, a federally chartered credit union,

Plaintiff,

v.

FRANCO SORO, an individual; MYRA
TAIGMAN-FARRELL, an individual; ISAAC
FARRELL, an individual; KATHY
ARRINGTON, an individual; and AUDIE
EMBESTRO, an individual; DOE Individuals 1
to 10; and ROE Business Entities 1 to 10.

Defendants.

Case No.: A - 13 - 679511 - C

Dept. No.: XXX

Arbitration Exemption Claimed:

(Amount in Controversy Exceeds \$50,000)

COMPLAINT

Plaintiff America First Federal Credit Union hereby complains against Defendants Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff America First Federal Credit Union ("America First") is a federally chartered credit union with offices at 4646 South 1500 West, Suite 130, Riverdale, Utah.

2. Defendant Franco Soro is an individual who, on information and belief, resides in Clark County, Nevada.

3. Defendant Myra Taigman-Farrell is an individual who, on information and belief,

BALLARD SPAHR LLP
100 NORTH CITY PARKWAY, SUITE 1750
LAS VEGAS, NEVADA 89106
(702) 471-7000 FAX (702) 471-7070

1 resides in Clark County, Nevada.

2 4. Defendant Kathy Arrington is an individual who, on information and belief, resides
3 in Clark County, Nevada.

4 5. Defendant Audie Embestro is an individual who, on information and belief, resides
5 in Austin, Texas.

6 6. Defendants Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington,
7 and Audie Embestro are collectively referred to hereafter as "Defendants."

8 7. The events giving rise to this Complaint took place in Clark County, Nevada.

9 8. The Court has subject matter jurisdiction over this matter and personal jurisdiction
10 over Defendants.

11 9. Venue is proper within this district pursuant to NRS 13.010 and by consent of the
12 parties.

13 GENERAL ALLEGATIONS

14 10. On April 11, 2002, Defendants executed in favor of America First a
15 Commercial Promissory Note which evidenced a loan from America to Mesquite Jabez LLC and
16 Defendants in the amount of \$2,900,000 (the "Note").

17 11. The Note was secured by a Trust Deed with Assignment of Rents (the "Deed of
18 Trust") executed by Mesquite Jabez, LLC on or about April 11, 2002, which was recorded in
19 Clark County, Nevada on April 11, 2002 as Instrument No. 00069, Book No. 20020411 (the
20 "Deed of Trust").

21 12. The Note, Deed of Trust, and other documents executed contemporaneously
22 therewith are hereafter referred to as the "Loan Documents."

23 13. Pursuant to the Loan Documents, Defendants agreed that each of them are jointly
24 and severally liable for all amounts due under the Note.

25 14. The Deed of Trust encumbered certain real property located in Clark County,
26 Nevada, as more particularly described in the Deed of Trust.

27 15. Defendants defaulted on their loan obligations by failing to make required
28 payments when due.

16. As a result of Defendants' default, America First proceeded with a non-judicial foreclosure sale of the collateral designated in the Deed of Trust (the "Collateral") in accordance with Nevada law.

17. A trustee's sale was held on October 4, 2012 at the front entrance to Nevada Legal News, 930 South Fourth Street, Las Vegas, Nevada. At the sale, the trustee sold the Collateral in a public auction.

18. America First was the high bidder at the sale and purchased the Collateral for \$1,215,000.00.

19. As of the date of the foreclosure sale, Defendants owed a principal balance of \$2,527,656.03 to America First pursuant to the terms of the Loan Documents.

20. With interest, penalty interest, and late fees, the total amount due and owing to America First under the terms of the Loan Agreement as of December 12, 2011 exceeded \$3,628,010.34.

21. At the time of the foreclosure sale, the fair market value of the Collateral did not exceed \$1,215,000.00.

22. After the foreclosure, the remaining balance due and owing to America First under the Loan Agreement exceeds \$2,413,010.34.

FIRST CLAIM FOR RELIEF
(Breach of Contract/Deficiency Against Defendants)

23. America First repeats and realleges the allegations set forth above by reference as though fully stated herein.

24. The Loan Documents are a valid contract.

25. Borrowers breached their obligations under the Loan Documents.

26. Pursuant to N.R.S. 40.455(1), at any time within six months after the trustee's sale of the Collateral described in Deed of Trust, America First is entitled to commence an action to recover the balance due upon the obligations for which the Deed of Trust was given as security.

27. America First completed the non-judicial foreclosure sale of the Collateral, but was not made whole.

1 28. As a result of Borrower's breach of contract, a deficiency balance remains, and
2 America First is entitled to recover an award of its damages in excess of \$10,000.

3 29. In addition, pursuant to the terms of the Loan Agreement, America First is entitled
4 to recover its attorneys fees and costs incurred in bringing this action.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, America First requests the following relief:

- 7 1. For damages in an amount to be proven at trial exceeding ten thousand dollars
8 (\$10,000.00);
9 2. For pre and post judgment interest;
10 3. For attorney's fees and costs;
11 4. For interest on all of the above amounts; and
12 5. For such other and further relief as the Court deems just.

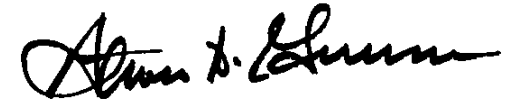
13 Dated this 13 day of April, 2013.

14 BALLARD SPAHR LLP

15 By: 
16

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23
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Attorneys for Plaintiff



CLERK OF THE COURT

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13 *Attorneys for Plaintiff*

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

16 AMERICA FIRST FEDERAL CREDIT)
17 UNION, a federally chartered credit union,)
18)
19 Plaintiff,)
20 vs.)
21)
22 FRANCO SORO, an individual; MYRA)
23 TAIGMAN-FARRELL, an individual; ISAAC)
24 FARRELL, an individual; KATHY)
25 ARRINGTON, an individual; and AUDIE)
26 EMBESTRO, an individual; DOE Individuals 1)
27 to 10; and ROE Business Entities 1 to 10.)
28 Defendants.)

Case No. **A-13-679511-C**

Dept. No. **XXX**

AFFIDAVIT OF SERVICE

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STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

RANDALL RAYMOND RUEGER, #R-066858, being duly sworn, or under penalty of perjury, states that at all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to or interested in the proceedings in which this Affidavit is made. That Affiant received a copy of the following document(s):
SUMMONS; COMPLAINT

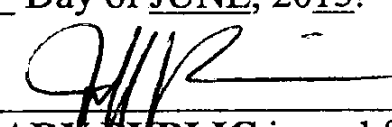
on the 14 day of JUNE, 2013, and
served the same on this 16 day of JUNE, 2013 at 5:51 PM by:

☒ Serving Defendant Kathy Arrington, an individual by personally delivering and leaving a copy with Kathy Arrington - Defendant (Caucasian, Female, 55 yrs., 5'7", 150 lbs., Gray hair, Brown eyes), located at 6424 Sundown Heights, Las Vegas, Nevada 89130.

CONTROL #21025848

SUBSCRIBED AND SWORN to before me this
18TH Day of JUNE, 2013.


(Server Signature)


NOTARY PUBLIC in and for
County of CLARK, State of NEVADA
My Commission Expires : 4/2/17 (SEAL)





CLERK OF THE COURT

1 **AOS**
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13 *Attorneys for Plaintiff*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 AMERICA FIRST FEDERAL CREDIT)
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25 ARRINGTON, an individual; and AUDIE)
26 EMBESTRO, an individual; DOE Individuals 1)
27 to 10; and ROE Business Entities 1 to 10.)
28 Defendants.)

Case No. **A-13-679511-C**

Dept. No. **XXX**

AFFIDAVIT OF SERVICE

1 STATE OF NEVADA)
2) ss.
3 COUNTY OF CLARK)

4 JUDITH MAE ALL, #R-040570, being duly sworn, or under penalty of perjury, states that at all times
5 herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to or
6 interested in the proceedings in which this Affidavit is made. That Affiant received a copy of the
7 following document(s):

8 SUMMONS; COMPLAINT

9 on the 20 day of JUNE, 2013, and
10 served the same on this 20 day of JUNE, 2013 at 7:44 PM by:

11 ☒ Serving Defendant Franco Soro, an individual by personally delivering and leaving a copy with
12 Kazuko Soro - Wife (Asian, Female, 60's, 5'5", 150 lbs., Salt & Pepper hair, Brown eyes), located at
13 8175 Cassian Court, Las Vegas, Nevada 89129.

14 CONTROL #21026249

15 SUBSCRIBED AND SWORN to before me this
16 24th Day of JUNE, 2013.

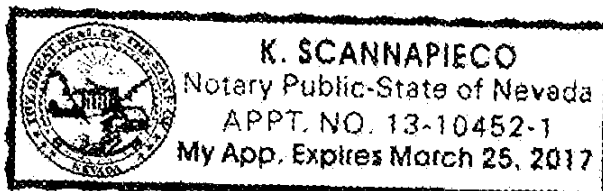
17 K. Scannapieco

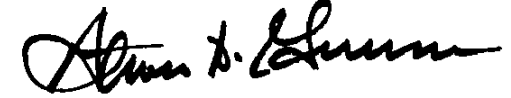
18 NOTARY PUBLIC in and for

19 County of CLARK, State of NEVADA

20 My Commission Expires : 3/25/17 (SEAL)

21 Judith Mae All
22 (Server Signature)





CLERK OF THE COURT

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13 *Attorneys for Plaintiff*

14 **DISTRICT COURT**

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16 AMERICA FIRST FEDERAL CREDIT)
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19 Plaintiff,)
20 vs.)
21)
22 FRANCO SORO, an individual; MYRA)
23 TAIGMAN-FARRELL, an individual; ISAAC)
24 FARRELL, an individual; KATHY)
25 ARRINGTON, an individual; and AUDIE)
26 EMBESTRO, an individual; DOE Individuals 1)
27 to 10; and ROE Business Entities 1 to 10.)
28 Defendants.)

Case No. A-13-679511-C

Dept. No. XXX

AFFIDAVIT OF SERVICE

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STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

JUDITH MAE ALL, #R-040570, being duly sworn, or under penalty of perjury, states that at all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to or interested in the proceedings in which this Affidavit is made. That Affiant received a copy of the following document(s):
SUMMONS; COMPLAINT

on the 25 day of JUNE, 2013, and
served the same on this 25 day of JUNE, 2013 at 8:42 PM by:

☒ Serving Defendant Isaac Farrell, an individual by personally delivering and leaving a copy at 67 Incline Village Court, Henderson, Nevada 89074 with Judy R. - Gate Guard (Caucasian, Female, 50's, 5'8", 220 lbs., Strawberry Blond hair, Brown eyes, Glasses), a person of suitable age and discretion authorized to accept service of process. Pursuant to NRS 14.090.

CONTROL #21026448

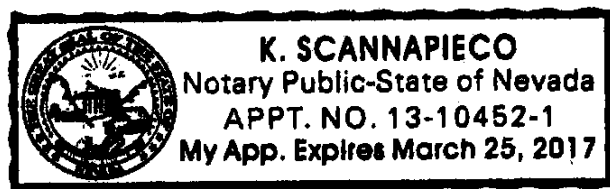
SUBSCRIBED AND SWORN to before me this
26th Day of JUNE, 2013.

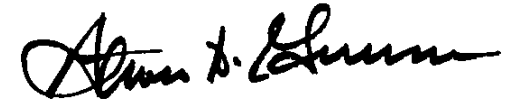
K Scannapieco

NOTARY PUBLIC in and for
County of CLARK, State of NEVADA

My Commission Expires : 3/25/17 (SEAL)

Judith Mae All
(Server Signature)





CLERK OF THE COURT

AOS
Stanley W. Parry, Esq.
Nevada Bar No. 1417
Timothy R. Mulliner
Nevada Bar No. 10692
BALLARD SPAHR LLP
100 North City Parkway, Suite 1750
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Email: parrys@ballardspahr.com
Email: mullinert@ballardspahr.com

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

AMERICA FIRST FEDERAL CREDIT)
UNION, a federally chartered credit union,)
)
Plaintiff,)
vs.)
FRANCO SORO, an individual; MYRA)
TAIGMAN-FARRELL, an individual; ISAAC)
FARRELL, an individual; KATHY)
ARRINGTON, an individual; and AUDIE)
EMBESTRO, an individual; DOE Individuals 1)
to 10; and ROE Business Entities 1 to 10.)
Defendants.)

Case No. **A-13-679511-C**

Dept. No. **XXX**

AFFIDAVIT OF SERVICE

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STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

JUDITH MAE ALL, #R-040570, being duly sworn, or under penalty of perjury, states that at all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to or interested in the proceedings in which this Affidavit is made. That Affiant received a copy of the following document(s):
SUMMONS; COMPLAINT

on the 25 day of JUNE, 2013, and
served the same on this 25 day of JUNE, 2013 at 8:42 PM by:

☒ Serving Defendant Myra Taigman-Farrell, an individual by personally delivering and leaving a copy at 67 Incline Village Court, Henderson, Nevada 89074 with Judy R. - Gate Guard (Caucasian, Female, 50's, 5'8", 220 lbs., Strawberry Blond hair, Brown eyes, Glasses), a person of suitable age and discretion authorized to accept service of process. Pursuant to NRS 14.090.

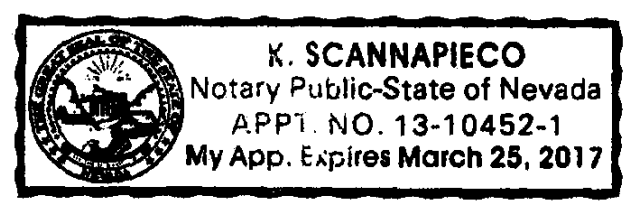
CONTROL #21026447

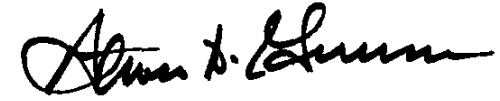
SUBSCRIBED AND SWORN to before me this
26th Day of JUNE, 2013.

K. Scannapieco

NOTARY PUBLIC in and for
County of CLARK, State of NEVADA
My Commission Expires : 3/25/17 (SEAL)

Judith Mae All
(Server Signature)





CLERK OF THE COURT

1 AOS

2 Stanley W. Parry, Esq.

3 Nevada Bar No. 1417

4 Timothy R. Mulliner

5 Nevada Bar No. 10692

6 BALLARD SPAHR LLP

7 100 North City Parkway, Suite 1750

8 Las Vegas, Nevada 89106

9 Telephone: (702) 471-7000

10 Facsimile: (702) 471-7070

11 Email: parrys@ballardspahr.com

12 Email: mullinert@ballardspahr.com

13 *Attorneys for Plaintiff*

14 DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 AMERICA FIRST FEDERAL CREDIT)
17 UNION, a federally chartered credit union,)

18 Plaintiff,)

19 vs.)

20 FRANCO SORO, an individual; MYRA)
21 TAIGMAN-FARRELL, an individual; ISAAC)
22 FARRELL, an individual; KATHY)
23 ARRINGTON, an individual; and AUDIE)
24 EMBESTRO, an individual; DOE Individuals 1)
25 to 10; and ROE Business Entities 1 to 10.)

26 Defendants.)

Case No. A-13-679511-C

Dept. No. XXX

AFFIDAVIT OF SERVICE

27 Person Who Served Papers:

28 KEVIN BLANDFORD,

Service Provided for:

NATIONWIDE LEGAL LLC

720 S. 4th STREET-SUITE 305

LAS VEGAS, NV 89101

(702)385-5444

I am a: Texas process server

Registration No.: SCH000000214

Employee.: Independent Contractor

City.: Austin

1 STATE OF Texas)
2) ss.
3 COUNTY OF Travis)

4 KEVIN BLANDFORD, #SCH000000214, being duly sworn, or under penalty of perjury, states that at
5 all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to
6 or interested in the proceedings in which this Affidavit is made. That Affiant received a copy of the
7 following document(s):

8 SUMMONS; COMPLAINT

9 on the 20 day of JUNE, 2013, and
10 served the same on this 25 day of JUNE, 2013 at 8:38 PM by:

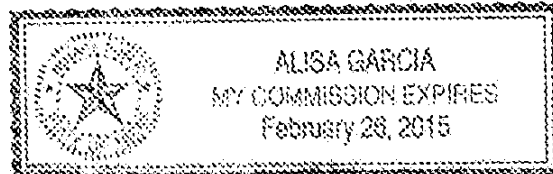
11 ☒ Serving Defendant Audie Embestro, an individual by personally delivering and leaving a copy at
12 360 Nueces Street, Austin, Texas with Christine Lemchi - Concierge (African American, Female, 23
13 yrs., 160-200 lbs., 5'11", Black hair, Brown eyes), a person of suitable age and discretion authorized to
14 accept service of process.

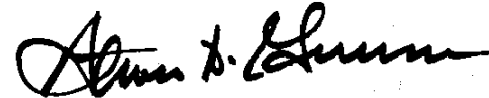
15 CONTROL #21026251

16 SUBSCRIBED AND SWORN to before me this
17 22 day of June, 2013.

18 (Server Signature)

19 Alisa Garcia
20 NOTARY PUBLIC in and for
21 County of Travis, State of Texas
22 My Commission Expires : 02/26/15 (SEAL)





CLERK OF THE COURT

1 **ACSR**
Stanley W. Parry, Esq.
2 Nevada Bar No. 1417
Timothy R. Mulliner,
3 Nevada Bar No. 10692
4 **BALLARD SPAHR LLP**
100 North City Parkway, Suite 1750
5 Las Vegas, Nevada 89106
Phone: 702.471.7000
6 Facsimile: 702.471.7070
parrys@ballardspahr.com
7 mullinert@ballardspahr.com
8 *Attorneys for Plaintiff*

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 **AMERICA FIRST FEDERAL CREDIT**
UNION, a federally chartered credit union,

12 Plaintiff,

13 v.

14 **FRANCO SORO**, an individual; **MYRA**
15 **TAIGMAN-FARRELL**, an individual; **ISAAC**
FARRELL, an individual; **KATHY**
16 **ARRINGTON**, an individual; and **AUDIE**
EMBESTRO, an individual; **DOE Individuals 1**
to 10; and **ROE Business Entities 1 to 10**.

17 Defendants.

Case No.: A-13-679511-C

Dept. No.: XXX

ACCEPTANCE OF SERVICE

18 I, Charles M. Vlasic III, counsel for all Defendants in this matter, have the authority to
19 accept service of the Summons and Complaint on behalf of said Defendant and hereby accept such
20 service on behalf of all Defendants. By agreement between counsel, the deadline for all
21 Defendants to respond to the Complaint shall be July 29, 2013.

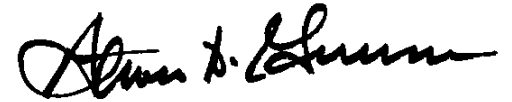
22 Dated this 9th day of July.

23 **BOGATZ LAW GROUP**

24 By: 

25 Charles M. Vlasic III, Esq.
26 Nevada Bar No. 11308
27 3800 Howard Hughes Pkwy., Ste. 1850
28 Las Vegas, Nevada 89169
Attorneys for Defendants

BALLARD SPAHR LLP
100 NORTH CITY PARKWAY, SUITE 1750
LAS VEGAS, NEVADA 89106
(702) 471-7000 FAX (702) 471-7070



CLERK OF THE COURT

MDSM
Bogatz Law Group
I. SCOTT BOGATZ, ESQ.
Nevada Bar No. 3367
CHARLES M. VLASIC III, ESQ.
Nevada Bar No. 11308
3800 Howard Hughes Parkway, Suite 1850
Las Vegas, Nevada 89169
Telephone: (702) 776-7000
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sbogatz@isbmv.com
cvlasic@isbmv.com
Attorneys for Defendants

DISTRICT COURT
CLARK COUNTY, NEVADA

AMERICA FIRST FEDERAL CREDIT
UNION, a federally chartered credit union,

Plaintiff,

vs.

FRANCO SORO, an individual; MYRA
TAIGMAN-FARRELL, an individual;
ISAAC FARRELL, an individual; KATHY
ARRINGTON, an individual; AUDIE
EMBESTRO, an individual; DOES 1
through 10; ROE ENTITIES I through X,

Defendants.

Case No.: A-13-679511-C

Dept. No.: XXX

Date:

Time:

MOTION TO DISMISS

Defendants, FRANCO SORO, MYRA TAIGMAN-FARRELL, ISAAC FARRELL,
KATHY ARRINGTON, and AUDIE EMBESTRO (hereinafter collectively referred to as
“Defendants”), through their attorneys of record, the law firm of Bogatz Law Group, hereby
respectfully move for dismissal of the Complaint filed by Plaintiff, AMERICA FIRST
FEDERAL CREDIT UNION (“America First”), pursuant to NRCP 12(b)(1) and 12(h)(3). This
Motion is made and based upon all the papers, pleadings and records on file herein, together with

...

...

1 the following points and authorities, and any oral argument entertained by the Court at the time
2 of the hearing in this matter.

3 Dated this 29th day of July, 2013.

4 **BOGATZ LAW GROUP**

5
6 By: /s/ Charles M. Vlasic III
7 I. Scott Bogatz, Esq.
8 Nevada Bar No. 3367
9 Charles M. Vlasic III, Esq.
10 Nevada Bar No. 11308
11 3800 Howard Hughes Parkway, Suite 1850
12 Las Vegas, Nevada 89169
13 *Attorneys for Defendants*

14 **NOTICE OF MOTION**

15 You and each of you, will please take notice that Defendants' **MOTION TO DISMISS**
16 will come on regularly for hearing on the 29 day of AUGUST, 2013, at the hour of
17 9 : 0 0 A
18 _____.m., or as soon thereafter as counsel may be heard in Department XXX of the above
19 referenced Court.

20 Dated this 29th day of July, 2013.

21 **BOGATZ LAW GROUP**

22 By: /s/ Charles M. Vlasic III
23 I. Scott Bogatz, Esq.
24 Nevada Bar No. 3367
25 Charles M. Vlasic III, Esq.
26 Nevada Bar No. 11308
27 3800 Howard Hughes Parkway, Suite 1850
28 Las Vegas, Nevada 89169
Attorneys for Defendants

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION.

This case must be dismissed pursuant to Nevada Rules of Civil Procedure 12(b)(1) and 12(h)(3), because this Court does not have subject matter jurisdiction over this dispute. Each of the allegations contained in the Complaint filed by America First, and all the relief sought thereby, arise directly from, and relate directly to a Business Loan Agreement and Promissory Note wherein the parties expressly agreed that any disputes arising thereunder would be adjudicated under Utah law, by a Utah court. Accordingly, because *only* a Utah court has jurisdiction to entertain the claims brought by America First in its Complaint, the Court must dismiss this case in its entirety.

II. STATEMENT OF RELEVANT FACTS.¹

A. THE LOAN DOCUMENTS.

On or about April 11, 2002, America First and the Defendants entered into a Business Loan Agreement (“Loan Agreement”), whereby America First agreed to lend, and the Defendants agreed to borrow, approximately \$2,900,000 for use in the construction of a liquor store/mini mart. On or about the same date, “Defendants executed in favor of America First, a Commercial Promissory Note which evidenced a loan from America First to Mesquite Jabez LLC and Defendants in the amount of \$2,900,000 (the “Note”).”² “The Note was secured by a Trust Deed with Assignment of Rents (the “Deed of Trust”) executed by Mesquite Jabez, LLC on or about April 11, 2002”³

. . .

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. . .

¹ Because all allegations in a complaint generally must be taken as true for the purposes of a motion to dismiss analysis, the Defendants will not detail herein, the many allegations set forth by America First that the Defendants dispute. See Conway v. Circus Circus Casinos, Inc., 116 Nev. 870, 873, 8 P.3d 837, 840 (2000).

² See Complaint on file herein at ¶ 10.

³ See Complaint on file herein at ¶ 11.

B. THE APPLICABLE LAW AND JURISDICTION SELECTION CLAUSES.

The Loan Agreement contained an “Applicable Law” clause which expressly provided:⁴

Applicable Law. 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.⁵

The Loan Agreement also contained a “Jurisdiction” selection clause which expressly provided:

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.⁶

Similarly, the Note contained a jurisdiction selection clause which expressly provided:

If there is a lawsuit, [Defendants] agree[] to submit to the jurisdiction of the court in the county in which Lender is located.⁷

First America is located at “4646 South 1500 West, Suite 130, Riverdale, Utah.”⁸

C. AMERICA FIRST’S ATTEMPT TO CIRCUMVENT THE APPLICABLE LAW AND JURISDICTION SELECTION CLAUSES.

Now, despite the fact that the parties hereto expressly agreed that all of the loan documents, including the Loan Agreement and Note “would be governed and construed in accordance with the laws of the State of Utah,” that the parties would “submit themselves to the jurisdiction of the courts of the State of Utah,” and that if a lawsuit was filed in connection with the Loan Agreement and/or Note, that lawsuit would be brought in Utah, (where America First is located)⁹, America First has impermissibly filed the underlying lawsuit in a Nevada court, seeking to recover against Defendants under Nevada law.¹⁰

⁴ Because the Complaint “necessarily relies” upon the Loan Agreement and the Note, they can be considered by the Court when deciding this Motion to Dismiss without converting it to a motion for summary judgment. See, e.g., Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006).

⁵ See Loan Agreement attached hereto as **Exhibit A** at p. 6.

⁶ See **Exhibit A** at p. 6.

⁷ See Note attached hereto as **Exhibit B** at p. 3.

⁸ See Complaint on file herein at ¶ 1.

⁹ See Complaint on file herein at ¶ 1.

¹⁰ See generally Complaint on file herein.

1 **III. LEGAL STANDARD.**

2 NRCP 12(b)(1) expressly authorizes this Court to dismiss a complaint for lack of subject
3 matter jurisdiction. Similarly, NRCP 12(h)(3) states that “[w]henever it appears by suggestion of
4 the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall
5 dismiss the action.” A motion to dismiss for lack of subject matter jurisdiction “may be utilized
6 when a lack of jurisdiction over the subject matter appears on the face of the pleading.” Girola v.
7 Roussille, 81 Nev. 661, 663, 408 P.2d 918, 919 (1965).

8 **IV. LEGAL ARGUMENT.**

9 **A. THIS CASE MUST BE DISMISSED PURSUANT TO NEVADA RULES OF**
10 **CIVIL PROCEDURE 12(B)(1) AND 12(H)(3), AS THIS COURT DOES**
NOT HAVE SUBJECT MATTER JURISDICTION OVER THIS DISPUTE.

11 In Nevada, there is no dispute that forum and jurisdictional selection clauses are fully
12 enforceable. The M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-15 (1972); Tuxedo Int’l
13 Inc. v. Rosenberg, 127 Nev. ___, 251 P.3d 690, 693 (2011) (noting that “forum selection clauses
14 should not be rendered meaningless by allowing parties to disingenuously back out of their
15 contractual obligations through attempts at artful pleading”); Campanelli v. Conservas Altamira,
16 S.A., 86 Nev. 838, 841, 477 P.2d 870, 872 (1970) (stating that “[i]gnorance through negligence
17 or inexcusable trustfulness will not relieve a party from his contract obligations”) (internal
18 citations omitted); Tandy Computer Leasing, a Div. of Tandy Electronics, Inc. v. Terina’s Pizza,
19 Inc., 105 Nev. 841, 843, 784 P.2d 7, 8 (1989) (*quoting* Burger King Corp. v. Rudzewicz, 471
20 U.S. 462, 472 n. 14 (1985)) (noting that as long as the selection clause has been “obtained
21 through ‘freely negotiated’ agreements and [is] not ‘unreasonable and unjust,’” it should be
22 enforced).

23 The Breman case is instructive here. In Breman, the parties entered into a commercial
24 contract wherein they agreed to have any disputes among themselves heard by a London court.
25 407 U.S. at 2. There, the United States Supreme Court held that the clause at issue should be
26 enforced, explaining “[t]he choice of that forum was made in an arm’s-length negotiation by
27 experienced and sophisticated businessmen, and absent some compelling and countervailing
28 reason it should be honored by the parties and enforced by the courts.” Id. at 12. The Court

1 further noted that “[t]he elimination of all such [jurisdictional] uncertainties by agreeing in
2 advance on a forum acceptable to both parties is an indispensable element in international trade,
3 commerce, and contracting.” Id. at 13-14.

4 In this case, America First’s Complaint must be dismissed for lack of subject matter
5 jurisdiction pursuant to NRCP 12(b)(1) and 12(h)(3), because the parties expressly agreed in an
6 arm’s-length transaction, to have any disputes related to the Business Loan Agreement and/or the
7 Promissory Note heard by a Utah court, applying Utah law. Specifically, the parties entered
8 into a Loan Agreement which expressly provided that “*[t]he parties agree and submit*
9 *themselves to the jurisdiction of the courts of the State of Utah with regard to the subject*
10 *matter of this agreement.*”¹¹ Similarly, the Note evidencing the loan at issue in this litigation
11 provided that if “*there is a lawsuit, [Defendants] agree[] to submit to the jurisdiction of the*
12 *court in the county in which Lender is located*” – which is in the State of Utah.¹² Here, just as
13 in Breman, these forum and jurisdiction selection clauses are fully enforceable. As a result, only
14 a *Utah* court has jurisdiction to entertain the claims brought by America First in its Complaint.
15 To hold otherwise would render these expressly bargained-for clauses meaningless, and would
16 allow America First to back out of their contractual obligations.

17 **V. CONCLUSION.**

18 This case must be dismissed because this Court does not have subject matter jurisdiction
19 over this dispute. Pursuant to the express terms of the Loan Agreement and Note freely entered
20 into by the parties hereto, only a Utah court has jurisdiction to entertain the claims brought by

21 . . .

22 . . .

23 . . .

24 . . .

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26
27 ¹¹ See Exhibit A at p. 6 (emphasis added).

28 ¹² See Exhibit B at p. 3 (emphasis added).

America First in its Complaint. For these reasons, the underlying Complaint must be dismissed pursuant to NRCP 12(b)(1) and 12(h)(3).

Dated this 29th day of July, 2013.

BOGATZ LAW GROUP

By: /s/ Charles M. Vlasic
I. Scott Bogatz, Esq.
Nevada Bar No. 3367
Charles M. Vlasic III, Esq.
Nevada Bar No. 11308
3800 Howard Hughes Parkway, Suite 1850
Las Vegas, Nevada 89169
Attorneys for Defendants

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of July, 2013, I served a copy of the foregoing **MOTION TO DISMISS** upon each of the parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, and addressed to:

Stanley W. Parry, Esq.
Timothy R. Mulliner, Esq.
BALLARD SPAHR LLP
100 North City Parkway, Suite 1750
Las Vegas, NV 89106
Attorneys for Plaintiff

and that there is a regular communication by mail between the place of mailing and the place(s) so addressed.

/s/ Jaimie Stilz-Outlaw
An employee of Bogatz Law Group

EXHIBIT A

EXHIBIT A

BUSINESS LOAN AGREEMENT

Agreement Date: _____

Reference:

MESQUITE JABEZ, LLC #718299-1.1

Lender:

AMERICA FIRST CREDIT UNION

PO BOX 9339

OGDEN, UTAH 84409

NOTE: ALL REFERENCES TO BORROWER INCLUDE ALL SIGNERS ON NOTE AND GUARANTOR(S).

Borrower has received prior loans from Lender or has applied to Lender for a loan or loans or other financial accommodations, including those which may, but need not, be described on any addendum or exhibit attached hereto. All such loans and financial accommodations together with future loans and financial accommodations from Lender to Borrower are referred to in this Agreement individually as the "Loan" and collectively as the "Loans".

Borrower understands and agrees that: (a) In granting, renewing or extending any Loan, Lender is relying upon Borrower's representations, warranties, and agreements as set forth in this Agreement; (b) the granting, renewing or extending of any Loan by Lender at all times shall be subject to Lender's sole judgement and discretion; and (c) all such Loans shall be and remain subject to the following terms and conditions of the Agreement.

TERM. This Agreement shall be effective as of the date of this Agreement and shall continue thereafter until all Loans and obligations of Borrower to Lender have been performed in full.

REPRESENTATIONS AND WARRANTIES. Borrower represents and warrants to Lender as of the date of this Agreement, and as of the date of each disbursement of Loan proceeds, the following:

Organization. Borrowers are individuals and a limited liability company duly organized, and in good standing under the laws of the state of Nevada.

Authorization. The execution, delivery, and performance of this Agreement by Borrower has been duly authorized by all necessary action by Borrower and do not conflict with, result in violation of, or constitute a default under any provision of its Articles of Incorporation or Organization, or Bylaws, or any agreement or other instrument binding upon it or any law or governmental regulation or court decree applicable to Borrower.

Financial Information. Each financial statement and other financial information of Borrower supplied to Lender is certified as being true and correct and truly disclosed Borrower's financial condition as of the date thereof, and there has been no material adverse change in Borrower's financial condition subsequent to the date of the most recent financial statement, or other financial information, supplied to Lender.

INITIALS:

ES LA
PA MT

BUSINESS LOAN AGREEMENT
(continued)

REFERENCE:

MESQUITE JAREZ, LLC #718299-1.1

Lender:

AMERICA FIRST CREDIT UNION

Borrower understand(s) and agree(s) that AFCU has relied upon the financial information provided in connection herewith, in making its decision to extend credit as provided by the loan documents of similar date. Each financial statement was prepared in accordance with generally accepted accounting principles consistently maintained throughout the periods involved. At the present time, there exists no material unrealized or anticipated losses from any unfavorable commitments of the Borrower.

Litigation. No litigation or claim (including unpaid taxes) against Borrower is pending or threatened and no other event has occurred which materially may adversely affect Borrower's financial condition other than such litigation, claim or other event, if any, as has been disclosed in writing to Lender.

AFFIRMATIVE COVENANTS. Borrower covenants and agrees that while the Agreement is in effect, Borrower will:

Litigation. Promptly inform Lender of all litigation and claims and all threatened litigation and claims affecting Borrower or any guarantor of Borrower which could materially affect the financial condition of Borrower.

Financial Records. Maintain its books and records in accordance with generally accepted accounting principles applied on a consistent basis and permit Lender to examine and audit Borrower's books and records at all reasonable times.

Financial Statements. Furnish Lender with, as soon as available, but in no event later than 60 days after the end of each fiscal year, operating statements, lease information, and other pertinent data related to the secured property, and, as soon as available, but in no event later than 60 days after filing, Borrower's tax return and financial statement, prepared and certified as correct to the best knowledge and belief by a person knowledgeable as to the Borrower's financial affairs. All financial reports required to be provided under this Agreement shall be prepared in accordance with generally accepted accounting principles on a consistent basis and certified by Borrower as being true and correct.

Additional Information. Furnish such additional information and statements, lists of assets and liabilities, budgets, forecasts and other reports with respect to Borrower's financial condition and business operations, or the collateral held as security, as Lender may request from time to time.

Insurance. Maintain fire and public liability insurance and such other insurance as Lender may require with respect to Borrower's properties and operations in form, amounts, coverages and with insurance companies reasonably acceptable to Lender. Borrower upon request of Lender will deliver to Lender from time to time the policies or certificates of insurance on forms satisfactory to Lender, including stipulations that coverages will not be canceled or diminished without at least ten (10) days prior written notice to Lender. In connection with all policies covering assets of Borrower

INITIALS: 

BUSINESS LOAN AGREEMENT
(continued)

REFERENCE:

MESQUITE JABEZ, LLC #718299-1.1

Lender:

AMERICA FIRST CREDIT UNION

in which Lender holds or is offered a security interest for the Loans, Borrower shall provide Lender with such loss payable endorsements as Lender may require.

Insurance Reports. Furnish to Lender, upon request of Lender, reports on each existing policy of insurance showing such information as Lender may reasonably request including the following: (a) the name of insurer; (b) the risks insured; (c) the amount of the policy; (d) the property insured; (e) the then current value on the basis of which insurance has been obtained, and the manner of determining that value; and (f) the expiration date of the policy. In addition, Borrower shall upon request (however not more often than annually) have an independent appraiser satisfactory to Lender determine, as applicable, the cash value or replacement cost of any collateral.

Guaranties. Prior to disbursement of the Loan Proceeds, furnish to Lender, on forms satisfactory to Lender, guaranties of the Loans executed in amounts and by the guarantors named below:

Name(s)

Amount(s)

All individuals have personal liability (full recourse). See Note.

The above guaranties are in addition to the liability of those individuals and/or entities executing the Promissory Note.

Other Agreements. Comply with all terms and conditions of all other loan agreements now or hereafter existing between Borrower and any other party and notify Lender immediately in writing of any default in connection therewith.

Loan Proceeds. Use the proceeds of all Loans solely for Borrower's business operations or as otherwise specifically consented to by Lender in writing.

Taxes, Etc. Pay and discharge when due all of its indebtedness, obligations, assessments, taxes and liens, of every kind and nature, except when contested in good faith by appropriate proceedings with adequate reserves therefor having been set aside on its books; the Borrower immediately shall pay or cause to be paid all such assessments, taxes, charges or indebtedness whenever foreclosure on any lien that may have attached appears imminent.

Performance. Perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements between Borrower and Lender.

Operations. Conduct its business affairs in a reasonable and prudent manner and in compliance with all applicable federal, state and municipal laws, ordinances rules and regulations respecting its properties, charters, businesses and operations, including compliance with all minimum funding and other requirements relating to Borrower's employee benefit plans.

INITIALS:

KA
mk

BUSINESS LOAN AGREEMENT
(continued)

REFERENCE:

MESQUITE JABEZ, LLC #718299-1.1

Lender:

AMERICA FIRST CREDIT UNION

Additional Documentation and Assurances. Make, execute and deliver to Lender such security agreements, instruments, documents and other agreements as Lender or its attorneys may reasonably request to evidence and secure the loans, and to perfect such security interests.

CESSATION OF ADVANCES. Lender shall have no obligation to advance or disburse loan funds under this Agreement or otherwise if: (a) Borrower dies, becomes incompetent or insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged a bankrupt; (b) an Event of Default occurs, including without limitation the unauthorized use of loan proceeds; or (c) Lender, for any reason and in the exercise of its sole discretion, deems itself insecure even though no Event of Default shall have occurred.

EVENTS OF DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Default on Loan. Failure to pay when due any installment of principal or interest on any loan or any other sum owing from Borrower to Lender.

Other Breaches. Failure to comply with or to perform any other provisions of the Agreement, or any other agreement between Borrower and Lender. If such a failure is curable and if Borrower has not been given a prior notice of a breach of the same provision of the applicable agreement, it may be cured (and no event of default will have occurred) if Borrower, after receiving written notice from Lender demanding cure of such failure: (a) cures the failure within 15 days; (b) if the cure requires more than 15 days, immediately initiates steps sufficient to cure the failure and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

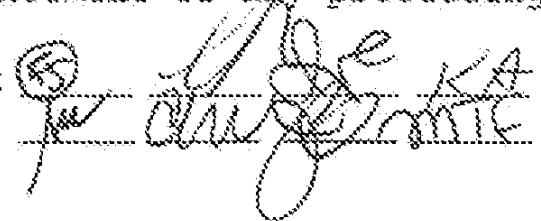
Defaults as to Third Persons. Failure to pay any indebtedness due any third person, and such failure shall continue beyond any applicable grace period, or the Borrower permits an event of default to exist under any agreement binding the Borrower.

Change in Condition. Material change in the financial condition of the Borrower or any Guarantor or in the operation of Borrower's business.

False Statements. Any representation, warranty or statement made or furnished to Lender by or on behalf of Borrower under this Agreement is, or at the time made or furnished was, false or misleading in any material respect.

Defective Collateralization. Any mortgage, security agreement, guaranty or other security instrument given to Lender in connection with any loan shall at any time and for any reason cease to be in full force and effect.

Insolvency. Dissolution or termination of Borrower's existence as a going business, insolvency, appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, or the commencement of any proceeding under

INITIALS: 

BUSINESS LOAN AGREEMENT
(continued)

REFERENCE:

MESQUITE JABEZ, LLC #718299-1.1

Lender:

AMERICA FIRST CREDIT UNION

bankruptcy or insolvency laws by or against Borrower.

Creditor Proceeding. Commencement of Foreclosure, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower against any collateral securing the Loans. However, this subsection shall not apply in the event of a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the foreclosure suit, provided that Borrower gives Lender written notice of such claim and furnishes adequate reserves for the claim.

Events Affecting Guarantor. Any of the preceding events occur with respect to any guarantor of a Loan or such guarantor dies or becomes incompetent, unless the obligations arising under the guaranty and related agreement have been unconditionally assumed by the guarantor's estate in a manner satisfactory to Lender.

EFFECT OF AN EVENT OF DEFAULT. If any Default described above shall occur, all commitments of Lender under this Agreement shall immediately terminate, (including any obligation to make Loan disbursements or advances), and all Loans shall become immediately due and payable, all without notice of any kind to the Borrower, at the option of Lender, except for an Event of Default described in the "Insolvency" subsection, in which case such acceleration shall be automated and not optional.

Additionally, upon the occurrence of any Event of Default, Lender may, and is hereby authorized by the Borrower, at any time and to the fullest extent permitted by applicable law, without advance notice to the Borrower (any such notice being expressly waived by the Borrower), to set-off and apply any and all deposits at any time held and any other indebtedness at any time owing by the Lender to, or for the credit or the account of the Borrower against any or all of the indebtedness owing by the Borrower to the Lender under any Loan, irrespective of whether the Lender has exercised any other rights which it has with respect to such indebtedness, including, without limitation, any acceleration rights.

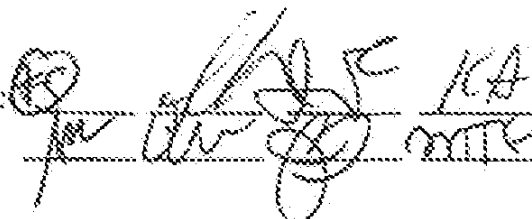
MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Agreement.

Inspections. Borrower agrees that lender may inspect the collateral in connection with this loan upon giving reasonable notice to the borrower.

Notices. All notices required to be given by either party to the other under this Agreement shall be in writing and shall be effective when actually delivered or when deposited in the United States mail, first class postage prepaid, addressed to the other party to whom the notice is to be given at the address shown above or to such other addresses as either party may designate to the other in writing. If there is more than one Borrower, notice to any Borrower shall constitute notice to all Borrowers.

Exhibits. Any additional loan terms or conditions set forth on any addendum or exhibit hereto are hereby incorporated into this Agreement by reference as if fully set forth in the Agreement.

INITIALS:

The block contains handwritten initials and signatures. There are several sets of initials, including what appears to be 'KA' and 'MR', and some signatures that are partially legible.

BUSINESS LOAN AGREEMENT
(continued)

REFERENCE:

MESQUITE JABEZ, LLC #718299-1.1

Lender:

AMERICA FIRST CREDIT UNION

Amendments, Modifications, and Waivers. An express waiver by Lender of an Event of Default will not constitute a waiver of Lender's right to declare a default under similar or identical circumstances. No amendment, modification, waiver, or consent with respect to any provision of this Agreement by Lender shall be effective unless it is in writing and signed and delivered by Lender to Borrower, and then any such amendment, modification, waiver, or consent shall be effective only in the specific instance and for the specific purpose for which given.

Costs and Expenses. Borrower agrees to pay upon demand all of Lender's out-of-pocket expenses, including attorney's fees, incurred in connection with this Agreement or in connection with the Loans made pursuant to this Agreement. Lender may pay someone else to help collect the Loans and to enforce this Agreement and Borrower will pay that amount. This includes, subject to any limits under applicable law, Lender's attorney's fees and legal expenses, whether or not there is a law suit, including attorney's fees for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Borrower also will pay any court costs, in addition to all other sums provided by law.

Guarantors. The word "Guarantor" as used in the Agreement means and includes all guarantors, sureties and accommodation parties.

Liability. If there is more than one Borrower under this Agreement or on any loan, all obligations of such Borrowers shall be joint and several.

Successors and Assigns. This Agreement shall be binding upon Borrower and Lender and their respective heirs, successors and assigns, and shall inure to the benefit of Borrower and Lender and the successors and assigns of Lender.

Acceptance. This Agreement is accepted by Lender in the State of Utah.

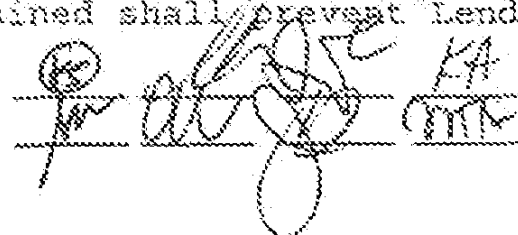
Applicable Law. This Agreement (and all loan documents in connection with this transaction) shall be governed by and construed in accordance with the laws of the State of Utah.

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.

Indemnification. The Borrower shall indemnify and hold America First Credit Union harmless from any and all liability, costs, charges or assessments with respect to hazardous or toxic substances or waste handling, disposal, storage repairs or cleanup, whether incurred or imposed pursuant to state or federal law, relating to or arising from the Borrower's business or activities or failure to act.

Construction. The provisions of this Agreement shall be in addition to those of any promissory note, deed of trust, pledge or security agreement, guaranty, construction agreement, assumption agreement, or other evidence of liability executed by Borrower now or hereafter held by Lender (the "Loan Documents"), all of which shall be construed as complementary to each other. Nothing herein contained shall prevent Lender from

INITIALS:

The block contains handwritten initials and signatures. There are several sets of initials, including what appears to be 'KA' and 'MK', and a large, stylized signature that spans across the 'INITIALS:' label and the first two sets of initials.

BUSINESS LOAN AGREEMENT
(continued)

REFERENCE:

MESQUITE JABEZ, LLC #718299-1.1

Lender:

AMERICA FIRST CREDIT UNION

enforcing any or all Loan Documents in accordance with their respective terms.

Enforcement. Lenders failure to enforce any provision of this agreement will not limit its ability to enforce that provision, or any other provision of this agreement, in the future.

The loan documents may not be contradicted by evidence of any oral agreement or alleged oral agreement. Any agreements between the parties must be in writing.

Borrower acknowledges it has read all of the provisions of this Business Loan Agreement and agrees to its terms.

INITIALS:

MA AK
ML OMK

EXHIBIT B

EXHIBIT B

COMMERCIAL PROMISSORY NOTE

(SIMPLE INTEREST)

BORROWER(S):

Individuals:

Clifford Redekop, et al

Entities:

Mesquite Jabez, LLC

Account #: 718299-1.1

LENDER:

AMERICA FIRST CREDIT UNION

PO BOX 9339

OGDEN, UTAH 84409

PRINCIPAL AMOUNT: \$ 2,900,000

DATE OF NOTE: April 11, 2007

Borrower(s) promises to pay to Lender, or order, TWO MILLION NINE HUNDRED THOUSAND***** DOLLARS together with interest on the unpaid principal balance outstanding from time to time at the rate set out below. Interest will accrue on the outstanding unpaid principal balance for each day that any amount is outstanding and will continue to accrue until this Note is paid in full.

ADVANCES UNDER THIS NOTE WILL BE MADE AS:

XX A single advance

N/A Multiple advances

N/A A construction loan (subject to Construction Loan Agreement)

N/A Revolving Line of Credit*

*Subject to annual renewal and new appraisal on collateral.

XX FIXED RATE FEATURE: The interest rate on this Note will be at a fixed rate of 8.00 percent per annum for 60 months.

XX VARIABLE RATE FEATURE: After the 60 month fixed period, the interest rate on this Note will be subject to change from time to time as the Reference Rate described below changes from time to time. The following provisions, numbered (1) through (5), apply during the variable rate period of the loan:

(1) RATE CHANGES. Interest rate changes will occur:

XX On the 30th day of April, 2007, and on the last day of each month thereafter (as the Reference Rate changes).

N/A On the last day of each month from the inception of the loan (as the Reference Rate changes).

(2) REFERENCE RATE. The Reference Rate for purposes of this Note is:

XX An independent index or rate known as the yield in percent per annum of United States Treasury Note (Five Year, adjusted for constant maturity) for the most recent date as quoted in the Key Interest Rates section of that edition of the Wall Street Journal published on the Tuesday immediately preceding the relevant Adjustment Date.

N/A Wall Street Journal published Prime Rate.

Initials

[Signature]
[Signature]

REFERENCE: MESQUITE LAKEZ, LLC #718299-JJ

- (3) **INTEREST RATE.** The interest rate to be applied to the unpaid principal balance of this Note shall be a rate of 375 basis points (3.75 percentage points) over the Reference Rate indicated above.
- (4) **INTEREST RATE FLOOR.** Notwithstanding the foregoing provisions, under no circumstances shall the interest rate on this Note be less than N/A percent per annum.
- (5) **PAYMENT CHANGES.** Whenever increases occur in the interest rate, Lender may, but need not, change Borrower's payments to ensure that loan will pay off by its original maturity date (or within the original amortization period) and that payments cover accruing interest.

Interest shall be calculated on this Note on the basis of 365/365.

BORROWER(S) WILL PAY THIS NOTE AS FOLLOWS:

MONTHLY PAYMENTS OF:

N/A	Interest Only*	XX	Amortizing payments of Principal and Interest
-----	----------------	----	---

N/A Interest Reserve

PAYMENTS BEGIN ON THE:

20 TH Day of May, 20 02, And continue on the same day of each month.

MONTHLY PAYMENT AMOUNT: \$22,385

Amortization Period: 25 Years

Loan Term: 10 Years!

Maturity Date: April 30, 2012

Note: All unpaid principal and interest will be due in full on the maturity date. This amount will be a balloon payment if the amortization period is longer than the loan term.

THIS LOAN IS SECURED BY ALL OF THE FOLLOWING:

1. XX First Second Trust Deed
Liquor Store/Mini Mart
(Including all Inventory and Equipment)
And Eight Acre Land Parcel
820 West Mesquite Boulevard,
Mesquite, NV

2. First Second Trust Deed

Initiatives

Page 2

Release Provision:

SEE TRUST DEED FOR ACTUAL LEGAL DESCRIPTIONS. THE BORROWER(S) AGREE TO PROVIDE NECESSARY DOCUMENTATION (EITHER NOW, OR LATER IF NECESSARY) TO ADEQUATELY PERFECT AFCU'S INTEREST IN THE COLLATERAL DESCRIBED.

~~Prepayment Penalty: THERE WILL BE A PRE-PAYMENT PENALTY EQUIVALENT TO 3% OF THE OUTSTANDING LOAN BALANCE FOR THE FIRST AND SECOND YEARS OF THE LOAN. A 2% PRE-PAYMENT PENALTY FOR THE THIRD AND FOURTH YEARS OF THE LOAN. A 1% PRE-PAYMENT PENALTY FOR THE FIFTH YEAR OF THE LOAN. THERE WILL BE NO PRE-PAYMENT PENALTY THEREAFTER. NOTWITHSTANDING THE ABOVE, BORROWER MAY MAKE ADDITIONAL PRINCIPAL REDUCTIONS UP TO 10% ANNUALLY (NON-CUMULATIVE) WITHOUT PENALTY.~~

If Borrower(s) does not pay as agreed, or if Borrower(s) or any guarantor of this note breaches any other agreement with Lender, Borrower(s) will be in default. Upon default, or if Lender reasonably deems itself insecure, Lender may declare the entire unpaid principal balance and accrued interest immediately due, without notice, and Borrower(s) will then pay that amount.

Upon default, Lender also may increase the interest to 18 per cent per annum and include any unpaid interest as of acceleration or maturity as part of the sum due and subject to the higher rate. The interest rate shall not exceed the maximum rate permitted by applicable law.

Borrower's payment will be late if not received within 10 days of the due date. If a payment is late, Borrower(s) will be charged 5 % of the payment amount as a late fee.

Borrower(s) will pay Lender at the address named above, or such other place as Lender may designate in writing.

Lender may pay someone else to help collect this Note if Borrower(s) does not pay. Borrower(s) also will pay Lender that amount. This includes Lender's attorneys' fees whether or not there is a lawsuit, including attorneys' fees for bankruptcy proceedings, appeals, and anticipated post-judgment collection services. Borrower(s) also will pay any court costs. Lender may delay enforcing any of its right under this Note without losing them. If there is a lawsuit, Borrower(s) agrees to submit to the jurisdiction of the court in the county in which Lender is located.

RIGHT OF SET-OFF

Borrower(s) authorizes Lender, to the extent permitted by applicable law, (a) upon default of any of its obligations to Lender, (b) at any time Lender reasonably deems itself insecure, or (c) in case of Borrower's death or insolvency, to charge or set-off all sums owing on this Note against any of Borrower's accounts with Lender (whether checking, savings, or some other account), including all accounts held jointly with someone else and all accounts Borrower(s) may open in the future. Borrower(s) grants Lender a contractual possessory security interest in Borrower's accounts to secure this right.

REFERENCE RATES

If the Variable Rate Loan box is marked on the previous page, the interest rate on this loan may change from time to time as the Reference Rate indicated on the previous page of this form changes in response to market forces that affect interest rates. That Reference Rate is not necessarily the lowest rate charged by Lender on its loans. Rather, it is an index used by Lender to set the rates on loans made by Lender subject to the Reference Rate. Lender may make loans based on other rates as well. Borrower(s) in executing this Note agrees that Lender may set the loan rate based upon the Reference Rate.

The Reference Rate in effect at any time on this Note is available from Lender.

Initials

[Handwritten initials and signatures]

MISCELLANEOUS PROVISIONS.

Unless the parties agree otherwise, payments will be applied first to any collection costs, then to any late charges, then to accrued unpaid interest, and any remaining amount to principal.

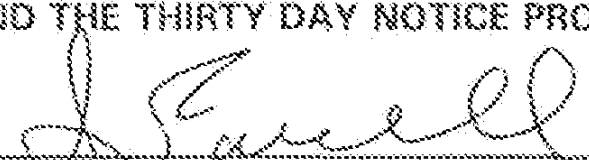
Borrower(s) waives presentment, demand for payment, protest, notice of dishonor, and notice of every other kind. The obligations of Borrower(s) under this Note are joint and several.

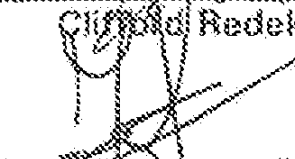
NOTE: A WRITTEN NOTICE IS REQUIRED THIRTY DAYS PRIOR TO ANY PAY-OFF, EXCEPTING THE STATED MATURITY DATE. IF A THIRTY DAY NOTICE IS NOT GIVEN, THEN INTEREST CHARGES WILL BE ASSESSED EQUIVALENT TO A THIRTY DAY NOTICE PERIOD. THIS IS IN ADDITION TO THE STATED PRE-PAYMENT PENALTY.

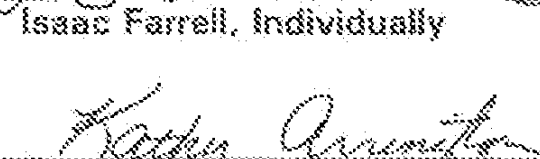
THIS PROMISSORY NOTE INCORPORATES BY REFERENCE THAT CERTAIN BUSINESS LOAN AGREEMENT, FLOOD INSURANCE CERTIFICATE, AGREEMENT TO PROVIDE FIRE-INSURANCE AND EXTENDED COVERAGE INSURANCE, AUTHORIZATION TO DISBURSE, AND ANNUAL INFORMATION FORM, WHICH DOCUMENTS ARE ATTACHED AS EXHIBITS HERETO. THE UNDERSIGNED ACKNOWLEDGE THAT THEY HAVE READ THE AFOREMENTIONED DOCUMENTS IN THEIR ENTIRETY, AND THAT BY THEIR SIGNATURES BELOW, AGREE TO BE BOUND BY THE TERMS CONTAINED THEREIN.

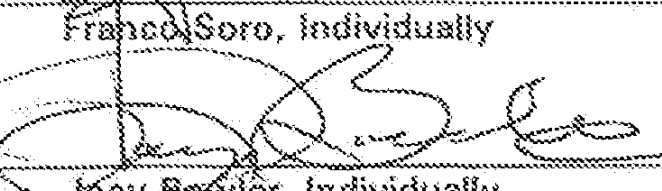
THE UNDERSIGNED ACKNOWLEDGE THEY HAVE READ THIS PROMISSORY NOTE IN ITS ENTIRETY, WITH ALL ITS PROVISIONS, INCLUDING THE PRE-PAYMENT PENALTY AND THE THIRTY DAY NOTICE PROVISION.

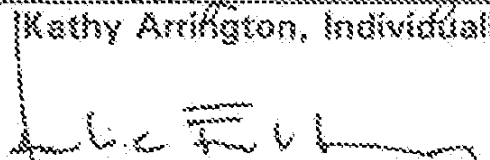
BY: 
Clifford Redekop, Individually

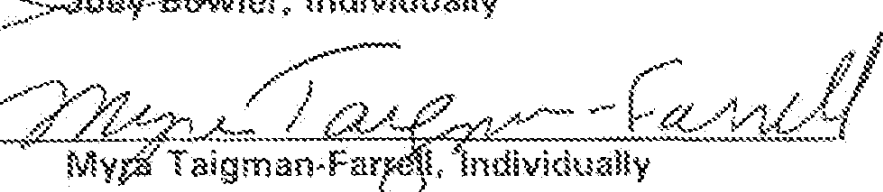
BY: 
Isaac Farrell, Individually

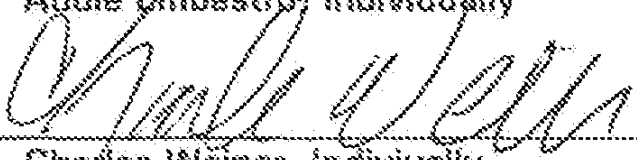
BY: 
Franco Soro, Individually

BY: 
Kathy Arrington, Individually


BY: 
Joey Bowler, Individually

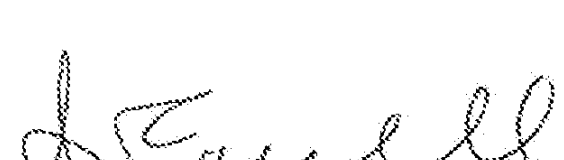
BY: 
Audie Embestro, Individually


BY: 
Myra Taigman-Farrell, Individually

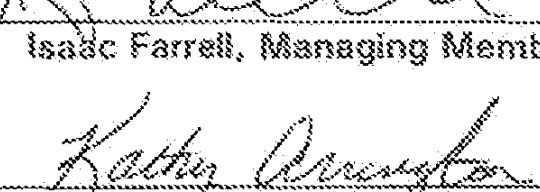
BY: 
Charles Weiner, Individually

BY: MESQUITE JABEZ, LLC

By: 
Clifford Redekop, Managing Member

By: 
Isaac Farrell, Managing Member

By: 
Franco Soro, Managing Member

By: 
Kathy Arrington, Managing Member

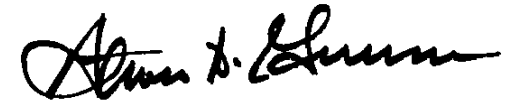
REFERENCE: MESQUITE JABEZ, LLC #718299-1.1

AMERICA FIRST CREDIT UNION
ADDENDUM TO COMMERCIAL PROMISSORY NOTE

1. Partial Releases at lender's sole discretion, but calculated at no less than 125% of the parcel's pro-rata share of the loan amount. This may require a specific appraisal for the parcel to be released. The liquor store will not be released until the loan is paid off.
2. No implied approval of related loans (any future request to be considered on its own merits.)

Initials

Handwritten initials and signatures. The word 'Initials' is printed to the left. There are several handwritten marks, including what appears to be 'KA' and 'mte' in the bottom right, and a large, stylized signature or set of initials in the center.



CLERK OF THE COURT

OPPS

Stanley W. Parry, Esq.
Nevada Bar No. 1417
Timothy R. Mulliner
Nevada Bar No. 10692
BALLARD SPAHR LLP
100 North City Parkway, Suite 1750
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Email: parrys@ballardspahr.com
Email: mullinert@ballardspahr.com

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

AMERICA FIRST FEDERAL CREDIT
UNION, a federally chartered credit union,

Plaintiff,

v.

FRANCO SORO, and individual; MYRA
TAIGMAN-FARRELL, an individual; ISAAC
FARRELL, an individual; KATHY
ARRINGTON, an individual; and AUDIE
EMBESTRO, an individual; DOE Individuals 1
to 10; and ROE Business Entities 1 to 10.

Defendants.

Case No.: A-13-679511-C

Dept. No.: XXX

Date: August 29, 2013

Time: 9:00 a.m.

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, America First Federal Credit Union ("America First"), by and through undersigned counsel, hereby files its Opposition to Defendants' Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By their motion, Defendants argue that this Court lacks subject matter jurisdiction over a deficiency claim arising under Nevada law and resulting from the non-judicial foreclosure of real property located in Clark County, Nevada in accordance with Nevada law. This argument is not supported by the language set forth in the underlying loan documents consenting to jurisdiction in Utah (which language is characterized by Defendants as a "forum selection clause") and is contrary to Nevada law. Therefore, Defendants' motion should be denied.

1 **II. STATEMENT OF FACTS**

2 Defendants, in making their motion, concede that the Court should accept all the
3 allegations set forth in the Complaint as true for the purposes of analyzing this motion.
4 (Defendant's Motion to Dismiss ("Defendants' Mot."), 3 n. 1.) As set forth in the Complaint, by
5 this action America First seeks a deficiency judgment against Defendant pursuant to N.R.S.
6 40.455(1). (See generally Complaint.) For the purposes of this memorandum, capitalized terms
7 not otherwise defined herein shall have the same meaning as they are given in the Complaint.

8 Defendants' motion to dismiss is based on certain language set forth in the Loan
9 Documents underlying the secured loan that ultimately resulted in the deficiency America First
10 seeks to recover, which language Defendants claim constitutes a "jurisdiction selection clause"
11 which, according to Defendants "expressly provide[s]" that "only a Utah court has jurisdiction to
12 entertain the claims brought by America First in its Complaint." (Defendants' Mot., 4, 6.) As
13 set forth below, Defendants' interpretation is contrary to the plain language they rely on and
14 unsupported by law. Specifically, Defendants' rely on the following provisions of the Loan
15 Agreement:

16 **Applicable Law.** This Agreement (and all loan documents in
17 connection with this transaction) shall be governed by and
18 construed in accordance with the laws of the State of Utah.

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

22 (Loan Agreement, a copy of which is attached to Defendant's Mot. as Exh. A., at 6.)
23 Defendants' Motion also relies on the last sentence of the following paragraph from the Note:

24 Lender may pay someone else to help collect this Note if
25 Borrower(s) does not pay. Borrower(s) will also pay Lender that
26 amount. This includes Lender's attorneys' fees whether or not
27 there is a lawsuit, including attorneys' fees for bankruptcy
28 proceedings, appeals, and anticipated post-judgment collection
services. Borrower(s) will also pay any court costs. Lender may
delay enforcing any of its right under this Note without losing
them. **If there is a lawsuit, Borrower(s) agrees to submit to the
jurisdiction of the court in the county in which Lender is
located.**

(Note, 3 (emphasis added).) As set forth below, none of these provisions deprives this Court of jurisdiction over this deficiency action.¹

III. LEGAL ARGUMENT

A. This Court Has Subject Matter Jurisdiction Over this Action, Which Arose Under N.R.S. 40.455(1).

N.R.S. 40.455(1) provides, in relevant part:

[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.

In this case, America First is the beneficiary of Deed of Trust and brought this action within six months after completing the non-judicial foreclosure of the Clark County, Nevada property that was encumbered by the Deed of Trust. America First's right to seek this deficiency did not arise from any provision of the Loan Documents themselves, but rather from Nevada statute. *See* N.R.S. 40.455 (creating the statutory right to a deficiency judgment). In fact, any cause of action for breach of contract under the Loan Documents after foreclosure would be barred by Nevada's one-action rule pursuant to N.R.S. 40.430. Instead, America First has the statutory right, under Nevada law, to pursue its deficiency action in this Nevada court.

B. The Non-Exclusive Consent to Jurisdiction Contained in the Loan Documents Does not Deprive this Court of Subject Matter Jurisdiction.

Defendant argues that this Court lacks jurisdiction "because the parties expressly agreed in an arms-length transaction, to have any disputes related to the Business Loan Agreement and/or the Promissory Note heard by a Utah court, applying Utah law." (Defendants' Mot., 6.)

¹ Tellingly, Defendants' motion makes no reference to the Deed of Trust encumbering property located in Clark County, Nevada, the foreclosure of which gave rise to this deficiency claim. The Deed of Trust actually states that it is to be "construed according to the laws of the State of NV." (Deed of Trust, a true and correct copy of which is attached hereto as Exhibit A, at ¶ 26.)

1 This argument misrepresents the contents of the Loan Documents and advocates an interpretation
2 of the Loan Documents that is entirely contrary to law.

3 As an initial matter, the plain language of the provisions relied on by Defendants does not
4 impose any requirement that disputes between the parties be heard in Utah. Indeed, it is a stretch
5 to even characterize those provisions, which do nothing more than *consent* to jurisdiction in the
6 State of Utah, as a “forum selection clause.” There is no language in the loan agreements
7 suggesting or implying that a dispute between the parties should be brought in Utah, much less
8 any language suggesting that *only* a Utah court would have jurisdiction. America First does not
9 dispute that forum selection clauses are generally enforceable under Nevada law, but in this case
10 the plain language of the contract itself does not select or designate Utah as a forum, much less
11 suggest or imply that Utah courts would have exclusive jurisdiction over any disputes between
12 the parties.

13 “Where a document is clear and unambiguous on its face, the court must construe it from
14 the language therein.” Southern Trust Mortgage Co., v. K & B Door Co., Inc., 104 Nev. 564,
15 568, 763 P.2d 353, 355 (1998). A court has no power to create a new contract or new duties for
16 the parties, which they have not created or intended themselves. Old Aztec Mine, Inc. v. Brown,
17 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Defendants’ Motion requests that this Court insert an
18 “exclusive jurisdiction” clause into the Loan Documents after the fact and thereby deprive
19 America First of its chosen forum. To do so would be entirely contrary to Nevada law with
20 respect to contract interpretation. The plain language of the provisions at issue indicates that
21 their sole intention was to *consent* in advance to jurisdiction in Utah, should an action be brought
22 there. The parties did nothing by those clauses but “submit themselves to the jurisdiction of the
23 Courts of the State of Utah.” (Loan Agreement, Defs.’ Mot. at 6.) Nothing in that language
24 deprives this Court of jurisdiction. Had the parties intended to make Utah the sole forum for
25 disputes to be heard, they would have inserted language to that effect.

26 Moreover, even if the language at issue were a “forum selection clause,” it falls far short
27 of designating Utah as an exclusive forum. “For a forum selection clause to be exclusive, it must
28 go beyond establishing that a particular forum will have jurisdiction and must clearly

demonstrate the parties' intent to make that jurisdiction exclusive." City of New Orleans v. Municipal Admin. Services, 376 F.3d 501, 504 (5th Cir. 2004). Language specifically requiring suit in a specific forum renders a forum selection clause mandatory. Id. In Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75 (9th Cir. 1987), the Ninth Circuit addressed the question of whether a "forum selection clause" that (1) specified that California law applied and (2) specified that the courts of Orange County, California had jurisdiction over the parties required the transfer of a suit filed in New Jersey. Id. at 76. Hunt Wesson Foods held that language consenting to jurisdiction but lacking language mandating exclusive jurisdiction "clearly falls short of designating an exclusive forum." Id. at 77-78.

Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), which Defendants cite as instructive and suggest requires dismissal of this action, actually addressed a forum selection clause containing mandatory language specifying that "[a]ny dispute arising must be treated before the London Court of Justice." Id. at 2. This language, which was ultimately enforced by the Court, was sufficient to justify depriving the plaintiff of its chosen forum. Such language is exactly what is lacking in this case. Unlike in Bremen, because the "forum selection clauses" at issue in this case contain no mandatory language, this Court has jurisdiction and Defendants' motion should be denied.

IV. CONCLUSION

Based on the foregoing, Defendants' motion to dismiss should be denied.

Dated this 19th day of August, 2013.

BALLARD SPAHR LLP

By: 

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that on the 19th day of August, 2013, a true and correct copy of the foregoing **MOTION TO DISMISS** was served to the following in the manner set forth below:

I. Scott Bogatz, Esq.
BOGATZ LAW GROUP
3800 Howard Hughes Parkway, Suite 1850
Las Vegas, NV 89169

☐ Facsimile Transmission

☒ U.S. Mail, Postage Prepaid

☐ E-mail

☐ Certified Mail, Receipt No. _____, return receipt requested


an Employee of Ballard Spahr LLP

Exhibit A

Exhibit A

Exhibit A

001-18-7020

WHEN RECORDED, MAIL TO:
AMERICA FIRST CREDIT UNION
4646 SO. 1500 W. STE 130
OGDEN, UTAH 84405

ATTN: BUSINESS SERVICES

Mail Tax Statement
Mesquite Jabez LLC
28 Anthem Creek Circle
Henderson NV 89052

SPACE ABOVE THIS LINE FOR RECORDER'S USE

TRUST DEED

With Assignment of Rents

THIS TRUST DEED, made this April 11, 2002, between MESQUITE JABEZ, LLC, as TRUSTOR, whose address is 28 ANTHEM CREEK CIRCLE, HENDERSON, NEVADA 89052, TIMOTHY W. BLACKBURN, ATTORNEY, as TRUSTEE, and AMERICA FIRST CREDIT UNION a Utah Corporation, as BENEFICIARY.

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST, WITH POWER OF SALE, the following described properties, situated in CLARK County, State of Nevada:

SEE ATTACHED "EXHIBIT A" FOR LEGAL DESCRIPTION

LIQUOR STORE/MINI MART AND EIGHT ACRE LAND PARCEL

APPROXIMATELY: 820 WEST MESQUITE BOULEVARD, MESQUITE, NEVADA

Together with all the estate, right, title, and interest, including insurance, which trustor now has or may hereafter, acquire, either in law or inequity, in and to said premises; to have and to hold the same, together with the buildings and improvements thereon and all alterations, additions or improvements now or hereafter made thereto, including all machinery, equipment, material, appliances, and fixtures now or hereafter installed or placed in said buildings or on said real property for the generation or distribution of air, water, heat, electricity, light, fuel or refrigeration or for ventilating or air conditioning purposes or for sanitary or drainage purposes, for the removal of dust, refuse or garbage and including stoves, ranges, cabinets, laundry equipment, all elevators, awnings, window shades, Venetian blinds, drapery rods and brackets, screens, floor coverings, including all rugs and carpets attached to floors, lobby furnishings and incinerators and all other similar items and things; all to the items and things so specified and all other similar items or things, whether now or hereafter placed on the property, being hereby declared to be, and in all circumstances, shall be construed to be, for and in connection with the purposes and powers of this trust deed, things affixed to and a part of the realty described herein; the specific enumerations herein not excluding the general, and together with all singular lands, tenements, hereditaments, reversion and reversions, remainder and remainders, rents, issues, profits, privileges, water rights and appurtenances of every kind and nature thereunto belonging to or in any way appertaining, or which may be hereafter acquired and used or enjoyed with said property, or any part thereof, SUBJECT HOWEVER, to the right, power and authority hereinafter given to and conferred upon beneficiary to collect and apply such rents, issues, and profits. FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by a promissory note of even date herewith, in the principal sum of \$ TWO MILLION NINE HUNDRED THOUSAND AND NO/100 DOLLARS, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

1. Upon request of the Beneficiary and from and after the date of such request, Trustor agrees to pay to Beneficiary in addition to the monthly payments of principal and interest payable under the terms of said note, monthly until said note is fully paid, the following sums:

(a) An installment of the taxes and assessments levied or to be levied against the premises covered by this Trust Deed and an installment of the premium or premiums that will become due and payable to renew the insurance of the premises covered hereby against loss by fire or such other hazard as may reasonably be required by the Beneficiary in amounts, and in a company or companies, satisfactory to the Beneficiary. Such installments shall be equal, respectively, to the estimated premium or premiums for such insurance, and taxes and assessments, next due (as estimated by the Beneficiary) less all installments already paid therefor, divided by the number of months that are to elapse before one month prior to the date when such premium or premiums and taxes and assessments will become due. Such added payments shall not be, nor be deemed to be, trust funds but may be commingled with the general funds of the Beneficiary, and no interest shall be payable in respect thereof. The said Beneficiary shall use such monthly payments to the extent they will suffice to pay such premium or premiums and taxes and assessments when due.

Initials LF MB JR KA