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**FILED**

**JAN 23 2017**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

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

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

Supreme Court Case No:

District Court Case No: A-13-  
679511-C

Petitioners,

v.

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

**MOTION TO STAY**  
**DISTRICT COURT**  
**PROCEEDINGS**

16 Respondents,

17 And

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

20 Real Party in Interest.

21

1                    **MOTION TO STAY DISTRICT COURT PROCEEDINGS**

2                    Petitioners, Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy  
3                    Arrington, and Audie Embestro (hereinafter collectively referred to as  
4                    “Petitioners”), by and through their attorneys of record, Reid Rubinstein &  
5                    Bogatz, hereby respectfully move this Court for a stay of the District Court’s  
6                    December 14, 2016 Order pursuant to NRAP 8. This Motion is made and  
7                    based upon the following Memorandum of Points and Authorities, all the  
8                    papers and pleadings on file herein and upon such oral argument as the  
9                    Court may permit at a hearing on this matter.

10                   Dated this 13<sup>th</sup> day of January, 2017.

11                   REID RUBINSTEIN & BOGATZ

12  
13                   By: /s/ Jaimie Stilz, Esq.  
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20                   **MEMORANDUM OF POINTS AND AUTHORITIES**

21                   **I. INTRODUCTION**

                  It is crucial that this Court grant a stay of the District Court litigation  
in this matter. Despite Petitioners’ extensive briefing regarding Real Party  
in Interest America First Federal Credit Union (“America First”)’s violation

1 of the statute of limitations imposed by the governing law in this matter, the  
2 District Court refused to dismiss deficiency judgment claims filed against  
3 Petitioners well after the three-month deadline set forth in Utah Code Ann. §  
4 57-1-32. Accordingly, Petitioners have filed a Petition for Writ of  
5 Mandamus and Prohibition, which is pending before this Court. In the  
6 interim, America First will not voluntarily agree to a stay, and the District  
7 Court has denied Petitioners' request for a stay. Without a stay, Petitioners  
8 face extensive and unnecessary time, effort, and expense further defending  
9 themselves and, potentially, a multi-million-dollar judgment with an  
10 enormous bond requirement to stay execution pending an appeal. As such,  
11 Petitioners respectfully seek a stay of these proceedings while this Court  
12 considers Petitioners' Writ.

13 **II. RELEVANT PROCEDURAL BACKGROUND**

14 On or about April 11, 2002, America First and Petitioners entered into  
15 a Business Loan Agreement ("Loan Agreement"), whereby America First  
16 agreed to lend, and Petitioners agreed to borrow, approximately \$2,900,000  
17 for use in developing a parcel of property ("Property"). On or about the  
18 same date, America First and Petitioners executed a Commercial Promissory  
19 Note ("Note") and a Trust Deed with Assignment of Rents ("Deed of Trust")  
20 to secure the Note (the Loan Agreement, Note and Deed of Trust are  
21 sometimes collectively referred to herein as the "Loan Documents"). The

1 Loan Agreement contains an “Applicable Law” clause which expressly  
2 provides that the loan documents “shall be governed by and construed in  
3 accordance with the laws of the State of Utah.” Utah’s anti-deficiency laws  
4 are set out in Utah Code Ann. § 57-1-32, which provides that deficiency  
5 actions may be commenced “[a]t any time within three months after any sale  
6 of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and  
7 57-1-27, . . . .”

8 On or about October 4, 2012, America First caused the Property  
9 securing the Note to be sold via a non-judicial foreclosure (the “Foreclosure  
10 Sale”). America First did not seek a deficiency judgment within three  
11 months after the Foreclosure Sale in accordance with Utah law; it was not  
12 until April 4, 2013 – exactly six months after the non-judicial foreclosure  
13 sale of the Property securing the Note – that America First filed the  
14 underlying Complaint in Nevada, seeking a deficiency judgment against  
15 Petitioners under Nevada law. In response to the Complaint filed by  
16 America First, Defendants filed a Motion to Dismiss on July 29, 2013.  
17 Though the District Court granted Petitioners’ Motion to Dismiss, on appeal,  
18 this Court overturned the ruling.

19 Upon remand, Petitioners filed a second Motion to Dismiss on August  
20 24, 2016. In the second Motion to Dismiss, Petitioners argued that because  
21 the Loan Documents’ choice-of-law provision specifies that Utah law –

1 which requires deficiency actions to be filed within three months – applies,  
2 and America First did not file for deficiency until six months after the  
3 Foreclosure Sale, America First’s failure to file for deficiency within three  
4 months necessitates dismissal. Following a hearing on the second Motion to  
5 Dismiss, the District Court issued an Order on December 14, 2016, denying  
6 the second Motion to Dismiss in its entirety. On January 12, 2017, the  
7 District Court orally denied Petitioners’ request for a stay.<sup>1</sup>

8 **III. LEGAL ARGUMENT**

9 Nevada courts have recognized stays are necessary in general to  
10 preserve the status quo, *and in particular when district courts refuse to*  
11 *enforce statutory anti-deficiency protections.* See Nelson v. Heer, 121 Nev.  
12 832, 122 P.3d 1252 (2005); William Walters, Docket No. 55912; Simon  
13 Lavi, Docket No. 58968. In deciding whether to issue a stay, Nevada courts  
14 generally consider the following factors: (1) whether the object of the appeal  
15 or writ petition will be defeated if the stay is denied; (2) whether  
16 appellant/petitioner will suffer irreparable or serious injury if the stay is  
17 denied; (3) whether respondent/real party in interest will suffer irreparable or  
18 serious injury if the stay is granted; and (4) whether appellant/petitioner is

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20 <sup>1</sup> The Order denying Petitioners’ request for a stay is still forthcoming, but  
21 the District Court ruled at the January 12, 2017 hearing that Petitioners’  
request was denied.

1 likely to prevail on the merits in the appeal or writ petition. NRAP 8(c);  
2 Hansen v. Eighth Judicial Dist. Ct., 116 Nev. 650, 657, 6 P.3d 982, 986  
3 (2000); Kress v. Corey, 65 Nev. 1, 189 P.2d 352 (1948). Under NRAP 8(a),  
4 parties usually must first move for a stay in the district court.

5 Here, this Court's prior granting of stays, each of the NRAP 8(c)  
6 factors, and the District Court's denial of Petitioners' request for stay all  
7 weigh heavily in favor of this Court granting a stay pending the outcome of  
8 the underlying Writ proceedings.

9 **A. PETITIONERS ARE ENTITLED TO THE SAME STAY**  
10 **ISSUED IN THE LAVI, WALTERS, AND SANDPOINTE**  
**CASES.**

11 Petitioners should receive the same stay issued in the Lavi, Walters,  
12 and Sandpointe cases, as this case involves similar issues regarding statutory  
13 interpretation and public policy that entitled the aforementioned cases to a  
14 stay.

15 In Lavi, this Court granted a stay of the lower court proceedings while  
16 reviewing the application of NRS 40.455 in the matter. See Lavi v. Eighth  
17 Jud. Dist. Ct., 130 Nev. Adv. Op. 38, 325 P.3d 1265, 1266 (2014). There, a  
18 lender instituted a guaranty action and, while it was pending, foreclosed on  
19 the property. Id. at 1266-67. However, it was not until almost a year later  
20 that the lender filed a motion for summary judgment and claimed it was  
21 seeking a deficiency judgment. Id. The District Court granted the motion

1 and denied the guarantors' counter-motion for summary judgment. Id. One  
2 of the guarantors, Lavi, filed a petition for writ of mandamus and requested a  
3 stay, noting the lender failed to claim it was seeking a deficiency judgment  
4 until Lavi pointed out the lender's failure to comply with NRS 40.455. Id.;  
5 Lavi, Docket No. 58968. This Court granted a stay and, after review, issued  
6 a writ directing dismissal of the guaranty action. Lavi, Docket No. 58968.

7 In Walters, this Court also granted a stay while reviewing the  
8 application of Nevada's anti-deficiency protections. See Walters v. Eighth  
9 Jud. Dist. Ct., 263 P.3d 231, 232 (2011). There, a lender implemented a  
10 breach of contract action, then a foreclosure sale was held on the underlying  
11 property. Id. Thereafter, the lender moved for summary judgment on the  
12 alleged deficiency, which the District Court held was sufficient to meet the  
13 six-month deadline contained in NRS 40.455. Id. at 233. Walters thereafter  
14 filed a petition for writ of mandamus and requested a stay, which this Court  
15 granted. Walters, Docket No. 55912.

16 In Sandpointe, this Court again granted a stay while reviewing the  
17 application of Nevada's anti-deficiency protections. See Sandpointe Apts. v.  
18 Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 87, 313 P.3d 849, 852 (2013).  
19 There, guarantors in a guaranty deficiency action filed a motion for partial  
20 summary judgment under NRS 40.459. Id. The District Court denied the  
21 motion and the guarantors filed a petition for writ of mandamus. Id. The

1 guarantors also requested a stay, which this Court granted. Id.; Sandpointe  
2 Apartments, LLC, Docket No. 59507.

3 The statutory issues Petitioners face are entirely similar to those that  
4 merited a stay in Lavi, Walters, and Sandpointe. As in those cases, which all  
5 involved appeals due to the District Court's interpretation of anti-deficiency  
6 actions and relevant protections, the primary issue here is whether Utah  
7 Code Ann. § 57-1-32 prevents America First from maintaining the  
8 underlying deficiency action filed outside the three-month statute of  
9 limitations. In all three of the above cases, this Court found that the issue of  
10 statutory interpretation is significant enough to warrant a stay, given the  
11 tremendous impact on the District Court proceedings if the guarantors'  
12 interpretations were correct. Here too, if Petitioners' position is correct, the  
13 District Court proceedings will be greatly impacted, to the extent that no  
14 further use of Petitioners', the Court's, or America First's resources will be  
15 necessary, as America First's claims against Petitioners will have to be  
16 dismissed.

17 Moreover, analogous public policy concerns also justify a stay. In  
18 Lavi, the guarantors noted in their request for stay that the lender had  
19 employed substantial gamesmanship and did not attempt to comply with  
20 NRS 40.455 until after the guarantors pointed out the defects in the claims  
21 against them. Lavi, Docket No. 58968. The guarantors argued this lack of



1 even minimal effort at compliance strongly favored a stay at the District  
2 Court level. Id. Here too, America First did not attempt to abide by the  
3 pertinent statutory requirements, refusing to even feign compliance with the  
4 contractually agreed-upon governing law until *after* Petitioners put America  
5 First on alert regarding Utah law by moving to dismiss the claims due to the  
6 forum selection clause in the Loan Documents. America First simply waited  
7 until six months after the Foreclosure Sale – twice as many months as  
8 permitted under the Utah statute – before filing the underlying deficiency  
9 action. Accordingly, Petitioners respectfully request this Court grant an  
10 immediate stay of the District Court proceedings.

11 **B. THE NRAP FACTORS ALL FAVOR A STAY OF THE**  
12 **DISTRICT COURT LITIGATION.**

13 Every factor under NRAP 8(c) justifies staying the lower court  
14 proceedings. Petitioners are likely to succeed on the merits of their writ  
15 petition, as well as lose the object of their appeal if a stay is not granted.  
16 Additionally, they will suffer irreparable harm if no stay is issued, while  
17 America First will not suffer irreparable injury upon grant of stay.  
18 Therefore, a stay is both appropriate and warranted.

19 **1. Petitioners Are Likely To Succeed On The Merits Of**  
20 **Their Writ Petition.**

1           Petitioners are likely to succeed on the merits of the writ petition filed  
 2 in this Court, as Utah Code Ann. § 57-1-32 and this Court’s precedent in  
 3 Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382 (1990), Mardian  
 4 v. Michael and Wendy Greenberg Family Trust, 131 Nev. Adv. Op. 72, 359  
 5 P.3d 109 (2015), and Branch Banking v. Windhaven & Tollway, LLC, 347  
 6 P.3d 1038, 131 Nev. Adv. Op. 20 (2015) illustrate the District Court’s clear  
 7 error in failing to grant Petitioners’ Second Motion to Dismiss. This Court  
 8 grants extraordinary writ relief when there are no factual disputes and the  
 9 District Court erroneously fails to dismiss an action pursuant to clear  
 10 authority under a statute or rule. See Scarbo v. Eighth Jud. Dist. Ct., 125  
 11 Nev. 118, 121, 206 P.3d 975, 977 (2009); Advanced Countertop Design, Inc.  
 12 v. Second Jud. Dist. Ct., 115 Nev. 268, 270, 984 P.2d 756, 758 (1999).

13           Utah Code Ann. § 57-1-32 is clear regarding the timeframe for  
 14 deficiency judgment:

15           At any time **within three months** after any sale of property  
 16 under a trust deed as provided in Sections 57-1-23, 57-1-24,  
 17 and 57-1-27, an action may be commenced to recover the  
 18 balance due upon the obligation for which the trust deed was  
 19 given as security, and in that action the complaint shall set forth  
 20 the entire amount of the indebtedness that was secured by the  
 21 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

1 value of the property as of the date of the sale. In any action  
2 brought under this section, the prevailing party shall be entitled  
to collect its costs and reasonable attorney fees incurred.<sup>2</sup>

3 America First is subject to the Utah statute of limitations. The Loan  
4 Agreement contains an “Applicable Law” clause which expressly provides:

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

7 Meanwhile, Utah’s statutory requirement is clear that application for  
8 deficiency judgment be made within 3 months after a trustee’s sale. Utah  
9 Code Ann. § 57-1-32. This Court has already previously determined that  
10 even when a foreclosure and deficiency action take place in Nevada, the out-  
11 of-state choice-of-law provision contained in the loan documents still applies  
12 when seeking a deficiency judgment, including the outside state’s deficiency  
13 action limitation period. See *Mardian v. Greenberg Family Trust*, 131 Nev.  
14 Adv. Op. 72, 359 P.3d 109 (2015); *Key Bank of Alaska v. Donnels*, 106  
15 Nev. 49, 787 P.2d 382 (1990).

16 Moreover, America First’s argument that the Utah statute of  
17 limitations cannot be enforced is without merit in light of this Court’s recent  
18 decision in *Branch Banking v. Windhaven & Tollway, LLC*, 131 Nev. Adv.  
19 Op. 20, 347 P.3d 1038, 1039 (2015), *reh'g denied* (July 23, 2015). Similar

20 \_\_\_\_\_  
21 <sup>2</sup> Emphasis added.

1 to the statute in Windhaven, the Utah statute is illustrative and meant to  
2 apply to extraterritorial foreclosure sales, including the one at issue here.

3 Accordingly, the District Court was required to grant Petitioners'  
4 Second Motion to Dismiss. America First failed to file its application for  
5 deficiency judgment against Petitioners within three months after the  
6 Foreclosure Sale occurred on October 4, 2012. Utah Code Ann. § 57-1-32 is  
7 quite clear: this failure means America First is barred from pursuing a  
8 deficiency judgment against Petitioners. A de novo review of the clear and  
9 unambiguous statutory limitation in Utah Code Ann. § 57-1-32 and the  
10 precedent set by Mardian, Key Bank, and Windhaven is therefore likely to  
11 overturn the District Court's erroneous decision. Accordingly, Petitioners  
12 respectfully request this Court grant an immediate stay of the District Court  
13 proceedings.

14 **2. Petitioners Will Lose The Object Of Their Appeal If**  
15 **A Stay Is Not Granted.**

16 Petitioners will lose the object of their appeal – specifically,  
17 enforcement of the anti-deficiency protections afforded by Utah Code Ann.  
18 § 57-1-32 – if a stay is not granted. This Court has established the  
19 importance of statutes of limitation in seeking deficiency judgments. Nev.  
20 State Bank v. Jamison Family P'ship, 106 Nev. 792, 798, 801 P.2d 1377,  
21 1381 (1990); Lavi, 325 P.3d at 1267; Walters, 263 P.3d at 234. In Jamison,

1 this Court noted that statutes of limitation provide important protections  
2 “against the evidentiary problems associated with defending a stale claim”  
3 and “promote repose by giving security and stability to human affairs.” 106  
4 Nev. at 798, 801 P.2d at 1381 (*quoting Wood v. Carpenter*, 101 U.S. 135,  
5 139 (1879)).

6 Here, if no stay is granted, Petitioners will lose the protections  
7 provided by Utah Code Ann. § 57-1-32. The District Court’s December 14,  
8 2016 Order violates the clear meaning and intent of Utah Code Ann. § 57-1-  
9 32, and ignores this Court’s precedent protecting guarantors and strictly  
10 enforcing statutes of limitation. If a stay is not granted, the underlying  
11 matter will proceed prior to this Court’s review of the District Court’s Order.  
12 Petitioners would therefore be deprived of the protections afforded by the  
13 Utah Legislature as they would be forced to continue defending themselves  
14 despite no longer being liable to America First and, if the District Court  
15 follows the same reasoning it did in the December 14, 2016 Order, will  
16 likely be subject to a possibly several million-dollar judgment in America  
17 First’s favor. Petitioners therefore respectfully request this Court stay the  
18 District Court proceedings.

19 **3. Petitioners Will Be Irreparably Harmed If A Stay Is**  
20 **Not Granted.**

1           Petitioners will be irreparably harmed if a stay is not granted.  
2 Specifically, Petitioners are faced with having to expend enormous amounts  
3 of time, effort and legal expenses to defend themselves in the underlying  
4 litigation, despite possessing no liability. As such, Petitioners respectfully  
5 request this Court grant an immediate stay of the District Court proceedings.

6                   **4.     America First Will Not Suffer Irreparable Harm If A**  
7                   **Stay Is Granted.**

8           America First will not suffer irreparable harm if a stay is granted in  
9 this matter. This Court has stated that “a mere delay in pursuing discovery  
10 in the litigation normally does not constitute irreparable harm.” Fritz  
11 Hanson A/S v. Dist. Ct., 116 Nev. 650, 658, 6 P.3d 982, 987 (2000).

12           Here, the prospective harm America First might incur, if any, does not  
13 rise to the level of irreparable. Should the parties continue moving forward,  
14 any hearing or discovery may be rendered moot if this Court grants  
15 Petitioners’ Writ Petition. It makes little sense to allow America First to  
16 continue pursuing its claims and, as a result, incur fees and costs that may  
17 ultimately be unnecessary. Further, in the event this Court does not grant  
18 Petitioners’ Writ Petition, the parties can easily begin proceeding again.  
19 While America First might have to wait longer to pursue its claims, such  
20 limited delay does not rise to the level of irreparable harm. Id. Thus,

21

1 Petitioners respectfully request this Court grant a stay of the District Court  
2 proceedings.

3 **C. THE DISTRICT COURT DENIED PETITIONERS'**  
4 **REQUEST FOR A STAY.**

5 NRAP 8(a) requires parties to first seek a stay from the District Court  
6 before seeking one from this Court.

7 Here, Petitioners filed a Motion to Stay that the District Court denied  
8 during a hearing regarding the Motion on January 12, 2017. As such,  
9 Petitioners have complied with the requirement set by NRAP 8(a) and this  
10 request for issuance of a stay is appropriately before this Court. Petitioners  
11 have no other method of relief from the District Court proceedings, and  
12 therefore respectfully request this Court grant an immediate stay of the  
13 District Court proceedings.

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**IV. CONCLUSION**

Based upon the foregoing, good cause exists to grant Petitioners' request for a stay of the lower court proceedings. Accordingly, Petitioners respectfully request this Court grant the immediate Motion To Stay District Court Proceedings.

Dated this 13th day of January, 2017.

**REID RUBINSTEIN & BOGATZ**

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