

## 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.

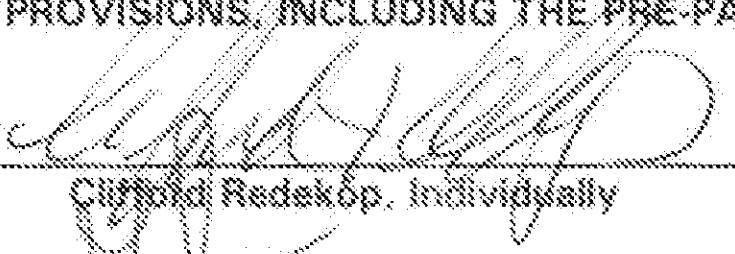
Unless the parties agree otherwise, payments will be applied first to any collection costs, then to any late charges, then to accrued unpaid interest, and any remaining amount to principal.

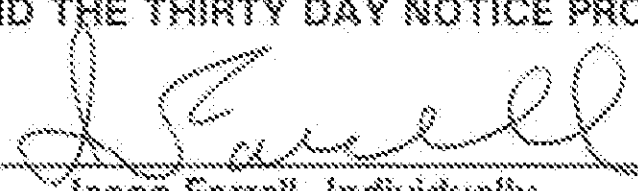
Borrower(s) waives presentment, demand for payment, protest, notice of dishonor, and notice of every other kind. The obligations of Borrower(s) under this Note are joint and several.

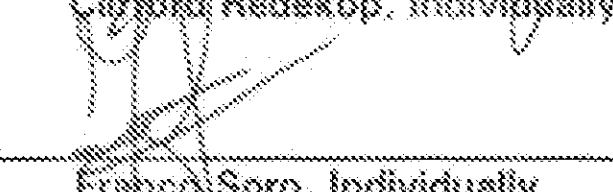
NOTE: A WRITTEN NOTICE IS REQUIRED THIRTY DAYS PRIOR TO ANY PAY-OFF, EXCEPTING THE STATED MATURITY DATE. IF A THIRTY DAY NOTICE IS NOT GIVEN, THEN INTEREST CHARGES WILL BE ASSESSED EQUIVALENT TO A THIRTY DAY NOTICE PERIOD. THIS IS IN ADDITION TO THE STATED PRE-PAYMENT PENALTY.


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.

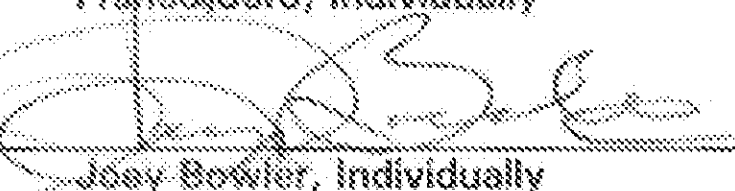
THE UNDERSIGNED ACKNOWLEDGE THEY HAVE READ THIS PROMISSORY NOTE IN ITS ENTIRETY, WITH ALL ITS PROVISIONS, INCLUDING THE PRE-PAYMENT PENALTY AND THE THIRTY DAY NOTICE PROVISION.

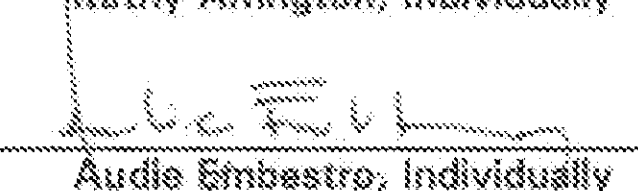
BY:   
Clifford Redekop, Individually

BY:   
Isaac Farrell, Individually

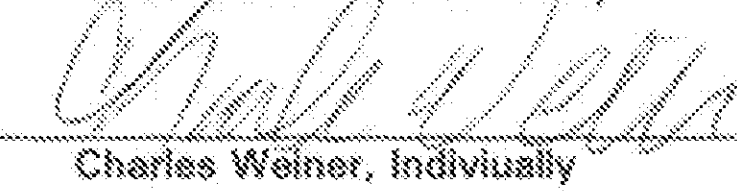
BY:   
Franco Soro, Individually

BY:   
Kathy Arrington, Individually

BY:   
Joey Bowler, Individually

BY:   
Audie Embestro, Individually

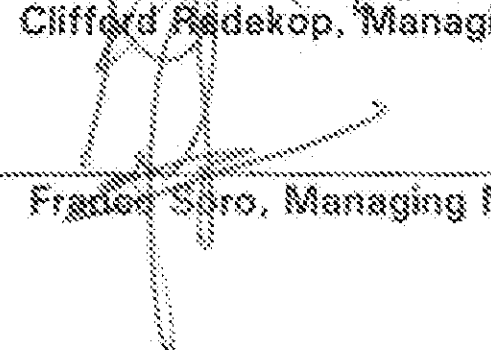
BY:   
Myra Taigman-Farrell, Individually


BY:   
Charles Weiner, Individually

BY: MESQUITE JABEZ, LLC

By:   
Clifford Redekop, Managing Member

By:   
Isaac Farrell, Managing Member

By:   
Franco Soro, Managing Member

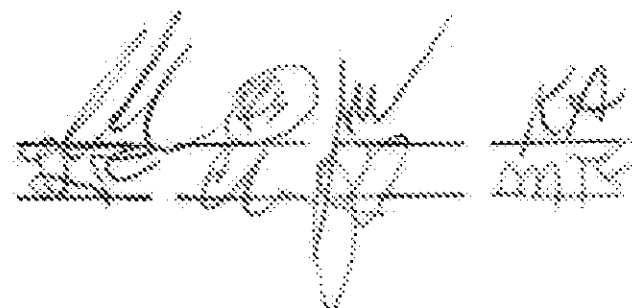
By:   
Kathy Arrington, Managing Member

REFERENCE: MESQUITE JABEZ, LLC #

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 three distinct handwritten marks: a large, stylized signature on the left, a smaller signature in the middle, and a set of initials on the right.

# Exhibit 4



001-18-30207  
 WHEN RECORDED, MAIL TO:  
 AMERICA FIRST CREDIT UNION  
 4646 SO. 1500 W. STE 130  
 OGDEN, UTAH 84405

ATTN: BUSINESS SERVICES

Hand Tax Statement  
 Mesquite Jarez, 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 JAREZ, 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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000069

(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 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 act or omission subsequent 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.

Initials

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

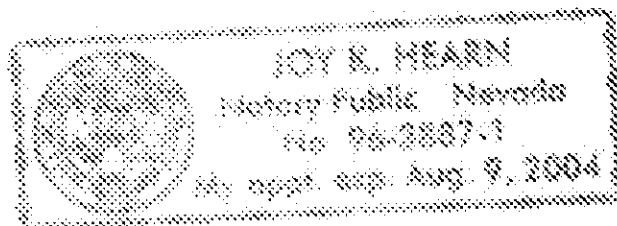
188

COUNTY OF

on the 10 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 LLC, L.L.C. and that he/she executed the same.

Residing at:

My Commission Expires:



[Signature]  
Notary Public

20020411  
00009

# 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.

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

NEVADA TITLE COMPANY

04-11-2002 00:01 STX 7  
OFFICIAL RECORDS

BOOK: 20020411 INST: 00009

FEE: 22.00 RPTT: .00



20020411  
00070

70

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 #

Mail Statement  
Mesquite Jabez LLC  
28 Arthem 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 10<sup>th</sup> 2008 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.

20020411  
000070

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

BY: MESQUITE JABEZ, LLC

By: [Signature]  
Clifford Redekop, Managing MemberBy: [Signature]  
Isaac Farrell, Managing MemberBy: [Signature]  
Franco Soro, Managing MemberBy: [Signature]  
Kathy Arrington, Managing Member

## LLC ACKNOWLEDGMENT

STATE OF NEVADA

155

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:

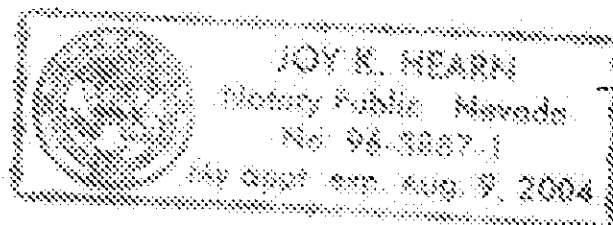

[Signature]  
 Notary Public

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.

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

NEVADA TITLE COMPANY

04-11-2002 08:01 STX 3

OFFICIAL RECORDS

BOOK: 20000411 INST: 00070

FEE: 16.00 RPTT: .00

# Exhibit 5

APN: 001-18-710-001

Recording Requested By, And  
When Recorded Mail To:

Ballard Spahr LLP  
100 North City Parkway  
Suite 1750  
Las Vegas, Nevada 89106

**Loan No.**

Inst #: 201102180004205

Fees: \$15.00

N/C Fee: \$25.00

02/18/2011 01:41:15 PM

Receipt #: 682147

Requestor:

BALLARD SPAHR LLP

Recorded By: KXC Pgs: 2

DEBBIE CONWAY

CLARK COUNTY RECORDER

### SUBSTITUTION OF TRUSTEE

WHEREAS, Mesquite Jabez, LLC, a Nevada limited liability company, is the trustor under that certain of Trust Deed with Assignment of Rents dated as of April 11, 2002 (the "**Deed of Trust**"), to Timothy W. Blackburn, Attorney, as trustee ("**Original Trustee**"), for the benefit of America First Credit Union, a Utah corporation, as beneficiary ("**Beneficiary**"), and recorded in the Official Records of Clark County, Nevada on April 11, 2002, as Document No. 20020411-00069; and

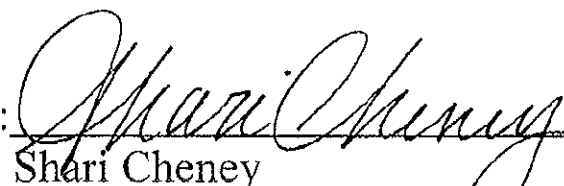
WHEREAS, the undersigned is the Beneficiary under the Deed of Trust; and

WHEREAS, the undersigned desires to substitute a new trustee under the Deed of Trust in the place and stead of Original Trustee, or any successor trustee thereunder, in the manner provided in the Deed of Trust.

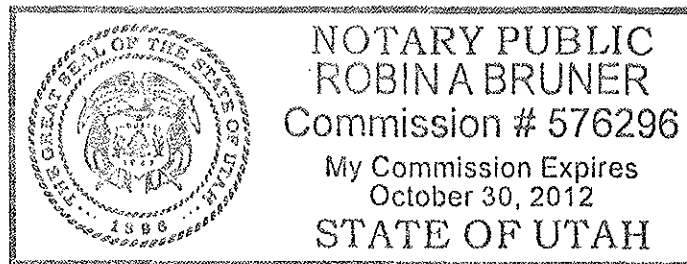
NOW THEREFORE, the undersigned hereby substitutes Ballard Spahr LLP as trustee under the Deed of Trust in the place and stead of Original Trustee, or any successor trustee thereunder.

DATED: February 15, 2011.

AMERICA FIRST FEDERAL CREDIT UNION

By:   
Shari Cheney  
Manager, Commercial Real Estate Lending

STATE OF UTAH                    )  
  : SS.  
COUNTY OF WEBER            )



Sworn and subscribed before me this 15 day of February, 2011.



Notary Public      **ROBIN A. BRUNER**  
Residing at Weber County, Utah

My Commission Expires:

October 30, 2012

# Exhibit 6



APN: 001-18-710-001

Recording Requested By, And  
When Recorded Mail To:

Ballard Spahr LLP  
100 North City Parkway  
Suite 1750  
Las Vegas, Nevada 89106

**Loan No.**

Inst #: 201102180004206

Fees: \$215.00

N/C Fee: \$25.00

02/18/2011 01:41:15 PM

Receipt #: 682147

Requestor:

BALLARD SPAHR LLP

Recorded By: KXC Pgs: 2

DEBBIE CONWAY

CLARK COUNTY RECORDER

## IMPORTANT NOTICE

### NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST

NOTICE IS HEREBY GIVEN THAT: Ballard Spahr LLP is the Trustee under a Trust Deed with Assignment of Rents dated as of April 11, 2002 (the "**Deed of Trust**"), executed by Mesquite Jabez, LLC, a Nevada limited liability company, as trustor ("**Trustor**"), to secure certain obligations in favor of America First Credit Union, a Utah corporation, as beneficiary ("**Beneficiary**"), and recorded in the Official Records of Clark County, Nevada on April 11, 2002, as Document No. 20020411-00069. Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Deed of Trust.

That a breach of the obligations for which the Deed of Trust is security has occurred in that Trustor has failed to pay the scheduled principal and interest payment and other amounts due on November 30, 2010, December 31, 2010, January 31, 2011, and all subsequent payments due to date, under that certain Commercial Promissory Note (Simple Interest) dated April 11, 2002, made by Trustor, and the other makers identified therein, payable to the order of Beneficiary (the "**Note**"). As a result of Trustor's breach, Beneficiary hereby accelerates the Note pursuant to the Deed of Trust, the Note and other loan documents executed by Trustor in connection therewith (the "**Loan Documents**"). There may also be other existing or potential events of default under the Deed of Trust, the Note and the Loan Documents. All amounts secured by the Deed of Trust are immediately due and payable, and the full balance remains due, owing and delinquent, together with default interest, late charges, all sums (if any) advanced by the Beneficiary and any interest accrued thereon to preserve the security of the Beneficiary, all together with reasonable attorneys' fees for the collection of the sums set forth and the costs of any action, proceeding or sale that Beneficiary may commence to foreclose the lien or otherwise enforce any right or remedy arising under, evidenced by or relating to any of the Loan Documents.

That by reason thereof, the Beneficiary under the Deed of Trust has surrendered to said Trustee the Deed of Trust and all documents evidencing obligations secured thereby, and

has declared and does hereby declare all sums secured thereby immediately due and has elected and does hereby elect to cause the real and personal property to be sold to satisfy the obligations secured thereby.

DATED: February 17, 2011.

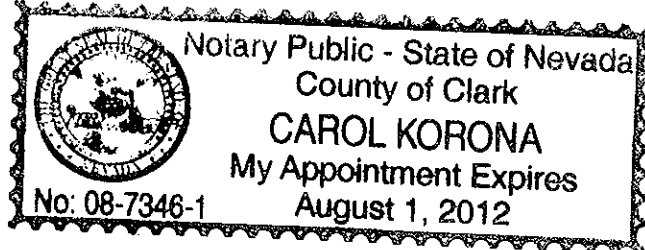
BALLARD SPAHR LLP  
a Pennsylvania limited liability partnership  
Trustee for the Beneficiary


By: 

Robert C. Kim  
Partner

STATE OF NEVADA       )  
                                  ):ss  
COUNTY OF CLARK     )

This instrument was acknowledged before me on the 17<sup>th</sup> day of February, 2011, by Robert C. Kim, as Partner of Ballard Spahr LLP.



  
Carol Korona, Notary Public  
My Commission Expires on: August 1, 2012

# Exhibit 7

APN: 001-18-710-001

Recording Requested By, And  
When Recorded Mail To:

Ballard Spahr LLP  
100 North City Parkway, Suite 1750  
Las Vegas, Nevada 89106  
Attn: Bruce F. Johnson

Loan No.

Inst #: 201207230001911

Fees: \$19.00

N/C Fee: \$0.00

07/23/2012 11:10:36 AM

Receipt #: 1243415

Requestor:

BALLARD SPAHR LLP

Recorded By: SOL Pgs: 3

DEBBIE CONWAY

CLARK COUNTY RECORDER

## IMPORTANT NOTICE

### NOTICE OF TRUSTEE'S SALE

On August 14, 2012, at 2:00 p.m., Ballard Spahr LLP, as duly appointed or substituted Trustee under and pursuant to that certain Trust Deed with Assignment of Rents dated as of April 11, 2002 (the "**Deed of Trust**"), executed by Mesquite Jabez, LLC, a Nevada limited liability company, as trustor ("**Trustor**"), to secure certain obligations in favor of America First Credit Union, a Utah corporation, as beneficiary ("**Beneficiary**"), and recorded in the Official Records of Clark County, Nevada on April 11, 2002, as Document No. 20020411-00069, by reason of the now and continuing default in the payment and/or performance of the obligations secured by the Deed of Trust, including the breach set forth in the Notice of Default and Election to Sell under Deed of Trust recorded by the Beneficiary and the undersigned on February 18, 2011, as Instrument No. 201102180004206 of the Official Records of Clark County, Nevada, and more than three (3) months prior to the date hereof, will cause to be sold at public auction to the highest bidder for cash (payable and to be tendered at the time of sale in lawful money of the United States of America) at the front entrance to Nevada Legal News located at 930 South Fourth Street, Las Vegas, Nevada 89101, all right, title and interest conveyed to and now held by it under the Deed of Trust in the real property situated in Mesquite, Clark County, Nevada, as described on Exhibit A attached hereto and incorporated herein by this reference (the "**Real Property**").

In addition, the Beneficiary shall, as provided in the Nevada Uniform Commercial Code, cause the personal property and rights described in the Deed of Trust in which the Beneficiary was granted a lien and security interest (including, without limitation, goods, materials, supplies, fixtures, equipment, machinery, furniture and furnishings, income, receipts, revenues, rents, issues and profits of the Real Property, and documents, instruments, agreements, permits, licenses, claims, causes of action, books, records and files related to the Real Property) to be sold in connection with, and at the same time and

place as, the Real Property. Upon request, the Trustor is entitled to an accounting of the unpaid indebtedness secured by the Deed of Trust.

In addition to cash, the Trustee will accept a cashier's check drawn on: (a) a national bank; (b) a state-chartered bank authorized to do business in this state; or (c) another bank acceptable to the Trustee in the Trustee's sole discretion. In the event tender other than cash is accepted, the Trustee may withhold the issuance of the Trustee's Deed until funds become available to the payee or endorsee as a matter of right.

Said sale will be made, but without any covenant or warranty, expressed or implied, regarding title, possession or encumbrances, to pay the remaining principal sum of the note secured by the Deed of Trust, to wit: \$2,527,656.03, plus and together with all interest, fees and charges thereon, as provided in said Note and advances thereunder, if any, fees, charges and expenses of the Trustee and of the trusts created by the Deed of Trust.

Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Deed of Trust.

DATED: July 23, 2012.

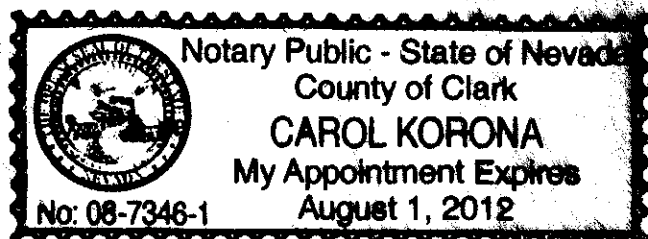
BALLARD SPAHR LLP  
a Pennsylvania limited liability partnership  
Trustee for the Beneficiary

By: \_\_\_\_\_

Robert C. Kim  
Partner

STATE OF NEVADA            )  
  ) ss.  
COUNTY OF CLARK        )

This instrument was acknowledged before me on the 23rd day of July, 2012, by Robert C. Kim, as Partner of Ballard Spahr LLP.



Carol Korona  
Carol Korona, Notary Public  
My Commission Expires on: August 1, 2012

## **EXHIBIT A**

### **LEGAL DESCRIPTION**

ALL THAT CERTAIN REAL PROPERTY SITUATED IN MESQUITE, CLARK COUNTY, STATE OF NEVADA, DESCRIBED AS FOLLOWS:

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:

#### **PARCEL I:**

ALL PROPERTY LYING WITHIN THE EXTERIOR BOUNDARIES OF MESQUITE JABEZ, AS SHOWN IN BOOK 109 OF PLATS, PAGE 77, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

#### **PARCEL II:**

A NON-EXCLUSIVE EASEMENT FOR INGRESS AND EGRESS AS CREATED BY THAT CERTAIN "DECLARATION OF RESERVED EASEMENTS FOR ACCESS, UTILITIES AND PARKING" RECORDED MARCH 17, 2003, IN BOOK 20030317 AS INSTRUMENT NO. 00627 OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

SAID PROPERTY IS DESCRIBED IN THE DEED OF TRUST AS:

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.

# Exhibit 8



Inst #: 201210220003114

Fees: \$21.00 N/C Fee: \$0.00

RPTT: \$0.00 Ex: #003

10/22/2012 02:48:30 PM

Receipt #: 1353200

Requestor:

FIRST AMERICAN TITLE NCS LA

Recorded By: MSH Pgs: 6

DEBBIE CONWAY

CLARK COUNTY RECORDER

APN# 001-18-710-001

Recording Requested by:

Name: First American Title Insurance  
Company National Commercial  
Services

Address: 2490 Paseo Verde Parkway #100

City/State/Zip: Henderson, NV 89074

Order Number: NCS 493452

Rerecord of Trustee's Deed Upon Sale

20121011-02657 to correct vesting

(Title of Document)

(for Recorder's use only)

(Additional recording fee applies)

APN: 001-18-710-001

Recording Requested By and  
When Recorded Return and  
Mail Tax Statements To:

America First Credit Union  
4646 South 1500 West #130  
Riverdale, UT 84405  
Attn: Commercial Real Estate  
Loan Administration

NCS 493452

Inst #: 201210110002657

Fees: \$19.00 N/C Fee: \$0.00

RPTT: \$5195.50 Ex: #

10/11/2012 03:48:06 PM

Receipt #: 1340530

Requestor:

FIRST AMERICAN TITLE NCS LA

Recorded By: MGM Pgs: 4

DEBBIE CONWAY

CLARK COUNTY RECORDER

### TRUSTEE'S DEED UPON SALE

Ballard Spahr LLP, a Pennsylvania limited liability partnership ("Trustee"), solely in its capacity as Trustee under that certain Deed of Trust (as defined below), does hereby grant and convey, but without covenant or warranty, express or implied, to ~~America First Credit Union, a Utah corporation~~ ("Grantee"), having an address at 4646 South 1500 West #130, Riverdale, Utah 84405, the real property (the "Property") located in Clark County, Nevada, described on Exhibit A attached hereto and incorporated herein by this reference. \*\*

This conveyance is made pursuant to the authority and powers vested in Trustee, as Trustee, or Successor Trustee, or Substituted Trustee, under that certain Trust Deed with Assignment of Rents, dated as of April 11, 2002 (the "Deed of Trust"), executed by Mesquite Jabez, LLC, a Nevada limited liability company, as trustor, and recorded on April 11, 2002, in Book 20020411, as Instrument No. 00069 in the Official Records of Clark County, Nevada.

The Notice of Default and Election to Sell under Deed of Trust recorded on February 18, 2011, as Instrument No. 201102180004206, in the Official Records of Clark County, Nevada. Trustee has complied with all applicable statutory requirements of the State of Nevada and performed all duties required by the Deed of Trust.

The Notice of Trustee's Sale recorded on July 23, 2012, as Instrument No. 201207230001911, in the Official Records of Clark County, Nevada (the "Notice of Trustee's Sale"), and published once a week for three consecutive weeks commencing on July 24, 2012 in the Nevada Legal News, a legal newspaper, and at least twenty days before the date fixed therein for sale, a copy of the Notice of Trustee's Sale was posted in a public place in Clark County, Nevada, namely: Nevada Legal News, 930 South Fourth Street, Las Vegas, Nevada.

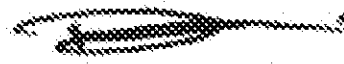
At the place fixed in the Notice of Trustee's Sale, Trustee did sell the Property at public auction on October 4, 2012, to Grantee, being the highest bidder, for \$1,215,000.00, in partial satisfaction of the indebtedness secured by the Deed of Trust.

\*\* America First Federal Credit Union (f/k/a America First Credit Union, a Utah corporation)

DMWEST #9352875 v2

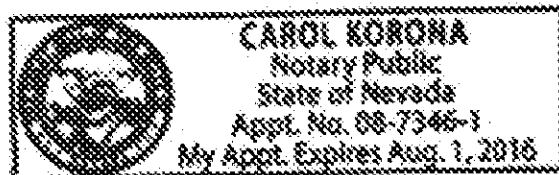
IN WITNESS WHEREOF, the undersigned Trustee has caused this instrument to be executed on October 11, 2012, effective as of October 4, 2012.

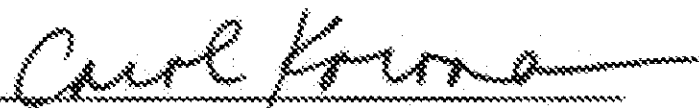
BALLARD SPAHR LLP  
A Pennsylvania limited liability partnership  
Trustee for the Beneficiary

By:   
Robert C. Kim  
Partner

STATE OF NEVADA           )  
                                      ) ss.  
COUNTY OF CLARK        )

This instrument was acknowledged before me on October 11, 2012, by Robert C. Kim, as Partner of Ballard Spahr LLP.



  
Carol Korona, Notary Public  
My Commission Expires on: August 1, 2016

Carol Korona  
NO # 08-7346-1  
Exp 8-1-16

EXHIBIT A

LEGAL DESCRIPTION

ALL THAT CERTAIN REAL PROPERTY SITUATED IN MESQUITE, CLARK COUNTY, STATE OF NEVADA, DESCRIBED AS FOLLOWS:

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:

PARCEL I:

ALL PROPERTY LYING WITHIN THE EXTERIOR BOUNDARIES OF MESQUITE JABEZ, AS SHOWN IN BOOK 109 OF PLATS, PAGE 77, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

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A NON-EXCLUSIVE EASEMENT FOR INGRESS AND EGRESS AS CREATED BY THAT CERTAIN "DECLARATION OF RESERVED EASEMENTS FOR ACCESS, UTILITIES AND PARKING" RECORDED MARCH 17, 2003, IN BOOK 20030317 AS INSTRUMENT NO. 00627 OF OFFICIAL RECORDS, CLARK COUNTY, NEVADA.

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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.

CERTIFIED COPY, THIS  
DOCUMENT IS A TRUE AND  
CORRECT COPY OF THE  
RECORDED DOCUMENT MINUS  
ANY REDACTED PORTIONS

OCT 17 2012

*Debbie Conway*  
RECORDER

# Exhibit 9

**AMERICA FIRST CREDIT UNION**  
**Business Loan Payoff**

Date: April 3, 2013

The payoff information listed is good through October 4, 2012. A Payoff made after this date will need to have the additional interest added to the payoff amount.

|                                    |                               |
|------------------------------------|-------------------------------|
| Account Number:                    |                               |
| Account Name:                      | Mesquite Jabez LLC            |
| Principal Balance:                 | \$ 2,527,656.03               |
| Unpaid Interest                    | \$ 223,222.53                 |
| Penalty Interest                   | \$ 596,166.72                 |
| Reconveyance Fee:                  | \$ 75.00                      |
| Prepayment Penalty:                | \$ -                          |
| Legal Fees/Expenses                | \$ 153,822.66 (estimate only) |
| Late Fees                          | \$ 127,067.40                 |
| Payoff Amount:                     | \$ 3,628,010.34               |
| Additional Interest:<br>(Per Diem) | \$ 1,246.52                   |

**UPDATED REQUESTS NEED TO BE FAXED AND REQUIRE A 24 HOUR TURN AROUND TIME.  
ADDITIONAL ITEMS MAY BE ADDED BEFORE PAYOFF.**

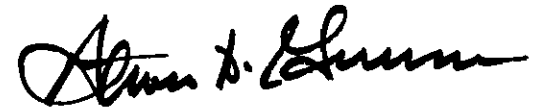
**America First Credit Union reserves the right to correct any errors on this statement**

**PLEASE DO NOT DELIVER PAYOFF FUNDS TO ANY AMERICA FIRST CREDIT UNION BRANCH OFFICE**

**Please deliver funds to:** **America First Credit Union**  
**Attn: Robin Bruner**  
**4646 So. 1500 W. Suite 130**  
**Riverdale, UT 84405**

**If you have any questions, please call the Business Services Department at (801) 827-8632.**





CLERK OF THE COURT

**RPLY**

**Reid Rubinstein & Bogatz**  
I. SCOTT BOGATZ, ESQ.  
Nevada Bar No. 3367  
CHARLES M. VLASIC III, ESQ.  
Nevada Bar No. 11308  
JAIMIE STILZ, ESQ.  
Nevada Bar No. 13772  
300 South 4th Street, Suite 830  
Las Vegas, Nevada 89101  
Telephone: (702) 776-7000  
Facsimile: (702) 776-7900  
[sbogatz@rrblf.com](mailto:sbogatz@rrblf.com)  
[cylasic@rrblf.com](mailto:cylasic@rrblf.com)  
[jstilz@rrblf.com](mailto:jstilz@rrblf.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: November 17, 2016**

**Time: 9:00 a.m.**

**REPLY IN SUPPORT OF MOTION TO DISMISS**

Defendants, FRANCO SORO, MYRA TAIGMAN-FARRELL, ISAAC FARRELL,  
KATHY ARRINGTON, and AUDIE EMBESTRO (“Defendants”), through their attorneys of  
record, the law firm of Reid Rubinstein & Bogatz, hereby respectfully submit this Reply in Support  
of their 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 20<sup>th</sup> day of October, 2016.

REID RUBINSTEIN & BOGATZ

By: /s/ Charles M. Vlasic  
 I. Scott Bogatz, Esq.  
 Nevada Bar No. 3367  
 Charles M. Vlasic, Esq.  
 Nevada Bar No. 11308  
 Jaimie Stilz, Esq.  
 Nevada Bar No. 13772  
 300 South 4th Street, Suite 830  
 Las Vegas, Nevada 89101  
 Attorneys for Defendants

**MEMORANDUM OF POINTS & AUTHORITIES**

**I. INTRODUCTION<sup>1</sup>**

The first question before the Court is what state's deficiency law applies to this action? The Supreme Court of Nevada already answered this question in both Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382 (1990) and Mardian v. Michael and Wendy Greenberg Family Trust, 131 Nev. Adv. Op. 72, 359 P.3d 109 (2015), finding that it is whatever state's anti-deficiency law the parties agreed upon in the underlying contract(s). In this case, it is undisputable that the parties unequivocally agreed that Utah law would apply. Accordingly, Utah law – **not** Nevada law – applies to this action.

The second question before the Court is whether Utah's anti-deficiency statute is limited to only those trustee's sales held in Utah? The Supreme Court of Nevada decisions in Key Bank (interpreting and applying Alaska's anti-deficiency statute, which is dissimilar to Utah's anti-deficiency statute, to a non-judicial foreclosure sale held in Nevada), and in Branch Banking v. Windhaven & Tollway, LLC, 347 P.3d 1038, 131 Nev. Adv. Op. 20 (2015) (interpreting and

<sup>1</sup> Unless otherwise stated, the capitalized terms herein have the same meanings ascribed to them in the underlying Motion to Dismiss filed by Defendants on August 24, 2016.

applying Nevada’s anti-deficiency statute, which is similar to Utah’s anti-deficiency statute, to a non-judicial foreclosure sale held in Texas), both addressed this second question. In Key Bank, the Supreme Court of Nevada held that based upon how Alaska’s anti-deficiency statute was drafted, in addition to the fact that Alaska’s anti-deficiency statute resulted in a complete prohibition on deficiency actions in other states, Alaska’s anti-deficiency statute did not apply in Nevada. More recently in Windhaven however, the Supreme Court of Nevada held that based upon how Nevada’s anti-deficiency statute was drafted, in addition to the fact that Nevada’s anti-deficiency statute contained no express limitation on its application to non-judicial foreclosure sales held in accordance with another state’s laws, Nevada’s anti-deficiency statute **did** apply in that case. Given the guidance provided in these two decisions, and because Utah’s anti-deficiency statute is much closer to Nevada’s anti-deficiency statute than Alaska’s anti-deficiency statute, the answer to the foregoing question is yes, Utah’s anti-deficiency statute applies to this deficiency action.

Because Utah anti-deficiency law applies in this case, and because America First failed to bring its claim for a deficiency against Defendants within the three-month limitation period as required under Utah law, this case must be dismissed in its entirety.

## II. LEGAL ARGUMENT

### A. UTAH LAW APPLIES TO THIS ACTION.

In its Opposition, America First repeatedly misstates the holding in Key Bank and then mistakenly concludes, based upon this erroneous holding, that Nevada anti-deficiency law must apply to this case. Specifically (and as correctly anticipated in Defendants’ Motion to Dismiss<sup>2</sup>), America First argues that “because the sale in Key Bank was conducted pursuant to Nevada law-not Alaska law-and because the subject property was located in this state, Nevada’s statute of limitations applied.”<sup>3</sup> This is a blatant misreading and mischaracterization of the holding in Key Bank.

<sup>2</sup> See August 24, 2016 Motion to Dismiss, on file herein, at p. 6 : 26 – 28; p. 7 : ¶ 1.

<sup>3</sup> See September 12, 2016 Opposition to Motion to Dismiss, on file herein, at p. 7 : ¶¶ 14 – 18.

Key Bank involved a loan with an Alaska choice of law provision secured by property located in Nevada. 106 Nev. 49, 50, 787 P.2d 382, 383. Following a non-judicial foreclosure sale held in Nevada, the lender brought a deficiency action against in the borrower and guarantors in Nevada. Id. **The Supreme Court of Nevada expressly held that Alaska law, not Nevada law, applied to the deficiency action brought in Nevada because the loan documents expressly provided for Alaska law to govern:**

**[R]egardless of whether the parties agreed that Nevada foreclosure procedures would apply, an action for a deficiency after partial satisfaction through sale of the security is an action on the debt. See Nevada Land & Mtge. v. Hidden Wells, 83 Nev. 501, 504, 435 P.2d 198, 200 (1967); McMillan v. United Mortgage Co., 82 Nev. 117, 122, 412 P.2d 604, 606 (1966). We have held that “[i]t 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.” Sievers v. Diversified Mtg. Investors, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979). Because there is no evidence or argument here regarding bad faith or evasion of Nevada law, the provision designating Alaska law in the promissory note is valid. Therefore, based on our decisions in *Hidden Wells* and *Sievers*, we hold that the district court did not err in concluding that the deficiency action was an action on the promissory note which contained a valid and enforceable agreement that Alaska law was to apply to the debt.**

106 Nev. at 52, 787 P.2d at 384 (emphasis added). As set forth in more detail below, the issue in Key Bank was simply whether this applicable Alaska law prevented a deficiency action brought in Nevada.

The Supreme Court of Nevada held the same in the Mardian case. Mardian involved a loan on undeveloped real property located in Arizona. 131 Nev. Adv. Op. at \* 1, 359 P.3d 109. Although the property at issue in Mardian was located in Arizona, the choice of law provision contained in the loan documents called for Nevada law to apply. Id. Following the non-judicial foreclosure sale on the underlying property located in Arizona, the creditor sought a deficiency judgment against the guarantors in Nevada pursuant to Nevada’s anti-deficiency statutes. Id. In concluding that Nevada law – *including Nevada’s limitation period* – should govern the deficiency action given the parties’ agreement, the Supreme Court of Nevada explained in relevant part:

**. . . the issue of whether the Arizona law should have been applied must [] be addressed.** In this regard, [the borrower/guarantor argues] that it would not

have been appropriate for the district court to apply the Arizona limitation period for foreclosures to the personal action commenced in Nevada because the guaranties specify that they are governed by Nevada law. **We agree and conclude that because of the choice-of-law provision, Nevada law—particularly Nevada’s limitations period, *see* NRS 40.455(1)—applies in this case. *See Key Bank of Alaska v. Donnels*, 106 Nev. 49, 52, 787 P.2d 382, 384 (1990) (concluding that where there was “no evidence or argument ... regarding bad faith or evasion of Nevada law, the provision designating Alaska law in the promissory note [was] valid”).”**

Id. at p. 111 (emphasis added).

Thus, contrary to the extensive argument contained in America First’s Opposition, the Key Bank decision is not at odds with the Mardian decision. In **both** cases, the Supreme Court of Nevada held that regardless of where the deficiency action is brought or where the underlying property was located, the choice-of-law provision contained in the loan documents governs which state’s laws apply to deficiency proceedings.

In this case, the Loan Agreement<sup>4</sup> contains an “Applicable Law” clause which clearly and expressly provides: **“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.”**<sup>5</sup> Given the Nevada Supreme Court decisions in Key Bank and Mardian, there can be no dispute that this Court must enforce the choice of law provision as written, which requires Utah law to govern this deficiency action.

**B. UTAH’S ANTI-DEFICIENCY STATUTES ARE NOT LIMITED TO ONLY NON-JUDICIAL FORECLOSURE SALES HELD IN UTAH.**

In Key Bank, the Supreme Court of Nevada determined that Alaska’s anti-deficiency statutes did not prohibit a lender from seeking a deficiency judgment in Nevada. In reaching this conclusion, the Supreme Court of Nevada analyzed how the Alaska anti-deficiency statute was drafted, and also the practical effect of applying Alaska’s anti-deficiency statute extraterritorially. The Alaska anti-deficiency statute in question - AS 34.20.100 - provides in relevant part:

<sup>4</sup> 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).

<sup>5</sup> *See* Exhibit A attached to the August 24, 2016 Motion to Dismiss, on file herein, at p. 6 (emphasis added).

1 **When a sale is made by a trustee under a deed of trust, as authorized by AS**  
2 **34.20.070 - 34.20.130**, no other or further action or proceeding may be taken nor  
3 judgment entered against the maker or the surety or guarantor of the maker, on the  
4 obligation secured by the deed of trust for a deficiency.

5 Emphasis added.

6 Thus, the central issue in Key Bank was whether the phrase “under a deed of trust, as  
7 authorized by AS 34.20.070 - 34.20.130,” was illustrative or exclusive. 106 Nev. at 53, 787 P.2d  
8 at 384. In other words, did the phrase “under a deed of trust, as authorized by AS 34.20.070 -  
9 34.20.130,” limit Alaska’s anti-deficiency statute’s applicability to only those non-judicial  
10 foreclosure sales held in Alaska (“as authorized by AS 34.20.070 - 34.20.130”), or did this phrase  
11 merely illustrate an example of what was meant by a non-judicial foreclosure sale. Id.

12 In concluding that the phrase “under a deed of trust, as authorized by AS 34.20.070 -  
13 34.20.130,” was exclusive, rather than illustrative, the Supreme Court of Nevada explained:

14 we cannot agree with respondents’ contention that if the Alaska legislature intended  
15 to limit the anti-deficiency provisions, it would not have placed non-restricting  
16 commas around the clause “as authorized by AS 34.20.070—34.20.130.” On the  
17 contrary, we read the offsetting commas as indicating a clear intent to limit the  
18 effect of the statute to foreclosures under those sections, especially because AS  
19 34.20.070 expressly refers to deed of trust conveyances of property *located in*  
20 *Alaska*. Furthermore, because anti-deficiency statutes derogate from the common  
21 law, they should be narrowly construed. 3 Sutherland, *Statutory Construction* §  
22 61.01 (4th ed. 1986). Consequently, we agree with appellant that the district court  
23 erred in concluding that AS 34.20.100 applied extraterritorially.

24 Id.

25 In sum, the Key Bank Court held that based upon how Alaska’s anti-deficiency statute was  
26 drafted (with restricting commas, and with the phrase “as authorized by”), in addition to the fact  
27 that Alaska’s anti-deficiency statute resulted in a complete prohibition on deficiency actions in  
28 other states, Alaska’s anti-deficiency statute did not apply in Nevada. Id.

This same issue came before the Supreme Court of Nevada again in the recent case of  
Windhaven.<sup>6</sup> In Windhaven, the Court determined whether Nevada’s anti-deficiency statutes

<sup>6</sup> America First may be unaware of the Windhaven case, as it erroneously argues in footnote 2 of its  
Opposition that the phrase “held pursuant to” is exclusive, rather than illustrative – the exact opposite of  
what the Windhaven case holds. See September 12, 2016 Opposition to Motion to Dismiss, on file herein,  
at p. 8 n.2.

1 applied to a deficiency action held in Nevada following a non-judicial foreclosure sale held in  
2 Texas. 347 P.3d 1038, 131 Nev. Adv. Op. 20. The Nevada anti-deficiency statute in question –  
3 NRS 40.455(1) – provided<sup>7</sup> in relevant part:

4 [U]pon application of the judgment creditor or the beneficiary of the deed of trust  
5 **within 6 months after the date of the foreclosure sale or the trustee’s sale held**  
6 **pursuant to NRS 107.080**, respectively, and after the required hearing, the court  
7 shall award a deficiency judgment to the judgment creditor or the beneficiary of the  
8 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.

9 Emphasis added.

10 Thus, the central issue in Windhaven was whether the phrase “trustee’s sale held pursuant  
11 to NRS 107.080” was illustrative or exclusive. 131 Nev. Adv. Op. 20, 347 P.3d at 1040. In other  
12 words, did the phrase “trustee’s sale held pursuant to NRS 107.080” limit Nevada’s anti-deficiency  
13 statute’s applicability to only those non-judicial foreclosure sales held in Nevada (“pursuant to  
14 NRS 107.080”), or did this phrase merely illustrate an example of what was meant by a non-  
15 judicial foreclosure sale. Id.

16 In concluding that the phrase “trustee’s sale held pursuant to NRS 107.080” was illustrative  
17 rather than exclusive (the exact opposite result from Key Bank), the Supreme Court of Nevada  
18 explained:

19 **We disagree that the statute limits deficiency judgments to judicial**  
20 **foreclosures and trustee’s sales held in accordance with NRS 107.080. NRS**  
21 **40.455(1) has no such limiting language.** While it clearly governs deficiencies  
22 arising from judicial foreclosures and those trustee’s sales that are held pursuant to  
NRS 107.080, **it does not indicate that it precludes deficiency judgments arising**  
**from nonjudicial foreclosure sales held in another state.**

23 Id. at 1041.

24 In sum, the Supreme Court of Nevada in Windhaven held that based upon how Nevada’s  
25 anti-deficiency statute was drafted (with the phrase “pursuant to”), in addition to the fact that  
26 Nevada’s anti-deficiency statute contained no express limitation on its application to non-judicial

27 <sup>7</sup> NRS 40.455 has since been amended.  
28

foreclosure sales held in accordance with another state's laws, Nevada's anti-deficiency statute **did** apply in that case. Id.

In this case, the Utah anti-deficiency statute in question – Utah Code Ann. § 57-1-32 – provides in relevant part:

**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.

Thus, just as in Key Bank and Windhaven, the central issue is whether the phrase “under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27,” is illustrative or exclusive. In other words, does the phrase “under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27,” limit Utah's anti-deficiency statute's applicability to only those non-judicial foreclosure sales held in Utah (“as provided in Sections 57-1-23, 57-1-24, and 57-1-27”), or did this phrase merely illustrate an example of what was meant by a non-judicial foreclosure sale.

**The answer is that the phrase “under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27,” is illustrative, not exclusive.** Just as the Supreme Court held in Windhaven with respect to Nevada's anti-deficiency statute, Utah's anti-deficiency statute contains no express limiting or precluding language. It merely provides an example of various types of non-judicial foreclosure sales. Utah's legislature could have easily included language in Utah Code Ann. § 57-1-32 which stated that it only applied to non-judicial foreclosures held in the state of Utah, but it chose not to do so. See Mineral County v. State, Bd. of Equalization, 121 Nev. 533, 539, 119 P.3d 706, 709 (2005) (explaining that “[s]ince the Legislature is silent, this court should not ‘fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.’”) (citing Falcke v. Douglas County, 116 Nev. 583, 589, 3 P.3d 661, 665 (2000) (quoting McKay v. Board of Cty. Comm'r, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987))).

Moreover, Utah's anti-deficiency statute is drafted much more similarly to Nevada's anti-deficiency statute (where the Nevada Supreme Court held that the phrase in question was



illustrative, not exclusive) than to Alaska’s anti-deficiency statute (where the Nevada Supreme Court held that the phrase in question was exclusive not illustrative). For example, both the Nevada anti-deficiency statute and the Utah deficiency statute do not have restricting commas in their relevant phrases: “trustee’s sale held pursuant to NRS 107.080,” and “under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27,” respectively. In contrast, the Alaska anti-deficiency statute does have restricting commas in its relevant phrase: “under a deed of trust, as authorized by AS 34.20.070 - 34.20.130,”. Finally, both the Nevada anti-deficiency statute and the Utah deficiency statute contain similar wording which indicates that they are illustrative, rather than exclusive. For example, in Windhaven, the Supreme Court of Nevada found the language “pursuant to” in Nevada’s anti-deficiency statute to be illustrative. In Key Bank, the Supreme Court of Nevada found the language “as authorized by” in Alaska’s anti-deficiency statute to be exclusive. Utah’s anti-deficiency statute contains the language “as provided in”, which is much more similar to Nevada’s illustrative language than to Alaska’s exclusive language.

Finally, unlike Alaska’s anti-deficiency statute, the extraterritorial application of Utah’s anti-deficiency statutes does not result in a complete prohibition on deficiency actions in other states. Creditors may pursue a deficiency action so long as the action is commenced at any time within three months after a non-judicial foreclosure sale. Utah Code Ann. § 57-1-32.

For all these reasons, Utah’s anti-deficiency statute applies to this deficiency action.

**C. UTAH LAW REQUIRES A CREDITOR TO SEEK A DEFICIENCY JUDGMENT WITHIN THREE MONTHS AFTER A FORECLOSURE SALE, YET AMERICA FIRST WAITED SIX MONTHS TO FILE THIS ACTION.**

As set forth above, Utah Code Ann. § 57-1-32 clearly and unambiguously requires a creditor seeking a deficiency judgment to bring an action within **three months** after a foreclosure sale. Despite this well-defined limitation period, America First waited **six months** to file this action seeking a deficiency against the Defendants.<sup>8</sup> Accordingly, because America First failed to

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<sup>8</sup> See April 4, 2013 Complaint, on file herein, at ¶¶ 16 – 17.

1 seek a deficiency judgment against Defendants within the three-month limitation period set forth  
2 in Utah Code Ann. § 57-1-32, this case must be dismissed.

3 **III. CONCLUSION**

4 Because America First did not bring its claim for a deficiency against the Defendants  
5 within the three-month limitation period as required under Utah law, this case must be dismissed  
6 in its entirety pursuant to NRCP 12(b)(5).

7 Dated this 20<sup>th</sup> day of October, 2016.

REID RUBINSTEIN & BOGATZ

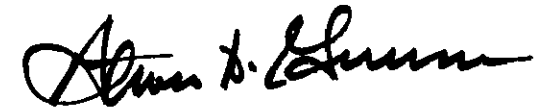
8  
9  
10 By: /s/ Charles M. Vlastic  
11 I. Scott Bogatz, Esq.  
12 Nevada Bar No. 3367  
13 Charles M. Vlastic, Esq.  
14 Nevada Bar No. 11308  
15 Jaimie Stilz, Esq.  
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17 300 South 4th Street, Suite 830  
18 Las Vegas, Nevada 89101  
19 *Attorneys for Defendants*  
20  
21  
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23  
24  
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26  
27  
28

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 20th day of October, 2016, our office served a copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS** upon the following, in accordance with Administrative Order 14.2:

Matthew Lamb, Esq.  
BALLARD SPAHR LLP  
100 North City Parkway, Suite 1750  
Las Vegas, NV 89106  
lambm@ballardspahr.com  
lvdocket@ballardspahr.com  
waltons@ballardspahr.com  
*Attorneys for Plaintiff*

/s/ Ariana Gennaro  
An employee of Reid Rubinstein & Bogatz



CLERK OF THE COURT

ODM  
Abran E. Vigil  
Nevada Bar No. 7548  
Matthew D. Lamb  
Nevada Bar No. 12991  
BALLARD SPAHR LLP  
100 North City Parkway, Suite 1750  
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Telephone: (702) 471-7000  
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vigila@ballardspahr.com  
lambm@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;

Defendants.

Case No. A-13-679511-C

Dept. No. XXX

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND DENYING  
PLAINTIFF'S COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT**

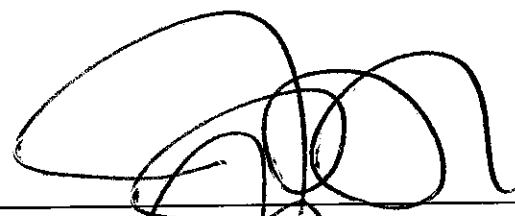

On August 24, 2016, defendants Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro ("Defendants") filed a motion to dismiss (the "Motion") the deficiency complaint of plaintiff America First Federal Credit Union ("Plaintiff"). On September 12, 2016, Plaintiff filed an opposition to the Motion and a counter-motion for partial summary judgment as to Defendants' liability (the "Counter-Motion"). Defendants filed a reply in support of the Motion and an opposition to the Counter-Motion on October 20, 2016. Plaintiff filed a reply in support of the Counter-Motion on November 9, 2016. The Court held a hearing on the Motion and Counter-

1 Motion on November 17, 2016 at 9:00 a.m. Matthew D. Lamb appeared on behalf of  
2 Plaintiff; I. Scott Bogatz and Charles Vlasic appeared on behalf of Defendants. The  
3 Court, being fully advised on the premises, orders as follows:

4 **IT IS HEREBY ORDERED** that pursuant to Key Bank of Alaska v. Donnels, 106  
5 Nev. 49, 52-53, 787 P.2d 382, 384-85 (1990), the Utah deficiency statute in this case  
6 (Utah Code Ann. § 57-1-32) – like the Alaska deficiency statute in Key Bank (AS  
7 34.20.100) – does not apply extraterritorially, and therefore Defendants' Motion is  
8 denied without prejudice.

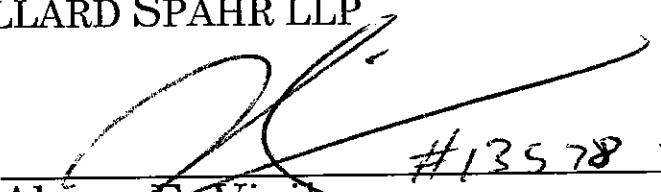
9 **IT IS HEREBY FURTHER ORDERED** that Plaintiff's Counter-Motion is denied  
10 without prejudice, pursuant to N.R.C.P. 56(f).

11 Dated: December 13, 2016.

12   
13 \_\_\_\_\_  
14 DISTRICT COURT JUDGE 

15 Respectfully submitted by:

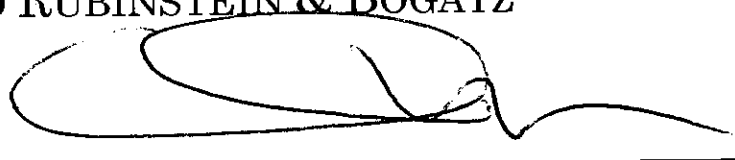
16 BALLARD SPAHR LLP

17 By:  #13578 for  
18 Abran E. Vigil  
19 Nevada Bar No. 7548  
20 Matthew D. Lamb  
21 Nevada Bar No. 12991  
22 100 North City Parkway, Suite 1750  
23 Las Vegas, Nevada 89106

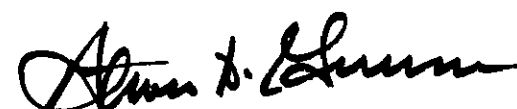
24 *Attorneys for Plaintiff*

25 Approved as to form by:

26 REID RUBINSTEIN & BOGATZ

27 By:   
28 I. Scott Bogatz  
Nevada Bar No. 3367  
Charles M. Vlasic III  
Nevada Bar No. 11308  
Jaimie Stilz  
Nevada Bar No. 13772  
300 South 4th Street, Suite 830  
Las Vegas, Nevada 89101

*Attorneys for Defendants*



CLERK OF THE COURT

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2 Nevada Bar No. 7548  
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6 vigila@ballardspahr.com  
lambm@ballardspahr.com

7 *Attorneys for Plaintiff*

8 DISTRICT COURT  
CLARK COUNTY, NEVADA

9  
10 AMERICA FIRST FEDERAL CREDIT  
UNION, a federally chartered credit  
11 union,

12 Plaintiff,

13 v.

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

17 Defendants.

Case No. A-13-679511-C

Dept. No. XXX

18 NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' MOTION TO DISMISS  
19 AND DENYING PLAINTIFF'S COUNTER-MOTION FOR PARTIAL SUMMARY  
20 JUDGMENT

21 PLEASE TAKE NOTICE that on the 14th day of December, 2016, the Clerk of  
the Court entered an *Order Denying Defendants' Motion to Dismiss and Denying*  
22 *Plaintiff's Counter-Motion for Partial Summary Judgment* in the above-referenced  
23 matter, attached hereto as Exhibit 1.

24 Dated: December 21, 2016.

BALLARD SPAHR LLP

25 By: /s/ Matthew D. Lamb

26 Abran E. Vigil, NV Bar 7548  
Matthew D. Lamb, NV Bar 12991  
27 100 North City Parkway, Suite 1750  
Las Vegas, Nevada 89106  
28 *Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

Pursuant to N.R.C.P. 5(b), I certify that on December 21, 2016, I electronically served a true and correct copy of the foregoing *Notice of Entry of Order Denying Defendants' Motion to Dismiss and Denying Plaintiff's Counter-Motion for Partial Summary Judgment* to the following via the Court's CM/ECF electronic service system:

REID RUBINSTEIN & BOGATZ

|                    |                    |
|--------------------|--------------------|
| Ariana Gennaro     | Agennaro@rrblf.com |
| Charles M. Vlastic | cvlastic@rrblf.com |
| Kristee Kallas     | kkallas@rrblf.com  |
| Scott Bogatz       | SBogatz@rrblf.com  |

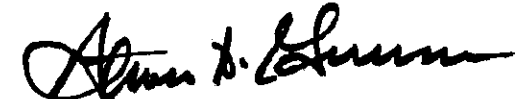
*Counsel for Defendants*

/s/ Sarah Walton  
An employee of BALLARD SPAHR LLP

# EXHIBIT 1

# EXHIBIT 1





CLERK OF THE COURT

1 ODM  
Abran E. Vigil  
2 Nevada Bar No. 7548  
Matthew D. Lamb  
3 Nevada Bar No. 12991  
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6 vigila@ballardspahr.com  
lambm@ballardspahr.com

7 *Attorneys for Plaintiff*

8  
9 DISTRICT COURT

10 CLARK COUNTY, NEVADA

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

13 Plaintiff,

14 v.

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

18 Defendants.

Case No. A-13-679511-C

Dept. No. XXX

19 **ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND DENYING**  
20 **PLAINTIFF'S COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT**

21 On August 24, 2016, defendants Franco Soro, Myra Taigman-Farrell, Isaac  
22 Farrell, Kathy Arrington, and Audie Embestro ("Defendants") filed a motion to dismiss  
23 (the "Motion") the deficiency complaint of plaintiff America First Federal Credit Union  
24 ("Plaintiff"). On September 12, 2016, Plaintiff filed an opposition to the Motion and a  
25 counter-motion for partial summary judgment as to Defendants' liability (the "Counter-  
26 Motion"). Defendants filed a reply in support of the Motion and an opposition to the  
27 Counter-Motion on October 20, 2016. Plaintiff filed a reply in support of the Counter-  
28 Motion on November 9, 2016. The Court held a hearing on the Motion and Counter-

1 Motion on November 17, 2016 at 9:00 a.m. Matthew D. Lamb appeared on behalf of  
2 Plaintiff I. Scott Bogatz and Charles Vlasic appeared on behalf of Defendants. The  
3 Court, being fully advised on the premises, orders as follows:

4 IT IS HEREBY ORDERED that pursuant to Key Bank of Alaska v. Donnels, 106  
5 Nev. 49, 52-53, 787 P.2d 382, 384-85 (1990), the Utah deficiency statute in this case  
6 (Utah Code Ann. § 57-1-32) – like the Alaska deficiency statute in Key Bank (AS  
7 34.20.100) – does not apply extraterritorially, and therefore Defendants' Motion is  
8 denied without prejudice.


9 IT IS HEREBY FURTHER ORDERED that Plaintiff's Counter-Motion is denied  
10 without prejudice, pursuant to N.R.C.P. 56(f).

11 Dated: ~~November~~ December 13, 2016.

12  
13   
14 DISTRICT COURT JUDGE ✓

15 Respectfully submitted by:

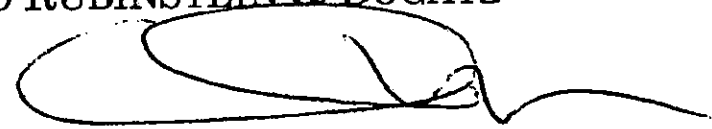
16 BALLARD SPAHR LLP

17  
18 By:  #13578 for  
19 Abram E. Vigil  
20 Nevada Bar No. 7548  
21 Matthew D. Lamb  
22 Nevada Bar No. 12991  
23 100 North City Parkway, Suite 1750  
24 Las Vegas, Nevada 89106

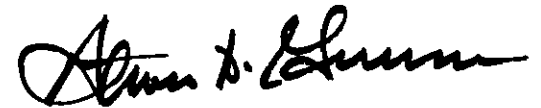
25 *Attorneys for Plaintiff*

26 Approved as to form by:

27 REID RUBINSTEIN & BOGATZ

28 By:   
I. Scott Bogatz  
Nevada Bar No. 3367  
Charles M. Vlasic III  
Nevada Bar No. 11308  
Jaimie Stilz  
Nevada Bar No. 13772  
300 South 4th Street, Suite 830  
Las Vegas, Nevada 89101

*Attorneys for Defendants*



CLERK OF THE COURT

**MDSM**  
**Reid Rubinstein & Bogatz**  
I. SCOTT BOGATZ, ESQ.  
Nevada Bar No. 3367  
CHARLES M. VLASIC III, ESQ.  
Nevada Bar No. 11308  
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[cvlasic@rrblf.com](mailto:cvlasic@rrblf.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 (“Defendants”), through their attorneys of  
record, the law firm of Reid Rubinstein & Bogatz, hereby respectfully move for dismissal of the  
Complaint filed by Plaintiff, AMERICA FIRST FEDERAL CREDIT UNION (“America First”),  
pursuant to NRCP 12(b)(5). This Motion 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 24th day of August, 2016.

REID RUBINSTEIN & BOGATZ

By: /s/ Charles M. Vlastic  
 I. Scott Bogatz, Esq.  
 Nevada Bar No. 3367  
 Charles M. Vlastic, Esq.  
 Nevada Bar No. 11308  
 300 South 4th Street, Suite 830  
 Las Vegas, Nevada 89101  
 Attorneys for Defendants

**NOTICE OF MOTION**

You and each of you, will please take notice that Defendants' **MOTION TO DISMISS** will come on regularly for hearing on the 27 day of September, 2016, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard in Department XXX of the above referenced Court.

Dated this 24th day of August, 2016.

REID RUBINSTEIN & BOGATZ

By: /s/ Charles M. Vlastic  
 I. Scott Bogatz, Esq.  
 Nevada Bar No. 3367  
 Charles M. Vlastic, Esq.  
 Nevada Bar No. 11308  
 300 South 4th Street, Suite 830  
 Las Vegas, Nevada 89101  
 Attorneys for Defendants

## MEMORANDUM OF POINTS & AUTHORITIES

### I. INTRODUCTION

Here, even if the Court were to accept all of the allegations contained in the underlying Complaint as true, this case must be dismissed pursuant to Nevada Rules of Civil Procedure 12(b)(5) because the Plaintiff failed to file this deficiency action within the three month limitation period as required by to **Utah law**.

As set forth in more detail herein, the Supreme Court of Nevada has repeatedly held that regardless of where the deficiency action is brought or where the underlying property was located, the choice-of-law provision contained in the loan documents governs which state's laws apply to deficiency proceedings. The loan documents in this case clearly and unambiguously provide that they will be "governed by and construed in accordance with the laws of the State of Utah." Utah law, in turn provides that in order to seek a deficiency judgment, a creditor must bring a deficiency action within three months following the foreclosure sale on the underlying property.

In this case, there is no dispute that Plaintiff did not bring its claim for a deficiency against the Defendants within the three-month limitation period as required under Utah law. Instead, Plaintiff waited until six months following the foreclosure sale on the underlying property to bring this action. Because Plaintiff failed to bring this deficiency action within the three month limitation period as required by to Utah law, this case must be dismissed in its entirety.

### II. STATEMENT OF RELEVANT FACTS<sup>1</sup>

#### **A. THE LOAN, THE LOAN DOCUMENTS AND THE PROPERTY**

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 developing a parcel of

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<sup>1</sup> 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).

property (“Property”).<sup>2</sup> On or about this 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 ([ ] “Note”).”<sup>3</sup> “The Note was secured by a Trust Deed with Assignment of Rents ([ ] “Deed of Trust”) executed by Mesquite Jabez, LLC on or about April 11, 2002 . . . .”<sup>4</sup>

**B. THE CHOICE-OF-LAW PROVISIONS CONTAINED IN THE LOAN DOCUMENTS CALL FOR UTAH LAW TO GOVERN.**

The Loan Agreement contained an “Applicable Law” clause, which expressly provided:<sup>5</sup>

**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.<sup>6</sup>

**C. UTAH LAW REQUIRES A DEFICIENCY ACTION TO BE COMMENCED “WITHIN THREE MONTHS AFTER ANY SALE OF PROPERTY UNDER A DEED OF TRUST”**

Utah’s anti-deficiency laws are set out in Utah Code Ann. § 57-1-32, which provides in relevant part:

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, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee’s and attorney’s fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred.<sup>7</sup>

<sup>2</sup> See April 4, 2013 Complaint on file herein at ¶ 10.

<sup>3</sup> See April 4, 2013 Complaint on file herein at ¶ 10.

<sup>4</sup> See April 4, 2013 Complaint on file herein at ¶ 11.

<sup>5</sup> 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).

<sup>6</sup> See Loan Agreement attached hereto as **Exhibit A** at p. 6.

<sup>7</sup> Emphasis added.

**D. AMERICA FIRST WAITED SIX MONTHS TO COMMENCE THIS DEFICIENCY ACTION AGAINST THE DEFENDANTS IN ACCORDANCE WITH NEVADA LAW.**

On or about October 4, 2012, America First caused the Property to be sold under the Deed of Trust (“Foreclosure Sale”).<sup>8</sup> America First did not seek a deficiency judgment within three months after the Foreclosure Sale” in accordance with Utah law. Instead, exactly six months after the Foreclosure Sale on April 4, 2013, America First filed this lawsuit seeking a deficiency judgment against the Defendants in accordance with Nevada law, specifically “N.R.S. 455(1).”<sup>9</sup>

**III. LEGAL STANDARD**

NRCP 12(b)(5) authorizes this Court to dismiss a complaint for failure to state a claim upon which relief can be granted. “The standard of review for a dismissal under NRCP 12(b)(5) is rigorous as this court ‘must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party].’” Conway v. Circus Circus Casinos, Inc., 116 Nev. 870, 873, 8 P.3d 837, 840 (2000) (*citing* Squires v. Sierra Nev. Educational Found., 107 Nev. 902, 905, 823 P.2d 256, 257 (1991); Merluzzi v. Larson, 96 Nev. 409, 411, 610 P.2d 739, 741 (1980)). If all the allegations pled are accepted as true, yet it “appears to a certainty that a plaintiff can prove no set of facts which would entitle h[er] to relief,” the trial court must dismiss the claims. Bergman v. Boyce, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993) (*citing* Edgar v. Wagner, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985); Capital Mortgage Holding v. Hahn, 101 Nev. 314, 315, 705 P.2d 126, 126 (1985)).

**IV. LEGAL ARGUMENT**

The recent decision by the Supreme Court of Nevada in Mardian v. Michael and Wendy Greenberg Family Trust, 131 Nev. Adv. Op. 72, 359 P.3d 109 (2015), along with the previous Supreme Court of Nevada decision set forth in Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382 (1990), require this case to be dismissed. Plaintiff simply failed to file this

<sup>8</sup> See April 4, 2013 Complaint on file herein at ¶¶ 16 – 17.

<sup>9</sup> See April 4, 2013 Complaint on file herein at ¶. 26.

deficiency action within the appropriate limitations period as set forth under **Utah law**, as mandated by the governing Loan Documents.

**A. REGARDLESS OF WHERE THE DEFICIENCY ACTION IS BROUGHT OR WHERE THE UNDERLYING PROPERTY WAS LOCATED, THE CHOICE-OF-LAW PROVISION CONTAINED IN THE LOAN DOCUMENTS GOVERNS WHICH STATE’S LAWS APPLY TO DEFICIENCY PROCEEDINGS.**

The Mardian case involved a loan on undeveloped real property located in Arizona. Id. at p. 110. Although the property at issue in Mardian was located in Arizona, the choice of law provision contained in the loan documents called for Nevada law to apply to any deficiency proceedings. Id. Following a foreclosure of the underlying property located in Arizona, the creditor sought a deficiency judgment against the guarantors in Nevada pursuant to Nevada’s anti-deficiency statutes. Id. In concluding that Nevada law – including Nevada’s limitation period, should govern the deficiency action given the parties’ agreement, the Supreme Court of Nevada explained in relevant part:

**... the issue of whether the Arizona law should have been applied must [] be addressed.** In this regard, [the borrower/guarantor argues] that it would not have been appropriate for the district court to apply the Arizona limitation period for foreclosures to the personal action commenced in Nevada because the guaranties specify that they are governed by Nevada law. **We agree and conclude that because of the choice-of-law provision, Nevada law—particularly Nevada’s limitations period, see NRS 40.455(1)—applies in this case. See *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 52, 787 P.2d 382, 384 (1990) (concluding that where there was “no evidence or argument ... regarding bad faith or evasion of Nevada law, the provision designating Alaska law in the promissory note [was] valid”).**

Id. at p. 111 (emphasis added).

Thus, the Supreme Court of Nevada in Mardian confirmed the well-settled rule that regardless of where the deficiency action is brought or where the underlying property was located, the choice-of-law provision contained in the loan documents governs which state’s laws apply to deficiency proceedings. Id.

The Supreme Court of Nevada also cited its previous decision in Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382 (1990). In Key Bank, the Supreme Court of Nevada expressly rejected the same argument Plaintiffs will make in this case – that because the foreclosure took place in Nevada, and because the deficiency action is being brought in Nevada,



the Court must ignore the choice-of-law provisions contained in the loan documents. Importantly with respect to this argument, the Supreme Court of Nevada in Key Bank explained:

[R]egardless of whether the parties agreed that Nevada foreclosure procedures would apply, an action for a deficiency after partial satisfaction through sale of the security is an action on the debt. *See Nevada Land & Mtge. v. Hidden Wells*, 83 Nev. 501, 504, 435 P.2d 198, 200 (1967); *McMillan v. United Mortgage Co.*, 82 Nev. 117, 122, 412 P.2d 604, 606 (1966). We have held that “[i]t 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.” *Sievers v. Diversified Mtg. Investors*, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979). Because there is no evidence or argument here regarding bad faith or evasion of Nevada law, the provision designating Alaska law in the promissory note is valid. Therefore, based on our decisions in *Hidden Wells* and *Sievers*, we hold that the district court did not err in concluding that the deficiency action was an action on the promissory note which contained a valid and enforceable agreement that Alaska law was to apply to the debt.

106 Nev. at 52, 787 P.2d at 384.

**B. THE LOAN DOCUMENTS CLEARLY PROVIDE THAT UTAH LAW APPLIES THIS DEFICIENCY JUDGMENT PROCEEDING.**

In this case, the Loan Agreement contains an “Applicable Law” clause which clearly and expressly provides: “**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.**”<sup>10</sup> Given the recent holding in Mardian along with the long-standing holding set forth in Key Bank, there can be no dispute that this Court must enforce the choice of law provision as written, which requires Utah law to govern this deficiency action.

**C. UTAH LAW REQUIRES A CREDITOR TO SEEK A DEFICIENCY JUDGMENT WITHIN THREE MONTHS AFTER A FORECLOSURE SALE, YET PLAINTIFFS WAITED SIX MONTHS TO FILE THIS ACTION.**

As set forth above, Utah Code Ann. § 57-1-32 clearly and unambiguously requires a creditor seeking a deficiency judgment to bring an action within **three months** after a foreclosure sale. Despite this well-defined limitation period, America First waited **six months** to file this action seeking a deficiency against the Defendants.<sup>11</sup> Accordingly, because America

<sup>10</sup> See Exhibit A at p. 6. Emphasis added.

<sup>11</sup> See April 4, 2013 Complaint on file herein at ¶¶ 16 – 17.

1 First failed to seek a deficiency judgment against Defendants within the three month limitation  
2 period set forth in Utah Code Ann. § 57-1-32, this case must be dismissed.

3 **V. CONCLUSION**

4 Because America First did not bring its claim for a deficiency against the Defendants  
5 within the three-month limitation period as required under Utah law, this case must be dismissed  
6 in its entirety pursuant to NRCP 12(b)(5).

7 Dated this 24th day of August, 2016.

8 REID RUBINSTEIN & BOGATZ

9  
10 By: /s/ Charles M. Vlasic

11 I. Scott Bogatz, Esq.

Nevada Bar No. 3367

Charles M. Vlasic, Esq.

Nevada Bar No. 11308

300 South 4th Street, Suite 830

Las Vegas, Nevada 89101

12 *Attorneys for Defendants*  
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**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 24th day of August, 2016, our office served a copy of the foregoing **MOTION TO DISMISS** upon the following, in accordance with Administrative Order 14.2:

Matthew Lamb, 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/ Ariana Gennaro  
An employee of Reid Rubinstein & Bogatz

# EXHIBIT A

# EXHIBIT A

## BUSINESS LOAN AGREEMENT

\*\*\*\*\*

Agreement Date: \_\_\_\_\_

Reference:

MESQUITE JABEZ, LLC #718299-11

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:

FA KA  
PK

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:

Handwritten initials and signatures, including "KA" and "MK", over a grid of lines.

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.

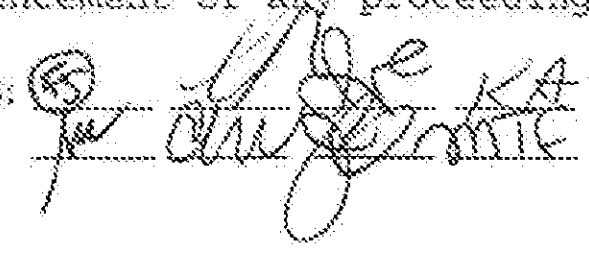
Defaults as to Third Persons. Failure to pay any indebtedness due any third person, and such failure shall continue beyond any applicable grace period, or the Borrower permits an event of default to exist under any agreement binding the Borrower.

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:

*[Handwritten initials and signatures]*

BUSINESS LOAN AGREEMENT  
(continued)

REFERENCE:

MESQUITE JAREZ, 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.

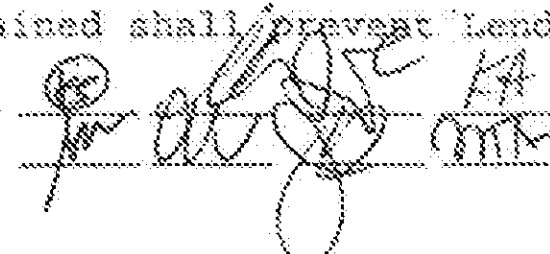
**Applicable Law.** This Agreement (and all loan documents in connection with this transaction) shall be governed by and construed in accordance with the laws of the State of Utah.

**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 'JF', 'AF', and 'MR'. There are also larger, more stylized signatures or initials, possibly 'AF' and 'MR', written over the printed text.

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:

⑥ AK mit  
for AK mit

  
CLERK OF THE COURT

OPPS  
Abran E. Vigil  
Nevada Bar No. 7548  
Matthew D. Lamb  
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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;

Defendants.

Case No. A-13-679511-C

Dept. No. XXX

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS  
AND COUNTER-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff America First Federal Credit Union ("AFCU") hereby opposes  
defendants' *Motion to Dismiss* filed August 24, 2016 (the "Motion"). In addition,  
pursuant to N.R.C.P. 56 and LR 2.20(f), AFCU moves for partial summary judgment  
as to defendants' liability. This opposition and counter-motion are based on the  
following memorandum of points and authorities, the pleadings and papers on file,  
and any oral argument the Court may hear.

///

1 Dated: September 12, 2016

2 BALLARD SPAHR LLP

3 By: /s/ Matthew D. Lamb  
4 Abran E. Vigil  
5 Nevada Bar No. 7548  
6 Matthew D. Lamb  
7 Nevada Bar No. 12991  
8 100 North City Parkway, Suite 1750  
9 Las Vegas, Nevada 89106

10 *Attorneys for Plaintiff*

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 This is a deficiency action under a commercial loan that plaintiff AFCU made  
14 to defendants in 2002. After defendants defaulted, AFCU foreclosed against the real  
15 property in Mesquite, Nevada that secured the loan. It then filed this action to  
16 recover the \$2.4 million that remained due. Defendants moved to dismiss AFCU's  
17 deficiency complaint on the ground that certain consent-to-jurisdiction provisions in  
18 the governing loan documents required AFCU to sue defendants in Utah. The Court  
19 granted the motion to dismiss, but the en banc Nevada Supreme Court unanimously  
20 rejected defendants' argument and remanded the case for further proceedings.

21 Now, over three years after AFCU filed its complaint, defendants argue the  
22 complaint is time-barred under Utah's three-month statute of limitations for  
23 deficiency actions. Defendants argue that Utah's statute of limitations applies  
24 because of a choice-of-law clause in the loan agreement between AFCU and  
25 defendants. It is unclear why defendants held this argument in reserve, rather than  
26 raising it at the outset of the case. But in any event, the argument is meritless. The  
27 Nevada Supreme Court held in Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d  
28 382 (1990), that a choice-of-law clause in favor of another state's law does not  
incorporate the other state's deficiency statutes if those statutes do not purport to  
apply to a trustee's sale in Nevada. Utah's deficiency statutes only purport to govern

1 sales of real property located in Utah. Therefore, AFCU's complaint is governed by  
2 Nevada's six-month statute of limitations and is timely.

3 Defendants point to a later decision of the Nevada Supreme Court in Mardian  
4 v. Michael & Wendy Greenberg Family Trust, 131 Nev. Adv. Rep. 72, 359 P.3d 109  
5 (2015). In Mardian, a lender sought a deficiency judgment in Nevada court after  
6 foreclosing against real property located in Arizona. The Supreme Court held that a  
7 choice of law clause in favor of Nevada law incorporated Nevada's deficiency statutes.  
8 In their Motion, defendants never discuss how the decisions in Key Bank and  
9 Mardian interact. However, defendants seem to believe that Mardian overrules Key  
10 Bank and holds that a choice-of-law provision always incorporates the selected  
11 jurisdiction's deficiency statutes, regardless of where the subject property is located.  
12 This argument fails for two reasons. First, there is no direct conflict between the  
13 holdings of Key Bank and Mardian. Therefore, this case remains governed by Key  
14 Bank and AFCU's complaint is subject to Nevada's six-month statute of limitations.  
15 Second, even if Key Bank and Mardian actually conflicted, Key Bank would govern  
16 under principles of stare decisis. Accordingly, AFCU's complaint is timely and  
17 defendants' motion must be denied. Further, as explained below, AFCU is entitled to  
18 partial summary judgment as to defendants' liability.

## 19 II. FACTUAL AND PROCEDURAL BACKGROUND

20 On April 11, 2002, nine borrowers obtained a commercial loan for \$2,900,000  
21 from plaintiff AFCU (the "Loan"). The nine borrowers were Mesquite Jabez, LLC;  
22 Clifford Redekop; Joey Bowler; Charles Weiner; Franco Soro; Myra Taigman-Farrell;  
23 Isaac Farrell; Kathy Arrington; and Audie Embestro (collectively, "Borrowers"). Ex. 3  
24 at 017. To evidence the Loan, Borrowers executed a *Business Loan Agreement* (the  
25 "Loan Agreement"), Ex. 2, as well as a *Commercial Promissory Note* (the "Note"), Ex.  
26 3. Borrowers agreed to be jointly and severally liable for all amounts due under the  
27 Loan. See Ex. 2 at 010 ("If there is more than one Borrower under this Agreement or  
28 on any loan, all obligations of such Borrowers shall be joint and several."); Ex. 3 at

1 017 (“The obligations of Borrower(s) under this Note are joint and several.”). The  
2 Loan was secured by a *Trust Deed* (the “Deed of Trust”) that encumbered real  
3 property located at 820 West Mesquite Boulevard, Mesquite, Nevada (the “Property”).  
4 Ex. 4. The Deed of Trust named Mesquite Jabez, LLC as trustor, AFCU as  
5 beneficiary, and Timothy W. Blackburn as trustee. *Id.* at 020.

6 Borrowers defaulted in their obligations under the Loan by failing to make  
7 monthly payments of principal and interest beginning with the payment due  
8 November 30, 2010. Ex. 6 at 034. In a *Substitution of Trustee* dated February 15,  
9 2011 and recorded on February 18, 2011, AFCU substituted Ballard Spahr LLP  
10 (“Ballard Spahr”) as the new trustee under the Deed of Trust. Ex. 5. Ballard Spahr  
11 then recorded and served a *Notice of Default and Election to Sell under Deed of Trust*  
12 dated February 17, 2011 (the “Notice of Default”). Ex. 6. It also recorded and served  
13 a *Notice of Trustee’s Sale* dated July 23, 2012. Ex. 7. A trustee’s sale of the Property  
14 was held on October 4, 2012 (the “Sale”). Ex. 8 at 042. At the Sale, AFCU purchased  
15 the Property with a credit bid of \$1,215,000.00. *Id.* Ballard Spahr executed and  
16 recorded a *Trustee’s Deed Upon Sale* (the “Trustee’s Deed”) which conveyed the  
17 Property to AFCU. *Id.* At the time of the Sale, the total amount owed by Borrowers  
18 to AFCU under the Loan was at least \$3,628,010.34. Ex. 9 at 047.

19 On April 4, 2013, AFCU brought this deficiency action against five of the nine  
20 Borrowers under the Loan. AFCU seeks to recover a deficiency judgment pursuant to  
21 NRS 40.455. On July 29, 2013, defendants moved to dismiss for lack of subject  
22 matter jurisdiction, arguing that certain consent-to-jurisdiction clauses in the Loan  
23 Agreement and Note required AFCU to sue for a deficiency in Utah. The Court  
24 granted the motion to dismiss. AFCU appealed, and the Nevada Supreme Court  
25 reversed and remanded. *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Rep. 73,  
26 359 P.3d 105 (2015).

27 In their current motion to dismiss, defendants argue that AFCU’s complaint  
28 for a deficiency judgment is time-barred. Defendants argue the complaint is governed

1 by Utah’s three-month statute of limitations for filing a deficiency action after a  
2 trustee’s sale, see Utah Code § 57-1-32, rather than Nevada’s six-month statute of  
3 limitations, see NRS 40.455. They base this argument on a choice of law provision in  
4 the Loan Agreement which states, “[t]his Agreement (and all loan documents in  
5 connection with this transaction) shall be governed by and construed in accordance  
6 with the laws of the State of Utah.” Ex. 2 at 6. For the reasons explained below,  
7 defendants are incorrect—this action is governed by Nevada’s statute of limitations  
8 and is therefore timely. Accordingly, the Court should deny defendants’ Motion and  
9 should enter partial summary judgment for AFCU on the issue of defendants’  
10 liability.

### 11 III. ARGUMENT

#### 12 A. Defendants’ motion to dismiss must be denied because this case is 13 governed by Nevada’s six-month statute of limitations and is therefore timely.

14 In Nevada, dismissal of a complaint is proper for “failure to state a claim upon  
15 which relief can be granted.” N.R.C.P. 12(b)(5). “All factual allegations of the  
16 complaint must be accepted as true.” Vacation Village v. Hitachi Am., 110 Nev. 481,  
17 484, 874 P.2d 744, 746 (1994) (citation omitted). However, “the allegations must be  
18 legally sufficient to constitute the elements of the claim asserted.” Sanchez v. Wal-  
19 Mart Stores, Inc., 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (citation omitted). A  
20 complaint should be dismissed where a party can prove no set of facts which, if true,  
21 would entitle it to relief. See Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224,  
22 228, 181 P.3d 670, 672 (2008). If, on a motion to dismiss for failure to state a claim,  
23 “matters outside the pleading are presented to and not excluded by the court, the  
24 motion shall be treated as one for summary judgment and disposed of as provided in  
25 Rule 56, and all parties shall be given reasonable opportunity to present all material  
26 made pertinent to such a motion by Rule 56.” N.R.C.P. 12(b).

27 Here, defendants’ Motion relies on material outside the pleadings—namely, the  
28 Loan Agreement. Motion at Ex. A. For this reason alone, the Court can and should



1 deny the Motion. But even if the Court chooses to entertain the Motion as one for  
2 summary judgment, it should still be denied.

3 A court may enter summary judgment when the moving party demonstrates  
4 that no genuine issue of material fact exists and that the moving party is entitled to  
5 judgment as a matter of law. N.R.C.P. 56(c). Substantive law controls which factual  
6 disputes are material and will therefore preclude summary judgment. Wood v.  
7 Safeway, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (citing Anderson v. Liberty  
8 Lobby, 477 U.S. 242, 247-48 (1986)). A factual dispute is genuine when the evidence  
9 is such that a rational trier of fact could return a verdict for the non-moving party.  
10 Wood, 121 Nev. at 731, 121 P.3d at 1031 (citing Matsushita Elec. Indus. Co. v. Zenith  
11 Radio Corp., 475 U.S. 574, 586 (1986)).

- 12 1. In Key Bank, the Nevada Supreme Court held that a choice of law  
13 provision cannot import a foreign jurisdiction's deficiency statutes  
14 to govern a trustee's sale in Nevada.

15 Defendants are not entitled to dismissal of AFCU's complaint or to summary  
16 judgment because this case is governed by Nevada's six-month statute of limitations.  
17 Defendants argue the choice-of-law provision in the Loan Agreement incorporates  
18 Utah's three-month statute of limitations. However, the Nevada Supreme Court's  
19 opinion in Key Bank disposes of this argument. In that case, lender Key Bank made  
20 a commercial loan to a corporate borrower. The loan was secured by real property  
21 located in Reno, Nevada and by two personal guaranties. 106 Nev. at 51, 787 P.2d at  
22 383. The note and guaranties contained choice of law provisions in favor of Alaska  
23 law. Id. When the borrower defaulted, Key Bank foreclosed against the Reno  
24 property and later brought a deficiency action against the guarantors. Id.

25 Alaska law prohibits a lender from recovering a deficiency judgment after a  
26 trustee's sale. See id., 106 Nev. at 51-52, 787 P.2d at 384 ("When a sale is made by a  
27 trustee under a deed of trust, as authorized by AS 34.20.070-34.20.130, no other or  
28 further action or proceeding may be taken nor judgment entered against the maker or  
the surety or guarantor of the maker, on the obligation secured by the deed of trust

1 for a deficiency.”) (citing Alaska Stat. § 34.20.100). The guarantors in Key Bank  
2 argued that Key Bank’s deficiency action was prohibited by this anti-deficiency  
3 statute. See id.

4 In addressing this issue, the Nevada Supreme Court initially noted that an  
5 action to recover a deficiency is an action on the underlying debt. See id., 106 Nev. at  
6 52, 787 P.2d at 384. Therefore, as a general matter, a choice of law provision  
7 contained in a note will govern a deficiency action by the lender. See id. However,  
8 the Court explicitly rejected the guarantors’ argument that Alaska’s anti-deficiency  
9 statute applied to Key Bank’s deficiency action. This was because Alaska’s deficiency  
10 statutes, by their own terms, did not apply extraterritorially to a trustee’s sale held in  
11 another state. See id. The Alaska statute which prohibits lenders from obtaining a  
12 deficiency only applies to trustee’s sales “as authorized by [Alaska Stat. §§] 34.20.070-  
13 34.20.130.” Id., 106 Nev. at 52 n.1, 787 P.2d at 384 (citing Alaska Stat. § 34.20.100).  
14 Therefore, the Court concluded, the Alaska anti-deficiency statute did not apply  
15 extraterritorially to the trustee’s sale of the property in Reno, Nevada. Because the  
16 sale in Key Bank was conducted pursuant to Nevada law—not Alaska law—and  
17 because the subject property was located in this state, Nevada’s statute of limitations  
18 applied.

19 To summarize, the central holding of Key Bank is that a choice of law provision  
20 in a loan document does not incorporate another jurisdiction’s deficiency statutes if  
21 those statutes, by their own terms, do not apply extraterritorially to a Nevada  
22 trustee’s sale.<sup>1</sup> Here, the Loan Agreement between AFCU and defendants states,

23 <sup>1</sup> The holding of Key Bank is consistent with the broader rule that a choice of law  
24 provision is not enforceable if it is “contrary to the public policy of the forum.” Ferdie  
25 Sievers & Lake Tahoe Land Co. v. Diversified Mortgage Investors, 95 Nev. 811, 815,  
26 603 P.2d 270, 273 (1979). Allowing parties to contract around Nevada’s deficiency  
27 statutes would skirt the protections for borrowers and guarantors provided by  
28 Nevada law. Cf. Keever v. Nicholas Beers Co., 96 Nev. 509, 512, 611 P.2d 1079, 1082  
(1980) (“Chapter 40 of the Nevada Revised Statutes provides a comprehensive scheme  
of creditor and debtor protection with respect to the foreclosure and sale of real  
property subject to security interests.”). It would also inappropriately allow other  
states to exercise jurisdiction over Nevada real property. And finally, it would

(continued...)

1 “[t]his Agreement (and all loan documents in connection with this transaction) shall  
2 be governed by and construed in accordance with the laws of the State of Utah.” Ex.  
3 2 at 6. Borrowers claim this provision incorporates Utah’s three-month statute of  
4 limitations for deficiency actions. See Utah Code § 57-1-32 (“At any time within three  
5 months after any sale of property under a trust deed as provided in Sections 57-1-23,  
6 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon  
7 the obligation for which the trust deed was given as security.”).

8 Under Key Bank, the Utah statute does not govern this case if, by its own  
9 terms, it does not apply extraterritorially to a Nevada trustee’s sale. By its own  
10 terms, the Utah statute of limitations does not apply extraterritorially. Instead, it  
11 only applies after a “sale of property under a trust deed as provided in Sections 57-1-  
12 23, 57-1-24, and 57-1-27...” Id. (emphasis added). It is undisputed that the sale of  
13 the Nevada property in this case was conducted pursuant to NRS 107.080, not  
14 pursuant to Utah Code §§ 57-1-23, 57-1-24, and 57-1-27.<sup>2</sup> Accordingly, the 3-month  
15 limitations period of Utah Code § 57-1-32 does not apply here. AFCU’s deficiency  
16 action is subject to Nevada’s 6-month statute of limitations and is therefore timely.

17  
18  
19  
20 (...continued)

21 undermine the certainty and predictability that are critical to real estate finance  
22 transactions. See Gramercy Inv. Trust v. Lakemont Homes Nev., Inc., 198 Cal. App  
23 4th 903, 909, 130 Cal. Rptr. 3d 496, 501 (2011) (New York’s deficiency statutes did  
24 not apply to sale of California real property, despite choice-of-law provision in favor of  
25 New York law); Cal. Fed. Sav. and Loan Ass’n v. Bell, 6 Haw App. 597, 606-07, 735  
26 P.2d 499, 506 (1987) (“If such matters as deficiency judgments arising from land  
27 transactions were not to be determined by the laws of this jurisdiction, the laws of  
28 nearly every other state as well as a number of foreign countries relating to that issue  
might be cited by parties as controlling their rights and liabilities.”)

25 <sup>2</sup> Unlike Utah’s deficiency statutes, Nevada’s deficiency statutes expressly govern  
26 trustee’s sales conducted under Nevada law. See NRS 40.455 (2012) (“[U]pon  
27 application of the judgment creditor or the beneficiary of the deed of trust within 6  
28 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...” (emphasis added).

2. Without discussing the central holding of Key Bank, the Mardian opinion holds that a choice of law provision may export Nevada's deficiency statutes to govern a sale in a foreign jurisdiction.

In their Motion, defendants never mention the central and dispositive holding of Key Bank. Instead, they rely on the Nevada Supreme Court's decision in Mardian. In Mardian, a borrower entity executed a promissory note in favor of the Michael and Wendy Greenberg Family Trust (the "Trust"). 359 P.3d at 110. The note was secured by a deed of trust encumbering 280 acres of real property in Arizona and was further secured by guaranties from two individuals. Id. The guaranties stated that they were governed by Nevada law. Id. After the loan fell into default, the Trust sued the guarantors personally to recover the amounts due under the loan. Id. Thereafter, the Arizona property was sold at a foreclosure sale. Id.

One of the issues in Mardian was whether the deficiency action was governed by (a) Arizona's three-month statute of limitations, (b) Nevada's six-month statute of limitations, or (c) neither statute of limitations. The district court in Mardian had held that neither state's limitation period applied. Id. With no discussion, the Supreme Court reversed on this issue. It held that "because of the choice-of-law provision, Nevada law—particularly Nevada's limitations period—applies in this case." Id. at 111 (citation omitted). In reaching this holding, the Mardian court cited a portion of Key Bank discussing the general rule that choice-of-law provisions are enforceable in Nevada. Id. However, the Mardian court never cited or discussed the central holding of Key Bank—that a choice-of-law clause does not incorporate a foreign jurisdiction's deficiency statutes where the subject property is located in Nevada and where the foreign jurisdiction's statutes do not purport to apply to a Nevada trustee's sale.

After deciding this issue with no discussion, the Mardian court addressed two other questions. First, it discussed whether the Trust could seek a deficiency judgment in Nevada after foreclosing against real property in another state. Id. at 111-12. The court ruled this was permissible. Second, the court discussed whether

1 NRS 40.455 required the Trust to file a new “application” for a deficiency judgment  
2 within six months after the foreclosure sale. Even though the Trust had already sued  
3 the guarantors before the sale, the Court ruled that the Trust had to file a new  
4 “application” for a deficiency judgment within six months of the sale. Since the Trust  
5 did not file an amended complaint, motion for summary judgment, or any other  
6 document that could be construed as an “application” within six months of the sale,  
7 the Trust was not entitled to a deficiency judgment. Id. at 112-13.

8           3.       Mardian does not conflict with Key Bank or purport to overrule it.

9           As noted above, Key Bank holds that a choice of law provision cannot  
10 incorporate another state’s deficiency statutes to govern a foreclosure sale of Nevada  
11 real property. Meanwhile, Mardian apparently holds that such a provision can  
12 incorporate Nevada’s deficiency statutes to govern a foreclosure sale of property in  
13 another state. These two decisions by the en banc Nevada Supreme Court arguably  
14 conflict. Where, as here, a court is faced with a potential intra-jurisdictional split of  
15 authority, the court should “first attempt to reconcile the conflicting cases before  
16 concluding that a true...split exists.” Michael Duvall, Resolving Intra-Circuit Splits  
17 in the Federal Courts of Appeal, 2008 Fed. Cts. L. Rev. 1, 2 (Apr. 2008); see also  
18 Skender v. Brunsonbuilt Constr. & Dev. Co., 171 P.3d 745, 746 (Nev. 2007) (analyzing  
19 two precedents of Nevada Supreme Court and concluding they did not actually  
20 conflict). In doing so, the court “may conclude that the decisions do not actually  
21 conflict because of a key factual distinction between the cases.” Id. Here, before the  
22 Court addresses whether Key Bank or Mardian takes precedence, it should determine  
23 whether the two cases actually conflict. For the three reasons explained below, there  
24 is no actual conflict between Key Bank and Mardian. Therefore, this case is governed  
25 by Key Bank and there is no need to decide which of the two decisions controls.

26           First, the holding of Mardian is dicta. Regardless of whether Nevada’s statute  
27 of limitations or Arizona’s statute of limitations had applied in Mardian, the Trust  
28 would have lost the case. This is because the Supreme Court held that the Trust

1 could not recover a deficiency judgment because it did not file an “application” for a  
2 deficiency within six months of the foreclosure sale. Therefore, by definition, the  
3 Trust also did not file any “application” for a deficiency judgment within three  
4 months after the sale, as required by Arizona’s statute of limitations. The Trust’s  
5 request for a deficiency judgment also would have been time-barred if it had been  
6 governed by Arizona’s three-month limitation period, meaning there was no need for  
7 the Supreme Court to decide which statute of limitations applied. Accordingly, the  
8 Mardian court’s holding on this issue is dicta. It is not precedential and does not  
9 govern the instant dispute between AFCU and defendants. Instead, this case is  
10 governed by Key Bank and by Nevada’s six-month statute of limitations.

11 Second, the facts of Key Bank and Mardian are distinguishable. In Key Bank,  
12 the governing loan documents included choice of law clauses in favor of Alaska law.  
13 The Supreme Court held these clauses did not incorporate Alaska’s deficiency  
14 statutes to govern a trustee’s sale of Nevada real estate. In contrast, the governing  
15 loan documents in Mardian involved choice of law clauses in favor of Nevada law.  
16 The Supreme Court held that these clauses could incorporate Nevada’s deficiency  
17 statutes to govern a trustee’s sale of Arizona real estate. In other words, Key Bank  
18 involved a choice of law clause that tried to “import” another state’s deficiency  
19 statutes into Nevada, whereas Mardian involved a clause that tried to “export”  
20 Nevada’s deficiency statutes to another state. The property in this case, like the  
21 property in Key Bank, is located in Nevada. Therefore, this case falls within the rule  
22 from Key Bank and is governed by Nevada’s six-month statute of limitations.<sup>3</sup>

23 Third, Nevada courts adhere to the doctrine of stare decisis. See Miller v.  
24 Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (“[U]nder the doctrine of stare  
25 decisis, we will not overturn [precedent] absent compelling reasons for so doing. Mere  
26 disagreement does not suffice.”); Stocks v. Stocks, 64 Nev. 431, 438, 183 P.2d 617, 620

27 <sup>3</sup> Notably, the practical result in both Key Bank and Mardian was that Nevada’s six-  
28 month statute of limitations applied.

(1947) (noting that stare decisis “has long been considered indispensable to the due administration of justice” and that “a question once deliberately examined and decided should be considered as settled.”); Kapp v. Kapp, 31 Nev. 70, 73, 99 P. 1077, 1078 (1909) (noting that precedent “should not be unsettled, except for very weighty and conclusive reasons.”) (citation omitted). Given Nevada’s strong adherence to stare decisis, if the Mardian court had intended to overrule the central holding of Key Bank, it would have said so and would have provided specific reasons for doing so. However, Mardian does not purport to overrule the central holding of Key Bank; it never mentions this holding. The parties in Mardian never even discussed Key Bank in their appellate briefs. See Appellants’ Opening Brief (Jun. 27, 2013); Respondents’ Answering Brief (Jul. 25, 2013); Appellants’ Reply Brief (Aug. 26, 2013). The Nevada Supreme Court does not typically overrule its precedent by ignoring it. Therefore, this case is governed by Key Bank and is subject to Nevada’s six-month statute of limitations.

4. **Even if the two decisions actually conflict, Key Bank controls over Mardian under principles of stare decisis.**

For the reasons explained above, Key Bank and Mardian do not conflict. Therefore, this case is governed by Key Bank and there is no need to decide which case takes precedence over the other. However, assume for the sake of argument that there is an actual conflict between Key Bank and Mardian. In other words, assume that Key Bank holds that a choice of law provision never incorporates the chosen jurisdiction’s deficiency statutes, regardless of where the subject property is located. Also assume that Mardian holds that a choice of law provision always incorporates the chosen jurisdiction’s deficiency statutes, regardless of where the property is located.

Where two precedents in the same jurisdiction conflict, but the later-decided precedent does not purport to overrule the earlier one, the earlier decision controls. See Alcorn Cty. v. U.S. Interstate Supplies, 731 F.2d 1160, 1166 (5th Cir. 1984) (“In

1 choosing between conflicting precedents, this court has held that the older rule is  
2 presumptively correct.”); cf. McMellon v. United States, 387 F.3d 329, 332-33 (4th Cir.  
3 2004) (“[A]pplication of the basic rule that one panel cannot overrule another requires  
4 a panel to follow the earlier of the conflicting opinions.”); Hiller v. Oklahoma, 327  
5 F.3d 1247, 1251 (10th Cir. 2003) (same); Walker v. Mortham, 158 F.2d 1177, 1188-89  
6 (11th Cir. 1998) (same); Newell Cos. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir.  
7 1988) (same); O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 354 (3d Cir. 1981) (same).

8 Here, Key Bank was decided before Mardian. Since Mardian does not purport  
9 to overrule Key Bank, Key Bank is presumptively correct. Unless and until the  
10 Supreme Court actually repudiates Key Bank, this dispute remains governed by Key  
11 Bank and by Nevada’s six-month statute of limitations.<sup>4</sup> Accordingly, defendants’  
12 motion to dismiss must be denied.

13 **B. AFCU is entitled to partial summary judgment because there is no**  
14 **genuine dispute that defendants are liable for a deficiency under the**  
15 **Loan.**

16 For the reasons explained above, defendants are not entitled to judgment in  
17 their favor. Further, as explained below, AFCU is entitled to partial summary

---

18 <sup>4</sup> Even if Mardian had actually overruled Key Bank, the Mardian decision would not  
19 apply retroactively to the transaction in this case. The Loan in this case was  
20 originated in 2002, when Key Bank was indisputably good law. Mardian was not  
21 decided until 2015. When deciding whether to limit a new rule of law to prospective  
22 application, the Nevada Supreme Court considers three factors: “(1) the decision to be  
23 applied nonretroactively must establish a new principle of law, either by overruling  
24 clear past precedent on which litigants may have relied, or by deciding an issue of  
25 first impression whose resolution was not clearly foreshadowed; (2) the court must  
26 weigh the merits and demerits in each case by looking to the prior history of the rule  
27 in question, its purpose and effect, and whether retrospective operation will further  
28 or retard its operation; and (3) courts consider whether retroactive application could  
produce substantial inequitable results.” Breithaupt v. USAA Prop. & Cas. Ins. Co.,  
110 Nev. 31, 35, 867 P.2d 402, 405 (1994) (internal citations and quotation marks  
omitted). Assuming that Mardian overrules Key Bank, the first Breithaupt factor is  
easily satisfied. The second factor also favors non-retroactivity because AFCU was  
entitled to rely on Key Bank’s explicit holding that a choice of law clause does not  
incorporate another state’s deficiency statutes where the statutes do not purport to  
govern a Nevada sale. And third, retroactively nullifying Key Bank would produce  
substantial inequitable results because it would permit the defendants to avoid  
liability for a multi-million dollar commercial loan which they are otherwise clearly  
required to repay.



1 judgment on the issue of defendants' liability. Nevada law allows the beneficiary of a  
2 deed of trust to pursue the trustor under the deed of trust for a deficiency judgment.  
3 "[U]pon application of the...beneficiary of the deed of trust within 6 months after the  
4 date of the foreclosure sale and after the required hearing, the court shall award a  
5 deficiency judgment to the...beneficiary of the deed of trust if it appears from the  
6 sheriff's return or the recital of consideration in the trustee's deed that there is a  
7 deficiency of the proceeds of the sale and a balance remaining due to the...beneficiary  
8 of the deed of trust..." NRS 40.455(1) (2012). "Before awarding a deficiency  
9 judgment under NRS 40.455, the court shall hold a hearing and shall take evidence  
10 presented by either party concerning the fair market value of the property sold as of  
11 the date of foreclosure sale." NRS 40.457(1) (2012). "After the hearing, the court  
12 shall award a money judgment against the debtor, guarantor or surety who is  
13 personally liable for the debt." NRS 40.459(1) (2012). The amount of the deficiency  
14 judgment is the least of three amounts:

15 The court shall not render judgment for more than:

- 16 (a) The amount by which the amount of the  
17 indebtedness which was secured exceeds the fair  
18 market value of the property sold at the time of the  
19 sale, with interest from the date of the sale;  
20 (b) The amount which is the difference between the  
21 amount for which the property was actually sold and  
22 the amount of the indebtedness which was secured,  
23 with interest from the date of sale; or  
24 (c) If the person seeking the judgment acquired the  
25 right to obtain the judgment from a person who  
26 previously held that right, the amount by which the  
27 amount of the consideration paid for that right  
28 exceeds the fair market value of the property sold at  
the time of sale or the amount for which the property  
was actually sold, whichever is greater, with interest  
from the date of sale and reasonable costs;

whichever is the lesser amount.

NRS 40.459(1)(a)-(c) (2012).

1 Here, there is no genuine dispute that defendants borrowed the Loan from  
2 AFCU, that they defaulted by failing to make payments, that the Property was sold,  
3 and that a deficiency remained after the Sale. Accordingly, AFCU is entitled to  
4 summary judgment as to defendants' liability, with the precise amount of the  
5 deficiency judgment to be determined at a future hearing on the Property's fair  
6 market value.

7 First, there is no genuine dispute that defendants borrowed the Loan from  
8 AFCU. The Loan Agreement and Note show that defendants borrowed a commercial  
9 loan for \$2,900,000 from AFCU in 2002. Ex. 2-3.<sup>5</sup> Further, the Deed of Trust  
10 demonstrates that the Loan was secured by the Property. Ex. 4 at 020 & 026.<sup>6</sup>

11 Second, there is no genuine dispute that defendants defaulted under the Loan.  
12 The Notice of Default shows that defendants failed to make monthly payments of  
13 principal and interest beginning with the payment due November 30, 2010. Ex. 6 at  
14 034.

15 Third, there is no genuine dispute that a trustee's sale of the Property was  
16 held. The Trustee's Deed shows that the Property was sold on October 4, 2012. Ex. 8  
17 at 042.<sup>7</sup> It also shows that AFCU bought the Property with a credit bid of  
18 \$1,215,000.00. Id.

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19 <sup>5</sup> These documents are authenticated by the Declaration of Shari Cheney. Ex. 1 at  
20 002 ¶¶ 5-6. Because they are written contracts, they have independent legal  
21 significance and are not subject to the hearsay rule. AFCU is offering these  
22 documents to show that AFCU and defendants entered a loan agreement, not to show  
that the statements contained in the agreement are true. Cf. NRS 51.035 (hearsay is  
"a statement offered in evidence to prove the truth of the matter asserted...").

23 <sup>6</sup> The Deed of Trust, Notice of Default, and Trustee's Deed are publicly recorded  
24 property instruments. Therefore, they are self-authenticating and are not subject to  
the hearsay rule. See NRS 51.215 & 52.085.

25 <sup>7</sup> The statute of limitations for challenging the Sale expired 90 days later, on January  
26 2, 2013. See NRS 107.080(5)(b) (2012). Further, the Trustee's Deed recites that the  
27 trustee "has complied with all applicable statutory requirements of the State of  
28 Nevada and performed all duties required by the Deed of Trust." Ex. 8 at 042. These  
recitals are conclusive under the terms of the Deed of Trust and under governing  
Nevada law. See Ex. 4 at 023 ¶ 19 (provision of Deed of Trust stating that recitals in  
Trustee's Deed "of any matters or facts shall be conclusive proof of the truthfulness

(continued...)

1 Fourth, there is no genuine dispute that defendants' indebtedness under the  
2 Loan exceeded the \$1,215,000.00 credit bid that AFCU submitted at the sale.  
3 AFCU's authenticated business records show the total indebtedness was at least  
4 \$3,628,010.34 as of October 4, 2012. Ex. 9 at 047.<sup>8</sup>

5 For these reasons, AFCU is entitled to summary judgment as to defendants'  
6 liability for a deficiency judgment. Per NRS 40.457(1), the Court should reserve a  
7 decision on the amount of the deficiency until after it determines the Property's fair  
8 market value.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court should deny defendants' motion to dismiss  
11 and enter partial summary judgment for AFCU as to defendants' liability.

12 Dated: September 12, 2016

BALLARD SPAHR LLP

By: /s/ Matthew D. Lamb

Abran E. Vigil  
Nevada Bar No. 7548  
Matthew D. Lamb  
Nevada Bar No. 12991  
100 North City Parkway, Suite 1750  
Las Vegas, Nevada 89106

*Attorneys for Plaintiff*

19  
20  
21  
22 (...continued)  
23 thereof."); NRS 107.030 (2002) (parties may agree in deed of trust that recitals in  
24 trustee's deed "of default, and of recording notice of breach and election of sale, and of  
25 the elapsing of the 3-month period, and of the giving of notice of sale, and of a  
26 demand by beneficiary, his heirs or assigns, that such sale should be made, shall be  
conclusive proof of such default, recording, election, elapsing of time, and of the due  
giving of such notice, and that the sale was regularly and validly made on due and  
proper demand by beneficiary, his heirs and assigns; and any such deed or deeds with  
such recitals therein shall be effectual and conclusive against grantor, his heirs and  
assigns, and all other persons...").

27 <sup>8</sup> The Declaration of Shari Cheney authenticates this document and establishes that  
28 it is a business record under NRS 51.135. Ex. 1 at 002 ¶ 7.

**CERTIFICATE OF SERVICE**

Pursuant to N.R.C.P. 5(b), I certify that on September 12, 2016, I electronically served a true and correct copy of **Plaintiff's Opposition to Motion to Dismiss and Counter-Motion for Partial Summary Judgment** to the following:

REID RUBINSTEIN & BOGATZ

|                   |                    |
|-------------------|--------------------|
| Ariana Gennaro    | Agennaro@rrblf.com |
| Charles M. Vlasic | cvlasic@rrblf.com  |
| Kristee Kallas    | kkallas@rrblf.com  |
| Scott Bogatz      | SBogatz@rrblf.com  |

*Counsel for Defendants*

/s/ Sarah Walton  
An employee of BALLARD SPAHR LLP

# Exhibit 1



C A ATL F I C E

1. I have the following:

1. I am a Commercial Real Estate Manager employed by a firm in America  
retained under contract with AP.

2. I make this declaration in support of C's statement of  
the amount of the debt owed by defendant to the Plaintiff and  
under contract.

3. In my position as a Commercial Real Estate Manager with CUI I am  
familiar with AP's accounting system and all business as recorded are  
kept in the regular course of business.

This case relates to a 2012 commercial loan which was borrowed  
including the defendant in this case borrowed from PC the loan.

Exhibit 2 to the Opposition and Counter Motion is an accurate copy of  
the documents between AP and defendant.

Exhibit 3 to the Opposition and Counter Motion is an accurate copy of  
the documents between AP and defendant.

Exhibit 4 to the Opposition and Counter Motion is an accurate copy of a  
payoff statement which AP generated for the Loan on April 3, 2013. The payoff  
statement is a compilation of the amounts owed under the Loan as of 4/2/13.  
These figures are provided by a person or persons with knowledge of the amounts  
owed. It is part of C's regular business activity to maintain information on the  
amounts owed and to keep records of these amounts.


and that of the same kind.



1           8.     I declare under penalty of perjury under the law of the State of Nevada  
2 that the foregoing is true and correct.

3           Executed on: September 12, 2016

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SHARI CHENEY

Submitted by:

BALLARD SPAHR LLP

By: 

Abran E. Vigil  
Nevada Bar No. 7548  
Matthew D. Lamb  
Nevada Bar No. 12991  
100 North City Parkway, Suite 1750  
Las Vegas, Nevada 89106

*Attorneys for Plaintiff*

BALLARD SPAHR LLP  
100 NORTH CITY PARKWAY, SUITE 1750  
LAS VEGAS, NEVADA 89106  
(702) 471-7006 FAX (702) 471-7076

# Exhibit 2



## BUSINESS LOAN AGREEMENT

\*\*\*\*\*

Agreement Date: APR 11 2002

Reference:  
MESOLITE JAREZ, LLC

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.

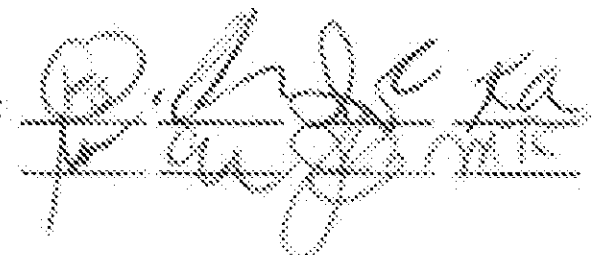
REPRESENTATIONS AND WARRANTIES. Borrower represents and warrants to Lender as of the date of this Agreement, and as of the date of each disbursement of Loan proceeds, the following:

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:



BUSINESS LOAN AGREEMENT  
(continued)

REFERENCE:

MESQUITE JABEZ, LLC

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

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:

[Signature] /CA  
[Signature] MK

**BUSINESS LOAN AGREEMENT**  
(continued)

REFERENCE:

MESQUITE JABEZ, LLC #

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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.

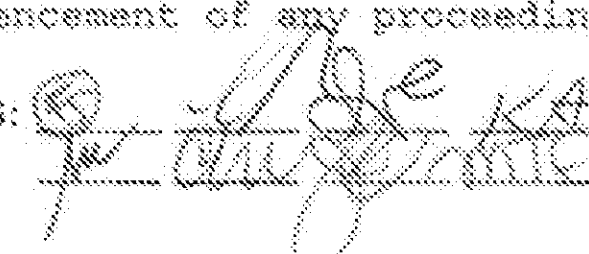
**Defaults as to Third Persons.** Failure to pay any indebtedness due any third person, and such failure shall continue beyond any applicable grace period, or the Borrower permits an event of default to exist under any agreement binding the Borrower.

**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 A

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.

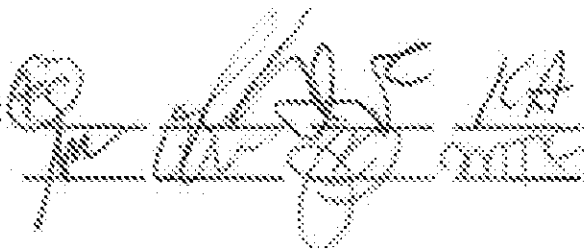
**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Agreement.

**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:





**BUSINESS LOAN AGREEMENT**  
(continued)

REFERENCE:

MESQUITE JABEZ, LLC

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.

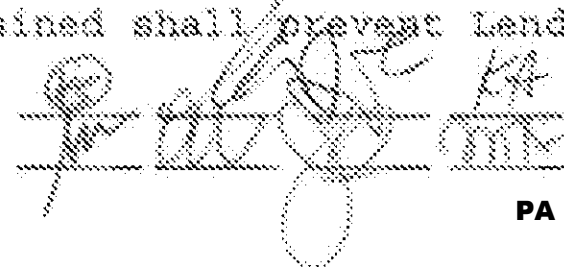
**Applicable Law.** This Agreement (and all loan documents in connection with this transaction) shall be governed by and construed in accordance with the laws of the State of Utah.

**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 'RJ' and 'ME', and a signature that looks like 'R. J. Jabez'.

BUSINESS LOAN AGREEMENT  
(continued)

REFERENCE:

MESQUITE JABEZ, LLC &

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:

Handwritten initials and signatures of the parties involved in the agreement.

AMERICA FIRST CREDIT UNION

The following is information that will be required (per the Business Loan Agreement) to be provided on an annual basis.

Borrowers:

- ☒ Current Tax Return.
- ☒ Current Balance Sheet and Income Statement.

Property:

- ☒ Rent Roll/Lease Summary
- ☒ Copy of Leases (if changed or renewed).
- ☒ Current operating statements showing income and expenses.
- ☒ Evidence of insurance.

Dated: 5/10/02

INITIALS:

|                    |           |
|--------------------|-----------|
| <u>[Signature]</u> | <u>B</u>  |
| <u>[Signature]</u> | <u>SE</u> |
| <u>[Signature]</u> | <u>al</u> |
| <u>[Signature]</u> | <u>mk</u> |



# Exhibit 3

# COMMERCIAL PROMISSOR NOTE

(SIMPLE INTEREST)

BORROWER(S):

LENDER:

Individuals:

Clifford Redekop, et al

AMERICA FIRST CREDIT UNION

PO BOX 9339

OGDEN, UTAH 84409

Entities:

Mesquite Jabez, LLC

PRINCIPAL AMOUNT: \$ 2,900,000

Account #: \_\_\_\_\_

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]

- (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, 2002. And continue on the same day of each month.

**MONTHLY PAYMENT AMOUNT: \$22,385**

Amortization Period: 25 Years

Loan Term: 10 Year(s)

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

Initials

[Signature]  
[Signature]

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, in and for the COUNTY OF  
CLARK, and the HONORABLE  
JERRY A. WIESE, District Court  
Judge,

Respondents,

And

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

Real Party in Interest.

Supreme Court Case No.:

Electronically Filed  
Jan 10 2017 09:34 a.m.

District Court Case No. 2016-095  
Elizabeth A. Brown  
Clerk of Supreme Court

**PETITIONERS' APPENDIX**

**REID RUBINSTEIN & BOGATZ**  
I. Scott Bogatz, Esq. (3367)  
Charles M. Vlasic III, Esq. (11308)  
Jaimie Stilz, Esq. (13772)  
300 S. 4<sup>th</sup> Street, Suite 830  
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sbogatz@rrblf.com  
cvlasic@rrblf.com  
jstilz@rrblf.com  
*Attorneys for Petitioners*

**CHRONOLOGICAL INDEX OF PETITIONERS' APPENDIX**

| <b>DESCRIPTION</b>  | <b>DATE<br/>FILED</b> | <b>PAGE NOS.</b>     |
|---|-----------------------|----------------------|
| Complaint   | 04/04/13              | 1 PA 000001 – 000004 |
| Affidavit of Service                                      | 06/19/13              | 1 PA 000005 – 000006 |
| Affidavit of Service                                      | 06/25/13              | 1 PA 000007 – 000008 |
| Affidavit of Service                                      | 06/27/13              | 1 PA 000009 – 000010 |
| Affidavit of Service                                      | 06/27/13              | 1 PA 000011 – 000012 |
| Affidavit of Service                                      | 07/01/13              | 1 PA 000013 – 000014 |
| Acceptance of Service                                     | 07/29/13              | 1 PA 000015 – 000015 |
| Motion to Dismiss   | 07/29/13              | 1 PA 000016 – 000037 |
| Opposition to Motion to Dismiss                           | 08/20/13              | 1 PA 000038 – 000064 |
| Reply in Support of Motion to Dismiss                     | 08/27/13              | 1 PA 000065 – 000072 |
| Order Granting Motion to Dismiss                          | 09/09/13              | 1 PA 000073 – 000078 |
| Notice of Entry of Order Granting Motion to Dismiss       | 09/10/13              | 1 PA 000079 – 000087 |
| Notice of Appeal  | 09/27/13              | 1 PA 000088 – 000089 |
| Order Reversing District Court                            | 09/24/15              | 1 PA 000090 – 000098 |
| Second Motion to Dismiss                                  | 08/24/16              | 1 PA 000099 – 000115 |
| Opposition to Second Motion to Dismiss                    | 09/13/16              | 1 PA 000116 – 000179 |
| Reply in Support of Second Motion to Dismiss              | 10/20/16              | 1 PA 000180 – 000190 |
| Order Denying Second Motion to Dismiss                    | 12/14/16              | 1 PA 000191 – 000192 |
| Notice of Entry of Order Denying Second Motion to Dismiss | 12/21/16              | 1 PA 000193 – 000197 |

## ALPHABETICAL INDEX OF PETITIONERS' APPENDIX

| DESCRIPTION   | DATE<br>FILED | BATES NO.            |
|---|---------------|----------------------|
| Acceptance of Service                                     | 07/29/13      | 1 PA 000015 – 000015 |
| Affidavit of Service                                      | 06/19/13      | 1 PA 000005 – 000006 |
| Affidavit of Service                                      | 06/25/13      | 1 PA 000007 – 000008 |
| Affidavit of Service                                      | 06/27/13      | 1 PA 000009 – 000010 |
| Affidavit of Service                                      | 06/27/13      | 1 PA 000011 – 000012 |
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| Notice of Entry of Order Denying Second Motion to Dismiss | 12/21/16      | 1 PA 000193 – 000197 |
| Notice of Entry of Order Granting Motion to Dismiss       | 09/10/13      | 1 PA 000079 – 000087 |
| Opposition to Motion to Dismiss                           | 08/20/13      | 1 PA 000038 – 000064 |
| Opposition to Second Motion to Dismiss                    | 09/13/16      | 1 PA 000116 – 000179 |
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| Reply in Support of Motion to Dismiss                     | 08/27/13      | 1 PA 000065 – 000072 |
| Reply in Support of Second Motion to Dismiss              | 10/20/16      | 1 PA 000180 – 000190 |
| Second Motion to Dismiss                                  | 08/24/16      | 1 PA 000099 – 000115 |



CLERK OF THE COURT

1 COMP  
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  
10 DISTRICT COURT  
CLARK COUNTY, NEVADA

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

13 Plaintiff,

14 v.

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

18 Defendants.

Case No.: A - 13 - 679511 - C

Dept. No.: XXX

**Arbitration Exemption Claimed:**

(Amount in Controversy Exceeds \$50,000)

19  
20 **COMPLAINT**

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

23 **PARTIES, JURISDICTION AND VENUE**

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

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

28 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.

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

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

**PRAYER FOR RELIEF**

WHEREFORE, America First requests the following relief:

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

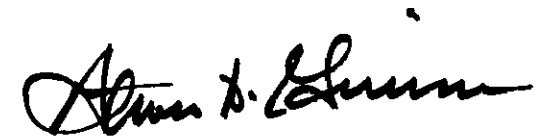
Dated this 1<sup>st</sup> day of April, 2013.

BALLARD SPAHR LLP

By: 

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*



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

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11 Email: [parrys@ballardspahr.com](mailto:parrys@ballardspahr.com)

12 Email: [mullinert@ballardspahr.com](mailto: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**

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

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

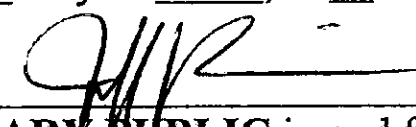
9 on the 14 day of JUNE, 2013, and  
10 served the same on this 16 day of JUNE, 2013 at 5:51 PM by:

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

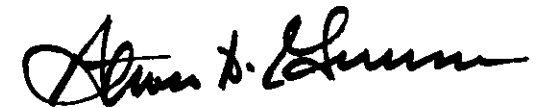
14 ..... CONTROL #21025848

15 SUBSCRIBED AND SWORN to before me this  
16 18<sup>TH</sup> Day of JUNE, 2013.

17   
18 (Server Signature)

19   
20 NOTARY PUBLIC in and for  
21 County of CLARK, State of NEVADA  
22 My Commission Expires : 4/2/17 (SEAL)





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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Facsimile: (702) 471-7070  
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Email: [mullinert@ballardspahr.com](mailto: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**

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

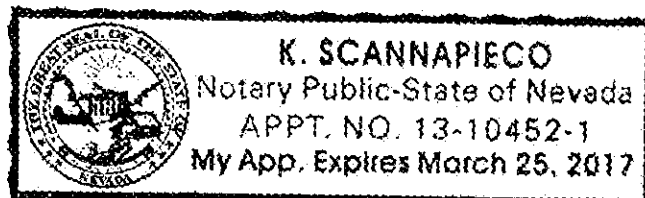
15 SUBSCRIBED AND SWORN to before me this  
16 24<sup>th</sup> Day of JUNE, 2013.

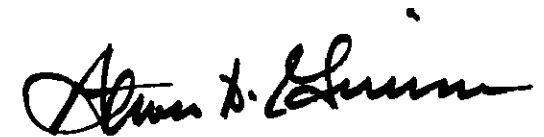
17 K. Scannapieco

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

1 AOS

Stanley W. Parry, Esq.

2 Nevada Bar No. 1417

Timothy R. Mulliner

3 Nevada Bar No. 10692

BALLARD SPAHR LLP

4 100 North City Parkway, Suite 1750

5 Las Vegas, Nevada 89106

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6 Facsimile: (702) 471-7070

Email: [parrys@ballardspahr.com](mailto:parrys@ballardspahr.com)

7 Email: [mullinert@ballardspahr.com](mailto:mullinert@ballardspahr.com)

8 *Attorneys for Plaintiff*

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 )  
17 FARRELL, an individual; KATHY )  
18 ARRINGTON, an individual; and AUDIE )  
19 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**

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

11 ☒ Serving Defendant Isaac Farrell, an individual by personally delivering and leaving a copy at 67  
12 Incline Village Court, Henderson, Nevada 89074 with Judy R. - Gate Guard (Caucasian, Female, 50's,  
13 5'8", 220 lbs., Strawberry Blond hair, Brown eyes, Glasses), a person of suitable age and discretion  
14 authorized to accept service of process. Pursuant to NRS 14.090.

15 CONTROL #21026448

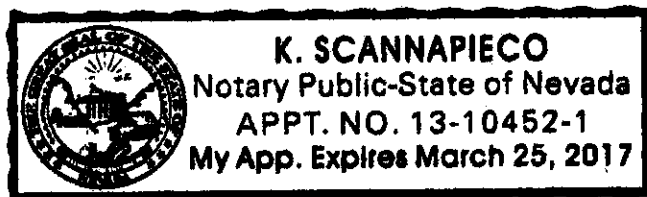
16 SUBSCRIBED AND SWORN to before me this  
17 26th Day of JUNE, 2013.

18 K. Scannapieco

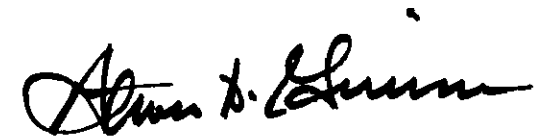
19 NOTARY PUBLIC in and for  
20 County of CLARK, State of NEVADA

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

22 Judith Mae All  
23 (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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Telephone: (702) 471-7000  
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Email: [parrys@ballardspahr.com](mailto:parrys@ballardspahr.com)  
Email: [mullinert@ballardspahr.com](mailto:mullinert@ballardspahr.com)

*Attorneys for Plaintiff*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

AMERICA FIRST FEDERAL CREDIT )  
UNION, a federally chartered credit union, )  
 )  
Plaintiff, )  
vs. )  
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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**

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  
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8 SUMMONS; COMPLAINT

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

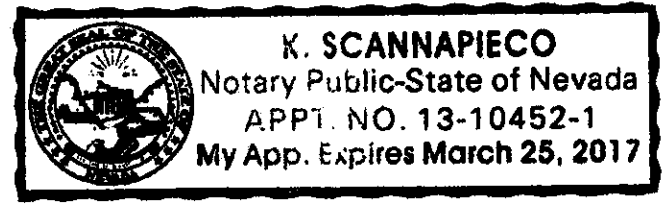
11 ☒ Serving Defendant Myra Taigman-Farrell, an individual by personally delivering and leaving a copy  
12 at 67 Incline Village Court, Henderson, Nevada 89074 with Judy R. - Gate Guard (Caucasian, Female,  
13 50's, 5'8", 220 lbs., Strawberry Blond hair, Brown eyes, Glasses), a person of suitable age and discretion  
14 authorized to accept service of process. Pursuant to NRS 14.090.

CONTROL #21026447

15 SUBSCRIBED AND SWORN to before me this  
16 20th Day of JUNE, 2013.

  
(Server Signature)

17 K. Scannapieco  
18 NOTARY PUBLIC in and for  
19 County of CLARK, State of NEVADA  
20 My Commission Expires : 3/25/17 (SEAL)





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  
Las Vegas, Nevada 89106  
Telephone: (702) 471-7000  
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Email: [mullinert@ballardspahr.com](mailto: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**

**Person Who Served Papers:**

**KEVIN BLANDFORD,**

**Service Provided for:**

**NATIONWIDE LEGAL LLC  
720 S. 4<sup>th</sup> 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:

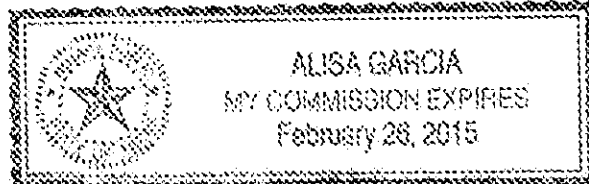
11 ☒ Serving Defendant Audie Embestro, an individual by personally delivering and leaving a copy at  
12 360 Nueces Street, Austin, Texas with Christine Lemchi - Concierge (African American, Female, 23  
13 yrs., 160-200 lbs., 5'11", Black hair, Brown eyes), a person of suitable age and discretion authorized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

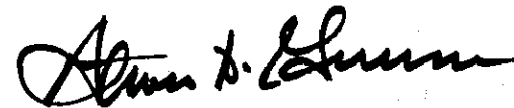
15 ..... CONTROL #21026251

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

18 (Signature)  
19 (Server Signature)

20 Al. Garcia  
21 NOTARY PUBLIC in and for  
22 County of Travis, State of Texas  
23 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

7 parrys@ballardspahr.com

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  
16 FARRELL, an individual; KATHY  
17 ARRINGTON, an individual; and AUDIE  
EMBESTRO, an individual; DOE Individuals 1  
to 10; and ROE Business Entities 1 to 10.

18 Defendants.

Case No.: A-13-679511-C

Dept. No.: XXX

ACCEPTANCE OF SERVICE

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

23 Dated this 9<sup>th</sup> day of July.

24 BOGATZ LAW GROUP

25 By: 

26 Charles M. Vlasic III, Esq.

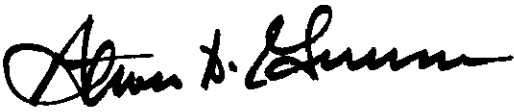
Nevada Bar No. 11308

27 3800 Howard Hughes Pkwy., Ste. 1850

Las Vegas, Nevada 89169

28 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  
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[cvlasic@isbmv.com](mailto: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.**<sup>1</sup>

**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”).”<sup>2</sup> “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 . . . .”<sup>3</sup>

. . .

. . .

. . .

---

<sup>1</sup> 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).

<sup>2</sup> See Complaint on file herein at ¶ 10.

<sup>3</sup> 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:<sup>4</sup>

**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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

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

**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)<sup>9</sup>, America First has impermissibly filed the underlying lawsuit in a Nevada court, seeking to recover against Defendants under Nevada law.<sup>10</sup>

---

<sup>4</sup> 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).

<sup>5</sup> See Loan Agreement attached hereto as **Exhibit A** at p. 6.

<sup>6</sup> See **Exhibit A** at p. 6.

<sup>7</sup> See Note attached hereto as **Exhibit B** at p. 3.

<sup>8</sup> See Complaint on file herein at ¶ 1.

<sup>9</sup> See Complaint on file herein at ¶ 1.

<sup>10</sup> 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]henver 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**  
11            **NOT HAVE SUBJECT MATTER JURISDICTION OVER THIS DISPUTE.**

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

24            The Breman case is instructive here. In Breman, the parties entered into a commercial  
25     contract wherein they agreed to have any disputes among themselves heard by a London court.  
26     407 U.S. at 2. There, the United States Supreme Court held that the clause at issue should be  
27     enforced, explaining “[t]he choice of that forum was made in an arm’s-length negotiation by  
28     experienced and sophisticated businessmen, and absent some compelling and countervailing  
   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.*”<sup>11</sup> 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.<sup>12</sup> 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 . . .

25 . . .

26 \_\_\_\_\_  
27 <sup>11</sup> See Exhibit A at p. 6 (emphasis added).

28 <sup>12</sup> 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. Vlastic  
I. Scott Bogatz, Esq.  
Nevada Bar No. 3367  
Charles M. Vlastic 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:

*[Handwritten initials]*

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:

Handwritten initials and signatures, including "KA" and "MK", over a grid of lines.

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.

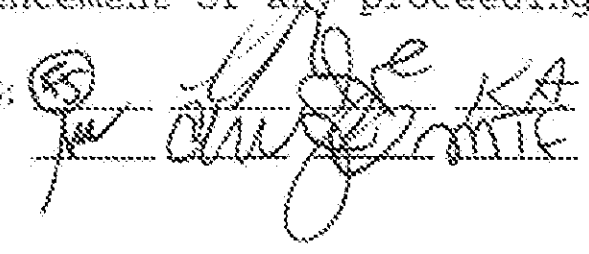
Defaults as to Third Persons. Failure to pay any indebtedness due any third person, and such failure shall continue beyond any applicable grace period, or the Borrower permits an event of default to exist under any agreement binding the Borrower.

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:

*[Handwritten initials and signatures]*

BUSINESS LOAN AGREEMENT  
(continued)

REFERENCE:

MESQUITE JAREZ, 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.

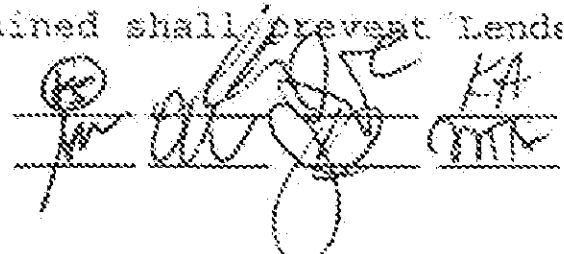
**Applicable Law.** This Agreement (and all loan documents in connection with this transaction) shall be governed by and construed in accordance with the laws of the State of Utah.

**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:

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BUSINESS LOAN AGREEMENT  
(continued)

REFERENCE:

MESQUITE JABEZ, LLC #718299-LL

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:

③ AK  
AK AK

**EXHIBIT B**

**EXHIBIT B**

# COMMERCIAL PROMISSORY NOTE

(SIMPLE INTEREST)

BORROWER(S):

LENDER:

Individuals:

Clifford Redekop, et al

AMERICA FIRST CREDIT UNION

PO BOX 9339

OGDEN, UTAH 84409

Entities:

Mesquite Jabez, LLC

PRINCIPAL AMOUNT: \$ 2,900,000

Account #: 718299-1.1

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]

- (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 Year(s)

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

Initials

*[Handwritten signatures and initials]*



## 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]*

MISCELLANEOUS PROVISIONS.

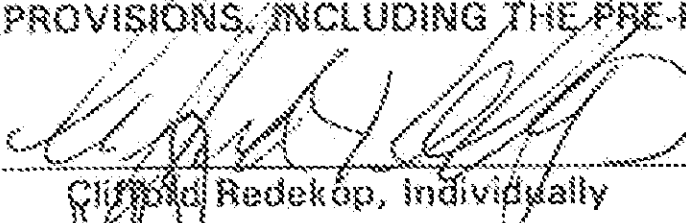
Unless the parties agree otherwise, payments will be applied first to any collection costs, then to any late charges, then to accrued unpaid interest, and any remaining amount to principal.

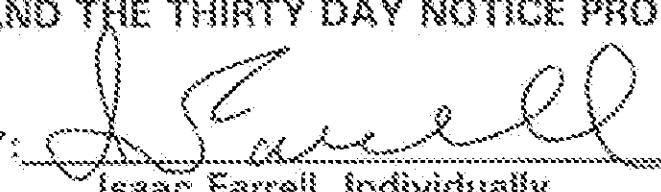
Borrower(s) waives presentment, demand for payment, protest, notice of dishonor, and notice of every other kind. The obligations of Borrower(s) under this Note are joint and several.

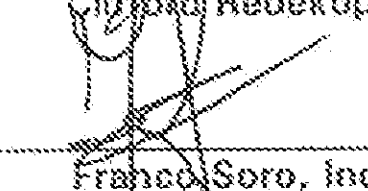
NOTE: A WRITTEN NOTICE IS REQUIRED THIRTY DAYS PRIOR TO ANY PAY-OFF, EXCEPTING THE STATED MATURITY DATE. IF A THIRTY DAY NOTICE IS NOT GIVEN, THEN INTEREST CHARGES WILL BE ASSESSED EQUIVALENT TO A THIRTY DAY NOTICE PERIOD. THIS IS IN ADDITION TO THE STATED PRE-PAYMENT PENALTY.

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.

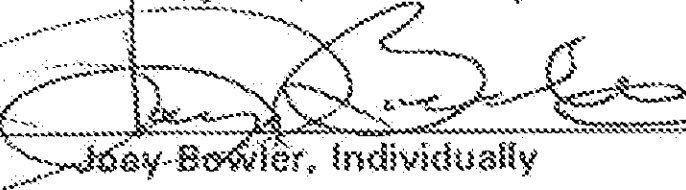
THE UNDERSIGNED ACKNOWLEDGE THEY HAVE READ THIS PROMISSORY NOTE IN ITS ENTIRETY, WITH ALL ITS PROVISIONS, INCLUDING THE PRE-PAYMENT PENALTY AND THE THIRTY DAY NOTICE PROVISION.

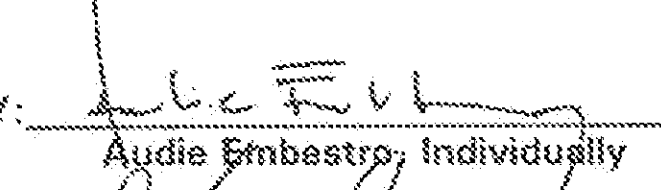
BY:   
Clifford Redekop, Individually

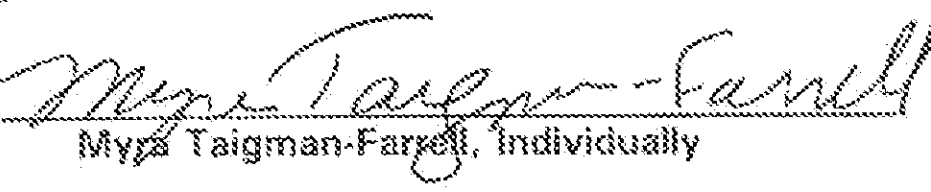
BY:   
Isaac Farrell, Individually

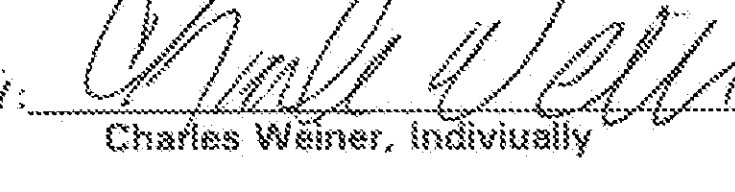
BY:   
Franco Soro, Individually

BY:   
Kathy Arrington, Individually

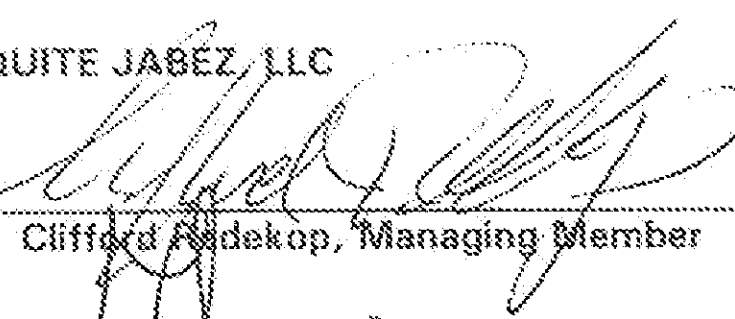
BY:   
Joey Bowler, Individually

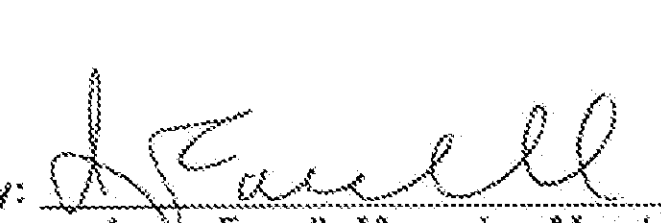
BY:   
Audie Embestro, Individually

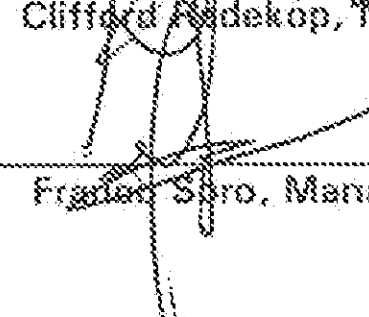
BY:   
Myra Taigman-Farrell, Individually

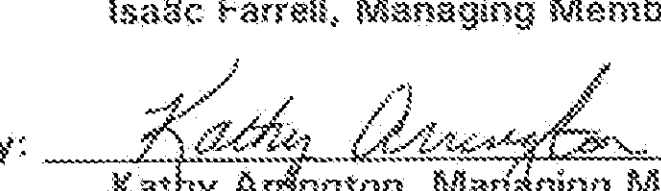
BY:   
Charles Weiner, Individually

BY: MESQUITE JABEZ, LLC

By:   
Clifford Redekop, Managing Member

By:   
Isaac Farrell, Managing Member

By:   
Franco Soro, Managing Member

By:   
Kathy Arrington, Managing Member

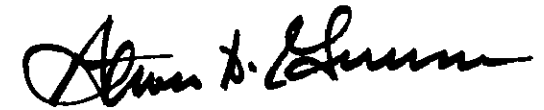
REFERENCE: MESQUITE JABEZ, LLC #718299-1.1

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

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CLERK OF THE COURT

**OPPS**

Stanley W. Parry, Esq.  
Nevada Bar No. 1417  
Timothy R. Mulliner  
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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.

## II. STATEMENT OF FACTS

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

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

**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.

(Loan Agreement, a copy of which is attached to Defendant's Mot. as Exh. A., at 6.)

Defendants' Motion also relies on the last sentence of the following paragraph from the Note:

Lender may pay someone else to help collect this Note if Borrower(s) does not pay. Borrower(s) will also 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) 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.<sup>1</sup>

### 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.)

---

<sup>1</sup> 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 19<sup>th</sup> day of August, 2013.

BALLARD SPAHR LLP

By: 

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*



**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

20020411  
000069

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

7

**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 JW KA

20020411  
00069

(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.

Initials 

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 of 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 of 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

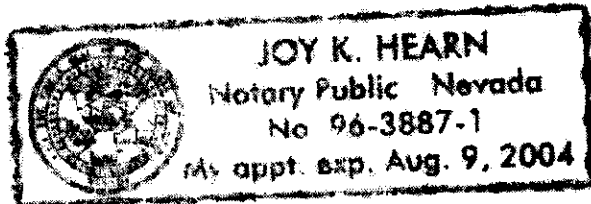
:ss

COUNTY OF

on the 10 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 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\_\_

\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



**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  
000070

001-18-702-018

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

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

**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 10<sup>th</sup> 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.

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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

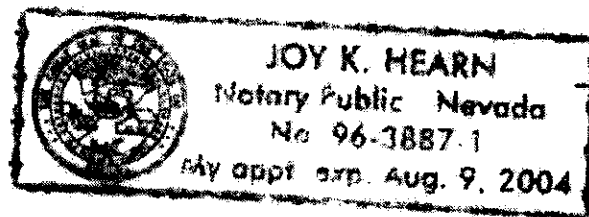
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COUNTY OF

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

**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,  
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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

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

(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.



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 of 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 of 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.

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.

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 it's 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 JF PS*
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 JF PS*
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

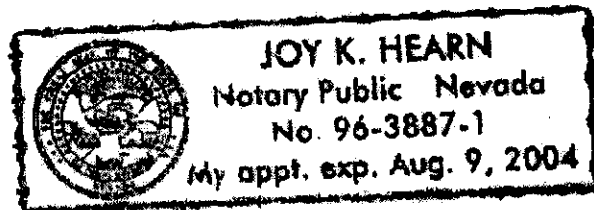
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COUNTY OF

on the 10 day of April A.D., 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 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\_\_

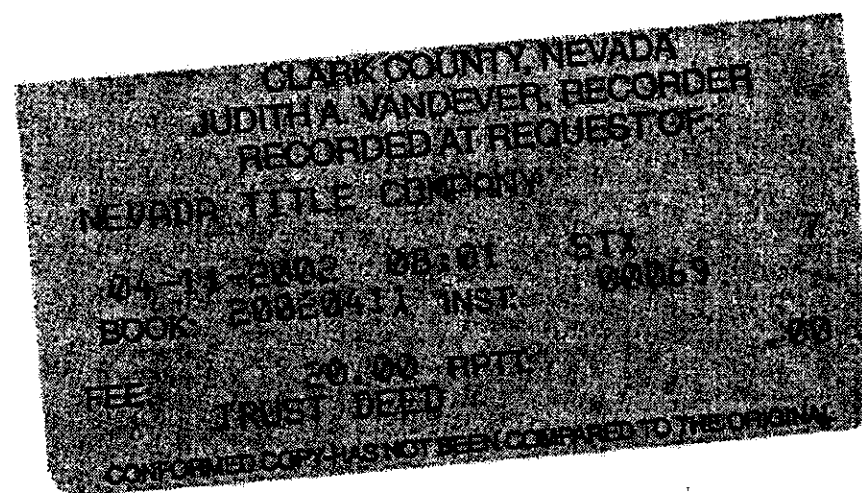
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\_\_\_\_\_

**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

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**DUE - ON - TRANSFER RIDER**

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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 10<sup>th</sup> 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

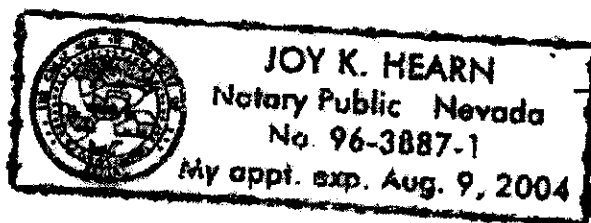
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COUNTY OF

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:

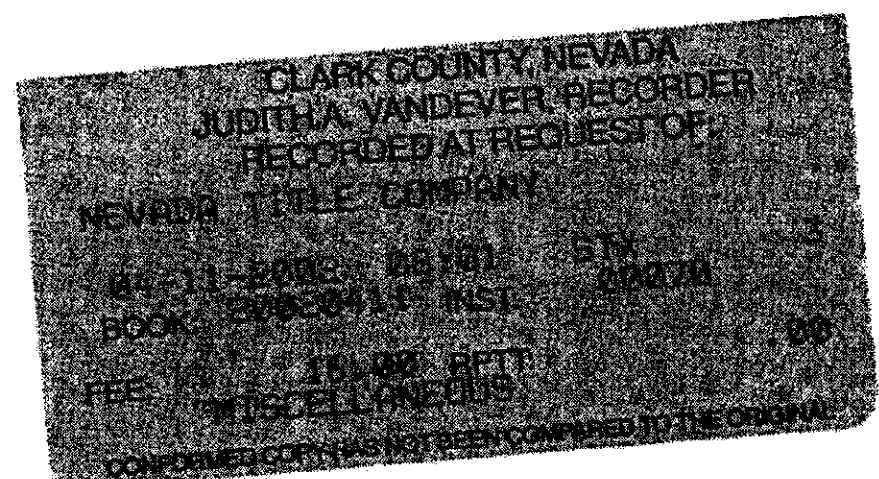


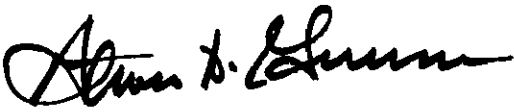
[Signature]  
Notary Public

**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**  
I. SCOTT BOGATZ, ESQ.  
Nevada Bar No. 3367  
CHARLES M. VLASIC III, ESQ.  
Nevada Bar No. 11308  
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[sbogatz@isbny.com](mailto:sbogatz@isbny.com)  
[cvlasic@isbny.com](mailto:cvlasic@isbny.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. INTRODUCTION**<sup>1</sup>

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

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<sup>1</sup> 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.”<sup>2</sup> 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 <sup>2</sup> 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*  
4 *promissory note for any deficiency which may occur.*

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

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

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

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

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

28 <sup>3</sup> 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).<sup>4</sup> 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.<sup>5</sup> It is also  
4 important to note that neither of these cases analyzed the same language contained in the  
5 underlying Loan Documents.<sup>6</sup> 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.<sup>7</sup> 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 <sup>4</sup> See August 20, 2013 Opposition to Motion to Dismiss at p. 5.

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

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

28 <sup>7</sup> 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).<sup>8</sup> 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.”<sup>9</sup> 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.<sup>10</sup>

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           <sup>8</sup> It is important to note that America First mischaracterizes the holding from the United States Supreme  
22 Court in Bremen.<sup>8</sup> 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           <sup>9</sup> *See* July 29, 2013 Motion to Dismiss at Exhibit A at p. 6 (emphasis added).

<sup>10</sup> *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.

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

### III. CONCLUSION

Given the foregoing, and as set forth more fully in the underlying Motion to Dismiss, this case must be dismissed because this Court does not have subject matter jurisdiction over this dispute. Pursuant to the express terms of the Loan Documents freely entered into by the parties hereto, only a Utah court has jurisdiction to entertain the claims brought by 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 27th day of August, 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 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

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*Alvin L. Shuman*

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"/> Voluntary Dis                   | <input type="checkbox"/> Stip Dis      | <input type="checkbox"/> Sum Jdgmt      |
| <input type="checkbox"/> Involuntary (stat) Dis          | <input type="checkbox"/> Stip Jdgmt    | <input type="checkbox"/> Non-Jury Trial |
| <input type="checkbox"/> Jdgmt on Arb Award              | <input type="checkbox"/> Default Jdgmt | <input type="checkbox"/> Jury Trial     |
| <input checked="" type="checkbox"/> Motion Dis (by deft) | <input type="checkbox"/> Transferred   |   |

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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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

---

25  
26  
27 <sup>1</sup> NRCP 12(b)(1).

28 <sup>2</sup> NRCP 12(h)(3).

<sup>3</sup> See Business Loan Agreement at pg. 6.

<sup>4</sup> 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.<sup>5</sup>

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

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 5<sup>th</sup> 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."<sup>7</sup>

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."<sup>8</sup> 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 <sup>5</sup> See Trust Deed, paragraphs 25-26, at pg. 5.

<sup>6</sup> See pg. 2 of the Commercial Promissory Note.

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

<sup>8</sup> 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.”<sup>9</sup>

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.”<sup>10</sup> 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.”<sup>11</sup>

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

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

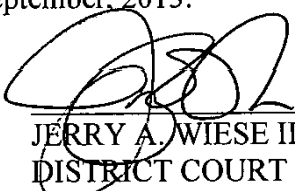
28 <sup>11</sup> See Defendant’s Reply at pg. 6, citing *Tandy Computer Leasing, a Div. of Tandy Electronics, Inc. v. Terina’s Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8, (1989).

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.

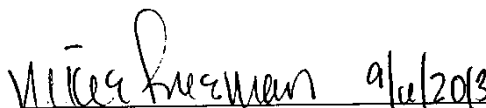
6  
7   
8 JERRY A. WIESE II  
9 DISTRICT COURT JUDGE, DEPT. XXX  
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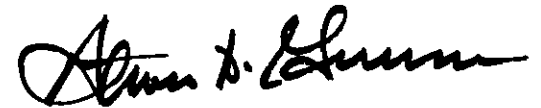
**CERTIFICATE OF SERVICE**

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@isbnnv.com](mailto:sbogatz@isbnnv.com)  
[cvlasic@isbnnv.com](mailto:cvlasic@isbnnv.com)  
7 *Attorneys for Defendants*

8 **DISTRICT COURT**  
9 **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;  
17 ISAAC FARRELL, an individual; KATHY  
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. Vlastic  
4 I. Scott Bogatz, Esq.  
5 Nevada Bar No. 3367  
6 Charles M. Vlastic 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 L. Lavin*

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"/> 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"/> Motion to Dis (by def) | <input type="checkbox"/> Transferred   |   |

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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  
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10  
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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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

26  
27 <sup>1</sup> NRCP 12(b)(1).

<sup>2</sup> NRCP 12(h)(3).

<sup>3</sup> See Business Loan Agreement at pg. 6.

<sup>4</sup> 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.<sup>5</sup>

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

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 5<sup>th</sup> 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."<sup>7</sup>

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."<sup>8</sup> 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 <sup>5</sup> See Trust Deed, paragraphs 25-26, at pg. 5.

26 <sup>6</sup> See pg. 2 of the Commercial Promissory Note.

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

<sup>8</sup> 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).

the security interest in the property that is being used to secure the note.”<sup>9</sup>

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

### CONCLUSIONS OF LAW.

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.

....

....

....

....

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

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

<sup>11</sup> 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.

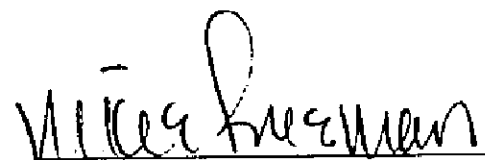
6   
7 \_\_\_\_\_  
8 JERRY A. WIESE II  
9 DISTRICT COURT JUDGE, DEPT. XXX

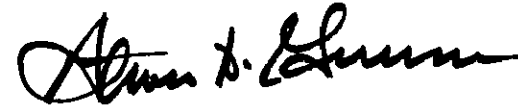
**CERTIFICATE OF SERVICE**

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**  
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*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, 2013<sup>1</sup>.

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*

<sup>1</sup> Notice of Entry was served on September 10, 2013.

1 **CERTIFICATE OF SERVICE**

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

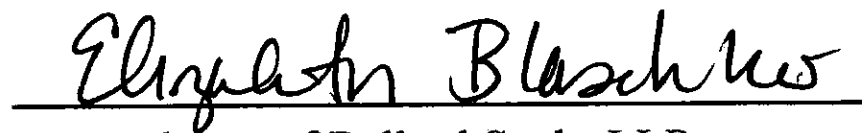
5 I. Scott Bogatz, Esq.  
6 BOGATZ LAW GROUP  
7 3800 Howard Hughes Parkway, Suite 1850  
8 Las Vegas, NV 89169

9 ☐ Facsimile Transmission

10 ☒ U.S. Mail, Postage Prepaid

11 ☐ E-mail

12 ☐ Certified Mail, Receipt No. \_\_\_\_\_, return receipt requested

13   
14 an Employee of Ballard Spahr LLP

Ballard Spahr LLP  
100 North City Parkway, Suite 1750  
Las Vegas, Nevada 89106-4617

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMERICA FIRST FEDERAL CREDIT  
UNION, A FEDERALLY CHARTERED  
CREDIT UNION,

Appellant,

vs.

FRANCO SORO, AN INDIVIDUAL;  
MYRA TAIGMAN-FARRELL, AN  
INDIVIDUAL; ISAAC FARRELL, AN  
INDIVIDUAL; KATHY ARRINGTON,  
AN INDIVIDUAL; AND AUDIE  
EMBESTRO, AN INDIVIDUAL,  
Respondents.

No. 64130

FILED

SEP 24 2015

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

Appeal from a district court order dismissing a deficiency judgment action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

*Reversed and remanded.*

Ballard Spahr, LLP, and Stanley W. Parry, Timothy R. Mulliner, and Matthew D. Lamb, Las Vegas,  
for Appellant.

Bogatz Law Group and I. Scott Bogatz and Charles M. Vlasic III, Las Vegas,  
for Respondents.

---

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

In this opinion, we must determine whether a contract clause stating that the parties “submit themselves to the jurisdiction of” another



state results in a mandatory forum selection clause requiring dismissal of the Nevada action. We hold that such a clause consenting to jurisdiction is permissive and therefore reverse the district court's order granting a motion to dismiss based on lack of subject matter jurisdiction in Nevada.

### *FACTS AND PROCEDURAL HISTORY*

In 2002, appellant America First Federal Credit Union (the credit union) loaned \$2.9 million, secured by real property in Mesquite, Nevada, to respondents (borrowers)<sup>1</sup> for the purchase of a liquor/mini-mart. The borrowers defaulted, and the credit union held a trustee's sale, resulting in a deficiency on the loan balance of approximately \$2.4 million. The Utah-based credit union sued the borrowers in Clark County to recover the deficiency.

The borrowers moved to dismiss the action under NRCP 12(b)(1), arguing that the credit union could not sue to recover the deficiency in Nevada and citing several clauses in the "Commercial Promissory Note" and "Business Loan Agreement" to support their argument. An "Applicable Law" clause in the loan agreement stated that "[t]his Agreement (and all loan documents in connection with this transaction) shall be governed by and construed in accordance with the laws of the State of Utah." The loan agreement also contained the following: "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." A clause in the note stated: "If there is a

---

<sup>1</sup>While eight individuals signed the note and loan agreement, the only borrowers in the instant action are Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro.

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

The district court agreed with the borrowers and granted the motion to dismiss. The district court found that the note and loan agreement “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. . . . [T]he language clearly enough identifies Utah as the forum[,] which they selected for purposes of subject matter jurisdiction.” This appeal followed.

### *DISCUSSION*

On appeal, the credit union argues that the district court erred in enforcing the clauses in question to preclude its complaint for a deficiency action.<sup>2</sup> More specifically, the credit union argues that the jurisdiction clauses here were permissive, and while the complaint could have been brought in Utah, the clauses do not mandate that Utah was the exclusive forum. In response, the borrowers contend that whether a forum selection clause is mandatory or permissive is a matter of contract interpretation, and therefore, the clauses are ambiguous and must be construed against the credit union as the contract drafter. Whether forum selection clauses may be mandatory or permissive is an issue of first impression for this court.

---

<sup>2</sup>Additionally, the credit union argues that Nevada’s six-month statute of limitations for recovery of deficiency judgments applies to the action, not Utah’s three-month statute of limitations. However, because the district court did not decide this issue, we do not address it here.

### *Standard of review*

This court reviews a district court's decision regarding subject matter jurisdiction de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009). Additionally, "[c]ontract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances." *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 127 Nev., Adv. Op. 38, 254 P.3d 641, 647-48 (2011). The objective of interpreting contracts "is to discern the intent of the contracting parties. Traditional rules of contract interpretation are employed to accomplish that result." *Davis v. Beling*, 128 Nev., Adv. Op. 28, 278 P.3d 501, 515 (2012) (citation and internal quotation marks omitted). This court initially determines whether the "language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Id.* An ambiguous contract is susceptible to more than one reasonable interpretation, and "[a]ny ambiguity, moreover, should be construed against the drafter." *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215-16, 163 P.3d 405, 407 (2007).

### *The district court erred when it dismissed the case based on the forum selection clauses*

The credit union argues that the clauses do not contain any mandatory language and, therefore, all of the forum selection clauses are merely permissive. We agree.

We have not yet distinguished between mandatory and permissive forum selection clauses. In *Tuxedo International, Inc. v. Rosenberg*, 127 Nev. 11, 251 P.3d 690 (2011), we reversed a district court's grant of a motion to dismiss based on the defendants' argument that any litigation must be brought in Peru. *Id.* at 14, 24-25, 251 P.3d at 692, 699.

There, we remanded the case to the district court to determine which of three separate forum selection clauses potentially controlled the dispute. *Id.* at 26, 251 P.3d at 699-700. In analyzing the clauses, we noted that one of the clauses contained both a consent to jurisdiction in Peru and a Peruvian choice-of-law provision. *Id.* at 22-23, 251 P.3d at 697. We then stated:

It can be argued, however, 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 [plaintiff] bringing its tort claims in the Nevada district court.

*Id.* at 23-24, 251 P.3d at 698 (second emphasis added). We also noted that another clause “resemble[d] a traditional exclusive forum selection clause,” containing language that “any action . . . must be brought in a court in the Country of Peru.” *Id.* at 24, 251 P.3d at 698. Thus, *Tuxedo International* observed the distinctions between mandatory and permissive forum selection clauses, but the facts of the case did not provide an opportunity for us to affirmatively adopt a rule. *See id.* at 26 n.5, 251 P.3d at 700 n.5.

Other state courts have distinguished between mandatory and permissive forum selection clauses. *See, e.g., Garcia Granados Quinones v. Swiss Bank Corp. (Overseas), S.A.*, 509 So. 2d 273, 274 (Fla. 1987) (recognizing that a mandatory jurisdiction clause requires “a particular forum be the exclusive jurisdiction for litigation,” while permissive

jurisdiction is merely a consent to jurisdiction in a venue (internal quotation marks omitted)); *Polk Cnty. Recreational Ass'n v. Susquehanna Patriot Commercial Leasing Co.*, 734 N.W.2d 750, 758-59 (Neb. 2007) (distinguishing a mandatory forum selection clause based on the words "shall be brought only in" a particular jurisdiction from a permissive forum selection clause where parties only "consent and submit to the jurisdiction" of other courts); *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 338-39 (W. Va. 2009) ("[T]o be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must either specify venue in mandatory language, or contain other language demonstrating the parties' intent to make jurisdiction exclusive."). For example, the Wisconsin Court of Appeals stated:

Clauses in which a party agrees to submit to jurisdiction are not necessarily mandatory. Such language means that the party agrees to be subject to that forum's jurisdiction *if sued there*. It does not prevent the party from bringing suit in another forum. The language of a mandatory clause shows more than that jurisdiction is *appropriate* in a designated forum; it unequivocally mandates *exclusive* jurisdiction. Absent specific language of exclusion, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere.

*Converting/Biophile Labs., Inc. v. Ludlow Composites Corp.*, 722 N.W.2d 633, 640-41 (Wis. Ct. App. 2006) (citations and internal quotation marks omitted).

Similarly, federal circuit courts generally agree that where venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause

will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.

*Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992); see *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997) (describing the "mandatory/permissive dichotomy" and concluding that the clause, "jurisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado," was mandatory (internal quotation marks omitted)); *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc.*, 22 F.3d 51, 52-53 (2d Cir. 1994) (holding the forum selection clause, "[a]ny dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts," as permissive (internal quotation marks omitted)); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 76-78 (9th Cir. 1987) (holding the forum selection clause, "[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," as permissive, and noting that to be considered mandatory, a forum selection clause must clearly require that a particular court is the only one that has jurisdiction (internal quotation marks omitted)); *Keaty v. Freeport Indon., Inc.*, 503 F.2d 955, 956-57 (5th Cir. 1974) (holding the forum selection clause, "[t]his agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York," as permissive (internal quotation marks omitted)).

We agree with the distinctions made by other state and federal courts regarding mandatory and permissive forum selection clauses described above. Here, there are two jurisdictional clauses at

issue. First, the loan agreement contains a clause entitled "Jurisdiction," which provides that "[t]he 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." We conclude that this language is permissive as there is no language within the clause containing words of exclusivity. Absent such language, we deem the clause permissive.

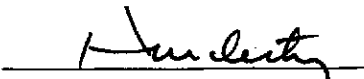
Second, a clause in the note stated: "If there is a lawsuit, Borrower(s) agrees to submit to the jurisdiction of the court in the county in which Lender is located." This language is also permissive as there is no language within the clause containing words of exclusivity. *See Golden Palm Hospitality, Inc. v. Stearns Bank Nat'l Ass'n*, 874 So. 2d 1231, 1233-37 (Fla. Dist. Ct. App. 2004) (concluding that the language, "[i]f there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of STEARNS County, the State of Minnesota" as permissive, and thus permitted, but did not require, that the action be brought in Minnesota (internal quotation marks omitted)). Thus, the case may be heard in another appropriate venue besides the courts in Utah.

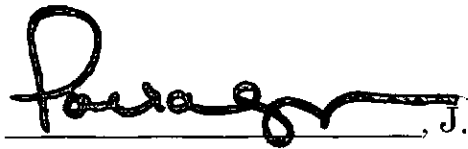
Without articulating why, the borrowers argue that the forum selection clauses are ambiguous and therefore must be construed against the credit union. We conclude that this argument is without merit as the clauses are clear and unambiguous and this court need not interpret the contract any differently from the contract's plain meaning. *See, e.g., Hunt Wesson Foods*, 817 F.2d at 77 ("A primary rule of interpretation is that '[t]he common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it.'" (quoting 4 Samuel Williston & Walter H. E. Jaeger, *A Treatise on the Law of Contracts* § 618 (3d ed. 1961))). The

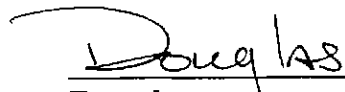
clauses provide no words of exclusivity and to interpret the clauses as mandatory forum selection clauses would read language into the contract that is not there.

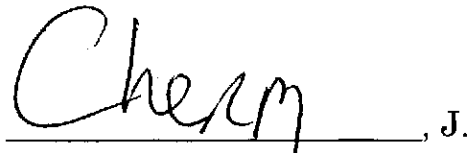
### CONCLUSION


In this case, none of the clauses contain exclusive language. Accordingly, all clauses are permissive forum selection clauses, and the district court erred when it found Utah was the sole forum for any controversy and dismissed the case for lack of subject matter jurisdiction. We therefore reverse the district court's order dismissing the case and remand this matter to the district court for further proceedings.

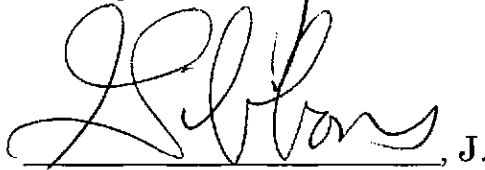
 C.J.  
Hardesty


 J.  
Parraguirre

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Douglas

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Cherry

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Saitta

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Gibbons

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Pickering