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

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APPEAL

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

APPELLANT'S REPLY BRIEF

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Docket 64130 Document 2015-03614

NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

Dated: February 2, 2015.

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ARGUMENT

In their answering brief, Borrowers[1] fail to cite a single reported case from any American jurisdiction in which a court has interpreted a bare "consent to jurisdiction" provision as a mandatory forum selection clause. Faced with this reality, Borrowers spend the entirety of their brief attempting to distract the Court by citing the principle that courts should resolve contractual ambiguities against the drafter of the contract. According to Borrowers, the Court should ignore the actual language of the consent to jurisdiction clauses in this case (and the myriad case law demonstrating the district court's erroneous interpretation of those clauses), and deem the clauses ambiguous in order to construe them against AFCU's interests.

However, the extensive authority cited in AFCU's opening brief cannot be ignored; consent to jurisdiction clauses unaccompanied by any compulsory or exclusive language, such as those at issue in this case, are <u>unambiguously</u> permissive. In fact, the Ninth Circuit has gone even further by holding that a consent to jurisdiction clause is <u>unambiguously</u> permissive <u>even if</u> it is supplemented with compulsory or exclusive terms. Therefore, a court presented with a bare consent to jurisdiction clause need not resort to rules of contract

[1] All capitalized terms not otherwise defined have the same meanings given in AFCU's opening brief.

interpretation to conclude that the clause merely permits jurisdiction in a specified forum, but does exclusively limit jurisdiction to one forum and to the exclusion of all others.

Moreover, even if the Court were required to rely upon rules of contract interpretation here, they certainly do not compel the result advanced by Respondents: that the Court must mechanically accept the Borrowers' position and reject AFCU's interpretation as the drafter. To the contrary, rules of contract interpretation require that the clauses at issue be applied as written, rather than transformed into something materially different as Borrowers would have it. Indeed, in order to reach the result advanced by Borrowers, the Court would have to "read in" additional terms to the contract that simply do not exist, a practice which is itself precluded by rules of contract interpretation.

Finally, Borrowers have failed to defend their argument that AFCU's deficiency action is governed by Utah law, and specifically its three-month statute of limitations, rather than Nevada's six-month statute of limitations. Because this issue was raised before the district court, because the district court addressed the issue in its order, and because Borrowers' position on the issue must be rejected as a matter of law under Key Bank of Alaska v. Donnels, the Court should reverse the

trial court's dismissal and remand the case with instructions to apply Nevada law, including its six-month statute of limitations.[2]

I. The consent to jurisdiction clauses in the Loan Agreement and Note are <u>unambiguously</u> permissive.

In their answering brief, Borrowers do not dispute the general distinction between permissive consent to jurisdiction clauses, on one hand, and mandatory forum selection clauses, on the other. <u>See generally</u> Opening Brief at 12-20 (collecting cases from Nevada and other jurisdictions recognizing the distinction between mandatory and permissive clauses). Instead, Borrowers argue that the two clauses in this case are ambiguous as to whether they are permissive, i.e. <u>permitting</u> a lawsuit in Utah, or mandatory, i.e. <u>requiring</u> that any and all lawsuits be filed in Utah to the exclusion of all other jurisdictions. According to Borrowers, a finding that the clauses are ambiguous requires the Court to construe them as being mandatory because AFCU purportedly drafted them.

While this argument is flawed in many respects, it must be rejected from the outset because it is premised on the falsity that the clauses at issue are ambiguous. To the contrary, the cases cited in AFCU's opening brief explain that a consent to

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[2] This issue was expressly included in AFCU's docketing statement as the second of two issues on appeal: "[w]hether the lower court erred in finding that Utah law applies to this deficiency action." <u>See</u> Docketing Statement, at § 9, "Issues on appeal." Notably, Borrowers did not object to AFCU's Docketing Statement as would have been permitted under NRAP 14(f) if they genuinely disagreed with AFCU's issues on appeal.

jurisdiction clause that does not include any mandatory or exclusive language is treated as unambiguously permissive. Borrowers' argument that such a clause should be construed against the drafter therefore fails because it presupposes an ambiguity that does not exist.

Tellingly, Borrowers do not point to any language actually included in the clauses as being ambiguous. Instead, Borrowers seem to base their finding of an ambiguity on their disagreement with AFCU's interpretation of the clauses (as supported by the myriad cases cited in its opening brief). However, it is well-settled that an ambiguity does not arise simply because the parties disagree on how to interpret their contract. Parman v. Petricciani, 70 Nev. 427, 430–32, 272 P.2d 492, 493–94 (1954), abrogated on other grounds by Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026 (2005). Where, as here, a contractual provision will only support one possible interpretation, a court must uphold that interpretation and may not read words into the contract which the parties did not use. See Ringle v. Bruton, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004) ("[W]hen a contract is clear, unambiguous, and complete, its terms must be given their plain meaning and the

contract must be enforced as written.").[3] As a matter of law, the clauses are therefore unambiguous and "must be enforced as written." Id.

A. Under Ninth Circuit case law, which this Court has previously cited, "consent to jurisdiction" language is unambiguously permissive.

As explained in AFCU's opening brief, permissive consent to jurisdiction clauses and mandatory forum selection clauses are distinct provisions that are designed to serve distinct goals. A permissive clause reduces uncertainty by allowing either party to sue in a designated jurisdiction if either party so chooses, whereas a mandatory clause forces the parties to litigate only in the designated jurisdiction. See 14D Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3803.1 (3d ed. 2007). Since the distinction between these two types of clauses is well-established both in the case law and in commercial practice, it is important for courts to strictly enforce this distinction, and not to allow a litigant to refashion a permissive clause into a mandatory clause for the sake of avoiding other contractual obligations.

Recognizing the importance of this distinction, the Ninth Circuit has held that "consent to jurisdiction language" is always permissive, even when it is supplemented with other language that appears to be mandatory or exclusive. In

[3] This principle alone bars the Borrowers' interpretation of the clauses, as in order to interpret them as mandatory forum selection clauses, the Court would have to read mandatory language into them that does not exist.

Hunt Wesson, the Ninth Circuit held that a clause stating that "[t]he courts of California, County of Orange, shall have jurisdiction over the parties in any action at law relating to the subject matter or the interpretation of this contract" was permissive even though the clause used the words "shall" and "any." See Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76 (9th Cir. 1987). Further, the Ninth Circuit stated that the clause was unambiguously permissive, meaning there was no need to utilize rules of contract interpretation. See id. at 77 ("[T]he plain meaning of the language is that the Orange County courts shall have jurisdiction over this action. The language says nothing about the Orange County courts having exclusive jurisdiction.") (emphasis added); id. at 78 ("[W]e are of the opinion that the language is not ambiguous…").

As noted in AFCU's opening brief, this Court cited Hunt Wesson approvingly in its Rosenberg opinion. Rosenberg involved a consent to jurisdiction clause which provided that "[t]he parties hereto hereby consent to jurisdiction in Lima, Peru." Tuxedo Int'l Inc. v. Rosenberg, 127 Nev. Adv. Rep. 2, 251 P.3d 690, 692 (2011). In discussing the clause, this Court noted:

> It can be argued…that there is no requirement contained in this clause that Peru is the exclusive forum for jurisdiction over any dispute between the parties. See, e.g., Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76-77 (9th Cir. 1987) (distinguishing between exclusive and nonexclusive forum selection clauses). If it is determined that the parties did not intend for the clause to act as an exclusive forum selection clause, then

> arguably, there is no contractual bar to Tuxedo bringing its tort claims in the Nevada district court.

Id. at 698 (citation original); accord K & V Scientific Co. v. Bayerische Moteren Werke Aktiengesellschaft (BMW), 314 F.3d 494, 496 (10th Cir. 2002) (clause stating that "[j]urisdiction for all and any disputes arising out of or in connection with this agreement is Munich" was permissive); Animal Film, LLC v. D.E.J. Productions, Inc., 193 Cal. App. 4th 466, 471-72, 123 Cal. Rptr. 3d 72, 76-77 (Cal. App. 2d Dist. 2011) (clause providing "the parties hereto submit and consent to the jurisdiction of the courts present in the State of Texas in any action brought to enforce (or otherwise relating to) this agreement" was permissive).

Thus, under Ninth Circuit case law—which this Court has previously cited approvingly—a consent to jurisdiction clause is always considered unambiguously permissive, regardless of what other language which the parties may use to supplement the provision.

B. At a minimum, a consent to jurisdiction clause which is not supplemented with any compulsory or exclusive language is unambiguously permissive.

Not all courts have followed the Ninth Circuit's absolute view that a "consent to jurisdiction" clause is unambiguously permissive, regardless of any other language that may be used in the clause. Some courts have held that where a "consent to jurisdiction" clause is supplemented with compulsory or exclusive language, the clause is mandatory. Critically, however, it appears that no reported

decision from any American court has held that a consent to jurisdiction clause with no compulsory or exclusive language is mandatory. See John Boutari & Son v. Attiki Importers & Distributors, Inc., 22 F.3d 51, 52 (2d Cir. 1994) ("The general rule in cases containing forum selection clauses is that when only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive.") (internal citations and quotation marks omitted); City of New Orleans v. Municipal Admin. Servs., 376 F.3d 501, 504 (5th Cir. 2004) ("For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties' intent to make that jurisdiction exclusive."); Kachal, Inc. v. Menzie, 738 F. Supp. 371, 373 (D. Nev. 1990) ("A forum selection clause providing a particular court or state has jurisdiction, but [saying] nothing about it being exclusive jurisdiction, is permissive rather than mandatory.").

Here, the Court does not have to choose between the absolute view taken by the Ninth Circuit in Hunt Wesson and the more nuanced view followed by certain other federal courts in order to decide this case. Under either approach, a "consent to jurisdiction" clause which is not supplemented with compulsory or exclusive language is unambiguously permissive. Since the two clauses in this case contain no compulsory or exclusive language, they are unambiguously permissive. AFCU

and Borrowers agreed that the courts of Utah could exercise jurisdiction over disputes arising from the Loan. However, they remained completely silent on the separate issue of whether the courts of other states could exercise jurisdiction. Had Borrowers and AFCU included such additional language, then Borrowers' argument that the clauses are ambiguous might be plausible. However, they did not, meaning there is no plausible way to interpret the two clauses as mandatory or even ambiguous.

In their answering brief, Borrowers cite several opinions in which courts analyzing consent to jurisdiction clauses applied the principle that contractual ambiguities should (sometimes) be construed against the drafter of the contract. See Answering Brief at 11-13. This argument fails for two reasons. First, Borrowers' argument conflicts with Hunt Wesson, discussed in Part I.B above, as well as the more moderate view discussed in this section. Under either view, bare "consent to jurisdiction" language is unambiguously permissive. Apparently, Borrowers are arguing that "consent to jurisdiction" language is always ambiguous, regardless of context, and that it must always be litigated on a case-by-case basis. This is not a workable approach, since it would encourage collateral litigation in any dispute involving a contract with a consent to jurisdiction clause. Indeed, the fear that a court may recharacterize a permissive clause as mandatory would likely discourage parties from including such clauses in the first place.

Second, the opinions cited by Borrowers all concluded that the clauses at issue were permissive rather than mandatory. For both doctrinal and prudential reasons, courts generally presume that a consent to jurisdiction clause is permissive unless the proponent of the clause proves otherwise. See Hunt Wesson at 75 ("[I]n cases in which forum selection clauses have been held to require litigation in a particular court, the language of the clauses clearly required exclusive jurisdiction."). One of the main reasons for this presumption is that mandatory clauses have a much more drastic effect than permissive clauses. In this case, for example, a correct permissive interpretation allows AFCU, as the injured party, to sue in any state in which it can demonstrate jurisdiction under the traditional analyses. In contrast, Borrowers' interpretation would force the parties to litigate only in Utah, despite the fact that the subject real property is located in Nevada where this lawsuit was filed.

Thus, in practice, courts tend to seize on any justification for treating consent to jurisdiction clauses as permissive. In some cases, this has led courts to apply the rule that contractual ambiguities should be construed against the drafter—but only where the result is to treat the clause as permissive. Therefore, the opinions cited by Borrowers are better explained by courts' general preference to interpret consent to jurisdiction clauses as permissive, rather than any special devotion to the concept that contracts should be construed in favor of the non-

drafting party. To reiterate, neither AFCU nor Borrowers have found any publicly available opinion from an American court which treats bare "consent to jurisdiction" language as mandatory. Accordingly, the two clauses in this case are unambiguously permissive, and AFCU may sue to collect a deficiency judgment from Borrowers in Nevada, as it has done here.

C. Even if the Court accepts Borrowers' argument that the clauses in this case are ambiguous, the Court is not required to interpret the clauses as mandatory.

Even if, *arguendo*, the clauses in the Loan Agreement and Note are deemed ambiguous, the Court should still hold that they are permissive. Borrowers apparently believe that if the clauses in the Loan Agreement and Note contain the slightest hint of ambiguity, then the Court must mechanically resolve this ambiguity against AFCU (as the drafting party) and hold that the clauses are mandatory.

As an initial matter, it is unclear why Borrowers—who are sophisticated parties to a commercial loan—deserve the protection of this rule, which is designed to protect a non-drafting party with dramatically less bargaining power than a drafting party. See Pacifico v. Pacifico, 190 N.J. 258, 268, 920 A.2d 73, 78 (2007) ("[C]ontra proferentem is only available in situations where the parties have unequal bargaining power. If both parties are equally 'worldly-wise' and sophisticated, contra proferentem is inappropriate.") (internal citation omitted). In

any case, Nevada law recognizes many other rules for interpreting ambiguous contracts which weigh heavily in favor of AFCU. For example, a Nevada court will interpret a contract in a manner that comports with industry practice and that avoids absurd results. See Mohr Park Manor, Inc. v. Mohr, 83 Nev. 107, 111, 424 P.2d 101, 104-05 (1967) ("[A]n interpretation which renders the contract or agreement valid and its performance possible will be preferred to one which makes it void or its performance impossible or meaningless; an interpretation which makes the contract or agreement fair and reasonable will be preferred to one which leads to harsh or unreasonable results."). Here, there was no plausible reason for AFCU to tie its own hands by agreeing to sue Borrowers only in Utah. This is especially true given that the subject real property is located in Nevada where jurisdiction most clearly and naturally exists. Essentially, then, Borrowers are arguing that AFCU unilaterally surrendered its right to obtain a deficiency judgment against them for no apparent reason. This argument defies economic common sense and is simply a last-ditch effort by Borrowers to avoid the obligations which they voluntarily assumed under the Loan Agreement and Note.

II. The application of Nevada's statute of limitations for deficiency actions is properly an issue on appeal and is compelled by existing Nevada law.

In their answering brief, Borrowers fail to meaningfully defend their position that AFCU's deficiency action is governed by Utah's three-month statute of limitations. Instead, they argue that this issue was not presented to the district

court. Borrowers' apparent strategy is to wait until the case is remanded, then re-raise the issue so that AFCU is forced to litigate this matter in a piecemeal fashion, thus temporarily delaying the entry of final judgment in AFCU's favor.

Contrary to Borrowers' assertions, the district court's dismissal order holds that Utah law—including Utah's statute of limitations—governs this lawsuit. See JA 078. In addition, the district court solicited arguments as to whether the case is governed by Nevada law or Utah law during the hearing on Borrowers' motion to dismiss. See JA 094-095. Finally, AFCU properly raised this issue on appeal, see Docketing Statement § 9, and Borrowers made no objection. See NRAP 14(f) (providing for a response to the docketing statement if there is a disagreement as to the issues on appeal). Borrowers' argument that the issue should not be addressed by this Court is without merit.

Borrowers' attempt to avoid the issue because it is a "complex, fact-intensive" issue is similarly unfounded and, in any event, simply wrong. Under this Court's holding in Donnels, a choice of law provision in a loan document does not incorporate the designated jurisdiction's deficiency statutes, including its statute of limitations, where those statutes' own terms preclude their application extraterritorially. See Key Bank of Alaska v. Donnels, 106 Nev. 49, 52, 787 P.2d 382, 384 (1990). This is a purely legal issue which the Court can resolve by simply examining the text of Utah's deficiency statutes. See Utah Code § 57-1-32

("At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security.") (emphasis added). By its own terms, Utah's statute of limitations only applies to foreclosures conducted pursuant to Utah law, specifically sections 57-1-23, 57-1-24, and 57-1-27. Id. Here, it is undisputed that the sale of the subject property was conducted pursuant to Nevada law, not Utah law, therefore triggering Nevada's statute of limitations.

Since Borrowers have failed to substantively address this issue, the Court should treat AFCU's arguments as unopposed and should hold that AFCU's deficiency action is governed by Nevada's six-month statute of limitations.

CONCLUSION

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

Dated: February 2, 2015.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 3,296 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

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

/ / /

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