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 Court Judge,

Respondents,

And

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

Real Party in Interest.

Supreme Court Case No: 72086

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

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I. INTRODUCTION

Despite AFFCU's valiant efforts to distract this Court, the fact of the matter is that Petitioners are entitled to dismissal of the underlying action. As explained further below, AFFCU's interpretations of the relevant case law are illogical and cannot disguise the fact that AFFCU failed to abide by the pertinent three-month statute of limitations. Petitioners have clear authority and precedent supporting the applicability of the three-month statute of limitations from Utah's anti-deficiency statute of limitations along with the Nevada Supreme Court's prior rulings related to out-of-state deficiency statutes. Accordingly, Petitioners are entitled to and respectfully request issuance of a writ of mandamus and prohibition overturning the District Court's erroneous denial of Petitioners' Second Motion to Dismiss.

II. LEGAL ARGUMENT

A. ISSUANCE OF A WRIT IS NECESSARY AND PROPER GIVEN THE SEVERE CONSEQUENCES OF THE DISTRICT COURT'S ERRORONEOUS DENIAL.

The District Court's erroneous denial of the Second Motion to Dismiss is a necessary and proper basis for writ relief. AFFCU claims, incorrectly, that said denial may not form the basis for a writ petition. While not routine, motion to dismiss denial writs are permitted when "the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law." See, e.g., Badger v. Eighth Jud. Dist. Ct., 132 Nev. Adv. Op. 39, 373

P.3d 89, 93 (2016) (*citing* Buckwalter v. Eighth Jud. Dist. Ct., 126 Nev. 200, 201, 234 P.3d 920, 921 (2010)); see also Smith v. Eighth Jud. Dist. Ct., 113 Nev. 1343, 1348, 950 P.2d 280, 283 (1997) (finding petition for writ following denial of motion to dismiss was appropriate and issuing writ of mandamus as "an appeal following final judgment would be an inadequate remedy," since petitioners would have to defend against claims that ought to have been dismissed). In this matter, there are no factual disputes, and the issues raised by Petitioners are uncontrovertibly unsettled, as is clear from Petitioners' and AFFCU's briefing.[1] Moreover, the Nevada Supreme Court has held matters impacting borrower rights are of great significance and importance. See Nev. State Bank v. Jamison Family P'ship, 106 Nev. 792, 798, 801 P.2d 1377, 1381 (1990). If this Court does not entertain Petitioners' writ request, Petitioners would wrongfully be forced to defend against claims and deficiency judgment proceedings that ought to have been dismissed at the outset. As such, it is entirely necessary and proper for this Court to entertain Petitioners' Writ.

B. THE DISTRICT COURT ERRED IN DENYING PETITIONERS' SECOND MOTION TO DISMISS DESPITE AFFCU'S FAILURE TO COMPLY WITH THE PERTINENT STATUTE OF LIMITATIONS.

AFFCU was required to comply with Utah's three-month statute of limitations, and the District Court therefore erred by denying Petitioners'

[1] Petitioners did not brief this matter in the original appeal because at the time, it was never properly addressed before the District Court; therefore, the Supreme Court found it was inappropriate for the parties to raise the issue at that time. See PA000092 n.2.

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Second Motion to Dismiss even though AFFCU failed to adhere to the pertinent statute of limitations when instituting the underlying action.

1. Under *Key Bank*, The Utah Choice-Of-Law Provision Applies To AFFCU's Statutory Deadline For Filing A Deficiency Action.

In Nevada, an out-of-state choice-of-law provision contained in the loan documents still applies to the deficiency action even when the foreclosure and deficiency action take place in state pursuant to Nevada procedure. Key Bank of Alaska v. Donnels, 106 Nev. 49, 52, 787 P.2d 382, 384 (1990).

AFFCU incorrectly interprets Key Bank's ruling regarding choice of law provisions and foreign statute applicability. Specifically, AFFCU incorrectly claims Key Bank stands for the proposition that if a foreign statute does not specifically claim to apply to Nevada trustee sales, the choice of law provision does not import that jurisdiction's deficiency statute.[2] However, what the Key Bank Court actually found was while the foreclosure took place in Nevada, "**the deficiency action was an action on the promissory note which contained a valid and enforceable agreement that Alaska law was to apply to the debt.**" Id. at 51-52, 787 P.2d at 384 (emphasis added).

After determining that Alaska law applied due to the choice of law provision, the Court then held that one specific Alaska statutory provision, AS 34.20.100, could not be applied extraterritorially. AS 34.20.100 states, in

[2] See Answer to Petition for Writ of Mandamus and Prohibition, at p. 8.

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relevant part, that "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 . . . ." The Court found that the offsetting commas of the statute "indicat[ed] 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.*" Id. at 53, 787 P.2d at 384–85 (emphasis in original). Moreover, the Court noted that the Alaska Supreme Court had already determined the language of AS 34.20.100 was intended to be limiting. Id. at 52, 787 P.2d at 384.

In other words, the Key Bank Court found that if a choice of law provision specifies a foreign state, then that state's law applies; however, the exception to this rule is that if the foreign state's statute by its own wording ***explicitly limits*** its foreign application, the statute cannot be applied. Thus, if a foreign statute **does not explicitly limit** its foreign application (whether by specifically stating it applies extraterritorially – an odd linguistic choice for any state legislature – or by simply remaining neutral/illustrative), then the Key Bank exception to standard choice of law application does not apply. AFFCU misleadingly twists this ruling to argue that if a statute does not explicitly ***state*** it applies extraterritorially, then it cannot be applied extraterritorially. AFFCU's claim does not logically follow from the actual holding in Key Bank and therefore must be dismissed.

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Here, the choice of law provision specifies Utah law applies, and the relevant Utah statute does not explicitly limit its foreign application, so the statute must be applied. Utah Code Ann. § 57-1-32 states in relevant part:

> At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due . . .

As detailed further below, this statutory provision is illustrative rather than exclusive; it does not contain the offsetting exclusionary commas like in Key Bank. Moreover, the referenced illustrative provisions ***do not contain any exclusionary reference*** to property located in Utah. Finally, AFFCU has not – and cannot, as no such case exists – pointed to any Utah case law specifying Utah Code Ann. § 57-1-32 is meant to be limiting.[3] Accordingly, pursuant to Key Bank, the choice of law provision selecting Utah law is valid and the three-month Utah statutory deadline must be applied. Since AFFCU filed the underlying deficiency action outside the three-month period, its claims are statutorily barred. Therefore, the District Court erred by denying the Second Motion to Dismiss, and writ relief overturning the denial must be granted.

2. Under *Mardian*, The Utah Choice-Of-Law Provision Applies To AFFCU's Statutory Deadline For Filing A Deficiency Action.

[3] AFFCU points to the manner ("pursuant to NRS Chapter 107") in which the foreclosure was conducted as purported proof that Utah law does not apply. However, this argument runs counter to the Restatement (Second) of Conflicts of Law, which states, "[W]hile the law of the situs of the foreclosed property dictates the manner in which property is foreclosed, the law governing the debt determines deficiency rights." § 229, cmt. e. It is Nevada law that is used in the actual foreclosing mechanism because the foreclosure implicates Nevada's *in rem* jurisdiction. See, e.g., Restatement (Second) Of Conflicts Of Law § 229; In re Lindsay, 59 F.3d 942, 948 (9th Cir. 1995).

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The Nevada Supreme Court reaffirmed the Key Bank decision by holding yet again that when a foreclosure and deficiency action take place, the out-of-state choice-of-law provision in the loan documents – ***including the specified state's deficiency action limitation period*** – still applies. Mardian v. Greenberg Family Trust, 131 Nev. Adv. Op. 72, 359 P.3d 109, 111 (2015).

AFFCU's misguided proposition that Mardian does not concern the central holding from Key Bank stands in distinct contravention to the actual language of the Mardian case. Specifically, when addressing whether to apply the foreclosing state (Arizona) statute of limitations versus the choice-of-law state (Nevada) statute of limitations, the Mardian Court returned to the Key Bank ruling and expressly cited to Key Bank in concluding that the choice-of-law state's deficiency laws – ***including the statutory limitation period*** – would apply. Id., 359 P.3d at 111 ("**[B]ecause of the choice-of-law provision, Nevada law—particularly Nevada's limitations period, *see* NRS 40.455(1)—applies in this case.** *See Key Bank of Alaska v. Donnels,* 106 Nev. 49, 52, 787 P.2d 382, 384 (1990) . . . ." (emphasis added)).

The Mardian Court then examined whether the pertinent deficiency statutes by their own wording ***explicitly limited their application.*** Id., 359 P.3d at 112. Having concluded the Nevada statutes did not limit application, the Mardian Court ultimately found the statute of limitations from the choice-of-law state applied and the creditor was barred from seeking deficiency

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judgment due to filing outside the limitation period. Id., 359 P.3d at 112.

a. **Mardian Follows The Key Bank Ruling.**

The Mardian case is neither new law nor an alteration of existing law; rather, it merely follows and clarifies the rule set forth in Key Bank. Indeed, nowhere in Mardian is there any indication of overriding or altering Key Bank. AFFCU incorrectly attempts to set Mardian apart from Key Bank and claim that all manner of woe[4] will result from the purported departure from Key Bank. Similarly, AFFCU incorrectly – albeit creatively – claims some sort of 'import versus export' distinction between the two cases. In truth though, a simple reading of Key Bank and Mardian shows that the Mardian Court merely confirmed the Key Bank rule that regardless of where a deficiency action is brought or where the underlying property is located, the choice-of-law provision contained in the loan documents governs which state's laws apply to ***all*** aspects of deficiency proceedings. Id. This reaffirmation or clarification does not constitute new law, there is no distinction or reference made in either case to 'exporting' Nevada law or 'importing' foreign law, and AFFCU's purported woes are absurd and imaginary. See Buffington v. State, 110 Nev. 124, 127, 868 P.2d 643, 645 (1994) ("When a decision merely interprets and clarifies an existing rule . . .

[4] It is interesting that AFFCU claims the correct reading of Mardian will allow creditors to skirt the protections for borrowers and guarantors, when it is actually AFFCU's interpretation that will allow AFFCU – a creditor – to skirt the protections contractually set forth for Petitioners – the borrowers.

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and does not announce an altogether new rule of law, the court's interpretation is merely a restatement of existing law."); Colwell v. State, 118 Nev. 807, 819, 59 P.3d 463, 472 (2002) (holding that when a decision interprets and clarifies an existing rule, the interpretation is merely a restatement of existing law rather than a "new rule").[5]

b. Mardian's Holding Concerns Substantive Issues.

The Mardian case addresses substantive deficiency law and thus does not alter any common law rule regarding statutes of limitation. AFFCU cites to certain cases in support of its proposition that statutes of limitation "are a procedural matter governed by the law of the forum where a lawsuit is filed."[6] However, AFFCU neglects to mention that every single one of these cases pertain to ***non-deficiency*** statutes of limitation. In contrast, the statutes of limitation at issue in Key Bank, Mardian, and this matter are deficiency statutes, and are therefore matters of substantive law for conflicts purposes. See Gate City Fed. Sav. and Loan Ass'n v. O'Connor, 410 N.W.2d 448, 450 (Minn. Ct. App. 1987); Cardon v. Cotton Lane Holdings, Inc., 173 Ariz. 203,

[5] For these same reasons, AFFCU's argument regarding retroactivity also fails and need not be extensively addressed, as Mardian is not a reversal of Key Bank. See Buffington, 110 Nev. at 127, 868 P.2d at 645; Colwell, 118 Nev. at 819, 59 P.3d at 472; Pyramid Lake Paiute Tribe of Indians v. State Eng'r, 127 Nev. 1168, 373 P.3d 952 (2011) (*citing* Fernandez v. Fernandez, 126 Nev. 28, 40 n.6, 222 P.3d 1031, 1039 (2010) (stating amendment meant to clarify rather than change a statute should be applied retroactively); 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 22.34 (7th ed. 2009) ("Where an amendment clarifies existing law but does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive . . . .")); Borden v. Division of Medical Quality, 30 Cal. App. 4th 874, 882 (1994).

[6] See Answer to Petition for Writ of Mandamus and Prohibition, at p. 13.

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206 (1992) (*citing* Greater Ariz. Sav. & Loan Ass'n v. Gleeson, 5 Ariz. App. 577, 582 (1967)); Catchpole v. Narramore, 102 Ariz. 248, 250 (1967); Citibank v. Errico, 251 N.J. Super. 236, 243 (N.J. Super. Ct. App. Div. 1991); Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 369–70 (1979); Graham v. Casa Investments Co., 274 Ga. App. 59, 60 (2005); Community First Bank v. Hanifin, 500 S.W.3d 881, 884 n.4 (Mo. Ct. App. 2016); Bank of Oklahoma, N.A. v. Red Arrow Marina Sales & Service, Inc., 224 P.3d 685, 696 (OK 2009); SBKC Service Corp. v. 1111 Prospect Partners, L.P., 153 F.3d 738, *6 (10th Cir. 1998).

Moreover, given the substantive importance of the statutes at issue in Mardian, the Mardian holding is not dicta. Per the Nevada Supreme Court, "A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.'" Argentena Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009). As discussed further above, the primary question involved in Mardian was whether to apply the statute of limitations from the foreclosing state (Arizona) versus the choice-of-law state (Nevada). The Mardian Court returned to the Key Bank ruling expressly in order to answer these questions. It was not until after extensively walking through the Key Bank rule and examining whether the Key Bank exception applied that the Mardian Court eventually concluded the deficiency action was time-barred under Nevada law. See Mardian, 359

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P.3d at 113. The Mardian Court's application of Key Bank was entirely necessary to determine which state's laws applied, and AFFCU's contention to the contrary defies both reason and the plain reading of the case.

3. AFFCU May Not Avoid Its Obligations Under The Loan Agreement By Failing To File For Deficiency Action Within The Statutory Three-Month Period.

It is well settled in Nevada that "[p]arties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy." Rivero v. Rivero, 125 Nev. 410, 429, 216 P.3d 213, 226-227 (2009) (*citing* NAD, Inc. v. Dist. Ct., 115 Nev. 71, 77, 976 P.2d 994, 997 (1999)). In fact, the Supreme Court of Nevada has specifically held:

> It is not a proper function of the court to re-write or distort a contract under the guise of judicial construction. ***The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other. The judicial function of a court of law is to enforce the contract as it is written***.

Pioneer Title Ins. & Trust Co. v. Cantrell, 71 Nev. 243, 245-246, 286 P.2d 261, 263 (1955) (internal citations omitted) (emphasis added).

AFFCU is impermissibly attempting to avoid the terms of its agreement in this matter. The facts are simple and undisputed – the Loan Agreement contains a choice-of-law provision designating Utah law. 1 PA000114. Pursuant to Utah law, a three-month statute of limitations applies to deficiency actions. Utah Code Ann. § 57-1-32. AFFCU waited six months after the

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foreclosure sale before filing the underlying deficiency action. 1 PA000001. AFFCU maneuvered around immediate dismissal – and its contractual obligation to abide by Utah law – by filing in Nevada, rather than Utah. 1 PA000001. The Nevada Supreme Court held that AFFCU was permitted to file in Nevada as Utah was not designated the sole forum. PA000098. However, if AFFCU is now allowed to maintain the underlying action, the Utah choice-of-law provision will essentially be rendered meaningless in contravention to Nevada's policy of enforcing contractual provisions. See Pioneer Title Ins., 71 Nev. at 245-246, 286 P.2d at 263. Indeed, any choice-of-law provision wherein the chosen state's statute of limitations is shorter than Nevada's will undeniably be skirted around as creditors flock to Nevada to file for deficiency action so as to avoid their contractual choice-of-law obligations. Such a result is impermissible and, as laid out extensively in the underlying motion, distinctly contravenes the Nevada Supreme Court's holdings in Key Bank and Mardian. AFFCU must therefore be unequivocally barred from pursuing an application for deficiency judgment against Petitioners. Accordingly, the District Court erroneously denied Petitioners' Second Motion to Dismiss, and Petitioners' writ petition must be granted.

C. THE DISTRICT COURT ERRED IN DENYING PETITIONERS' SECOND MOTION TO DISMISS DESPITE THE ILLUSTRATIVE, APPLICABLE NATURE OF THE PERTINENT ANTI-DEFICIENCY STATUTE.

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This Court need merely apply the Key Bank and Mardian rulings to the facts of this case to find the District Court's clear error in denying Petitioners' Second Motion to Dismiss. In addition though, the District Court also overlooked the effect of the Windhaven matter on the Key Bank case.

As explained further above, the Key Bank exception only applies to exclusive, not illustrative, anti-deficiency statutes. The Key Bank Court went to great lengths to detail why the phrase "under a deed of trust, as authorized by AS 34.20.070 - 34.20.130," was exclusive, rather than illustrative. AFFCU's disdain for comma usage as a dispositive factor is belied by the language of Key Bank, wherein the Court specifically called out the commas as the first and foremost reason, stating "the offsetting commas [] indicat[e] 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.*" 106 Nev. at 53, 787 P.2d at 384.

Meanwhile, in Windhaven, the Nevada Supreme Court examined why Nevada's anti-deficiency statute is illustrative, rather than exclusive. NRS 40.455(1), the anti-deficiency statute in question, provided[7] in relevant part:

> [U]pon application of the judgment creditor or the beneficiary of the deed of trust **within 6 months after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080**, respectively, and after the required hearing, ...[8]

[7] NRS 40.455 has since been amended.

[8] Emphasis added.

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The Windhaven Court concluded that the phrase "trustee's sale held pursuant to NRS 107.080" was illustrative rather than exclusive, explaining that "NRS 40.455(1) has no limiting language" and noting that even though it references judicial foreclosure sales and trustee sales held pursuant to NRS 107.080, the statute "**does not indicate that it precludes deficiency judgments arising from nonjudicial foreclosure sales held in another state.**" Branch Banking v. Windhaven & Tollway, LLC, 131 Nev. Adv. Op. 20, 347 P.3d 1038, 1041 (2015), reh'g denied (2015) (emphasis added).

In short, the Windhaven Court held that based upon how Nevada's anti-deficiency statute was drafted (with the phrase "pursuant to"), in addition to the fact that NRS 40.455 (1) contained **no express limitation** on its application to non-judicial foreclosure sales held in accordance with another state's laws, Nevada's anti-deficiency statute **did** apply in that case. Id.

Here, the Utah statute is much more similar to the Nevada statute than the Alaska statute. AS 34.20.100 contained clear and distinct commas that the Key Bank Court explicitly relied on to determine an exclusive intent. NRS 40.455(1) and Utah Code Ann. § 57-1-32, on the other hand, contain no such limiting or restricting commas. A comparison of the Nevada and Utah deficiency statutes with the Alaska deficiency statute makes this clear: NRS 40.455(1) states "trustee's sale held pursuant to NRS 107.080," and Utah Code Ann. § 57-1-32 states "under a trust deed as provided in Sections 57-1-

23, 57-1-24, and 57-1-27," in contrast to AS 34.20.100, which states, "under a deed of trust, as authorized by AS 34.20.070 - 34.20.130, ..."

Moreover, the Nevada and Utah statutes are very neutrally worded, with no reference or tie specifically to their respective states. Utah's legislature could have easily included language in Utah Code Ann. § 57-1-32 to state it only applied to non-judicial foreclosures held in Utah, but the legislature chose not to do so. See Mineral County v. State, Bd. of Equalization, 121 Nev. 533, 539, 119 P.3d 706, 709 (2005) (explaining that "[s]ince the Legislature is silent, this court should not 'fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.'") (*citing* Falcke v. Douglas County, 116 Nev. 583, 589, 3 P.3d 661, 665 (2000) (*quoting* McKay v. Board of Cty. Comm'r, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987))).

This neutral wording is important because unlike Alaska's deficiency statute, Utah Code Ann. § 57-1-32 – like NRS 40.455(1) – may be extraterritorially applied. The additional statutes set apart in commas in AS 34.20.100 evidenced an intent for that statute to exclude foreign applicability. In contrast, the additional provisions in the Nevada and Utah statutes – which, again, were not set apart – are also very neutrally worded, with no reference or tie to property in their respective states. Therefore, unlike AS 34.20.100 but similar to NRS 40.455(1) – the former of which by its own terms restricted

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deficiency actions to Alaska foreclosures, the latter of which merely illustrated examples of foreclosure methods – the Utah statute could and should be utilized in any state. Accordingly, the Utah statute is illustrative and, under the Key Bank decision, its statute of limitations should have been applied. Therefore, the District Court's ruling was erroneous and Petitioners respectfully request this Court overturn the incorrect ruling in its entirety.

III. CONCLUSION

Statutes of limitation are implemented for a reason – while creditors have the right to bring deficiency actions, borrowers and guarantors must be protected via strict deadline for filing deficiency claims. Here, AFFCU failed to file its deficiency claim within the applicable three-month deadline, and the underlying matter must therefore be dismissed without exception. The District Court cannot be permitted to ignore the Nevada Supreme Court's decisions in Key Bank, Mardian, and Windhaven by refusing to apply the three-month statute of limitations of the governing state law of Utah.

Based upon the foregoing, and as set forth in more detail in the underlying Writ Petition, Petitioners respectfully request this Court: 1) issue a Writ of Mandamus compelling the District Court to grant Petitioners' Second Motion to Dismiss AFFCU's claims and vacate the Order denying same, and 2) issue a Writ of Prohibition precluding the District Court from undertaking further proceedings against Petitioners in the underlying case.

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Dated this 24th day of April, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Reply in Support of 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 Reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the Reply 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 Reply is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of April, 2017.

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By: */s/ Jaimie Stilz, Esq.*

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2017, I served a copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION** by first class United States mail, postage prepaid, Las Vegas, Nevada, to the following:

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