IN THE COURT OF APPEALS 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 JUDGE,

Respondents,

and

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

Real Party in Interest.

No. 72086

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ANSWER TO PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

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17-900572

NRAP 26.1 DISCLOSURE STATEMENT

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

Real Party in Interest America First Federal Credit Union ("AFCU") is a federally regulated credit union. Appellant has no parent company and no stock.

BALLARD SPAHR LLP appeared on AFCU's behalf in the district court and is expected to appear on AFCU's behalf in this Court.

Dated: March 23, 2017.

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INTRODUCTION

This matter arises from a deficiency action by real party in interest America First Credit Union ("AFCU") against petitioners Franco Soro, Myra-Taigman Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro ("Borrowers"). Borrowers obtained a $2.9 million commercial loan from AFCU in 2002. After defendants defaulted, AFCU foreclosed against the real property in Mesquite, Nevada that secured the loan. It then filed this action to recover the $2.4 million deficiency that remained due. Borrowers moved to dismiss AFCU's complaint on statute of limitations grounds. When the district court denied the motion, Borrowers filed their instant petition.

As an initial matter, the denial of Borrowers' motion to dismiss is not a proper basis for writ relief. Subject to limited exceptions that do not apply here, the Nevada Supreme Court will not issue an extraordinary writ based on the denial of a motion to dismiss. But even if the Court reaches the merits, it ought to deny Borrowers' petition. Borrowers claim that a choice of law clause in the parties' loan agreement incorporates Utah's three-month statute of limitations for deficiency actions. However, the Nevada Supreme Court held in Key Bank of Alaska v. Donnels, 106 Nev. 49, 787 P.2d 382 (1990), that a choice-of-law clause does not import another state's deficiency statutes if those statutes do not purport to govern a sale in Nevada. Utah's deficiency statutes only purport to govern sales

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

Borrowers try to distract the Court from Key Bank in two ways. First, Borrowers argue that Mardian v. Michael & Wendy Greenberg Family Trust, 131 Nev. Adv. Rep. 72, 359 P.3d 109 (2015), somehow governs this case. This is despite the fact that Mardian does not change (or even discuss) the central holding of Key Bank; that Mardian involved a different factual scenario; that Mardian is dicta with regard to the issue it actually does address; and that Mardian would not apply retroactively to the facts of this case even if it reversed Key Bank. Borrowers also try to distract the Court from Key Bank by claiming the Utah deficiency statute is merely "illustrative" when it says that it governs sales in Utah. Borrowers point to several purported differences between the Alaska statute in Key Bank and the Utah statute in this case, but none of these purported differences change the application of Key Bank. For these reasons, the Court should deny the petition.

FACTS AND PROCEDURAL BACKGROUND

On April 11, 2002, AFCU made a $2,900,000 commercial loan (the "Loan") to nine co-obligors, including the five Borrowers named as defendants in this case. Petitioners' Appendix ("PA") 000149. The Loan is evidenced by a Business Loan Agreement (the "Loan Agreement"), PA 000137-144, and a Commercial Promissory Note (the "Note"), PA 000146-150. The obligors agreed to be jointly and severally liable for all amounts due under the Loan. PA 000142 & 000149. The Loan was secured by a Trust Deed (the "Deed of Trust") that encumbered real property at 820 West Mesquite Boulevard, Mesquite, Nevada (the "Property"). PA 000152-161. The Deed of Trust named Mesquite Jabez, LLC as trustor, AFCU as beneficiary, and Timothy W. Blackburn as trustee. PA 000152.

The obligors defaulted by failing to make monthly payments of principal and interest beginning with the payment due November 30, 2010. PA 000166. A trustee's sale of the Property was held on October 4, 2012 (the "Sale"). PA 000174. At the Sale, AFCU bought the Property with a credit bid of $1,215,000. Id. After the Sale, there remained a deficiency of approximately $2.4 million. PA 000174 & 000179.

On April 4, 2013, AFCU brought a deficiency action against Borrowers pursuant to NRS 40.455. PA 000001-004. Defendants moved to dismiss for lack of subject matter jurisdiction, arguing that certain consent-to-jurisdiction clauses in

the Loan Agreement and Note required AFCU to sue for a deficiency in Utah. PA 000016-023. The district granted the motion to dismiss. PA 000073-078. AFCU appealed and the Nevada Supreme Court reversed in a unanimous, en banc opinion. PA 000090-098.

On remand, Borrowers filed a second motion to dismiss, this time on statute of limitations grounds. PA 000099-107. Defendants argued the complaint was governed by Utah's three-month statute of limitations for bringing a deficiency action after a trustee's sale, see Utah Code § 57-1-32, instead of Nevada's six-month statute of limitations, see NRS 40.455. They based this argument on a choice of law provision in the Loan Agreement in favor of Utah law. PA 000142. AFCU filed an opposition to Borrowers' second motion to dismiss, together with a counter-motion for partial summary judgment as to liability. PA 000116-132. Borrowers then filed a reply in support of their second motion to dismiss, PA 000180-190, and an opposition to AFCU's counter-motion. Finally, AFCU filed a reply in support of the counter-motion. After a hearing, the district court entered an order denying the second motion to dismiss and denying the counter-motion. PA 000191-192. Borrowers' instant petition asks the Court to issue a writ of mandamus and prohibition compelling the district court to grant the second motion to dismiss and to stop any further proceedings.

ARGUMENT

I. The denial of petitioners' motion to dismiss is not a proper basis for an extraordinary writ.

A writ of mandamus or prohibition may issue "where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170 & 34.330. "[T]he right to appeal is generally an adequate legal remedy that precludes writ relief." Pan v. Eighth Judicial Dist. Court, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) (citations omitted). "[E]ven if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief." Id., 120 Nev. at 225, 88 P.3d at 841 (citation omitted).

Accordingly, the Nevada Supreme Court ususally "will not exercise [its] discretion to consider writ petitions that challenge orders of the district court denying motions to dismiss or motions for summary judgment." Smith v. Eighth Jud. Dist. Ct., 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997) (citation omitted). The Supreme Court "adopted this policy because very few writ petitions warrant extraordinary relief, and [the Supreme Court] expends an enormous amount of time and effort processing these petitions." Id. (citation omitted). The Supreme Court has "allowed a very few exceptions where considerations of sound judicial economy and administration militated in favor of granting such petitions." Id. (citation omitted). For example, relief may be appropriate "with respect to certain

petitions where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action." Id., 113 Nev. at 1345, 950 P.2d at 281. Additionally, relief may be appropriate where "an important issue of law requires clarification." Id.

Here, Borrowers challenge the denial of a motion to dismiss, which is a presumptively invalid basis for a writ petition. See id., 113 Nev. at 1344, 950 P.2d at 281. Defendants' proper remedy is to appeal from any adverse final judgment which the district court may enter. Neither of the two exceptions from Smith applies here.

First, there is no "clear authority under a statute or rule" which requires dismissal. The question of whether Nevada's statute of limitations or Utah's statute of limitations governs AFCU's complaint turns on common law choice-of-law principles, not on any statute or rule. Cf. Badger v. Eighth Judicial Dist. Court, 132 Nev. Adv. Rep. 39, 373 P.3d 89, 93 (2016) (considering petition because "the district court failed to grant summary judgment where a Nevada statute required it."). Further, in the earlier appeal, Borrowers specifically asked the Supreme Court not to address the statute of limitations issue. In doing so, they described this as a "nuanced issue" that involved "complex, fact-intensive" arguments. Respondent's Answering Brief at viii n.1, Soro, 359 P.3d 105 (No.

64130) (emphasis in original). Borrowers cannot now claim that "clear authority under a statute or rule" somehow dictates their preferred outcome.

Second, the issue at hand does not have any particular statewide importance or require any clarification. As explained below, the Supreme Court held in Key Bank that a choice of law provision does not import another state's deficiency statute if the foreign statute does not purport to govern a Nevada sale. The Supreme Court has seen no need to revisit or clarify this central holding. Defendants' esoteric statute of limitations argument has required no further repudiation since 1990 and it requires no further repudiation now.

For these reasons, extraordinary writ relief is not appropriate at this point in the case and the Court need not even consider the merits of Borrowers' petition.

II. The petition also fails on the merits.

Even if the Court reaches the merits, it still ought to deny the petition. As explained below, Key Bank holds that a choice of law provision does not import another state's deficiency statute if the foreign statute does not claim to apply extraterritorially in Nevada. The Utah deficiency statute in this case only claims to govern Utah sales, not Nevada sales. Therefore, Key Bank is directly on point and it defeats Borrowers' argument. Further, the Mardian decision does not alter the holding of Key Bank in any way, and Borrowers' efforts to distinguish Key Bank are unavailing.

A. Under Key Bank, a choice of law provision does not import another jurisdiction's deficiency statute if the foreign statute does not claim to govern a Nevada trustee's sale.

In Key Bank, a lender made a commercial loan to a corporate borrower. The loan was secured by real property located in Reno and by two personal guaranties. 106 Nev. at 51, 787 P.2d at 383. The note and guaranties contained choice of law provisions in favor of Alaska law. Id. When the borrower defaulted, the lender foreclosed against the Reno property and later brought a deficiency action against the guarantors. Id.

At the time, Alaska law prohibited a lender from recovering a deficiency judgment after a trustee's sale. See id., 106 Nev. at 51-52, 787 P.2d at 384 ("When a sale is made by a trustee under a deed of trust, as authorized by AS 34.20.070-34.20.130, no other or 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 for a deficiency.") (citing Alaska Stat. § 34.20.100). The guarantors in Key Bank argued the choice of law clause in the note and guaranties incorporated the Alaska statute, even though the subject property was located in Nevada. See id.

Addressing this issue, the Nevada Supreme Court initially noted that an action to recover a deficiency judgment is an action on the underlying debt. See id., 106 Nev. at 52, 787 P.2d at 384. Therefore, as a general matter, a choice of

law provision in a note will govern a deficiency action by the lender. See id. However, the Court explicitly rejected the guarantors' argument that Alaska's deficiency statute applied. This was because Alaska's deficiency statute, by its own terms, did not claim to govern a trustee's sale held in another state. The Alaska statute only governed trustee's sales "as authorized by [Alaska Stat. §§] 34.20.070-34.20.130." Id., 106 Nev. at 52 n.1, 787 P.2d at 384 (citing Alaska Stat. § 34.20.100). Therefore, the Supreme Court concluded, the Alaska statute did not apply extraterritorially to the sale of the Reno property.

Under the rule from Key Bank, Utah's deficiency statute does not apply here if the statute itself does not claim to apply extraterritorially in Nevada. It does not. It provides that "[a]t 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." Utah Code § 57-1-32. Thus, the Utah statute only applies after a "sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27..." Id. (emphasis added). It is undisputed that the sale of the Nevada property in this case was conducted pursuant to NRS Chapter 107, not pursuant to Utah Code §§ 57-1-23, 57-1-24, or 57-1-27. Therefore, AFCU's deficiency complaint is subject to Nevada's six-month statute of limitations, not Utah's three-month statute, and the complaint is timely.

B. Mardian does not alter or overrule Key Bank.

Perhaps realizing that Key Bank defeats their argument, Borrowers try to distract the Court by discussing the Mardian case. 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 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 held that neither state's limitation period applied. Id. The Nevada 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 that discussed 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—i.e., that a choice-of-law clause

does not incorporate a foreign jurisdiction's deficiency statute where the subject property is located in Nevada and where the foreign statute does not purport to govern a Nevada sale.

After deciding this issue, the Mardian court addressed whether NRS 40.455 required the Trust to file a new "application" for a deficiency judgment within six months after the sale. Although the Trust had sued the guarantors before the sale, the Supreme Court ruled the Trust had to file a new "application" for a deficiency judgment within six months of the sale. Since the Trust did not file an amended complaint, motion for summary judgment, or some other document that could be construed as an "application," the Trust was not entitled to a deficiency judgment. Id. at 112-13.

For at least four reasons, Mardian has no bearing on whether the choice of law clause in the Loan Agreement imports Utah's deficiency statute. As explained below, Mardian does not alter the rule from Key Bank that a choice of law clause does not incorporate a foreign deficiency statute where the foreign statute does not claim to govern in Nevada.

1. Mardian never discusses or mentions the central holding of Key Bank.

Nevada courts strongly adhere to the doctrine of stare decisis. See Miller v. Burk, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) ("[U]nder the doctrine of stare decisis, we will not overturn [precedent] absent compelling reasons for so

doing. Mere disagreement does not suffice."); Stocks v. Stocks, 64 Nev. 431, 438, 183 P.2d 617, 620 (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 this fact, if the Mardian court had meant to overrule, alter, or even clarify Key Bank, it would have been explicit. But Mardian never purports to overrule Key Bank's holding that a choice of law clause does not incorporate a foreign deficiency statute. In fact, Mardian never even mentions this holding, and the parties in Mardian never discussed Key Bank at all in their appellate briefs. See Appellants' Opening Brief (Jun. 27, 2013); Respondents' Answering Brief (Jul. 25, 2013); Appellants' Reply Brief (Aug. 26, 2013).

Further, departing from Key Bank would have had major implications for commercial lending—implications the Supreme Court would have considered and addressed if it had meant to overrule its precedent. First, allowing parties to contract around Nevada's deficiency statutes would skirt the protections for borrowers and guarantors provided by 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.").

Second, departing from Key Bank would undermine the predictability of commercial real estate transactions. See Cal. Fed. Sav. and Loan Ass'n v. Bell, 6 Haw App. 597, 606-07, 735 P.2d 499, 506 (1987) ("If such matters as deficiency judgments arising from land transactions were not to be determined by the laws of this jurisdiction, the laws of 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."); see also Gramercy Inv. Trust v. Lakemont Homes Nev., Inc., 198 Cal. App 4th 903, 909, 130 Cal. Rptr. 3d 496, 501 (2011) (New York's deficiency statutes did not apply to sale of California real property, despite choice-of-law provision in favor of New York law).

Finally, overruling Key Bank would violate the common law rule that limitations are a procedural matter governed by the law of the forum where a lawsuit is filed. See Wilcox v. Williams, 5 Nev. 206, 211 (1869) ("[T]he law of the forum always governs the remedy in England and this country; and the statute of limitations applies only to a remedy, and not to a right or obligation."); Asian Am. Ent. Corp. v. Las Vegas Sands, Inc., 324 Fed. Appx. 567, 568-69 (9th Cir. 2009) (noting that Nevada Supreme Court "has not abrogated Wilcox's *lex fori* approach to statute-of-limitations conflicts...."); Sierra Diesel Injection Serv. v.

Burroughs Corp., 648 F. Supp. 1148, 1152 (D. Nev. 1986) ("[T]he local law of the forum governs whether an action is barred by the statute of limitations.") (applying Nevada law). Under this approach, a choice of law clause does not change the governing statute of limitations for a case; this is always governed by the law of the forum. See Cole v. Mileti, 133 F.3d 433, 437 (6th Cir. 1998); Gluck v. Unisys Corp., 960 F.2d 1168, 1179-80 (3d Cir. 1992); Fed. Deposit Ins. Corp. v. Petersen, 770 F.2d 141, 142 (10th Cir. 1985); Des Brisay v. Goldfield Corp., 637 F.2d 680, 682 (9th Cir. 1981); Sierra Diesel Injection Serv. v. Burroughs Corp. 648 F. Supp. 1148, 1152 (D. Nev. 1986); Portfolio Recovery Assocs. LLC v. King, 14 N.Y.3d 410, 416, 927 N.E.2d 1059 (2010). If the Nevada Supreme Court had meant to overrule Key Bank—and thus work a sea change in the areas of commercial lending and conflict of laws—it at least would have noted and addressed these issues.

2. Mardian addressed whether Nevada's deficiency statutes could govern a sale in another state—not whether another state's deficiency statutes could govern a sale in Nevada.

A second reason why Mardian does affect Key Bank is that the facts of Key Bank and Mardian are distinguishable. In Key Bank, the governing loan documents included choice of law clauses in favor of Alaska law. The Nevada Supreme Court held these clauses did not incorporate Alaska's deficiency statutes to govern a trustee's sale of Nevada real estate. In contrast, the loan documents in

Mardian involved choice of law clauses in favor of Nevada law. The Supreme Court held that these clauses could incorporate Nevada's deficiency statutes to govern a trustee's sale of Arizona real estate. In other words, Key Bank involved a provision that tried to "import" another state's deficiency statutes to govern a Nevada sale, whereas Mardian involved a provision that tried to "export" Nevada's deficiency statutes to govern a sale in another state. Like Key Bank, and unlike Mardian, this case involves an attempt to "import" another state's deficiency statutes to govern a Nevada sale. Therefore, this case is governed by Key Bank.[1]

3. With regard to the issue it actually decided, Mardian is dicta.

A third reason why Mardian does not alter Key Bank is that Mardian's discussion of the relevant statute of limitations is dicta. In Mardian, the Supreme Court stated the lender's deficiency action was time-barred because the lender did not file an "application" for a deficiency judgment within six months of the foreclosure sale, per NRS 40.455. By definition, the lender also did not file any "application" within the three-month limitation period imposed by Arizona law. Therefore, the deficiency action would have been time-barred under either jurisdiction's statute of limitations. To reach its decision, the Supreme Court did not need to choose between the Nevada statute, on one hand, and the Arizona

[1] Notably, the end result in both Key Bank and Mardian was that Nevada's six-month statute of limitations governed.

statute, on the other. The Supreme Court only needed to reject the district court's esoteric conclusion that neither statute of limitations applied. Accordingly, Mardian's discussion of the applicable statute of limitations is dicta, and Mardian has no bearing on this case.

4. Even if Mardian actually reversed Key Bank, that reversal would not apply retroactively to the events of this case.

Finally, even if Mardian had actually reversed Key Bank by holding that a choice of law provision always imports another state's deficiency statutes to govern a Nevada sale, that holding would not apply retroactively to the events of this case. AFCU made its Loan to Borrowers in 2002, the Sale was held in 2012, AFCU filed suit in 2013, and Mardian was not decided until 2015. Therefore, for Mardian to govern this case, it would need to apply retroactively.

In Breithaupt v. USAA Prop. & Cas. Ins. Co., the Nevada Supreme Court addressed the retroactive application of judicial decisions as follows:

> In determining whether a new rule of law should be limited to prospective application, courts have considered three factors: (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) courts consider whether retroactive application could produce substantial inequitable results.

110 Nev. 31, 35, 867 P.2d 402, 405 (1994) (internal citations and quotation marks omitted).

Assuming, *arguendo*, that Mardian overrules Key Bank, the first Breithaupt factor is easily satisfied because Key Bank was clear past precedent. The second Breithaupt factor also favors non-retroactivity. Based on the holding of Key Bank, AFCU was entitled to believe when it extended the Loan in 2002 and when it foreclosed in 2012 that any deficiency action would be governed by Nevada's deficiency statutes. As for the third Breithaupt factor, 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. Therefore, even if Mardian actually overturned Key Bank, that holding would not apply retroactively to the transaction in this case.

For all these reasons, Mardian does not reverse or otherwise modify Key Bank. A choice of law clause does not import another jurisdiction's deficiency statutes to govern a Nevada sale where the foreign statute does not claim to apply extraterriorially. This was the law before Mardian, and it remains the law today.

C. Petitioners cannot distinguish Key Bank from this case.

After finally acknowledging Key Bank's central holding more than halfway through their petition, Pet. at 16, Borrowers try to distinguish Key Bank. They

argue that Utah Code § 57-1-32 is simply "illustrative" when it says that it governs sales "under a trust deed as provided in [Utah Code] Sections 57-1-23, 57-1-24, and 57-1-27[.]" In contrast, Borrowers claim, the Alaska statute in Key Bank was "exclusive" when it said that it governed sales "under a deed of trust, as authorized by [Alaska Statutes] 34.20.070-34.20.130[.]" Borrowers make four arguments for why the two near-identical statutes are distinguishable. None of these arguments is persuasive.

1. The applicability of Key Bank does not depend on a foreign deficiency statute's use of commas.

First, Borrowers argue the Alaska statute in Key Bank used offsetting commas around the phrase "as authorized by [Alaska Statutes] 34.20.070-34.20.130" whereas the Utah statute in this case does not use offsetting commas around the phrase "as provided in [Utah Code] Sections 57-1-23, 57-1-24, and 57-1-27." According to Borrowers, the commas in the Alaska statute indicated that the reference to Alaska sales was exclusive, whereas the lack of commas in the Utah statute indicates that the reference to Utah sales is illustrative. Pet. at 18 & 21-22.

Comma use was hardly a dispositive factor in Key Bank. To be fair, the Nevada Supreme Court did note that the offsetting commas suggested the statute was exclusive. However, the court also gave two additional, more important reasons for why the Alaska statute did not govern a Nevada sale:

> In dismissing appellant's complaint, the district court apparently construed the language of AS 34.20.100 as illustrative rather than exclusive and concluded that the statute applied extraterritorially. However, we cannot agree with respondents' contention that if the Alaska legislature intended to limit the anti-deficiency provisions, it would not have placed nonrestricting commas around the clause "as authorized by AS 34.20.070 -- 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-deficiency statutes derogate from the common law, they should be narrowly construed. 3 Sutherland, Statutory Construction § 61.01 (4th ed. 1986). Consequently, we agree with appellant that the district court erred in concluding that AS 34.20.100 applied extraterritorially.

Key Bank, 106 Nev. at 53 (emphasis original).

Thus, the Nevada Supreme Court held that the statute in Key Bank did not apply extraterritorially because it specifically referred to sales conducted under Alaska law (and no other state's law) and because it derogated from the common law. The same exact arguments apply here: the Utah statute explicitly refers to sales conducted under Utah law (and no other state's law) and it also derogates from a lender's common law right to a deficiency judgment. The outcome of Key Bank would have been no different even if the Alaska statute had not used offsetting commas. Under Key Bank, when a foreign deficiency statute specifically refers to sales held in a foreign jurisdiction, and no other jurisdiction,

that renders the statute exclusive. The extraterritorial effect of a foreign deficiency does not stand or fall on the finer points of comma use.[2]

2. The applicability of Key Bank does not depend on whether a foreign deficiency statute expressly says it is exclusive.

Even though Utah Code § 57-1-32 specifically refers to sales in Utah—and no other jurisdiction—Borrowers still argue the statute is illustrative because it does not explicitly state that it only governs Utah sales. Pet. at 18-20. Borrowers cite the Windhaven case as alleged support for this argument.

The central issue in Windhaven was whether a lender could file a deficiency action in Nevada after a sale of property in Texas. Under the version of NRS 40.455(1) that was then in effect, a lender could seek a deficiency in Nevada after a "trustee's sale held pursuant to NRS 107.080." 347 P.3d at 1039. The defendants in Windhaven moved for summary judgment on the ground that the sale was held in Texas pursuant to Texas law, and therefore not "pursuant to NRS 107.080." The Nevada Supreme Court rejected this argument, noting the statute "does not indicate that it precludes deficiency judgments arising from non judicial foreclosure sales

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[2] The Windhaven case which petitioners cite to support their comma argument actually declines to address the issue. Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC, 131 Nev. Adv. Rep. 20, 347 P.3d 1038, 1040 n.4 (2015) ("The parties also disagree about the effect of the lack of offsetting commas in the phrase 'trustee's sale held pursuant to NRS 107.080.' However, as this effect is not essential to our determination, we do not address it here.")

held in another state." Id. at 1041. The Supreme Court reversed the district court's judgment against the lender and remanded the case for further proceedings.[3]

Windhaven is irrelevant in several respects. First, unlike Key Bank or this case, Windhaven did not involve any sort of statute of limitations issue. The issue was whether the lender could sue for a deficiency in Nevada, not how much time the lender had to sue. In fact, the Supreme Court specifically declined to rule on whether Nevada's deficiency statutes or Texas's deficiency statutes would govern the case on remand. See id. at 1042 n.8 ("The question of whether a court should, in such situations, apply Nevada law or the law of the state where the foreclosure was held is a conflict-of-laws question that will depend upon the particular facts of the case.").

Second, Windhaven involved a sale of property in another state and the issue of how Nevada law would apply to the out-of-state sale. In contrast, Key Bank and this case both involved trustee's sales held in Nevada and the issue of whether another state's law would govern the Nevada sale. While Windhaven is superficially similar to Key Bank and this case because Windhaven involved a

[3] The lack of "express" exclusivity language in Windhaven was simply one of several reasons for the Supreme Court's ruling. Windhaven also noted that (1) another Nevada statute contemplated that a party could bring a deficiency action in Nevada after foreclosing in another state; (2) statutes limiting deficiency judgments derogate from the common law and must be narrowly construed; and (3) NRS 40.455 is meant to create fairness for both creditors and debtors. Id. at 1041-42.

deficiency action, but the similarities essentially end there. Windhaven says nothing as to whether a choice of law provision can import Utah's deficiency statutes to govern a Nevada sale. Once again, Borrowers are simply talking around the issue that was decided against them in Key Bank.

To read Borrowers' argument more charitably, they may be using Windhaven to make a more general point about the differences between illustrative and exclusive statutory language. Borrowers may be arguing that an exclusive statute must explicitly say it is exclusive. Further, they may be basing this argument on the Nevada Supreme Court's observation in Windhaven that NRS 40.455(1) did not "indicate that it preclude[d]" a lender from suing for a deficiency in Nevada after a sale in another state. But even when viewed in this light, Borrowers' argument is still a non-starter. If Borrowers are claiming that a foreign deficiency statute applies extraterrorially to sale in Nevada whenever the foreign statute does not explicitly deny this fact, then Borrowers are contradicting Key Bank. The Alaska statute in Key Bank also did not explicitly claim to be exclusive, but that did not affect the outcome of the case. Therefore, Key Bank necessarily rejects petitioners' purported application of Windhaven.

3. The applicability of Key Bank does not depend on whether a foreign deficiency statute completely eliminates deficiency judgments.

Borrowers also try to distinguish Key Bank by arguing that the Alaska statute in Key Bank completely prohibited deficiency judgments, whereas the Utah statute in this case simply imposes limitations on deficiency judgments. However, the nature of the restriction imposed by a deficiency statute has nothing to do with whether the statute applies extraterritorially. Under Key Bank, the extraterritorial effect of the Utah statute turns on whether it claims to govern sales in Nevada—not on whether the statute completely eliminates deficiency judgments or simply limits them. Further, regardless of whether a deficiency statute limits or completely eliminates deficiency judgments, it derogates from the common law and must be narrowly construed. See Windhaven, 347 P.3d at 1041 (narrowly construing Nevada statute which limited but did not eliminate deficiency judgments).

4. The applicability of Key Bank does not depend on whether a foreign deficiency statute uses the phrase "as authorized by" or uses a different phrase.

Finally, Borrowers note that the Utah deficiency statute governs a sale "as provided in" Utah law. Utah Code § 57-1-32. Borrowers argue this is closer to the language of the statute in Windhaven—which governed sales "pursuant to" Nevada law—than it is to the language of the statute in Key Bank—which governed sales "as authorized by" Alaska law. This is clearly a distinction without

a difference. Foreclosing "as provided in" a statute is the same as foreclosing "pursuant to" the statute or "as authorized by" the statute.

For all these reasons, Key Bank is directly on point. Under Key Bank, the choice of law provision in the Loan Agreement does not incorporate Utah Code § 57-1-32 because the statute only purports to govern sales in Utah. Therefore, AFCU's complaint is governed by Nevada's six-month statute of limitations and is timely.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of March, 2017 the Answer to Petition for Writ of Mandamus and Prohibition was served via U.S. Mail, postage prepaid to the following:

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