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

PETITION FOR REHEARING

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I. INTRODUCTION[1]

Recently, this Court issued a decision (the "December 27 Order") regarding Petitioners' underlying Writ Petition, and upheld the District Court's denial of Petitioners' Motion to Dismiss. This decision, however, was made without consideration of several important points of law and facts. Petitioners therefore respectfully request this Court reconsider the December 27 Order and reverse the District Court's denial of Petitioners' Motion to Dismiss.

Specifically, Petitioners believe the following two points were not considered in the December 27 Order. First, the Bullington case upon which this Court relies requires this Court to look at both legislative intent **and** public policy when determining extraterritorial application of Utah statutes. Since statutes of limitation are important matters of public policy, the statute of limitations portion of Utah Code Ann. § 57-1-32 must be extended extraterritorially.

Second, unlike the cases relied upon by this Court in reaching its decision, the parties here specifically agreed to subject themselves to Utah law, including the statute of limitations contained within Utah Code Ann. § 57-1-32. This valid, binding choice of law provision was neither present in nor taken into account by the Bullington or Nevares courts, but should be given due weight here.

[1] Unless otherwise noted, the capitalized terms herein have the same meaning ascribed to them in Petitioners' Opening Brief and Reply Brief.

Based upon the foregoing, and as set forth in more detail below, Petitioners respectfully request this Court to review the overlooked arguments below, grant this Petition for Rehearing, and reverse the District Court's denial of Petitioners' Motion to Dismiss. In the event this Court directs AFCU to answer this Petition for Rehearing, Petitioners respectfully request this Court permit leave for Petitioners to file a Reply in support of this Petition.

II. LEGAL ARGUMENT

A. STANDARD FOR PETITIONS FOR REHEARING

Pursuant to NRAP 40(c)(2), this Court may consider a rehearing in the following circumstances: (A) When the Court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the Court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.[2]

In the instant case, rehearing is necessary and appropriate pursuant to NRAP 40(c)(2) because, respectfully, it appears this Court has overlooked or

[2] See, e.g., Am. Cas. Co. of Reading, Pa. v. Hotel and Rest. Employees and Bartenders Intern. Union Welfare Fund, 113 Nev. 764, 766, 942 P.2d 172, 174 (1997); City of N. Las Vegas v. 5th & Centennial, 130 Nev. Adv. Op. 66, 331 P.3d 896, 898 (2014); see also Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 606, 609, 245 P.3d 1182, 1184 (2010) (noting that "a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, or when otherwise necessary to promote substantial justice.").

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misapprehended a material question of law in this case and a material fact in the record – specifically, the application of the Bullington case analysis to the extraterritorial reach of the statute of limitations portion of Utah Code Ann. § 57-1-32, as well as the impact of the valid, binding Utah choice-of-law provision.

B. A REHEARING SHOULD ISSUE BECAUSE UNDER *BULLINGTON*, UTAH'S STATUTE OF LIMITATIONS WOULD STILL APPLY.

Rehearing is necessary and appropriate pursuant to NRAP 40(c)(2) because with all due respect, the Court overlooked an important second part of the applicable case law analysis, which requires the Court to look at public policy in addition to legislative intent to determine whether the statute at issue ought to be applied extraterritorially. If public policy so requires – as it does here – the statute must be applied extraterritorially even if the legislative intent does not indicate extraterritorial reach.

1. The Utah Supreme Court's *Bullington* Decision Requires This Court To Analyze Both Legislative Intent *And* Public Policy To Determine Extraterritorial Application Of Utah Code Ann. § 57-1-32.

In reaching its determination that Utah's statute of limitations does not apply in this matter, this Court relied upon a prior decision from the Utah Supreme Court, Bullington v. Mize, 25 Utah 2d 173, 178, 478 P.2d 500, 503 (1970), which this Court found to stand for the proposition that Utah Code Ann.

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§ 57-1-32 does not apply extraterritorially. See December 27 Order at p. 11.

Pursuant to Bullington, however, there are actually **two** aspects that must be considered in determining whether a Utah statute will be extended extraterritorially – ***first***, whether the language of the statute expresses a legislative intent to extend its protection extraterritorially, and ***second***, whether public policy exists that would be contravened if the statute is not applied extraterritorially. 25 Utah 2d at 178, 478 P.2d at 503-04 ("[W]hether a forum statute would be applied to protect a defendant sued on a deficiency relating to foreign land, must depend on the **interpretation** of the statute **in the light of its policy**." (citing *Conflicts of Law* § 232, 2(a)(2), p. 611)).

In discussing the second portion of the above analysis with respect to Utah Code Ann. § 57-1-32, the Bullington Court noted that:

> The traditional test used in determining whether the public policy of the forum prevents the application of otherwise applicable conflict-of-laws principles was well expressed by Justice Cardozo in Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198, to the effect that foreign law will not be applied if it 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'

Id. at 179, 478 P.2d at 504 (internal citations omitted).

The Bullington Court then went on to discuss whether enforcing the situs – Texas – law, rather than extending the forum – Utah – law extraterritorially, would violate fundamental Utah jurisprudence. Id. at 180, 478 P.2d at 504. The

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Bullington Court ultimately concluded that allowing the deficiency judgment amount in accordance with Texas law would not violate Utah public policy. Id. at 180, 478 P.2d at 504-05. Critically, the Bullington Court focused exclusively on the deficiency judgment amount statutory provision, without analysis or reference to the statute of limitations component, in discussing and deciding no public policy violation would occur. See id.

Here, a determination regarding extraterritorial application of Utah Code Ann. § 57-1-32 must include both the first and second parts of the Bullington analysis. The December 27 Order erroneously focuses exclusively on the first half of the Bullington analysis, addressing the Utah legislature's intent with respect to Utah Code Ann. § 57-1-32 without any reference to the second portion of Bullington. See December 27 Order at pp. 11-13. Given that the December 27 Order specifies this Court will look to a chosen jurisdiction's courts to see if they have already determined the statute's extraterritorial reach "and, if so, apply that ruling,"[3] it is necessary for this Court to apply both steps of the Bullington analysis, rather than just the first half.

Since the Bullington Court, when analyzing the second step of the process, focused only on the deficiency amount provision and did not address the statute of limitations portion of Utah Code Ann. § 57-1-32, this Court must therefore

[3] See December 27 Order at p. 9.

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look to whether special public policy circumstances necessitate extraterritorial enforcement of Utah Code Ann. § 57-1-32 regardless of legislative intent.

2. Utah Law Holds Statutes Of Limitation Constitute Important Matters Of Public Policy, Thereby Requiring Extraterritorial Application Of The Statute Of Limitations Contained Within Utah Code Ann. § 57-1-32.

As discussed above, pursuant to Bullington, even if legislative intent does not indicate a Utah statute is meant to be applied extraterritorially, the Court must assess whether failure to extend the statute extraterritorially would violate fundamental Utah jurisprudence. Id. at 180, 478 P.2d at 504. If so, it is necessary to extend the Utah statute at issue. Id. The Bullington Court, in assessing extraterritorial application of Utah Code Ann. § 57-1-32, did not discuss or weigh public policy regarding the statute of limitations provision. Id. at 180, 478 P.2d at 504-05. Rather, the Bullington Court narrowly focused on the public policy implications of the statute's deficiency judgment amount provision. See id.

Other Utah courts, though, have long held that statutes of limitation are important matters of public policy. See Falkenrath v. Candela Corp., 780 Utah Adv. Rep. 25, 374 P.3d 1028, 1031 (Utah Ct. App. 2016); Ireland v. Mackintosh, 22 Utah 296, 61 P. 901, 902 (1900) (stating that construction/interpretation of a statute of limitations "which will most effectually accomplish the purpose of the statute should be adopted. The purpose of the

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statute is the same both in cases involving the title to tangible property, and in cases relating to the enforcement of the obligations of contracts."); Kuhn v. Mount, 13 Utah 108, 44 P. 1036, 1037 (1896); Horton v. Goldminer's Daughter, 785 P.2d 1087, 1091 (Utah 1989), abrogated on other grounds; see also Hirtler v. Hirtler, 566 P.2d 1231, 1231 (Utah 1977) (finding a contractual waiver of statutes of limitation was violative of public policy and therefore void). Utah courts have noted that statutes of limitation are public policy matters because "the law has long recognized the need 'to prevent the enforcement of stale claims,'" reiterating that

> [A]t some point in time after the defendant has become liable for damages he must, in fairness, be protected from suit . . . because of the drying up or disappearance of evidence that might have been used in the defense, because of the desirability of security against old claims brought by persons who have slept on their rights, or because the judicial system may not be able to handle stale claims effectively.

Falkenrath, 780 Utah Adv. Rep. 25, 374 P.3d at 1031 (citing 4 Am. Jur. *Trials* § 441(2) (2016)).

Here, the public policy importance of statutes of limitations necessitate extraterritorial application of the statute of limitations contained within Utah Code Ann. § 57-1-32. Unlike the deficiency judgment amount provision, the three-month limitation provision of Utah Code Ann. § 57-1-32, as a statute of limitations, carries significant public policy weight. See Falkenrath, 780 Utah

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Adv. Rep. 25, 374 P.3d at 1031; Ireland, 22 Utah 296, 61 P. at 902; Kuhn, 13 Utah 108, 44 P. at 1037; Horton, 785 P.2d at 1091; Hirtler, 566 P.2d at 1231. Indeed, Utah jurisprudence requires the statute of limitations provision to be constructed in a way that accomplishes its purpose, i.e. preventing the enforcement of stale claims. See Ireland, 22 Utah 296, 61 P. at 902; Falkenrath, 780 Utah Adv. Rep. 25, 374 P.3d at 1031. Failure to extend the statute of limitations extraterritorially would thus violate fundamental Utah jurisprudence. As such, the second part of the Bullington analysis requires that the statute of limitations portion of Utah Code Ann. § 57-1-32 be extended extraterritorially due to the public policy considerations. Bullington, 25 Utah 2d at 180, 478 P.2d at 504. Accordingly, rehearing of the December 27 Order declining to extend Utah Code Ann. § 57-1-32 extraterritorially is necessary.

3. Unlike *Bullington* and *Nevares*, The Parties Here Specifically Agreed To The Statute Of Limitations In Utah Code Ann. § 57-1-32.

As this Court noted, the Bullington decision did not touch upon the statute of limitations portion of Utah Code Ann. § 57-1-32. The Bullington Court was focused upon whether a Texas resident could pursue a Colorado resident for a deficiency resulting from the sale of property in Texas. Id. at 175, 478 P.2d at 500-01. There was no choice of law provision involved; the parties in Bullington had not agreed to abide by and comply with Utah law. See generally id.

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The other case this Court relies upon, Nevares v. M.L.S., 2015 UT 34, 345 P.3d 719 (Utah 2015), also addressed matters entirely unrelated to statutes of limitations or contractual choice of law provisions. Rather, the Nevares Court looked at whether parental rights were foreclosed under Utah Code Ann. § 78B–6–111, and found the statute did not apply to sexual activity between non-Utah citizens outside of Utah. 2015 UT 34, 345 P.3d at 722.

In contrast here, the parties already agreed to extraterritorial application of the statute of limitations contained in Utah Code Ann. § 57-1-32. Specifically, unlike Bullington and Nevares, the instant action revolves around a valid, bargained-for agreement with a choice of law provision, requiring any action to exist within the realm of Utah's laws. Neither the Bullington nor Nevares courts considered the implication of an agreement to proceed in accordance with Utah's statutes when reaching their decisions. Indeed, the Nevares Court had to clarify that Utah statutes do not seek out individuals in other states to impose their requirements, because the parties involved had not made any agreement to comply with Utah law. See id. at 2015 UT 34, 345 P.3d at 722.

Here, though, the parties deliberately availed themselves of the laws of Utah, and sought to be subject to Utah's statutes. Determining the parties are subject to Utah law ***except for*** the statute of limitations, despite the existence of a valid choice-of-law provision, is an absurd result unsupported by the pertinent

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Utah case law.[4] Accordingly, for this additional reason Utah Code Ann. § 57-1-32 must be extended extraterritorially and a rehearing should issue.

III. CONCLUSION

Based on the foregoing, Petitioners respectfully request this Court to grant this Petition for Rehearing and reverse the District Court's denial of Petitioners' Motion to Dismiss. In the event this Court directs AFCU to answer this Petition for Rehearing, Petitioners also respectfully request that this Court permit leave for Petitioners to file a Reply in support of this Petition.

Dated this 16th day of January, 2018.

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[4] Such a result would also be unsupported by Nevada law as well. See NRS 11.020 (stating in relevant part that "[w]hen a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against the person in this State.").

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

2. I further certify that this Brief complies with the page or type-volume limitations of NRAP 32(a)(7)(C) because it:

[X] Does not exceed 10 pages.

3. Finally, I hereby certify that I have read this Petition for Rehearing, 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 for Rehearing complies with all applicable Nevada Rules of Appellate Procedure.

Dated this 16th day of January, 2018.

REID RUBINSTEIN & BOGATZ

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2018, our office served a copy of the foregoing **PETITION FOR REHEARING** upon each of the following parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, to the following:

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133 Nev., Advance Opinion 107

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,
vs.
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 CHARTERED CREDIT UNION,
Real Party in Interest.

No. 72086

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BY
CHIEF DEPUTY CLERK

Received
JAN 02 2018
Reid Rubinstein & Bogatz

Original petition for writ of mandamus and/or prohibition arising from the district court's denial of a motion to dismiss in a foreclosure deficiency action.

Petition denied.

Reid Rubinstein Bogatz and Charles M. Vlasic, III, Jaimie Stilz, and I. Scott Bogatz, Las Vegas,
for Petitioners.

Ballard Spahr, LLP, and Matthew D. Lamb and Joseph P. Sakai, Las Vegas; Ballard Spahr, LLP, and Mark R. Gaylord, Salt Lake City, Utah,
for Real Party in Interest.

17-902731

BEFORE SILVER, C.J., TAO and GIBBONS, JJ.

OPINION

By the Court, SILVER, C.J.:

In this opinion, we determine whether Utah's antideficiency statute applies extraterritorially to a Nevada deficiency action. Petitioners moved to dismiss the underlying case on the ground that it was time-barred by Utah's antideficiency statute, which they maintained applied to the dispute pursuant to the parties' choice-of-law provision. The district court considered that statute, concluded it did not apply extraterritorially, and denied petitioners' motion to dismiss. This original petition for a writ of mandamus and/or prohibition seeking to compel the dismissal of the underlying action followed.

The Nevada Supreme Court has notably addressed the application of antideficiency statutes in *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990); *Branch Banking & Trust Co. v. Windhaven & Tollway, LLC*, 131 Nev. ___, 347 P.3d 1038 (2015); and *Mardian v. Michael & Wendy Greenberg Family Trust*, 131 Nev. ___, 359 P.3d 109 (2015). Read together, these cases provide that, in a deficiency action where the parties have an enforceable choice-of-law provision, before the district court applies the antideficiency statute from the parties' chosen jurisdiction, the court must first determine whether that statute, by its terms, has extraterritorial reach. *See Mardian*, 131 Nev. at ___, 359 P.3d at 111-12; *Branch Banking*, 131 Nev. at ___, 347 P.3d at 1041-42; *Key Bank*, 106 Nev. at 52-53, 787 P.2d at 384-85. In this opinion we clarify that, if a party seeks to apply another jurisdiction's antideficiency statute to a Nevada deficiency action, and the courts of that jurisdiction have addressed the statute's extraterritorial application, we will follow that jurisdiction's determination regarding this

issue rather than independently construe the antideficiency statute to assess whether it can be applied extraterritorially. Here, because the Utah Supreme Court has already determined that Utah's antideficiency statute does not apply extraterritorially, that decision controls our resolution of this issue. As a result, we conclude the district court properly denied petitioners' motion to dismiss and we therefore deny the petition.

FACTS AND PROCEDURAL HISTORY

In 2002, real party in interest America First Federal Credit Union (America First) loaned petitioners Franco Soro, Myra Taigman-Farrell, Isaac Farrell, Kathy Arrington, and Audie Embestro (collectively Soro) $2.9 million for the purchase of a mini-mart business. The loan was secured by real property in Mesquite, Nevada. The promissory note specified that Utah law governed the agreement and related loan documents.

Soro defaulted, and America First proceeded with a nonjudicial foreclosure sale of the Mesquite property in accordance with Nevada law. On October 4, 2012, America First purchased the Mesquite property at a trustee's sale for a little over $1.2 million, resulting in a deficiency on the loan balance of approximately $2.4 million, including interest and fees.

Six months after the foreclosure sale, America First filed a deficiency action in Nevada under NRS 40.455(1). Soro then moved to dismiss the action pursuant to NRCP 12(b)(1), arguing that the agreement's forum selection clause divested Nevada of jurisdiction. The district court agreed, but on appeal the Nevada Supreme Court reversed, concluding that the forum selection clause was permissive and Nevada was a proper forum for a deficiency action. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. ___, 359 P.3d 105 (2015).

On remand, Soro filed another motion to dismiss, this time under NRCP 12(b)(5), arguing America First's deficiency action was time-barred by Utah's three-month statute of limitations. Critically, although Nevada's antideficiency statute allows a party to bring a deficiency action within six months of the property's foreclosure sale, Utah's antideficiency statute imposes a three-month statute of limitations. *See* NRS 40.455(1); Utah Code Ann. § 57-1-32 (LexisNexis 2010). The district court concluded that Utah's antideficiency statute does not apply extraterritorially and denied the motion. Thereafter, Soro petitioned for a writ of mandamus and/or prohibition seeking to overturn the denial of the motion to dismiss.

ANALYSIS

In the petition, Soro contends that the district court should have dismissed the deficiency action because the complaint is time-barred by Utah's antideficiency statute. Specifically, Soro asserts that, under *Key Bank* and *Mardian*, the parties' choice-of-law provision in the promissory note requires the district court to apply Utah law, and consequently, America First was required to bring the deficiency action within three months of the foreclosure sale pursuant to Utah Code Ann. § 57-1-32 (LexisNexis 2010). Soro further contends that the district court erred by concluding that Utah Code Ann. § 57-1-32 (LexisNexis 2010) does not apply extraterritorially because, under *Key Bank* and *Branch Banking*, the Utah statute is illustrative, not exclusive. America First counters that *Mardian* and *Branch Banking* are inapposite and that, under *Key Bank*, Utah's antideficiency statute does not apply extraterritorially.

Propriety of writ relief

We first consider whether the petition for writ relief is proper. The grant of a writ petition is extraordinary relief that is rarely warranted, and, for reasons of judicial economy, we do not often entertain writ petitions

challenging the denial of a motion to dismiss. *See Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997). Nevertheless, we may exercise our discretion to consider petitions in cases where "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *State, Office of the Attorney Gen. v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002).

Key Bank, *Branch Banking*, and *Mardian* address the effect of a valid choice-of-law provision on a deficiency action and set forth a framework for analyzing the antideficiency statute from the chosen jurisdiction to determine whether it can apply extraterritorially. This case, however, presents a new situation because the Utah Supreme Court has already analyzed the extraterritorial application of the antideficiency statute at issue here, Utah Code Ann. § 57-1-32 (LexisNexis 2010), in *Bullington v. Mize*, 478 P.2d 500 (Utah 1970). Our supreme court has not addressed whether Nevada courts, in determining the extraterritorial reach of another state's antideficiency statute, must follow that jurisdiction's dispositive caselaw. We therefore exercise our discretion to address the petition and clarify this point in Nevada law. *See Anzalone*, 118 Nev. at 147, 42 P.3d at 238. We review de novo the district court's decision. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008) (addressing questions of law de novo); *see also Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. ___, ___, 401 P.3d 1100, 1104 (2017) (reviewing a question of law de novo in the context of a writ petition).

Whether Utah's antideficiency statute applies

The question before this court is whether Utah Code Ann. § 57-1-32 (LexisNexis 2010) applies to bar America First's deficiency action.

Although Soro frames this issue as a conflict-of-laws question, contending that the parties' choice-of-law provision requires this court to apply Utah Code Ann. § 57-1-32 (LexisNexis 2010),[1] this argument bypasses the underlying question of whether that statute can project extraterritorially. *See Key Bank*, 106 Nev. at 52-53, 787 P.2d at 384-85 (considering whether Alaska's antideficiency statute applied to a Nevada deficiency action where Alaska law otherwise governed the lawsuit). In short, if Utah's statute cannot apply extraterritorially, then there is no conflict of law.

We begin our analysis by reviewing the three cases upon which Soro and America First rely: *Key Bank*, *Branch Banking*, and *Mardian*. In *Key Bank*, the parties contracted for a loan secured by a deed of trust on real property in Nevada. *Id.* at 51, 787 P.2d at 383. Under a choice-of-law provision contained in the promissory note, Alaska law governed the debt memorialized in that document. *See id.* at 52, 787 P.2d at 384. The borrowers in *Key Bank* defaulted, and the lender foreclosed on the property and later sued in Nevada to recover the deficiency. *See id.* at 51, 787 P.2d at 383. The parties disputed whether Alaska's antideficiency statute applied in light of their choice-of-law provision. *Id.* at 52, 787 P.2d at 384. The Nevada Supreme Court determined that Alaska law governed the action pursuant to the parties' choice-of-law provision, but ultimately concluded Alaska's antideficiency statute did not apply extraterritorially to bar the action. *Id.* at 52-53, 787 P.2d at 384-85. In reaching this decision, the court scrutinized the statute's structure and language and determined

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[1]While America First disputes whether the Utah statute has extraterritorial reach, it does not dispute the enforceability of the underlying choice-of-law provision.

that the statute showed "a clear intent to limit the effect of the statute to foreclosures" within Alaska.[2] *Id.* at 53, 787 P.2d at 384-85. Thus, under *Key Bank*, the parties' valid choice-of-law provision will control, but, before applying the chosen jurisdiction's antideficiency statute to a Nevada deficiency action, the court must determine whether that statute, by its terms, can apply extraterritorially.

While *Key Bank* dealt with the extraterritorial application of another state's antideficiency statute to a Nevada deficiency action involving Nevada real property, *Branch Banking* and *Mardian* dealt with the application of Nevada's antideficiency statute, NRS 40.455, to Nevada deficiency actions where the foreclosure took place in another state. In these latter cases, the parties secured their loans with real property outside Nevada. *Mardian*, 131 Nev. at ___, 359 P.3d at 110; *Branch Banking*, 131 Nev. at ___, 347 P.3d at 1039. The parties in *Branch Banking* agreed Nevada law would govern the note, but Nevada and Texas would both have jurisdiction in the event of a future dispute, 131 Nev. at ___, ___, 347 P.3d at 1039, 1042, whereas in *Mardian* the parties' agreement included a Nevada choice-of-law provision, 131 Nev. at ___, 359 P.3d at 110. In each case, the borrower defaulted and the lender sued the borrower in Nevada to recover for a deficiency following the property's foreclosure sale. *Mardian*, 131 Nev. at ___, 359 P.3d at 110-11; *Branch Banking*, 131 Nev. at ___, 347 P.3d at 1039.

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[2]The court based its decision on the antideficiency statute's use of offsetting commas to highlight other Alaskan statutes, including a statute that expressly referenced deed of trust conveyances of property located specifically in Alaska. *Id.* at 52-53, 787 P.2d at 384-85.

Branch Banking scrutinized NRS 40.455, Nevada's antideficiency statute, which at that time allowed for a deficiency judgment "within 6 months after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080." 131 Nev. at ___, 347 P.3d at 1040. The court considered whether this statute allowed a deficiency action to proceed in Nevada where the lender foreclosed on property located in another state and consequently did not foreclose "pursuant to NRS 107.080." *Id.* at ___, 347 P.3d at 1039. After examining the structure of the statute and its context in the statutory scheme, the court concluded the statute did not bar the Nevada deficiency action. *See id.* at ___, 347 P.3d at 1041-42. In particular, the court reasoned that NRS 40.455(1) did not specifically address nonjudicial foreclosure sales involving property within another state, and Nevada's statutory scheme contemplates a party's ability to foreclose on property located in another state and thereafter bring a deficiency action in Nevada. *See id.* at ___, 347 P.3d at 1041. Thus, *Branch Banking* provides additional framework for interpreting an antideficiency statute to determine whether it will bar a deficiency action.

In *Mardian*, the supreme court considered the effect of the parties' choice-of-law provision and thereafter determined whether the deficiency action was time-barred by Nevada's antideficiency statute. 131 Nev. at ___, 359 P.3d at 111-12. The court in *Mardian* applied *Key Bank* to conclude that the parties' choice-of-law provision controlled and extended *Key Bank*'s holding to statutory limitations periods, thus requiring the parties to abide by the limitations period set forth in Nevada's antideficiency statute. *Id.* at ___, 359 P.3d at 111. The court next addressed whether Nevada's antideficiency statute barred the action where the subject property was outside the forum and the lender did not follow

Nevada's foreclosure procedures. *Id.* at ___, 359 P.3d at 111-12. Citing to *Branch Banking*, and without interpreting Nevada's antideficiency statute, the court in *Mardian* concluded that the lender's foreclosure in another state pursuant to that state's foreclosure rules did not bar the action. *Id.* at ___, 359 P.3d at 112. But citing to Nevada law addressing NRS 40.455's statute of limitations, the court ultimately concluded that the lender's failure to apply for a deficiency judgment within the statutory limitations period barred the action. *Id.* at ___, 359 P.3d at 112-13. Thus, *Mardian* reinforces that parties in a deficiency action are generally bound by their choice-of-law provision.[3]

In sum, under *Key Bank*, *Branch Banking*, and *Mardian*, the court presiding over a deficiency action must first determine whether the parties have an enforceable choice-of-law provision and, if so, thereafter determine whether the chosen jurisdiction's antideficiency statute can apply extraterritorially. On the second step, *Key Bank* and *Branch Banking* provide a framework for analyzing the statute's structure, language, and context to make that determination. But these cases do not address whether, before analyzing another state's antideficiency statute, Nevada courts must first consider whether the chosen jurisdiction's courts have already determined the statute's extraterritorial reach and, if so, apply that ruling.

In considering this question, we again turn to *Mardian*. There, the Nevada Supreme Court, in addressing whether Arizona or Nevada law applied, held "that because of the choice-of-law provision, Nevada law—

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[3]We have considered the arguments asserting that *Mardian* is inapplicable in the present case and reject those arguments as without merit in accordance with our decision.

particularly Nevada's limitations period, *see* NRS 40.455(1)—applie[d] in th[at] case." *Mardian*, 131 Nev. at ___, 359 P.3d at 111. And as detailed above, in determining whether the lender timely applied for a deficiency judgment, the court considered Nevada caselaw construing the applicable statute of limitations. *See id.* at ___, 359 P.3d at 112-13. Thus, *Mardian* demonstrates that, when parties in a deficiency action have a valid choice-of-law provision, their chosen state's antideficiency statutes, as well as its caselaw interpreting those statutes, will control the action. This implication is echoed in other Nevada cases where our supreme court has applied another state's caselaw based on a choice-of-law provision. *See Pentax Corp. v. Boyd*, 111 Nev. 1296, 1299-1301, 904 P.2d 1024, 1026-28 (1995) (applying Colorado's statutes and caselaw pursuant to a choice-of-law provision); *Tipton v. Heeren*, 109 Nev. 920, 922 n.3, 923-24, 859 P.2d 465, 466 n.3, 466-67 (1993) (concluding that a Wyoming choice-of-law provision controls, and considering Wyoming caselaw in construing Wyoming's statutes). In the present context, we therefore hold that if the parties have a valid choice-of-law provision, and the controlling state's courts have addressed whether that state's antideficiency statute projects extraterritorially, we will adhere to that caselaw and not independently interpret the statute.

Here, the parties agree their choice-of-law provision is valid, and we therefore conclude Utah law governs the deficiency action. Thus, we must next determine whether Utah Code Ann. § 57-1-32 (LexisNexis 2010), Utah's antideficiency statute, may apply extraterritorially to a deficiency action in Nevada. That statute states, in relevant part, that "[a]t any time within three months after any sale of property under a trust deed as provided in [Utah Code Ann. §§] 57-1-23, 57-1-24, and 57-1-27

[(LexisNexis 2010)], an action may be commenced to recover the balance due." The parties expend significant energy applying the analyses of the statutes at issue in *Key Bank* and *Branch Banking* to Utah Code Ann. § 57-1-32 (LexisNexis 2010) to argue whether that statute is illustrative or exclusive. However, in *Bullington*, 478 P.2d 500, the Utah Supreme Court previously addressed whether this statute applies extraterritorially, and we need not embark upon an exhaustive analysis of the statute under the framework set forth in *Key Bank* and *Branch Banking* if *Bullington* is determinative here.

In *Bullington*, the Utah Supreme Court considered whether Texas or Utah law applied to a deficiency action. 478 P.2d at 501. There, the borrower secured a deed of trust with real property in Texas. *Id.* After the borrower defaulted, the lenders foreclosed on the property, purchased it for $25,000, and sued in Utah to recover the unpaid balance. *Id.* at 500-01. The borrower argued the purchase price was unconscionably low; but while Utah law took into account the property's fair market value in a deficiency action, Texas law did not. *Id.* at 501-02. In determining the underlying conflict of law question, the Utah Supreme Court addressed the 1953 version of Utah Code Ann. § 57-1-32 as a whole and considered whether "the language of [that statute] express[es] a legislative intent to extend its protection to all debtors whose obligations are secured by trust deeds, regardless of the situs of the land." *Id.* at 503. Noting that the statute's language "refers solely to the sale of property situated within Utah," the Utah Supreme Court concluded "the entire statutory scheme concerning trust deeds . . . could not have any extra-territorial effect," and, therefore, the court held "the statutory protection extended solely to debtors whose obligations were secured by trust deeds on land in Utah." *Id.*

As the relevant portion of Utah Code Ann. § 57-1-32 (LexisNexis 2010) has remained substantively unchanged since *Bullington* was decided,[4] we conclude that *Bullington*'s analysis still applies. And although *Bullington* concerned fair market value rather than the limitations period, the Utah Supreme Court addressed the statute as a whole and concluded that "the entire statutory scheme" does not have extraterritorial effect. 478 P.2d at 503. Thus, while *Bullington* did not specifically address the choice-of-law issue presented here, that difference does not change our analysis. Indeed, our application of *Bullington* to this matter is consistent with

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[4]When *Bullington* was decided, the statute in relevant part read:

> At any time within three months after any sale of property under a trust deed, *as hereinabove provided*, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security . . . .

Bullington, 478 P.2d at 503 (quoting former Utah Code Ann. § 57-1-32 (1953)). In comparison, Utah Code Ann. § 57-1-32 (LexisNexis 2010) now reads, in relevant part:

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

(Emphasis added.)

We have carefully reviewed the referenced statutes and their revisions since *Bullington*, and note those statutes still demonstrate the requirement of a substantial connection to Utah. Therefore, in the absence of any clear change in the statutory scheme or a pronouncement from the Utah Supreme Court indicating the law on this point has changed, *Bullington* remains in force and guides the outcome here pursuant to the parties' choice-of-law provision.

Utah's long-standing presumption against giving its statutes extraterritorial effect absent clear language requiring a contrary result. *See Nevares v. M.L.S.*, 345 P.3d 719, 727 (Utah 2015) (explaining that, under Utah law, "unless a statute gives a clear indication of an extraterritorial application, it has none" (internal quotation marks omitted)).

Because Utah's Supreme Court has decided Utah Code Ann. § 57-1-32 (LexisNexis 2010) does not project itself extraterritorially, we follow that precedent and do not independently construe the statute. The foreclosed-upon property was located in Nevada, not Utah, and pursuant to *Bullington*, Utah Code Ann. § 57-1-32 (LexisNexis 2010) does not apply. *Bullington*, 478 P.2d at 503. Accordingly, America First was not barred by Utah's three-month statute of limitations and timely filed its deficiency action in Nevada within the controlling six-month limitations period. We therefore conclude the district court correctly denied Soro's motion to dismiss, as America First timely filed suit in this case.

CONCLUSION

When a party seeks to apply another state's antideficiency statute to a Nevada deficiency action pursuant to a valid choice-of-law provision, the Nevada court must first look to the chosen jurisdiction's caselaw before independently construing the statute. If the courts of the chosen jurisdiction have already determined whether the statute projects extraterritorially, the Nevada court must apply that law. Under Utah law, Utah Code Ann. § 57-1-32 (LexisNexis 2010) does not apply extraterritorially and, therefore, does not bar the underlying action.

Accordingly, the district court properly denied the motion to dismiss and, as a result, we deny this petition.[5]

_____, C.J.
Silver

We concur:

_____, J.
Tao

_____, J.
Gibbons

[5]In light of this opinion, we vacate the stay imposed on the district court proceedings in this matter, Eighth Judicial District Court Case No. A-13-679511-C, by our April 6, 2017, order.

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCO SORO, an individual; MYRA TAIGMAN-FARRELL, an individual; ISAAC FARRELL, an individual; KATHY ARRINGTON, an individual; and AUDIE EMBESTRO, an individual; Petitioners, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the COUNTY OF CLARK, and the HONORABLE JERRY A. WIESE, District Court Judge, Respondents, And AMERICA FIRST FEDERAL CREDIT UNION, a federally chartered credit union, Real Party in Interest.	Supreme Court Case No: 72086 District Court Case No: A-13-679511-C APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT, THE HONORABLE JERRY A. WIESE PRESIDING

PETITION FOR REVIEW BY THE SUPREME COURT

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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 the justices of this Court may evaluate possible disqualification or recusal.

1. Parent Corporation of Petitioners: N/A.

2. Publicly Held Shareholders of Petitioners: N/A.

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Dated this 23rd day of April, 2018.

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I. STATEMENT OF QUESTIONS PRESENTED

A. WHETHER THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTION TO DISMISS WHEN THIS COURT'S PRIOR CONTRARY DECISIONS IN KEY BANK, MARDIAN, AND PIONEER TITLE REQUIRE UTAH'S STATUTE OF LIMITATIONS TO BE APPLIED HERE?

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II. STATEMENT OF REASONS REVIEW IS WARRANTED

As discussed further below, the Court of Appeals' decision conflicts with this Court's prior decisions in Key Bank, Mardian, Pioneer Title, and Windhaven, all of which, when applied to this matter, require enforcement of the Utah choice-of-law provision and pertinent statute of limitations.

Additionally, the Court of Appeals' reliance on Bullington is a matter of first impression of general statewide significance due to the creation of a new

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rule requiring interpretation of a foreign state's case law regarding extraterritorial application of its statutes.

Finally, this matter involves fundamental issues of statewide public importance – specifically, the application (or lack thereof) of statutes of limitation, which this Court has continually held to embody important public policy considerations. See Winn v. Sunrise Hosp. & Med. Ctr., 128 Nev. 246, 257, 277 P.3d 458, 465 (2012) (quoting Petersen v. Bruen, 106 Nev. 271, 274, 792 P.2d 18, 19 (1990)); City of Fernley v. State, Dep't of Tax, 132 Nev. Adv. Op. 4, 366 P.3d 699, 706 (2016); Kopicko v. Young, 114 Nev. 1333, 1339, 971 P.2d 789, 793 (1998).

III. BRIEF STATEMENT OF FACTS

A. THE LOAN AND LOAN DOCUMENTS

On April 11, 2002, Real Party In Interest America First Federal Credit Union ("AFCU") and Petitioners entered into a Business Loan Agreement ("Loan Agreement"), whereby AFCU loaned Petitioners approximately $2,900,000 to develop a parcel of property ("Property"). 1 PA000101-02. That same day, AFCU and Petitioners executed a Commercial Promissory Note ("Note") and Trust Deed with Assignment of Rents ("Deed of Trust") to secure the Note (the Loan Agreement, Note and Deed of Trust are sometimes collectively referred to herein as the "Loan Documents"). 1 PA000102.

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The Loan Agreement contains an "Applicable Law" clause providing:

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

1 PA000114. In addition, the Loan Agreement contains an "Acceptance" clause specifying, "This Agreement is accepted by Lender in the State of Utah." Id.

B. THE ACTION

On October 4, 2012, AFCU caused the Property to be sold via non-judicial foreclosure (the "Foreclosure Sale"). 1 PA000103. AFCU did not seek a deficiency judgment within three months after the Foreclosure Sale despite Utah Code Ann. § 57-1-32, which stipulates a three-month statute of limitations for deficiency actions. Id. It was not until April 4, 2013 – exactly six months after the non-judicial foreclosure sale of the Property – that AFCU filed the underlying Complaint seeking a deficiency judgment against Petitioners. 1 PA000001.

Petitioners filed an initial Motion to Dismiss based on forum/jurisdiction issues on July 29, 2013 (the "Initial Motion to Dismiss"). 1 PA000016. The district court granted Petitioners' Initial Motion to Dismiss. 1 PA000073. On appeal, this Court overturned the district court, holding the forum and jurisdiction selection clauses were permissive rather than mandatory. 1 PA000090-91. This Court specifically did not address the issue of statute of limitations, stating that "because the district court did not decide this issue, we

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do not address [Nevada's six-month statute of limitations versus Utah's three-month statute of limitations] here." 1 PA000092.

Upon remand, Petitioners filed the underlying Second Motion to Dismiss on August 24, 2016. 1 PA000099. The district court issued an Order on December 14, 2016, erroneously denying Petitioners' Second Motion to Dismiss. 1 PA000191.

Petitioners subsequently filed a Petition for Writ of Mandamus and Prohibition with the Court of Appeals on January 10, 2017. In an Order issued on December 27, 2017, the Court of Appeals erroneously upheld the district court's denial of Petitioners' Second Motion to Dismiss. Petitioners filed a Petition for Rehearing on January 16, 2018, which the Court of Appeals denied on March 26, 2018.

IV. LEGAL ARGUMENT

A. STANDARD FOR PETITIONS FOR REVIEW

A party aggrieved by a decision of the Court of Appeals may file a petition for review with this Court. See NRAP 40B; Jacinto v. PennyMac Corp., 129 Nev. 300, 303, 300 P.3d 724, 726 (2013). Pursuant to NRAP 40B, this Court considers the following factors for a Petition for Review: (1) Whether the question presented is one of first impression of general statewide significance; (2) Whether the decision of the Court of Appeals conflicts with a prior decision

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of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) Whether the case involves fundamental issues of statewide public importance. See NRAP 40B(a).

In the instant case, Petitioners submit review is necessary and appropriate based on all three NRAP 40B factors.

B. THE COURT OF APPEALS ERRED IN UPHOLDING THE DISTRICT COURT'S DENIAL OF PETITIONERS' SECOND MOTION TO DISMISS IN CONTRADICTION OF THIS COURT'S PRIOR RELEVANT DECISIONS.

Pursuant to the valid choice-of-law provision in the underlying loan documents, AFCU was required to abide by – but subsequently failed to comply with – Utah's three-month statute of limitations. By upholding the district court's erroneous denial of Petitioners' Second Motion to Dismiss, the Court of Appeals incorrectly accepted AFCU's violation of the pertinent Utah statute of limitations, contrary to this Court's prior decisions in Key Bank, Mardian, and Pioneer Title.

1. The Court Of Appeals Erred As Pursuant To *Key Bank*, The Utah Choice-Of-Law Provision Applies To AFCU'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

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of Alaska v. Donnels, 106 Nev. 49, 52, 787 P.2d 382, 384 (1990).

In Key Bank, this Court held out-of-state law applies in a Nevada foreclosure/deficiency action when the promissory note so specifies. Id. at 51-52, 787 P.2d at 384 (emphasis added). The exception to this rule occurs when an out-of-state statute "indicat[es] a clear intent to limit the effect of the statute to foreclosures under those sections . . . ." Id. at 53, 787 P.2d at 384–85 (emphasis in original). In other words, if a choice-of-law provision specifies a foreign state, then that state's law applies; however, the exception to this rule occurs 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 or by simply remaining neutral/illustrative), then the Key Bank exception does not apply.

Here, the choice-of-law provision in the pertinent loan documents specifies Utah law applies, and language in the relevant Utah statute does not explicitly limit its foreign application. Therefore, 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

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exclusive; it does not contain the offsetting exclusionary commas like the statute at issue in Key Bank. This illustrative provision ***does not contain any exclusionary reference*** to property located in Utah. Accordingly, pursuant to Key Bank, the three-month Utah statutory deadline must be applied. Since AFCU filed the underlying action outside the three-month period, its claims are statutorily barred.

2. The Court Of Appeals Erred As Pursuant To *Mardian*, The Utah Choice-Of-Law Provision Applies To AFCU's Statutory Deadline For Filing A Deficiency Action.

This Court reaffirmed the Key Bank decision by holding 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).

In Mardian, when addressing whether to apply the foreclosing state (Arizona) statute of limitations versus the choice-of-law state (Nevada) statute of limitations, this Court reiterated and expressly cited to Key Bank in concluding 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

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Nev. 49, 52, 787 P.2d 382, 384 (1990) . . . ." (emphasis added)).

This 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 statutes did not limit application, this Court ultimately found the statute of limitations from the choice-of-law state applied and the creditor was barred from seeking deficiency judgment due to filing outside the limitation period. Id., 359 P.3d at 112. Therefore, when reading Key Bank and Mardian together, it is clear the rule in Nevada remains that regardless of where a deficiency action is brought or 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. As such, the choice-of-law provision at issue here requires that Utah's laws, including Utah's statute of limitations, must be applied.

3. The Court Of Appeals Erred By Allowing AFCU To Avoid Its Obligations Under The Loan Agreement When AFCU Failed To File For Deficiency Action Within The Requisite 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,

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226-227 (2009) (*citing* NAD, Inc. v. Dist. Ct., 115 Nev. 71, 77, 976 P.2d 994, 997 (1999)). In fact, this Court 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).

By upholding the district court's decision, the Court of Appeals has incorrectly permitted AFCU 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. AFCU waited six months after the foreclosure sale before filing the underlying deficiency action. 1 PA000001. AFCU maneuvered around immediate dismissal – and its contractual obligation to abide by Utah law – by filing in Nevada, rather than Utah. 1 PA000001. By allowing AFCU to maintain the underlying action, the Utah choice-of-law provision is impermissibly rendered meaningless in contravention of Nevada's policy of enforcing

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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 distinctly contravenes this Court's explicit holdings in Key Bank and Mardian. AFCU must therefore be unequivocally barred from pursuing deficiency judgment against Petitioners. Accordingly, the Court of Appeals erroneously affirmed the district court's ruling and Petitioners' Petition for Review must be granted.

C. THE COURT OF APPEALS ERRED IN UPHOLDING THE DISTRICT COURT'S DENIAL OF PETITIONERS' SECOND MOTION TO DISMISS DESPITE THE ILLUSTRATIVE, APPLICABLE NATURE OF THE STATUTE AT ISSUE, IN CONFLICT WITH THIS COURT'S WINDHAVEN RULING.

This Court need merely look to the holdings of Key Bank and Mardian to find the lower courts' clear error with respect to denial of Petitioners' Second Motion to Dismiss. In addition, the Court of Appeals also erred by failing to apply this Court's holding in Windhaven to this matter.

As explained further above, the Key Bank exception only applies to exclusive, not illustrative, anti-deficiency statutes. This Court went to great

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lengths in Key Bank 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. Indeed, this Court in Key Bank specifically called out the commas as the first and foremost reason for its decision, 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, this Court examined why Nevada's anti-deficiency statute is illustrative, rather than exclusive. NRS 40.455(1), the anti-deficiency statute in question in Windhaven, provided[1] 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, ...[2]

Thus, in Windhaven, this Court concluded the phrase "trustee's sale held pursuant to NRS 107.080" was illustrative rather than exclusive, explaining NRS 40.455(1) has no limiting language" and noting 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**

[1] NRS 40.455 has since been amended.

[2] Emphasis added.

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nonjudicial foreclosure sales held in another state." Branch Banking v. Windhaven & Tollway, LLC, 131 Nev. Adv. Op. 20, 347 P.3d 1038, 1041 (2015) (emphasis added).

In short, this Court in Windhaven 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 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. This neutral wording is

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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 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, pursuant to Key Bank, its statute of limitations should have been applied here. Therefore, the Court of Appeals erroneously affirmed the district court's ruling and Petitioners' Petition for Review must be granted.

D. THE COURT OF APPEALS ERRED IN UPHOLDING THE DISTRICT COURT'S DENIAL OF PETITIONERS' SECOND MOTION TO DISMISS DESPITE THE FACT THAT UNDER *BULLINGTON*, UTAH'S STATUTE OF LIMITATIONS WOULD STILL APPLY.

In light of the pertinent Nevada case law detailed above, Petitioners contend the Court of Appeals' decision to look to Utah case law in this matter was incorrect. Nevertheless, even if the Court of Appeals was correct in its reliance on Utah Supreme Court case Bullington v. Mize, the Court of Appeals

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still overlooked an important second part of Bullington's analysis. This additional necessary analysis requires the Court to look at public policy in addition to legislative intent to determine whether the statute at issue ought to be applied extraterritorially. If public policy so requires – as it does here – the statute must be applied extraterritorially. As this is a matter of first impression, as well as a public policy issue of statewide significance and importance, the Court of Appeals erred by failing to address the full Bullington analysis.

1. The Court Of Appeals Erred As *Bullington* Requires This Court To Analyze Both Legislative Intent *And* Public Policy To Determine Extraterritorial Application Of Utah Code Ann. § 57-1-32.

In reaching its determination that Utah's statute of limitations does not apply in this matter, the Court of Appeals relied upon a prior decision from the Utah Supreme Court, Bullington v. Mize, 25 Utah 2d 173, 178, 478 P.2d 500, 503 (1970), which the Court of Appeals incorrectly found to stand for the proposition that Utah Code Ann. § 57-1-32 does not apply extraterritorially.

Pursuant to Bullington, however, there are actually **two** aspects that must be considered in determining whether a Utah statute will be extended extraterritorially – ***first***, whether the language of the statute expresses a legislative intent to extend its protection extraterritorially, and ***second***, whether public policy exists that would be contravened if the statute is not applied

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extraterritorially. 25 Utah 2d at 178, 478 P.2d at 503-04 ("[W]hether a forum statute would be applied to protect a defendant sued on a deficiency relating to foreign land, must depend on the **interpretation** of the statute **in the light of its policy**." (citing *Conflicts of Law* § 232, 2(a)(2), p. 611)).

In discussing the second portion of the above analysis with respect to Utah Code Ann. § 57-1-32, the Bullington Court noted:

> The traditional test used in determining whether the public policy of the forum prevents the application of otherwise applicable conflict-of-laws principles was well expressed by Justice Cardozo in Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 120 N.E. 198, to the effect that foreign law will not be applied if it 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'

Id. at 179, 478 P.2d at 504 (internal citations omitted).

The Bullington Court then went on to discuss whether enforcing the situs – Texas – law, rather than extending the forum – Utah – law extraterritorially, would violate fundamental Utah jurisprudence. Id. at 180, 478 P.2d at 504. The Bullington Court ultimately concluded that allowing the deficiency judgment amount in accordance with Texas law would not violate Utah public policy. Id. at 180, 478 P.2d at 504-05. Critically, the Bullington Court focused exclusively on the deficiency judgment amount statutory provision, without analysis or reference to the statute of limitations component, in discussing and deciding no public policy violation would occur. See id.

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Here, a determination regarding extraterritorial application of Utah Code Ann. § 57-1-32 must include both the first **and** second parts of the Bullington analysis. The Court of Appeals' decision erroneously focused exclusively on the first half of the Bullington analysis, addressing the Utah legislature's intent with respect to Utah Code Ann. § 57-1-32 without any reference to the second portion of Bullington. Given that the Court of Appeals' decision specified the Court will look to a chosen jurisdiction's courts to see if they have already determined the statute's extraterritorial reach "and, if so, apply that ruling," if this Court is to adopt the Court of Appeals' rule of analysis, it is necessary to apply both steps of the Bullington analysis, rather than merely only the first half.

Since the Bullington Court, when analyzing the second step of the process, focused only on the deficiency amount provision and did not address the statute of limitations portion of Utah Code Ann. § 57-1-32, this Court must therefore look to whether special public policy circumstances necessitate extraterritorial enforcement of Utah Code Ann. § 57-1-32 regardless of legislative intent.

2. The Court Of Appeals Erred In Not Applying Utah Code Ann. § 57-1-32 As Utah Statutes Of Limitation Constitute Important Matters Of Public Policy Which Necessitate Extraterritorial Application.

As discussed above, pursuant to Bullington, even if legislative intent does not indicate a Utah statute is meant to be applied extraterritorially, this Court

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must assess whether failure to extend the statute extraterritorially would violate fundamental Utah jurisprudence. Id. at 180, 478 P.2d at 504. If so, it is necessary to extend the Utah statute at issue. Id. The Bullington Court, in assessing extraterritorial application of Utah Code Ann. § 57-1-32, did not discuss or weigh public policy regarding the statute of limitations provision. Id. at 180, 478 P.2d at 504-05. Rather, the Bullington Court narrowly focused on the public policy implications of the statute's deficiency judgment amount provision. See id.

Other Utah courts, though, have long held that statutes of limitation are important matters of public policy. See Falkenrath v. Candela Corp., 780 Utah Adv. Rep. 25, 374 P.3d 1028, 1031 (Utah Ct. App. 2016); Ireland v. Mackintosh, 22 Utah 296, 61 P. 901, 902 (1900) (stating that construction/interpretation of a statute of limitations "which will most effectually accomplish the purpose of the statute should be adopted. The purpose of the statute is the same both in cases involving the title to tangible property, and in cases relating to the enforcement of the obligations of contracts."); Kuhn v. Mount, 13 Utah 108, 44 P. 1036, 1037 (1896); Horton v. Goldminer's Daughter, 785 P.2d 1087, 1091 (Utah 1989), abrogated on other grounds; see also Hirtler v. Hirtler, 566 P.2d 1231, 1231 (Utah 1977) (finding a contractual waiver of statutes of limitation was violative of public policy and therefore void).

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Utah courts have noted statutes of limitation are public policy matters because "the law has long recognized the need 'to prevent the enforcement of stale claims,'" reiterating that

> [A]t some point in time after the defendant has become liable for damages he must, in fairness, be protected from suit . . . because of the drying up or disappearance of evidence that might have been used in the defense, because of the desirability of security against old claims brought by persons who have slept on their rights, or because the judicial system may not be able to handle stale claims effectively.

Falkenrath, 780 Utah Adv. Rep. 25, 374 P.3d at 1031 (citing 4 Am. Jur. *Trials* § 441(2) (2016)).

Here, the public policy importance of statutes of limitations necessitate extraterritorial application of Utah Code Ann. § 57-1-32's statute of limitations. Unlike the deficiency judgment amount provision, the three-month limitation provision of Utah Code Ann. § 57-1-32, as a statute of limitations, carries significant public policy weight. See Falkenrath, 780 Utah Adv. Rep. 25, 374 P.3d at 1031; Ireland, 22 Utah 296, 61 P. at 902; Kuhn, 13 Utah 108, 44 P. at 1037; Horton, 785 P.2d at 1091; Hirtler, 566 P.2d at 1231. Indeed, Utah jurisprudence requires the statute of limitations provision to be constructed in a way that accomplishes its purpose, i.e. preventing the enforcement of stale claims. See Ireland, 22 Utah 296, 61 P. at 902; Falkenrath, 780 Utah Adv. Rep. 25, 374 P.3d at 1031. Failure to extend the statute of limitations extraterritorially

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would thus violate fundamental Utah jurisprudence. As such, the second part of the Bullington analysis requires the statute of limitations portion of Utah Code Ann. § 57-1-32 be extended extraterritorially due to the public policy considerations. Bullington, 25 Utah 2d at 180, 478 P.2d at 504. Accordingly, the Court of Appeals' determination that Utah Code Ann. § 57-1-32 cannot be applied extraterritorially is erroneous.

3. The Court Of Appeals Erred As Unlike *Bullington* and *Nevares*, The Parties Here Specifically Agreed To The Statute Of Limitations In Utah Code Ann. § 57-1-32.

The Bullington decision did not touch upon the statute of limitations portion of Utah Code Ann. § 57-1-32. Rather, the Bullington Court was focused upon whether a Texas resident could pursue a Colorado resident for a deficiency resulting from the sale of property in Texas. Id. at 175, 478 P.2d at 500-01. There was no choice of law provision involved; the parties in Bullington had not agreed to abide by and comply with Utah law. See generally id.

The other case the Court of Appeals relied upon, Nevares v. M.L.S., 2015 UT 34, 345 P.3d 719 (Utah 2015), also addressed matters entirely unrelated to statutes of limitations or contractual choice of law provisions. Rather, the Nevares Court looked at whether parental rights were foreclosed under Utah Code Ann. § 78B–6–111, and found the statute did not apply to sexual activity between non-Utah citizens outside of Utah. 2015 UT 34, 345 P.3d at 722.

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In contrast here, the parties already agreed to extraterritorial application of the statute of limitations contained in Utah Code Ann. § 57-1-32. Specifically, unlike Bullington and Nevares, the instant action revolves around a valid, bargained-for agreement with a choice-of-law provision, requiring any action to exist within the realm of Utah's laws. Neither the Bullington nor Nevares courts considered the implication of an agreement to proceed in accordance with Utah's statutes when reaching their decisions. Indeed, the Nevares Court had to clarify Utah statutes do not seek out individuals in other states to impose their requirements, because the parties involved had not made any agreement to comply with Utah law. See id. at 2015 UT 34, 345 P.3d at 722.

Here, though, the parties deliberately availed themselves of Utah's laws and sought to be subject to Utah's statutes. Determining the parties are subject to Utah law ***except for*** the statute of limitations, despite the existence of a valid choice-of-law provision, is an absurd result unsupported by the pertinent Utah case law.[3] Accordingly, for this additional reason, Utah Code Ann. § 57-1-32 must be extended extraterritorially. As such, the Court of Appeals erroneously

[3] Such a result would be unsupported by Nevada law as well. See NRS 11.020 ("When a cause of action has arisen in another state . . . and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against the person in this State.").

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affirmed the district court's ruling and Petitioners' Petition for Review must be granted.

V. CONCLUSION

Based on the foregoing, Petitioners respectfully request this Court to grant the instant Petition for Review and reverse the district court's denial of Petitioners' Second Motion to Dismiss. In the event this Court directs AFCU to answer this Petition for Review, Petitioners also respectfully request this Court permit leave for Petitioners to file a Reply in support of this Petition.

Dated this 23rd day of April, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Review by the Supreme Court complies with the formatting requirements, typeface requirements, and type style requirements of NRAP 32(a)(4)-(6) because:

[X] This Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

2. I further certify that this Petition for Review complies with the page or type-volume limitations of NRAP 32(a)(7)(C) because it:

[X] Does not exceed 4,667 words in the pertinent sections.

3. Finally, I hereby certify that I have read this Petition for Review, 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 for Review complies with all applicable Nevada Rules of Appellate Procedure.

Dated this 23rd day of April, 2018.

REID RUBINSTEIN & BOGATZ

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2018, our office served a copy of the foregoing **PETITION FOR REVIEW BY THE SUPREME COURT** upon each of the following parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, to the following:

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