IN THE SUPREME COURT OF THE STATE 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 Case No: 64130

Dist. Court Case No: A-13-679511-C

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT,
THE HONORABLE JERRY A. WIESE PRESIDING

RESPONDENTS' ANSWERING BRIEF

BOGATZ LAW GROUP
I. Scott Bogatz, Esq.
Nevada Bar No. 3367
Charles M. Vlasic III, Esq.
Nevada Bar No. 11308
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
Telephone: (702) 776-7000
Facsimile: (702) 776-7900
sbogatz@isbnv.com
cvlasic@isbnv.com
Attorneys for Respondents

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

NRAP 26.1 DISCLOSURE STATEMENT

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

1. Parent Corporation of Respondents:

   - N/A.

2. Publicly Held Shareholders of Respondents:

   - N/A.

3. Law Firms who have appeared for Respondents:

   - Bogatz Law Group
     3883 Howard Hughes Parkway, Suite 790
     Las Vegas, Nevada 89169

Dated this 12th day of December, 2014.

BOGATZ LAW GROUP

By: _____

I. Scott Bogatz, Esq.
Nevada Bar No. 3367
Charles M. Vlasic III, Esq.
Nevada Bar No. 11308
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
Attorneys for Respondents

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

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BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

TABLE OF AUTHORITIES

CASES

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

SECONDARY SOURCES

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

I. STATEMENT OF THE ISSUE ON APPEAL[1]

A. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING, BASED UPON THE EVIDENCE PRESENTED, THAT THE LOAN AGREEMENT AND THE PROMISSORY NOTE CONTAIN LANGUAGE WHICH CLEARLY EXPRESSES THE PARTIES' INTENT TO SUBMIT LITIGATION RELATING TO THE AGREEMENT AND THE NOTE TO THE JURISDICTION OF COURTS IN THE STATE OF UTAH?

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[1] Approximately half of the Appellant's Opening Brief is dedicated to a ***complex, fact-intensive*** statute of limitations/choice of law argument – an issue that has not been raised, briefed, argued, nor decided upon in the underlying action. See Key Bank of Ala. v. Donnels, 106 Nev. 49, 52, 787 P.2d 382, 384 (1990) (explaining "[w]e have held that 'it is well settled that the expressed intention of the parties as to the applicable law in the construction of a contract is controlling ***if the parties acted in good faith and not to evade the law of the real situs of the contract***'") (emphasis added) (*quoting* Sievers v. Diversified Mtg. Investors, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979)).

In this case, the district court expressly ***declined*** to rule on this issue, instead leaving it for a Utah court to determine (explaining "***[w]hether or not*** the [Appellant] has a valid claim for a deficiency judgment in the State of Utah, under the laws of the State of Utah, and pursuant to the Loan Agreement and the Promissory Note, ***is for a Utah court to decide***"). Joint Appendix 078 (emphasis added).

Given that this nuanced issue was never properly before the district court, it is not appropriate for Appellant to raise this new issue herein. See Walch v. State, 112 Nev. 25, 30, 909 P.2d 1184, 1187 (1996) (explaining "if a party fails to raise an issue below, this court need not consider it on appeal") (*citing* Montesano v. Donrey Media Group, 99 Nev. 644, 650 n. 5, 668 P.2d 1081, 1085 n. 5 (1983), *cert. denied,* 466 U.S. 959, 104 S.Ct. 2172 (1984)); see also Diamond Enter., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) (holding "[i]t is well established that arguments raised for the first time on appeal need not be considered by this court.") (*citing* Montesano, 99 Nev. at 650 n. 5, 668 P.2d at 1085 n. 5.

However, in the unlikely event this Court determines it would like to consider this newly-raised issue in the instant appeal, Respondents respectfully request leave to file a supplementary brief of points and authorities on this matter.

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

II. STATEMENT OF THE FACTS AND PROCEDURE

A. RELEVANT FACTUAL BACKGROUND

1. The Loan And Loan Documents

On or about April 11, 2002, America First Federal Credit Union ("America First") and Respondents entered into a Business Loan Agreement ("Loan Agreement"), whereby America First agreed to lend, and Respondents agreed to borrow, approximately $2,900,000 for use in the purchase of a liquor store/mini mart in Nevada. Joint Appendix ("JA") 019. On or about the same date, America First and Respondents executed a Commercial Promissory Note ("Note") and a Trust Deed with Assignment of Rents ("Deed of Trust") to secure the Note (the Loan Agreement, Note and Deed of Trust are sometimes collectively referred to herein as the "Loan Documents"). Id.

2. The Applicable Law And Jurisdiction Selection Clauses Within The Loan Documents

The Loan Agreement contains an "Applicable Law" clause which expressly provides:

> **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.

JA 031. In addition, the Loan Agreement contains an "Acceptance" clause which specifies that "This Agreement is accepted by Lender in the State of Utah. Id. The Loan Agreement also contains a "Jurisdiction" selection clause which expressly provides:

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

Id.

Similarly, the Note contains a jurisdiction selection clause which expressly provides:

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

JA 036.

America First is located at "4646 South 1500 West, Suite 130, Riverdale, Utah." JA 002 ¶ 1.

The Deed of Trust, however, provides in relevant part:

> This Trust Deed shall be construed according to the laws of the State of N[evada]. 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 N[evada].

JA 050 ¶ 25.

3. The Non-Judicial Foreclosure

The Nevada property securing the Note was sold via a non-judicial foreclosure sale on October 4, 2012. JA 004 ¶ 17.

B. RELEVANT PROCEDURAL BACKGROUND

1. The Complaint

On April 4, 2013 - exactly six months after the non-judicial foreclosure sale of the property securing the Note - America First filed the

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

underlying Complaint in Nevada, seeking a deficiency judgment against Respondents under Nevada law. JA 002 – 005.

2. The Motion To Dismiss

In response to the Complaint filed by America First, Respondents filed a Motion to Dismiss on July 29, 2013. JA 017 – 038. In the Motion to Dismiss, Respondents argued essentially that pursuant to NRCP 12(b)(1) and 12(h)(3), the district court did not have subject matter jurisdiction over the dispute based upon the forum and jurisdiction selection clauses contained in the relevant Loan Documents. JA 019 – 032.

In its Opposition, America First argued that the applicable forum and jurisdiction selection clauses contained in the Loan Documents were merely permissive, not mandatory. JA 042 – 043. Based upon this erroneous argument, America First suggested that the district court should simply ignore the forum and jurisdiction selection clauses contained in the underlying Loan Documents which they drafted, and allow this action to proceed in Nevada. JA 041 – 043.

3. The District Court Grants Respondents' Motion To Dismiss

Following a hearing on Respondents' Motion to Dismiss, the district court issued an Order on September 6, 2013, granting Respondents' Motion to Dismiss in its entirety. JA 075 – 080. In the September 6, 2013 Order, the district court correctly found and concluded in relevant part:

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

> Although the Trust Deed includes language indicating that Nevada law applies, the Trust Deed is simply security for the Promissory Note.
>
> Plaintiff's attempt to obtain a deficiency judgment is an action based upon the Business Loan Agreement and the Commercial Promissory Note, not based on the Trust Deed.
>
> . . .
>
> This Court concludes, based upon the evidence presented, that the Loan Agreement and the Promissory Note contain language which clearly expresses the parties' intent to submit litigation relating to the Agreement and the Note, to the jurisdiction of the State of Utah. This Court finds that while the language of such documents could have more clearly made such forum selection "exclusive," nonetheless, the language clearly enough identifies Utah as the forum which they selected for purposes of subject matter jurisdiction. Because the property which provided security for the loan, was already foreclosed upon, the language contained in the Trust Deed is no longer relevant. This Court will not attempt to second guess the intent of the parties, or the clear language of the contract, but will instead enforce the contract as written. Whether or not the Plaintiff has a valid claim for a deficiency judgment in the State of Utah, under the laws of the State of Utah, and pursuant to the Loan Agreement and the Promissory Note, is for a Utah court to decide.

JA 077 – 078.

III. SUMMARY OF THE ARGUMENT

The forum selection clauses at issue in this case state in relevant part: "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," and "If there is a lawsuit, [Respondents] agree[] to submit to the jurisdiction of the court in [Utah]." JA 031, 036. After considering the plain language of these clauses in addition to the arguments made by counsel for the respective

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

parties, the district court concluded that "based upon the evidence presented, [] the Loan Agreement and the Promissory Note contain language which clearly expresses the parties' intent to submit litigation relating to the Agreement and the Note, to the jurisdiction of the State of Utah." JA 078. The district court further concluded "that while the language of such documents could have more clearly made such forum selection 'exclusive,' nonetheless, the language clearly enough identifies Utah as the forum which they selected for purposes of subject matter jurisdiction." Id.

As Respondents will demonstrate herein, this conclusion was not made in error. Rather, this conclusion was entirely appropriate given the plain language of the forum selection clauses in question. On the other hand, *even if* this forum selection language could be considered ambiguous, the district court's conclusion was *still not* in error, as it is universally held that ambiguously-drafted forum selection clauses are to be construed against the drafter - America First. Given the foregoing, in addition to the fact that America First failed to make a showing, or even allege that the enforcement of its forum selection clauses would be unreasonable under the circumstances of this case, this Court must come to the same conclusion as the district court and determine that America First must pursue Respondents in Utah. Allowing America First to maintain this action would allow America First to avoid its contractual obligations - something this Court has repeatedly and expressly refused to allow.

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

IV. STANDARD OF REVIEW

"Contract interpretation is subject to a de novo standard of review." May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Similarly, "[s]ubject matter jurisdiction is a question of law subject to de novo review." Ogawa v. Ogawa, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (citations omitted). "***The district court's factual findings, however, are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence.***" Id. (emphasis added) (*citing* Int'l Fid. Ins. v. State of Nev., 122 Nev. 39, 42, 126 P.3d 1133, 1134–35 (2006)).

V. LEGAL ARGUMENT

A. THE DISTRICT COURT CORRECTLY RULED THAT AMERICA FIRST MUST LITIGATE IN UTAH BECAUSE THE FORUM SELECTION CLAUSES CLEARLY EXPRESS THE PARTIES' INTENT TO LITIGATE THIS DISPUTE IN UTAH OR, AT THE VERY LEAST, ARE AMBIGUOUS AND MUST BE CONSTRUED AGAINST AMERICA FIRST AS THE DRAFTER.

The forum selection clauses at issue in this matter are clear on their face: the parties intended to litigate any dispute regarding the Agreement or Note in Utah. As the clauses are subject to contract interpretation – which requires a plain reading – they should be construed and enforced as they were written. However, even if the clauses are deemed ambiguous, they must still be construed against the drafter. Given that America First drafted the underlying Loan Documents, the district court was correct in determining that the parties are required to litigate this dispute in Utah.

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

1. Whether A Forum Selection Clause Is Mandatory Or Permissive Is A Matter Of Contract Interpretation.

It is widely held that the issue of whether a forum selection clause is mandatory or permissive is a matter of contract interpretation. Terra Int'l, Inc. v. Mississippi Chem. Corp., 922 F. Supp. 1334, 1370 (N.D. Iowa 1996) aff'd, 119 F.3d 688 (8th Cir. 1997) (*citing* No. Cal. Dist. Council of Laborers v. Pittsburg–Des Moines Steel Co., 69 F.3d 1034, 1036 (9th Cir. 1995) (*citing* Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987); Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342, 1345 (10th Cir. 1992))).

In Nevada, the rules governing contract interpretation are well settled. "It has long been the policy in Nevada that absent some countervailing reason, contracts will be construed from the written language and enforced as written." Ellison v. Cal. State Auto. Ass'n, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (*citing* Cf. So. Trust Mort. Co. v. K & B Door Co., 104 Nev. 564, 568, 763 P.2d 353, 355 (1988) (explaining where a document is clear on its face, the court will construe it according to its plain language)); see Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 216, 163 P.3d 405, 407 (2007) (explaining "[i]n interpreting a contract, "'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'"") (*quoting* NGA # 2 Ltd. Liab. Co. v. Rains, 113 Nev. 1151, 1158, 946 P.2d 163, 167 (1997) (*quoting* Davis v. Nev. Nat'l Bank, 103 Nev. 220, 223, 737 P.2d 503,

505 (1987))); Rivero v. Rivero, 125 Nev. 410, 429, 216 P.3d 213, 226-27 (2009) (explaining that "[p]arties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy") (*citing* NAD, Inc. v. Dist. Ct., 115 Nev. 71, 77, 976 P.2d 994, 997 (1999) (explaining that "parties are free to contract in any lawful matter")). Moreover, this Court has held:

> It is not a proper function of the court to re-write or distort a contract under the guise of judicial construction. ***The law will not make a better contract for parties 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***.

Pioneer Title Ins. & Trust Co. v. Cantrell, 71 Nev. 243, 245-46, 286 P.2d 261, 263 (1955) (internal citations omitted) (emphasis added).

It is also well settled in Nevada that ***any ambiguity in the contract will "be construed against the drafter***." Anvui, LLC, 123 Nev. at 215-16, 163 P.3d at 407 (emphasis added) (*citing* Mullis v. Nev. Nat'l Bank, 98 Nev. 510, 513, 654 P.2d 533, 535 (1982)). "A contract is ambiguous when it is subject to more than one reasonable interpretation." Anvui, LLC, 123 Nev. at 215, 163 P.3d at 407 (*citing* Shelton v. Shelton, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003)). An ambiguous contract is also "'an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.'" Galardi v. Naples Polaris, LLC, 129 Nev. Adv. Op. 33, 301 P.3d 364, 366 (2013) *reconsideration en banc denied* (July 18, 2013) (*citing* Hampton v. Ford Motor Co., 561 F.3d 709, 714 (7th Cir. 2009) (*quoting*

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

Whiting Stoker Co. v. Chicago Stoker Corp., 171 F.2d 248, 251 (7th Cir. 1948))).

Indeed, there can be no dispute that these well settled rules of contractual interpretation hold true when courts interpret forum selection clauses. Specifically with respect to forum selection clauses, it is widely held that "[t]he plain language of the contract should be considered first, with the understanding that the common or normal meaning of the language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it." Gennock v. Lucas Energy, Inc., No. 1:11-CV-982 AWI SMS, 2011 WL 4738320 at *3 (E.D. Cal. Oct. 5, 2011) (*citing* Simonoff v. Expedia, Inc., 643 F.3d 1202, 1205 (9th Cir. 2011); Doe 1 v. AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009)); Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999)); see also Interactive Music Tech., LLC v. Roland Corp. U.S., No. CIV.A. 6:07-CV-282, 2008 WL 245142 at *3 (E.D. Tex. Jan. 29, 2008) (explaining "[i]n examining forum selection clauses, courts must examine the language of the clause and determine whether or not the forum selection clause evidences an intent of the parties' to limit the scope of jurisdiction or venue to a particular forum, or whether an ambiguity exists").

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BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

2. It Is Universally Held That Ambiguous Forum Selection Clauses Are To Be Construed Against The Drafter.

In those instances where a forum selection clause appears to be neither permissive nor mandatory but is instead ambiguous, it is universally held that ***the forum selection clause should be construed against the drafter***. See Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 957 (5th Cir. 1974); Interpetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp., 719 F.2d 992, 998 (9th Cir. 1983); Milk 'N' More, 963 F.2d 1342, 1346 (10th Cir. 1992); Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231, 1232 (11th Cir. 1985); Waste Servs., LLC v. Red Oak Sanitation, Inc., No. 2Z, 08CV417-DS, 2008 WL 2856459 at *2 (D. Utah July 23, 2008) (*citing* Utah Pizza Service, Inc. v. Heigel, 784 F.Supp. 835, 837–39 (D. Utah 1992)); First Nat. City Bank v. Nanz, Inc., 437 F. Supp. 184, 187 (S.D.N.Y. 1975); Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A., 509 So. 2d 273, 275 (Fla. 1987); Amermed Corp. v. Disetronic Holding Ag, 6 F.Supp.2d 1371, 1374 (N.D. Ga. 1998); Brigman v. Great Am. Opportunities, Inc., No. CIV.A. 11-00470-KD-B, 2012 WL 262394 at *5 (S.D. Ala. Jan. 6, 2012) *report and recommendation adopted*, No. CIV.A. 11-00470-KD-B, 2012 WL 262393 (S.D. Ala. Jan. 27, 2012); Stat Nurses Int'l, Inc. v. John, No. CIV. 06CV00460LTBPAC, 2006 WL 1794666 at *2 (D. Colo. June 27, 2006); Harvard Eye Assoc. v. Clinitec Int'l, Inc., No. CIV.A. 98-302, 1998 WL 248916 at *1 (E.D. Pa. May 5, 1998).

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

The Keaty case is one of the seminal cases deciding whether a forum selection clause is ambiguous and how an ambiguous forum selection clause should be interpreted, and is therefore instructive to the instant analysis. In Keaty, the court interpreted a forum selection clause similar to the ones at issue in this case, which stated in pertinent part that "the parties submit to the jurisdiction of the courts of New York."[2] Keaty, 503 F.2d at 956. In construing that particular forum selection clause, the court in Keaty explained:

> We note initially that this is not a situation where the contract, on its face, clearly limits action thereunder to the courts of a specified locale . . . (citations omitted). Neither is this a situation involving an adhesion contract whereby contract provisions are literally forced upon the weaker party . . . (citations omitted). Instead we are confronted here with a negotiated contract provision subject to opposing, yet reasonable, interpretations.
>
> . . . Freeport alleges that the questioned contract provision 'was intended to evidence the agreement of both parties thereto that the law of the State of New York would govern all disputes arising under the contract and that any such disputes would be litigated only in the State or Federal Courts located within the State of New York.' On the other side, Keaty acknowledges his intent to have the law of the State of New York govern all contract disputes, but states that he merely intended to submit to the jurisdiction of the New York courts if sued there; he did not intend to waive his right to sue or be sued elsewhere. We find both interpretations of the contract provision to be reasonable.
>
> When previously confronted with two opposing, yet reasonable, interpretations of the same contract provision, this Court

[2] Similarly, the forum selection provisions in this matter provide in relevant part: "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," and "If there is a lawsuit, [Respondents] agree[] to submit to the jurisdiction of the court in [Utah]." JA 031, 036.

> adopted ***the traditional rule whereby, 'an interpretation is preferred which operates more strongly against the party from whom (the words)*** **PROCEED**.' Tenneco, Inc. v. Greater LaFourche Port Comm'n, 5 Cir. 1970, 427 F.2d 1061, 1065, quoting from Restatement of Contracts Sec. 236(d) (1932).

Id. at 957 (emphasis added). Thereafter, the court in Keaty applied the foregoing universal rule of contract interpretation - which requires that an ambiguously drafted forum selection clause should be construed against the drafter - and ultimately ruled against the drafter.[3] Id.

Other courts have reached similar conclusions when interpreting forum selection clauses like the ones at issue in this litigation. See Citro Florida, Inc. v. Citrovale, S.A., 760 F.2d 1231, 1232 (11th Cir. 1985) (holding where "the [forum selection] clause merely states "place of jurisdiction is Sao Paulo/Brazil . . . the clause [is ambiguous and therefore] must be construed against [the drafter] and in favor of [the non-drafter]."); Brigman v. Great Am. Opportunities, Inc., No. CIV.A. 11-00470-KD-B, 2012 WL 262394 at *5 (holding that where "[t]he clause in this case provides that the employee 'consents to the venue and jurisdiction of the courts of competent jurisdiction, state and federal, situated in Nashville, Davidson County, Tennessee.' [the clause was ambiguous and therefore this] ambiguity in the clause is properly construed against [the drafter]"); First Nat'l. City Bank v. Nanz, Inc., 437 F. Supp. 184, 187 (S.D.N.Y. 1975)

[3] Unlike in this case, the party in Keaty who was seeking to have the forum selection clause interpreted as permissive rather than mandatory *did not draft the contract*, so the court in Keaty ultimately held the ambiguous clause to be permissive, rather than mandatory. Keaty, 503 F.2d at 957.

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

(holding that where the forum selection clause stated that "the Supreme Court of the State of New York, within any county of the City of New York shall have jurisdiction of any dispute" between plaintiff . . . and defendants," the forum selection clause was "susceptible to the interpretation that the New York State Supreme Court *could have jurisdiction* of disputes under the loan agreement, but that other forums *may also be appropriate* [. . . we construe such an ambiguity against [the drafter, bank]" (emphasis added)); Global Satellite Commc'n Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1274 (11th Cir. 2004) (finding "the phrase 'submit to the jurisdiction of Broward County, Florida,' to be vague and imprecise," and therefore construing the clause against the drafter); Caldas & Sons, Inc. v. Willingham, 17 F.3d 123, 127 (5th Cir. 1994) (where the forum selection clause stated "[t]he laws and courts of Zurich are applicable," the court found the clause ambiguous, and therefore construed the language against the drafter); Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A., 509 So. 2d 273, 275 (Fla. 1987) (holding that "when a contract [choice-of-forum] provision is subject to opposing, yet reasonable interpretations, an interpretation is preferred which operates more strongly against the party from whom the words proceeded").

In this case, the forum selection clauses state in relevant part: "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," and "If

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

there is a lawsuit, [Respondents] agree[] to submit to the jurisdiction of the court in [Utah]." JA 031, 036.

Respondents agree with the district court in that the forum selection clauses at issue herein "clearly express[] the parties' intent to submit litigation relating to the Agreement and the Note, to the jurisdiction of the State of Utah." JA 078. Furthermore, "while the language of such documents could have more clearly made such forum selection "exclusive," nonetheless, the language clearly enough identifies Utah as the forum which they selected for purposes of subject matter jurisdiction." Id.

Even looking beyond the forum selection clauses, additional evidence demonstrates that the parties in general, and America First in particular, intended litigation to be within the sole jurisdiction of Utah, as the Loan Agreement specifies that "[t]his Agreement is accepted by Lender in the State of Utah." JA 031. Accordingly, under a plain language contract interpretation, the district court's determination was correct, and this analysis should end here. See Utah Pizza Serv., Inc., 784 F. Supp. at 837 (explaining "[a] party is obligated to abide by its contractual duties, and litigate in the agreed-upon forum"); see also Ellison, 106 Nev. at 603, 797 P.2d at 977; Cf. So. Trust Mort. Co., 104 Nev. at 568, 763 P.2d at 355; Anvui, LLC, 123 Nev. at 216, 163 P.3d at 407; NGA # 2 Ltd. Liab. Co., 113 Nev. at 1158, 946 P.2d at 167; Davis, 103 Nev. at 223, 737 P.2d at 505; Rivero, 125 Nev. at 429, 216 P.3d at 226-27; NAD, Inc., 115 Nev. at 77, 976 P.2d at 997; Pioneer Title Ins. & Trust Co., 71 Nev. at 245-46, 286 P.2d at

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

263; Gennock, No. 1:11-CV-982 AWI SMS, 2011 WL 4738320 at *3; Simonoff, 643 F.3d at 1205; Doe 1, 552 F.3d at 1081; Klamath Water Users Protective Ass'n, 204 F.3d at 1210; Interactive Music Tech., LLC, No. CIV.A. 6:07-CV-282, 2008 WL 245142 at *3.

However, even if the language is not found to be clear, at the very least the forum selection clauses are ambiguous and therefore should be construed against America First as the drafter. For example, in this case, just as in Keaty, Respondents are arguing that the forum selection clauses within the Loan Documents were intended to evidence the agreement of both parties that any dispute between them would be litigated ***only*** in Utah. See Keaty, 503 F.2d at 957. America First, on the other hand, is arguing that the forum selection clauses were only included in the Loan Documents so that Respondents would submit to the jurisdiction of Utah courts ***only if*** America First decided to sue there.[4] Id.; see October 13, 2014 Opening Brief at p. 26. In these situations, courts have repeatedly found the forum selection clauses to be "subject to opposing, yet reasonable interpretations," ***which would require the ambiguous clauses to be construed against America First as the drafter***. See Keaty, 503 F.2d at 956; Citro Florida, Inc., 760 F.2d at 1232; Brigman, No. CIV.A. 11-00470-KD-B, 2012 WL 262394 at *5; First

[4] Note that this is the first time America First has made this argument. Accordingly, this argument need not be considered by the Court on appeal. See Diamond Enter., Inc., 113 Nev. at 1378, 951 P.2d at 74 (holding "[i]t is well established that arguments raised for the first time on appeal need not be considered by this court.") (*citing* Montesano, 99 Nev. at 650 n. 5, 668 P.2d at 1085 n. 5).

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

Nat'l. City Bank, 437 F. Supp. at 187; Global Satellite Commc'n Co., 378 F.3d at 1274; Caldas & Sons, Inc., 17 F.3d at 127; see also Interpetrol Bermuda Ltd., 719 F.2d at 998; Milk 'N' More, 963 F.2d at 1346; Waste Servs., LLC, No. 2Z, 08CV417-DS, 2008 WL 2856459 at *2; Utah Pizza Service, Inc., 784 F.Supp. at 837–39; Garcia Granados Quinones, 509 So. 2d at 275; Amermed Corp., 6 F.Supp.2d at 1374; Stat Nurses Int'l, Inc., No. CIV. 06CV00460LTBPAC, 2006 WL 1794666 at *2; Harvard Eye Assoc., No. CIV.A. 98-302, 1998 WL 248916 at *1.

It is also important to note that generally, it is the drafter who seeks to enforce the forum selection clause as mandatory, while the non-drafting party seeks to have the forum selection clause enforced as permissive. As a result, although some of the authority cited herein, and virtually all of that cited by America First in its Opening Brief finds the various forum selection clauses they analyze to be permissive, rather than mandatory, ***this does not change the fact that all of this authority uniformly holds in favor of the non-drafting party when the forum selection clause is held to be ambiguous - the same position held by Respondents in this case***.

For example, in Zapata Marine Serv. v. O/Y Finnlines, Ltd., 571 F.2d 208, 209 (5th Cir. 1978), the drafter of a forum selection clause attempted to misconstrue the Keaty court's ultimate decision to support the argument that the wording of an ambiguous forum selection clause was permissive, rather than mandatory, as America First has argued in its Opening Brief. Id. The Zapata court refused to allow this tortured interpretation of Keaty, however,

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

noting that the drafter "argues that this case is controlled by Keaty v. Freeport Indonesia, Inc., 503 F.2d 955 (5th Cir. 1974), which held that a clause directing that the parties 'must submit to the jurisdiction of the court of New York' was not a mandatory forum selection clause." Id. Clarifying the holding from Keaty, the Zapata court explained, "***Keaty, however, teaches another principle which is equally forceful as a rule of interpretation that when a contract provision is subject to opposing, yet reasonable interpretation, an interpretation is preferred which operates more strongly against the party from whom the words proceeded.***" Id. (*citing* Keaty, 503 F.2d at 957) (emphasis added).

In sum, there is no dispute that America First drafted the Loan Documents in question. As the drafter, America First could have left the applicable jurisdiction selection clauses out of the Loan Documents completely, or it could have identified and inserted Nevada, or any other state[s] it wanted. However, when it drafted these Loan Documents, America First deliberately and specifically chose to state that the agreement was entered into in the state of ***Utah***, to only identify ***Utah*** as the state which would have subject matter over this dispute, and to identify ***Utah*** as the state in which any lawsuit between the parties would be brought. JA 031, 036. There is simply no legitimate dispute that this is what the parties bargained for and agreed to. For all these reasons, Respondents respectfully request this Court deny the underlying Appeal in its entirety.

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BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

B. AMERICA FIRST FAILED TO OPPOSE THE GENERAL RULE THAT FORUM SELECTION CLAUSES ARE PRIMA FACIE VALID AND SHOULD BE ENFORCED AS WRITTEN ABSENT A SHOWING OF UNREASONABLENESS.

Furthermore, the general rule according to both the United States Supreme Court and this Court is that, with respect to forum selection clauses, "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S. Ct. 1907, 1913 (1972) (*citing* Central Contracting Co. v. Md. Cas. Co., 367 F.2d 341 (3rd Cir. 1966); Anastasiadis v. S.S. Little John, 346 F.2d 281 (5th Cir. 1965) (by implication); Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806 (2nd Cir. 1955), *cert. denied*, 350 U.S. 903, 76 S.Ct. 182, (1955); Cerro de Pasco Copper Corp. v. Knut Knutsen, O.A.S., 187 F.2d 990 (2nd Cir. 1951); Central Contracting Co. v. C. E. Youngdahl & Co., 209 A.2d 810 (Pa. 1965)); Tuxedo Int'l Inc. v. Rosenberg, 127 Nev. Adv. Op. 2, 251 P.3d 690, 693 (2011); Campanelli v. Conservas Altamira, S.A., 86 Nev. 838, 841, 477 P.2d 870, 872 (1970); Tandy Computer Leasing, a Div. of Tandy Electronics, Inc. v. Terina's Pizza, Inc., 105 Nev. 841, 843, 784 P.2d 7, 8 (1989) (*quoting* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n. 14 (1985)). In other words, "[a] party is obligated to abide by its contractual duties, and litigate in the agreed-upon forum." Utah Pizza Serv., Inc., 784 F. Supp. at 837. Moreover, in Tuxedo Int'l, this Court specifically held that ***forum selection clauses should not be "rendered***

meaningless by allowing parties to disingenuously back out of their contractual obligations through attempts at artful pleading." Tuxedo Int'l Inc., 127 Nev. Adv. Op. 2, 251 P.3d at 693 (emphasis added).

In this case, America First has not shown or even alleged that the Loan Documents were unconscionable, illegal or in violation of public policy. Furthermore, America First has not shown or even alleged that the Loan Documents were not freely negotiated, unreasonable or unjust. As a result, the Court should not and cannot allow the express, deliberate forum selection language contained within the Loan Documents to be ignored and rendered meaningless by America. Indeed, America First's mischaracterization of the applicable jurisdiction selection clauses contained in the Loan Documents (which it drafted) as merely permissive, represents an impermissible and disingenuous attempt to avoid its contractual obligations under the Loan Documents, something this Court has expressly refused to allow. See Tuxedo Int'l Inc., 127 Nev. Adv. Op. 2, 251 P.3d at 693; see also M/S Bremen, 407 U.S. at 10, 92 S. Ct. at 1913. For these additional reasons, Respondents respectfully request this Court deny the underlying Appeal in its entirety.

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BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

VI. CONCLUSION

Based upon the foregoing, Respondents respectfully request this Court deny the underlying appeal in its entirety.

Dated this 12th day of December, 2014.

BOGATZ LAW GROUP

By: _____

I. Scott Bogatz, Esq.
Nevada Bar No. 3367
Charles M. Vlasic III, Esq.
Nevada Bar No. 11308
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
Attorneys for Respondents

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

VII. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

2. I further certify that this Brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it:

[X] Does not exceed 30 pages; or 14,000 words

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

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BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

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

Dated this 24th day of December, 2014.

BOGATZ LAW GROUP

By: _____

I. Scott Bogatz, Esq.
Nevada Bar No. 3367
Charles M. Vlasic III, Esq.
Nevada Bar No. 11308
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
Attorneys for Respondents

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2014, I served a copy of the foregoing **RESPONDENTS' ANSWERING BRIEF** upon each of the following parties electronically, through the Nevada Supreme Court's e-filing system:

Stanley W. Parry, Esq.
Timothy R. Mulliner, Esq.
Matthew D. Lamb, Esq.
BALLARD SPAHR, LLP
100 N City Pkwy, Ste. 1750
Las Vegas, Nevada 89106
Attorneys for Appellant

An employee of Bogatz Law Group

BOGATZ LAW GROUP
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
(702) 776-7000 FAX: (702) 776-7900