

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

2 FRANCO SORO, an individual; MYRA
3 TAIGMAN-FARRELL, an individual;
4 ISAAC FARRELL, an individual;
5 KATHY ARRINGTON, an individual;
6 and AUDIE EMBESTRO, an individual;

7 Petitioners,

8 v.

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

14 Respondents,

15 And

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

19 Real Party in Interest.

Electronically Filed
Jan 10 2017 09:32 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No:

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

20 **PETITION FOR WRIT OF MANDAMUS AND PROHIBITION**

21 **REID RUBINSTEIN & BOGATZ**

I. Scott Bogatz, Esq. (3367)
Charles M. Vlastic III, Esq. (11308)
Jaimie Stiliz, Esq. (13772)
300 S. 4th Street, Suite 830
Las Vegas, Nevada 89101
Telephone: (702) 776-7000
Facsimile: (702) 776-7900
sbogatz@rrblf.com
cvlastic@rrblf.com
jstilz@rrblf.com
Attorneys for Petitioners

NRAP 26.1 DISCLOSURE STATEMENT

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

1. Parent Corporation of Petitioners:
 - N/A.
2. Publicly Held Shareholders of Petitioners:
 - N/A.
3. Law Firms who have appeared for Petitioners:
 - Bogatz Law Group
3883 Howard Hughes Parkway, Suite 790
Las Vegas, Nevada 89169
 - Reid Rubinstein & Bogatz
300 S. 4th Street, Suite 830
Las Vegas, Nevada 89101

Dated this 6th day of January, 2017.

REID RUBINSTEIN & BOGATZ

By: /s/ Charles M. Vlastic III, Esq.
I. Scott Bogatz, Esq. (3367)
Charles M. Vlastic III, Esq. (11308)
Jaimie Stilz, Esq. (13772)
300 S. 4th Street, Suite 830
Las Vegas, Nevada 89101
Attorneys for Petitioners

TABLE OF CONTENTS

1

2 NRAP 26.1 DISCLOSURE STATEMENT I

3 TABLE OF AUTHORITIES V

4 I. INTRODUCTION 1

5 II. ISSUES PRESENTED 3

6 III. RELIEF REQUESTED 3

7 i. A Writ of Mandamus compelling the District Court

8 to vacate its December 14, 2016 Order, which

9 denied Petitioners’ Second Motion to Dismiss in the

underlying District Court Case No. A-13-679511-
C;..... 3

10 ii. A Writ of Mandamus compelling the District Court

11 to enter an order granting, in its entirety, Petitioners’

12 Second Motion to Dismiss in the underlying District

13 Court Case No. A-13-679511-C; and 3

14 iii. A Writ of Prohibition precluding the District Court

15 from undertaking further proceedings against

16 Petitioners in the underlying case, given America

17 First’s failure to timely apply for deficiency

18 judgment within the statutorily mandated three-

19 month deadline imposed by Utah Code Ann. § 57-

20 1-32. 3

21 IV. STANDARD OF REVIEW AND JURISDICTION 4

V. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND ... 6

A. RELEVANT FACTUAL BACKGROUND 6

i. The Loan And Loan Documents 6

ii. The Loan Documents’ Specification That Utah Law
Governs 7

1 iii. Utah’s Deficiency Statute Requiring
2 Commencement Of Deficiency Actions Within
 Three Months Following Foreclosure Sales.....7

3 iv. The Non-Judicial Foreclosure And America First’s
4 Decision Not To Seek Deficiency In Utah.....8

5 B. RELEVANT PROCEDURAL BACKGROUND8

6 i. The Complaint8

7 ii. The Initial Motion To Dismiss8

8 iii. The Second Motion To Dismiss9

9 iv. The District Court Erroneously Denies Petitioners’
 Second Motion To Dismiss10

10 VI. LEGAL ARGUMENT11

11 A. THE DISTRICT COURT ERRED AS A MATTER OF
12 LAW WHEN IT DENIED PETITIONERS’ SECOND
13 MOTION TO DISMISS, DESPITE THE FACT THAT
 AMERICA FIRST CONTRACTUALLY AGREED TO
14 BE GOVERNED BY UTAH LAW, THEN FAILED TO
 COMPLY BY FILING FOR A DEFICIENCY
15 JUDGMENT AGAINST PETITIONERS OUTSIDE THE
 THREE-MONTH PERIOD SET FORTH IN UTAH’S
 DEFICIENCY STATUTES.....11

16 1. Pursuant To This Court’s Decision In Key Bank, America
17 First Was Required To Abide By The Utah Choice-Of-
 Law Provision When Filing A Deficiency
18 Action.11

19 2. Pursuant To This Court’s Decision In Mardian,
20 America First Was Required To Abide By The Utah
 Choice-Of-Law Provision When Filing A
21 Deficiency Action.....10

 3. America First Failed To Abide By The Utah

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

Choice-Of-Law Provision When It Filed The Underlying Deficiency Action Outside The Statutorily-Mandated Three-Month Period.10

B. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT DENIED PETITIONERS’ SECOND MOTION TO DISMISS, DESPITE THE FACT THAT UTAH’S ANTI-DEFICIENCY STATUTE IS ILLUSTRATIVE AND APPLICABLE TO THE UNDERLYING DEFICIENCY ACTION.16

VII. CONCLUSION23

CERTIFICATE OF COMPLIANCE25

CERTIFICATE OF SERVICE.....26

TABLE OF AUTHORITIES

CASES

Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 575, 97 P.3d 1132 (2004).....5

Bergmann v. Boyce, 109 Nev. 670, 856 P.2d 560 (1993).....5

Branch Banking v. Windhaven & Tollway, LLC, 131 Nev. Adv. Op. 20, 347 P.3d 1038 (2015), reh'g denied (July 23, 2015)..... passim

Capital Mortgage Holding v. Hahn, 101 Nev. 314, 705 P.2d 126 (1985)5

Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Court ex rel. County of Clark, 120 Nev. 632, 97 P.3d 607 (2004).....5

Edgar v. Wagner, 101 Nev. 226, 699 P.2d 110 (1985)5

Falcke v. Douglas County, 116 Nev. 583, 3 P.3d 661 (2000).....21

Jeep Corp. v. Second Judicial Dist. Court, 98 Nev. 440, 652 P.2d 1183 (1982).....6

Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382 (1990) ... passim

Mardian v. Greenberg Family Trust, 131 Nev. Adv. Op. 72, 359 P.3d 109 (2015)..... passim

McKay v. Board of Cty. Comm’r, 103 Nev. 490, 746 P.2d 124 (1987).....21

Mineral County v. State, Bd. of Equalization, 121 Nev. 533, 119 P.3d 706 (2005)21

Sanchez v. Wal-Mart Stores, Inc., 125 Nev. 818, 221 P.3d 1276 (2009).....5

Smith v. Eighth Judicial Dist. Court In & For County of Clark, 107 Nev. 674, 818 P.2d 849 (1991).....4, 6

State of Nev. v. Eighth Judicial Dist. Court, 118 Nev. 140, 42 P.3d 233 (2002)5

Walker v. Eighth Judicial Dist. Court, 120 Nev. 815, 101 P.3d 787 (2004).....6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

STATUTES

AS 34.20.100 10, 16, 17
NRS 34.160.....4
NRS 34.170.....4
NRS 34.320.....4
NRS 34.330.....4
Utah Code Ann. § 57-1-32 passim

RULES

NRAP 17(b)v
NRAP 21(a)v
NRAP 28(a)(5).....v

CONSTITUTIONAL PROVISIONS

Nev. Const., art. 6, §44

1 **ROUTING STATEMENT**

2 NRAP 21(a)(1) requires writ petitions to include a Routing Statement
3 “identify[ing] whether the matter falls in one of the categories of cases
4 presumptively assigned to the Court of Appeals pursuant to NRAP 17(b),
5 either by virtue of its subject matter or under NRAP 17(b)(8).” NRAP 17(b),
6 in turn, provides in relevant part that:

7 The Court of Appeals shall hear and decide only those matters
8 assigned to it by the Supreme Court. The following case
categories are presumptively assigned to the Court of Appeals:

9 . . .

10 8. Pretrial writ proceedings challenging discovery orders or orders
11 resolving motions in limine;

12 This particular matter does not fall within any of the categories of cases
13 presumptively assigned to the Court of Appeals, as this petition’s subject
14 matter does not encompass those subject matters detailed within NRAP 17(b),
15 nor is this petition a pretrial writ proceeding challenging a discovery order or
16 order resolving motions in limine. Accordingly, the Supreme Court should
17 retain jurisdiction to hear and decide this Petition for Writ of Mandamus and
18 Prohibition.

REID RUBINSTEIN & BOGATZ
300 South Fourth Street, Suite 830
Las Vegas, Nevada 89101
(702) 776-7000 FAX: (702) 776-7900

1 **PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION**

2 TO THE HONORABLE SUPREME COURT OF THE STATE OF
3 NEVADA:

4 Pursuant to NRAP 21, Franco Soro, Myra Taigman-Farrell, Isaac
5 Farrell, Kathy Arrington, and Audie Embestro (hereinafter collectively
6 referred to as “Petitioners”), by and through their attorneys of record, Reid
7 Rubinstein & Bogatz, hereby petition this Court for a Writ of Mandamus and
8 Prohibition (“Petition”).

9 **I. INTRODUCTION**

10 Petitioners are compelled to bring this Petition because the District
11 Court erred as a matter of law when it denied Petitioners’ August 24, 2016
12 Motion to Dismiss (the “Second Motion to Dismiss”) on the grounds that
13 Utah’s anti-deficiency statute of limitations does not apply to this matter. The
14 District Court’s determination is legally unsustainable because Real Party in
15 Interest America First Federal Credit Union (“America First”) is contractually
16 obligated to comply with Utah law, which mandates that deficiency actions
17 must be filed within three months after a foreclosure sale. Moreover, this
18 Court’s prior rulings in several key cases dictate that Utah’s statute of
19 limitations must be applied to the underlying deficiency action.

20 Petitioners have no plain, speedy, or adequate remedy at law to protect
21 their legal rights. Specifically, immediate review is required because the

1 District Court's Order violates the clear rulings set forth in Mardian, Key
2 Bank, and Windhaven, thereby ignoring Nevada Supreme Court precedent
3 protecting obligors from statutorily-violative creditor claims. Moreover, there
4 is a strong likelihood that America First, a party whose claims are statutorily
5 limited, will immediately proceed with the action without intervention from
6 this Court. If Petitioners were to wait and appeal a final judgment, they would
7 be forced to expend enormous amounts of time and money unnecessarily
8 defending themselves in the underlying action and may then face a monetary
9 judgment of likely several million dollars with a requirement to post a
10 supersedeas bond to stay execution pending appeal. This, despite the fact that
11 under the governing Utah deficiency statute, any claims against Petitioners
12 have already expired, and therefore they have no liability to America First. In
13 this case, writ relief is appropriate, necessary and required to ensure the clear
14 and unambiguous language and intent of the Legislature and this Court is
15 properly enforced.

16 Based upon the foregoing, and as set forth in more detail herein, the
17 extraordinary relief requested by this Petition is necessary and appropriate at
18 this time. Accordingly, Petitioners respectfully submit that the Court's
19 resolution, in their favor, of the significant legal issues presented by this
20 Petition will promote the interests of justice and judicial economy.

21 . . .

1 **II. ISSUES PRESENTED**

- 2 i. Whether the District Court erred as a matter of law when it
3 denied Petitioners’ Second Motion to Dismiss, even though
4 America First contractually agreed to be governed by Utah law,
5 then failed to comply with Utah’s statute of limitations for
6 deficiency actions?
7 ii. Whether the District Court erred as a matter of law when it
8 denied Petitioners’ Second Motion to Dismiss, even though
9 Utah’s anti-deficiency statute is illustrative and applicable to the
10 underlying deficiency action?

11 **III. RELIEF REQUESTED**

12 Petitioners respectfully request that this Honorable Court issue:

- 13 i. A Writ of Mandamus compelling the District Court to vacate its
14 December 14, 2016 Order, which denied Petitioners’ Second Motion to
15 Dismiss in the underlying District Court Case No. A-13-679511-C;
16 ii. A Writ of Mandamus compelling the District Court to enter an
17 order granting, in its entirety, Petitioners’ Second Motion to Dismiss in the
18 underlying District Court Case No. A-13-679511-C; and
19 iii. A Writ of Prohibition precluding the District Court from
20 undertaking further proceedings against Petitioners in the underlying case,
21 given America First’s failure to timely apply for deficiency judgment within

1 the statutorily mandated three-month deadline imposed by Utah Code Ann. §
2 57-1-32.

3 **IV. STANDARD OF REVIEW AND JURISDICTION**

4 The Nevada Constitution provides in relevant part: “[t]he supreme
5 court shall have . . . power to issue writs of mandamus, certiorari, prohibition,
6 quo warranto, and habeas corpus and also all writs necessary or proper to the
7 complete exercise of its appellate jurisdiction.”¹ “Mandamus is a proper
8 remedy to compel performance of a judicial act when there is no plain, speedy,
9 and adequate remedy at law in order to compel the performance of an act
10 which the law requires as a duty resulting from office.”² “Prohibition is a
11 proper remedy to restrain a district judge from exercising a judicial function
12 without or in excess of its jurisdiction.”³ Writ relief is also an appropriate
13 remedy where, among other things, “an important issue of law needs
14 clarification and considerations of sound judicial economy and administration
15 militate in favor of granting the petition.”⁴

16
17

¹ Nev. Const., art. 6, §4.

18 ² Smith v. Eighth Judicial Dist. Court In & For County of Clark, 107 Nev.
19 674, 677, 818 P.2d 849, 851 (1991); see NRS 34.160; NRS 34.170; NRS
34.320; NRS 34.330.

20 ³ Smith, 107 Nev. at 677, 818 P.2d at 851; NRS 34.320; NRS 34.330.
21

1 This Court may review, through petitions for writ relief, district court
2 decisions denying motions to dismiss.⁵ Specifically, a writ petition
3 challenging a denial of a motion to dismiss will only be granted when ““(1)
4 no factual dispute exists and the district court is obligated to dismiss an action
5 pursuant to clear authority under a statute or rule; or (2) an important issue of
6 law needs clarification and considerations of sound judicial economy and
7 administration militate in favor of granting the petition.”⁶ This Court reviews
8 a District Court’s orders of dismissal de novo.⁷ If all of plaintiff’s allegations
9 are accepted as true and still do not justify any relief, the trial court must
10 dismiss the claims.⁸

12 ⁴ State v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 118 Nev. 140, 147,
13 42 P.3d 233, 238 (2002).

14 ⁵ See Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Court ex rel. Cty. of
Clark, 120 Nev. 632, 97 P.3d 607 (2004).

15 ⁶ See Beazer Homes Nevada, Inc. v. Eighth Judicial Dist. Court ex rel. Cty. of
16 Clark, 120 Nev. 575, 579, 97 P.3d 1132, 1134 (2004) (*quoting State v. Dist.*
Court, 118 Nev. at 147, 42 P.3d at 238).

17 ⁷ See, e.g., Sanchez v. Wal-Mart Stores, Inc., 125 Nev. 818, 823, 221 P.3d
18 1276, 1280 (2009).

19 ⁸ See Bergmann v. Boyce, 109 Nev. 670, 674–675, 856 P.2d 560, 563 (1993)
20 (*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
21 (1985)).

1 In evaluating the propriety of writ petitions, “each case must be
2 individually examined, and where circumstances reveal urgency or strong
3 necessity, extraordinary relief may be granted.”⁹ The decision to grant writ
4 petitions is within this Court’s sound discretion.¹⁰ Importantly, this Court may
5 exercise its “discretion with respect to certain petitions where no disputed
6 factual issues exist and, pursuant to clear authority under a statute or rule, the
7 district court is obligated to dismiss an action.”¹¹

8 **V. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND**

9 **A. RELEVANT FACTUAL BACKGROUND**

10 **i. The Loan And Loan Documents**

11 On or about April 11, 2002, America First and Petitioners entered into
12 a Business Loan Agreement (“Loan Agreement”), whereby America First
13 agreed to lend, and Petitioners agreed to borrow, approximately \$2,900,000
14 for use in developing a parcel of property (“Property”). 1 PA000101-02. On
15 or about the same date, America First and Petitioners executed a Commercial
16 Promissory Note (“Note”) and a Trust Deed with Assignment of Rents (“Deed

17 _____
18 ⁹ Jeep Corp. v. Second Judicial Dist. Court, 98 Nev. 440, 443, 652 P.2d 1183,
1185 (1982).

19 ¹⁰ Walker v. Eighth Judicial Dist. Court, 120 Nev. 815, 819, 101 P.3d 787,
20 790 (2004).

21 ¹¹ Smith v. Eighth Judicial Dist. Court In & For Cty. of Clark, 113 Nev. 1343,
1345, 950 P.2d 280, 281 (1997).

1 of Trust”) to secure the Note (the Loan Agreement, Note and Deed of Trust
2 are sometimes collectively referred to herein as the “Loan Documents”). 1
3 PA000102.

4 ii. **The Loan Documents’ Specification That Utah Law**
5 **Governs**

6 The Loan Agreement contains an “Applicable Law” clause which
7 expressly provides:

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

10 1 PA000114. In addition, the Loan Agreement contains an “Acceptance”
11 clause that specifies, “This Agreement is accepted by Lender in the State of
12 Utah.” Id.

13 iii. **Utah’s Deficiency Statute Requiring Commencement**
14 **Of Deficiency Actions Within Three Months Following**
Foreclosure Sales

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

17 At any time **within three months** after any sale of property
18 under a trust deed as provided in Sections 57-1-23, 57-1-24,
19 and 57-1-27, an action may be commenced to recover the
20 balance due upon the obligation for which the trust deed was
21 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

1 market value of the property at the date of sale. The court
2 may not render judgment for more than the amount by which
3 the amount of the indebtedness with interest, costs, and
4 expenses of sale, including trustee's and attorney's fees,
5 exceeds the fair market value of the property as of the date of
6 the sale. In any action brought under this section, the
7 prevailing party shall be entitled to collect its costs and
8 reasonable attorney fees incurred.¹²

9 iv. **The Non-Judicial Foreclosure And America First's**
10 **Decision Not To Seek Deficiency In Utah**

11 On or about October 4, 2012, America First caused the Property
12 securing the Note to be sold via a non-judicial foreclosure (the "Foreclosure
13 Sale"). 1 PA000103. America First did not seek a deficiency judgment within
14 three months after the Foreclosure Sale in accordance with Utah law. Id.

15 **B. RELEVANT PROCEDURAL BACKGROUND**

16 i. **The Complaint**

17 On April 4, 2013 - exactly six months after the non-judicial foreclosure
18 sale of the Property securing the Note - America First filed the underlying
19 Complaint in Nevada, seeking a deficiency judgment against Petitioners under
20 Nevada law, specifically under "N.R.S. 455(1)." 1 PA000001.

21 ii. **The Initial Motion To Dismiss**

In response to the Complaint filed by America First, Petitioners filed a

¹² Emphasis added.

1 Motion to Dismiss on July 29, 2013 (the “Initial Motion to Dismiss”). 1
2 PA000016. In the Initial Motion to Dismiss, Petitioners argued essentially
3 that pursuant to NRCP 12(b)(1) and 12(h)(3), the district court did not have
4 subject matter jurisdiction over the dispute based upon the forum and
5 jurisdiction selection clauses contained in the relevant Loan Documents
6 designating Utah as the proper forum. See id.

7 The district court granted Petitioners’ Initial Motion to Dismiss. 1
8 PA000073. On appeal, this Court overturned the district court, holding that
9 the forum and jurisdiction selection clauses were permissive rather than
10 mandatory. 1 PA000090-91. This Court specifically did not address the issue
11 of statute of limitations, stating that “because the district court did not decide
12 this issue, we do not address [Nevada’s six-month statute of limitations versus
13 Utah’s three-month statute of limitations] here.” 1 PA000092.

14 iii. **The Second Motion To Dismiss**

15 Upon remand to the district court, Petitioners filed the underlying
16 Second Motion to Dismiss on August 24, 2016. 1 PA000099. In the Second
17 Motion to Dismiss, Petitioners argued that because the Loan Documents’
18 choice-of-law provision specifies that Utah law – which requires deficiency
19 actions to be filed within three months – applies, and America First did not
20 file for deficiency until six months after the Foreclosure Sale, America First’s
21 failure to file for deficiency within three months necessitates dismissal. Id.

1 In its Opposition, America First argued that under this Court’s decision
2 in Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382 (1990), the
3 choice-of-law provision in the Loan Documents is purportedly unenforceable
4 as Utah’s deficiency statute allegedly only governs property located in Utah.
5 1 PA000116. Based upon this erroneous argument, America First suggested
6 that the district court should simply ignore the clear and unambiguous choice-
7 of-law provision contained in the underlying Loan Documents that they
8 drafted, refrain from enforcing Utah’s three-month statute of limitations for
9 deficiency actions, and allow this action to proceed in Nevada. Id.

10 iv. **The District Court Erroneously Denies Petitioners’**
11 **Second Motion To Dismiss**

12 Following a hearing on Petitioners’ Second Motion to Dismiss, the
13 district court issued an Order on December 14, 2016, denying Petitioners’
14 Second Motion to Dismiss in its entirety. 1 PA000191. In the December 14,
15 2016 Order, the district court erroneously found and concluded in relevant
16 part:

17 [P]ursuant to Key Bank of Alaska v. Donnels, 106 Nev. 49, 52-
18 53, 787 P.2d 382, 384-85 (1990), the Utah deficiency statute in
19 this case (Utah Code Ann. § 57-1-32) – like the Alaska
deficiency statute in Key Bank (AS 34.20.100) – does not apply
extraterritorially

20 1 PA000192.

1 **VI. LEGAL ARGUMENT**

2 **A. THE DISTRICT COURT ERRED AS A MATTER OF**
3 **LAW WHEN IT DENIED PETITIONERS' SECOND**
4 **MOTION TO DISMISS, DESPITE THE FACT THAT**
5 **AMERICA FIRST CONTRACTUALLY AGREED TO BE**
6 **GOVERNED BY UTAH LAW, THEN FAILED TO**
7 **COMPLY BY FILING FOR A DEFICIENCY JUDGMENT**
8 **AGAINST PETITIONERS OUTSIDE THE THREE-**
9 **MONTH PERIOD SET FORTH IN UTAH'S DEFICIENCY**
10 **STATUTES.**

11 The District Court erroneously denied Petitioners' Second Motion to
12 Dismiss given that America First agreed to be governed by Utah law, then
13 failed to file for a deficiency judgment within three months of the Foreclosure
14 Sale as required by Utah law and in direct contravention to this Court's
15 decisions in Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382
16 (1990) and Mardian v. Greenberg Family Trust, 131 Nev. Adv. Op. 72, 359
17 P.3d 109 (2015). Specifically, when read together, Keybank and Mardian
18 require parties to comply with choice-of-law provisions, *including* when
19 seeking a deficiency judgment; however, despite the Utah choice-of-law
20 provision in the Loan Documents, America First failed to adhere to Utah's
21 three-month statutory limitation on deficiency actions.

1 **1. Pursuant To This Court's Decision In *Key Bank,***
2 **America First Was Required To Abide By The Utah**
3 **Choice-Of-Law Provision When Filing A Deficiency**
4 **Action.**

1 This Court has previously determined that even when a foreclosure and
2 deficiency action take place in Nevada, the out-of-state choice-of-law
3 provision contained in the loan documents still applies. Key Bank, 106 Nev.
4 at 52, 787 P.2d at 384.

5 Key Bank involved a loan with an Alaska choice-of-law provision
6 secured by property located in Nevada. Id. at 50, 787 P.2d at 383. Following
7 a non-judicial foreclosure sale held in Nevada, the lender brought a deficiency
8 action against the borrower and guarantors in Nevada. Id. **This Court**
9 **expressly held that Alaska law, not Nevada law, applied to the deficiency**
10 **action brought in Nevada because the loan documents expressly provided**
11 **for Alaska law to govern:**

12 **[R]egardless of whether the parties agreed that Nevada**
13 **foreclosure procedures would apply, an action for a**
14 **deficiency after partial satisfaction through sale of the**
15 **security is an action on the debt. See Nevada Land & Mtge.**
16 **v. Hidden Wells, 83 Nev. 501, 504, 435 P.2d 198, 200 (1967);**
17 **McMillan v. United Mortgage Co., 82 Nev. 117, 122, 412**
18 **P.2d 604, 606 (1966). We have held that “[i]t is well settled**
19 **that the expressed intention of the parties as to the**
20 **applicable law in the construction of a contract is**
21 **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

1 **agreement that Alaska law was to apply to the debt.**

2 Id. at 51-52, 787 P.2d at 384 (emphasis added).

3 2. **Pursuant To This Court’s Decision In *Mardian*,**
4 **America First Was Required To Abide By The Utah**
5 **Choice-Of-Law Provision When Filing A Deficiency**
6 **Action.**

7 In keeping with the Key Bank decision, this Court recently held yet
8 again that when a foreclosure and deficiency action take place, the out-of-state
9 choice-of-law provision contained in the loan documents – *including the*
10 *specified state’s deficiency action limitation period* – still applies. Mardian,
11 131 Nev. Adv. Op. 72, 359 P.3d at 111.

12 The Mardian case involved a loan on undeveloped real property located
13 in Arizona. Id., 359 P.3d at 110. Although the property at issue in Mardian
14 was located in Arizona, the choice-of-law provision contained in the loan
15 documents called for Nevada law to apply to any deficiency proceedings. Id.
16 Following a foreclosure of the underlying property located in Arizona, the
17 creditor sought a deficiency judgment against the guarantors in Nevada
18 pursuant to Nevada’s anti-deficiency statutes. Id. **This Court expressly cited**
19 **to Key Bank in concluding that Nevada law – *including Nevada’s***
20 ***limitation period* – should govern the deficiency action given the parties’**
21 **agreement**, explaining in relevant part:

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

9 Id., 359 P.3d at 111 (emphasis added).

10 Thus, this Court confirmed in Mardian the well-settled rule that
11 regardless of where a deficiency action is brought or where the underlying
12 property is located, the choice-of-law provision contained in the loan
13 documents governs which state’s laws apply to all aspects of deficiency
14 proceedings. Id.

15 3. **America First Failed To Abide By The Utah Choice-**
16 **Of-Law Provision When It Filed The Underlying**
17 **Deficiency Action Outside The Statutorily-Mandated**
18 **Three-Month Period.**

18 In light of the recent holding in Mardian, along with the long-standing
19 holding set forth in Key Bank, there can be no dispute that America First was
20 required to comply with the Utah choice-of-law provision contained in the
21

1 Loan Documents when bringing forth the underlying deficiency action, which
2 it failed to do.

3 Specifically, the Loan Agreement contains an “Applicable Law” clause
4 which clearly and expressly provides: “**This Agreement (and all loan**
5 **documents in connection with this transaction) shall be governed by and**
6 **construed in accordance with the laws of the State of Utah.**” 1 PA000114.

7 Turning to the laws of the State of Utah, Utah Code Ann. § 57-1-32 clearly
8 and unambiguously requires a creditor seeking a deficiency judgment to bring
9 an action within **three months** after a foreclosure sale. Despite this well-
10 defined limitation period, America First waited **six months** to file the
11 underlying action seeking a deficiency against Petitioners, three months later
12 than allowed under Utah law. 1 PA000001. Given the decisions in Key Bank
13 and Mardian and in light of America First’s failure to seek a deficiency
14 judgment within the three-month limitation period set forth in Utah Code Ann.
15 § 57-1-32, America First is unequivocally barred from pursuing an application
16 for deficiency judgment against Petitioners. Therefore, it was error for the
17 District Court to deny Petitioners’ Second Motion to Dismiss, and the District
18 Court’s ruling must now be reversed by this Court.

1 **B. THE DISTRICT COURT ERRED AS A MATTER OF**
2 **LAW WHEN IT DENIED PETITIONERS' SECOND**
3 **MOTION TO DISMISS, DESPITE THE FACT THAT**
4 **UTAH'S ANTI-DEFICIENCY STATUTE IS**
5 **ILLUSTRATIVE AND APPLICABLE TO THE**
6 **UNDERLYING DEFICIENCY ACTION.**

7 This Court need look no further than the application of Key Bank and
8 Mardian to the facts of this case to see it was clear error for the District Court
9 to deny Petitioners' Second Motion to Dismiss. America First was required
10 to comply with Utah law when bringing a deficiency action, but America First
11 failed to comply with Utah Code Ann. § 57-1-32 in filing the underlying
12 deficiency action. As such, Key Bank and Mardian are controlling and
13 dispositive; there is no further need of any additional analysis. Unfortunately,
14 the District Court ignored the controlling weight of Mardian and misapplied
15 Key Bank when it determined Utah Code Ann. § 57-1-32 does not apply
16 extraterritorially. The District Court's error is apparent in looking at both Key
17 Bank as well as another recent ruling from this Court in Branch Banking v.
18 Windhaven & Tollway, LLC, 131 Nev. Adv. Op. 20, 347 P.3d 1038, 1039
19 (2015), reh'g denied (July 23, 2015).

20 The determination in Key Bank regarding the limited reach of Alaska's
21 anti-deficiency statute only applies to exclusive, not illustrative, anti-
22 deficiency statutes. 106 Nev. at 53, 787 P.2d at 384. The Alaska anti-
23 deficiency statute in question – AS 34.20.100 – provides in relevant part:

1 **When a sale is made by a trustee under a deed of trust, as**
2 **authorized by AS 34.20.070 - 34.20.130**, no other or further
3 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 for a deficiency.

4 Emphasis added.

5 There, this Court analyzed how AS 34.20.100 was drafted and the
6 practical effect of applying the statute extraterritorially, to determine whether
7 the phrase “under a deed of trust, as authorized by AS 34.20.070 - 34.20.130,”
8 was illustrative or exclusive. 106 Nev. at 53, 787 P.2d at 384. In other words,
9 this Court examined whether the phrase “under a deed of trust, as authorized
10 by AS 34.20.070 - 34.20.130,” limited Alaska’s anti-deficiency statute’s
11 applicability to only those non-judicial foreclosure sales held in Alaska (“as
12 authorized by AS 34.20.070 - 34.20.130”), or whether that phrase merely
13 illustrated an example of what was meant by a non-judicial foreclosure sale.
14 Id. Ultimately, this Court concluded that the phrase “under a deed of trust, as
15 authorized by AS 34.20.070 - 34.20.130,” was exclusive, rather than
16 illustrative, explaining:

17 [W]e cannot agree with respondents’ contention that if the
18 Alaska legislature intended to limit the anti-deficiency
19 provisions, it would not have placed non-restricting commas
20 around the clause “as authorized by AS 34.20.070—
21 34.20.130.” On the contrary, we read the offsetting commas
 as indicating a clear intent to limit the effect of the statute to
 foreclosures under those sections, especially because AS
 34.20.070 expressly refers to deed of trust conveyances of
 property *located in Alaska*. Furthermore, because anti-

1 deficiency statutes derogate from the common law, they
2 should be narrowly construed. 3 Sutherland, *Statutory*
3 *Construction* § 61.01 (4th ed. 1986). Consequently, we agree
4 with appellant that the district court erred in concluding that
5 AS 34.20.100 applied extraterritorially.

4 Id.

5 In sum, this Court held that based upon how Alaska’s anti-deficiency
6 statute was drafted (with restricting commas, and with the phrase “as
7 authorized by”), in addition to the fact that Alaska’s anti-deficiency statute
8 resulted in a complete prohibition on deficiency actions in other states,
9 Alaska’s anti-deficiency statute could not apply in Nevada. Id.

10 In contrast, this Court’s recent decision in Windhaven regarding the
11 extensive reach of Nevada’s anti-deficiency statute applies to illustrative,
12 rather than exclusive, anti-deficiency statutes. 131 Nev. Adv. Op. 20, 347
13 P.3d at 1041. In Windhaven, the Court determined whether Nevada’s anti-
14 deficiency statutes applied to a deficiency action held in Nevada following a
15 non-judicial foreclosure sale held in Texas. Id., 347 P.3d at 1038. The
16 Nevada anti-deficiency statute in question – NRS 40.455(1) – provided¹³ in
17 relevant part:

18 [U]pon application of the judgment creditor or the beneficiary
19 of the deed of trust **within 6 months after the date of the**
20 **foreclosure sale or the trustee’s sale held pursuant to NRS**
21 **107.080**, respectively, and after the required hearing, the
court shall award a deficiency judgment to the judgment

21 ¹³ NRS 40.455 has since been amended.

1 creditor or the beneficiary of the deed of trust if it appears
2 from the sheriff’s return or the recital of consideration in the
3 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.

4 Emphasis added.

5 Thus, the Windhaven Court analyzed whether the phrase “trustee’s sale
6 held pursuant to NRS 107.080” was illustrative or exclusive. Id., 347 P.3d at
7 1040. In other words, this Court examined whether the phrase “trustee’s sale
8 held pursuant to NRS 107.080” limited Nevada’s anti-deficiency statute’s
9 applicability to only those non-judicial foreclosure sales held in Nevada
10 (“pursuant to NRS 107.080”), or whether that phrase merely illustrated an
11 example of what was meant by a non-judicial foreclosure sale. Id. Inverse to
12 the Key Bank case, this Court concluded that the phrase “trustee’s sale held
13 pursuant to NRS 107.080” was illustrative rather than exclusive, explaining:

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

19 Id., 347 P.3d at 1041 (emphasis added).

20 In sum, this Court held in Windhaven that based upon how Nevada’s
21 anti-deficiency statute was drafted (with the phrase “pursuant to”), in addition

1 to the fact that Nevada’s anti-deficiency statute contained **no express**
2 **limitation** on its application to non-judicial foreclosure sales held in
3 accordance with another state’s laws, Nevada’s anti-deficiency statute **did**
4 apply in that case. Id.

5 Here, similar to the Windhaven case, the Utah anti-deficiency statute in
6 question is illustrative, rather than exclusive. Utah Code Ann. § 57-1-32
7 provides in relevant part:

8 **At any time within three months after any sale of property**
9 **under a trust deed as provided in Sections 57-1-23, 57-1-**
10 **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

11 Emphasis added.

12 Just as in Key Bank and Windhaven, the central issue is whether the
13 phrase “under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-
14 1-27,” is illustrative or exclusive. In other words, the question is whether the
15 phrase “under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-
16 1-27,” limits Utah’s anti-deficiency statute’s applicability to only those non-
17 judicial foreclosure sales held in Utah (“as provided in Sections 57-1-23, 57-
18 1-24, and 57-1-27”), or whether this phrase merely illustrates an example of
19 what was meant by a non-judicial foreclosure sale.

20 The answer is that the phrase “under a trust deed as provided in Sections
21 57-1-23, 57-1-24, and 57-1-27,” is illustrative, not exclusive. Just as this

1 Court held in Windhaven with respect to Nevada’s anti-deficiency statute,
2 Utah’s anti-deficiency statute contains no express limiting or precluding
3 language. It merely provides an example of various types of non-judicial
4 foreclosure sales. Utah’s legislature could have easily included language in
5 Utah Code Ann. § 57-1-32 which stated that it only applied to non-judicial
6 foreclosures held in the state of Utah, but it chose not to do so. See Mineral
7 County v. State, Bd. of Equalization, 121 Nev. 533, 539, 119 P.3d 706, 709
8 (2005) (explaining that “[s]ince the Legislature is silent, this court should not
9 ‘fill in alleged legislative omissions based on conjecture as to what the
10 legislature would or should have done.’”) (*citing* Falcke v. Douglas County,
11 116 Nev. 583, 589, 3 P.3d 661, 665 (2000) (*quoting* McKay v. Board of Cty.
12 Comm’r, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987))).

13 Moreover, Utah’s anti-deficiency statute is drafted much more
14 similarly to Nevada’s anti-deficiency statute (which this Court has deemed
15 illustrative, not exclusive) than to Alaska’s anti-deficiency statute (which this
16 Court has deemed exclusive, not illustrative). For example, both the Nevada
17 anti-deficiency statute and the Utah deficiency statute do not have restricting
18 commas in their relevant phrases: “trustee’s sale held pursuant to NRS
19 107.080,” and “under a trust deed as provided in Sections 57-1-23, 57-1-24,
20 and 57-1-27,” respectively. In contrast, the Alaska anti-deficiency statute
21

1 does have restricting commas in its relevant phrase: “under a deed of trust, as
2 authorized by AS 34.20.070 - 34.20.130,”.

3 Additionally, both the Nevada anti-deficiency statute and the Utah
4 deficiency statute contain similar wording which indicates that they are
5 illustrative, rather than exclusive. For example, the Windhaven Court found
6 the language “pursuant to” in Nevada’s anti-deficiency statute to be
7 illustrative. In Key Bank, the Court found the language “as authorized by” in
8 Alaska’s anti-deficiency statute to be exclusive. Utah’s anti-deficiency statute
9 contains the language “as provided in”, which is much more similar to
10 Nevada’s illustrative language than Alaska’s exclusive language.

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

16 In sum, any suggestion by the District Court that Utah’s anti-deficiency
17 statute is similar to the Alaska anti-deficiency statute in Key Bank and
18 therefore cannot be applied is without merit and contradicts this Court’s
19 decisions in Key Bank and Windhaven. Given the foregoing, Utah’s anti-
20 deficiency statute applies to this deficiency action. For these additional
21 reasons, it was error for the District Court to deny Petitioners’ Second Motion

1 to Dismiss, and Petitioners respectfully request this Court overturn the District
2 Court’s ruling in its entirety.

3 **VII. CONCLUSION**

4 Statutes of limitation are implemented for a reason – while creditors
5 have the right to bring deficiency actions, borrowers and guarantors must be
6 protected via a strict timeline for filing deficiency claims. Here, America First
7 failed to adhere to the relevant timeline for filing its deficiency claim, and the
8 underlying matter must therefore be dismissed without exception. The
9 District Court cannot be permitted to ignore this Court’s decisions in Key
10 Bank, Mardian, and Windhaven by misreading and ignoring such precedent
11 and refusing to apply the three-month statute of limitations of the governing
12 state law of Utah.

13 Petitioners are thus compelled to bring this Writ because the District
14 Court erred as a matter of law when it denied their Second Motion to Dismiss,
15 thereby leaving them exposed to pursuit of an expressly time-barred action by
16 America First against them. As discussed further above, the District Court’s
17 determination is legally unsustainable and flies directly in the face of this
18 Court’s prior rulings. Petitioners have no plain, speedy, or adequate remedy
19 at law to protect their legal rights. For these and the foregoing reasons, the
20 extraordinary relief requested by this Petition is necessary and appropriate at
21 this time. Accordingly, Petitioners submit that the Court’s resolution, in their

1 favor, of the significant legal issues presented by this Petition will promote
2 the interests of justice, and Petitioners respectfully request the Court grant this
3 Petition in its entirety.

4 Dated this 6th day of January, 2017.

5 REID RUBINSTEIN & BOGATZ

6
7 By: /s/ Charles M. Vlastic III, Esq.

8 I. Scott Bogatz, Esq.
9 Nevada Bar No. 3367
10 Charles M. Vlastic III, Esq.
11 Nevada Bar No. 11308
12 Jaimie Stiliz, Esq.
13 Nevada Bar No. 13772
14 300 S. 4th Street, Suite 830
15 Las Vegas, Nevada 89101
16 *Attorneys for Petitioners*
17
18
19
20
21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

CERTIFICATE OF COMPLIANCE

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

Dated this 6th day of January, 2017.

REID RUBINSTEIN & BOGATZ

By: /s/ Jaimie Stilz, Esq.

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 S. 4th Street, Suite 830
Las Vegas, Nevada 89101
Attorneys for Petitioners

