

SUPREME COURT OF THE STATE OF NEVADA

SATICOY BAY, LLC SERIES 34
INNISBROOK,

Appellant,

vs.

THORNBURG MORTGAGE
SECURITIES TRUST 2007-3,
FRANK TIMPA; MADELINE
TIMPA; TIMPA TRUST; RED
ROCK FINANCIAL SERVICES,
LLC; SPANISH TRAIL MASTER
ASSOCIATION ; REPUBLIC
SERVICES; AND LAS VEGAS
VALLEY WATER DISTRICT,

Respondents.

Supreme Court Case No.: 80111

District Court Case No.
A-14-710161-C

Electronically Filed
May 12 2020 03:43 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

From the Eighth Judicial District Court
The Honorable Gloria Sturman

**RESPONDENT SPANISH TRAIL MASTER ASSOCIATION'S
MOTION TO DISMISS APPEAL**

Sean L. Anderson
Nevada Bar No. 7259
Ryan D. Hastings
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RESPONDENT’S MOTION TO DISMISS APPEAL

I. PROCEDURAL HISTORY

This action emanates from the Association’s foreclosure of a delinquent assessment lien against the property located at 34 Innisbrook Ave., Las Vegas, NV 89113; APN: 163-28-614-00 (the “Property”) on November 7, 2014. On November 20, 2014 Saticoy Bay LLC (“Saticoy”) filed a complaint against Thornburg Mortgage Securities Trust (“Bank”) seeking to quiet title in the Property. *See* Complaint, **Exhibit A**. According to the Complaint, Saticoy was the successful bidder at the foreclosure sale, taking title to the Property by way of a foreclosure deed. *Id.*

On May 30, 2017, the Bank filed its Answer to Third Amended Complaint and Counterclaim (“Counterclaim”) wherein the Bank brought several causes of action against the Association alleging violations of Nevada law with respect to the actions leading up to the Association’s foreclosure sale. *See* Bank’s Answer to Third Amended Complaint and Counterclaims, **Exhibit B**. Specifically, the Bank brought the following claims against the Association: wrongful foreclosure, negligence, negligence per se, breach of contract, misrepresentation, unjust enrichment, and breach of covenant of fair dealing. *Id.*

On August 9, 2017 the Association filed a motion to dismiss the Bank’s counterclaims. On October 5, 2017, the district court granted in part and denied in

part the Association's Motion dismissing the Bank's claims for quiet title/declaratory relief, negligence per se, breach of contract, and breach of covenant of good faith and fair dealing. *See* Notice of Entry of Order Granting Motion to Dismiss In Part, **Exhibit C**.

In May 2018 the Bank, Saticoy and the Association each filed motions for summary judgment. On November 30, 2018 the district court signed its findings of fact, conclusions of law and order ("FFCL"). *See* November 30, 2018 FFCL, **Exhibit D**. The FFCL was filed on December 3, 2018 and notice of entry of the FFCL was filed on December 5, 2018. *Id.* In the FFCL, the district court declared that Saticoy took title to the Property subject to the Bank's deed of trust. *Id.* The district court also dismissed with prejudice all remaining claims, whether specifically mentioned in the FFCL or not, including all remaining claims against the Association. *Id.*

On May 10, 2019, Saticoy filed a motion to reinstate statistically closed case arguing that Saticoy, Timpa Trust and Red Rock remained parties to an interpleader action that needed to be resolved by the Court. *See* Motion to Reinstate Statistically Closed Case, **Exhibit E**. On June 11, 2019, the district court granted Saticoy's motion to reinstate for the limited purpose of addressing the interpleader of surplus funds remaining from the sale of the Property. *See* Order Granting Motion to Reinstate, **Exhibit F**.

On June 25, 2019 Timpa Trust filed a motion for summary judgment arguing that it was entitled to the surplus funds remaining from the sale of the Property. *See* Timpa Trust’s Motion for Summary Judgment, **Exhibit G**. On August 20, 2019 the Court granted Timpa Trust’s motion finding that the Timpa Trust was entitled to the surplus funds from the sale of the Property. *See* Order filed September 11, 2019, **Exhibit H**.

On September 24, 2019 Saticoy filed a motion for reconsideration. *See* Motion for Reconsideration, **Exhibit I**. On October 29, 2019 the district court denied Saticoy’s motion for reconsideration. *See* Order filed November 18, 2019. On November 19, 2019 Saticoy filed its notice of appeal in which it attempts to appeal orders entered on November 18, 2019, September 11, 2019 and December 3, 2018. *See* Notice of Appeal, **Exhibit J**.

II. ARGUMENT

A. Saticoy’s Appeal of the December 3, 2018 Findings of Fact, Conclusions of Law is Untimely.

Nevada Rules of Appellate Procedure (“NRAP”) 4(a)(1) mandates that a party must file its notice of appeal no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served. Here, the district court entered its FFCL dismissing any and all claims against the Association on November 30, 2018. *See* November 30, 2018 FFCL, **Exhibit D**. Notice of entry the November 30, 2018 FFCL was filed and served upon all parties

on December 5, 2018. *Id.* Pursuant to NRAP 4(a)(1) if Saticoy, or any other party in this case, wanted to appeal the FFCL, it was required to do so by January 4, 2019. Saticoy did not file its notice of appeal in this case until November 19, 2019, over ten months after the deadline to do so. Because Saticoy's appeal of the November 30, 2018 FFCL is untimely, it must be dismissed from the rest of the appeal.

CONCLUSION

Saticoy failed to file a timely appeal of the district court's November 30, 2018 FFCL. Therefore, the Association's motion to dismiss Saticoy's appeal should be granted.

DATED this 12th day of May, 2020.

LEACH KERN GRUCHOW ANDERSON SONG

/s/ Ryan D. Hastings

Sean L. Anderson
Nevada Bar No. 7259
Ryan D. Hastings
Nevada Bar No. 12394
2525 Box Canyon Drive
Las Vegas, Nevada 89128
*Attorneys for Respondent Spanish Trails
Master Association*

CERTIFICATE OF SERVICE

I hereby certify that on this date, May 12, 2020, I submitted the foregoing
**RESPONDENT SPANISH TRAIL MASTER ASSOCIATION’S MOTION
TO DISMISS APPEAL** for filing and service through the Court’s eFlex electronic
filing service. According to the system, electronic notification will be
automatically sent to the following:

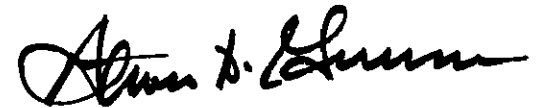
Roger P. Croteau Timothy E. Rhoda Roger P. Croteau & Associates, Ltd. 2810 W. Charleston Blvd., Suite 75 Las Vegas, NV 89102	David R. Koch Daniel G. Scow Steven B. Scow Brody R. Wight Koch & Scow, LLC 11500 S. Eastern Ave., Suite 210 Henderson, NV 89052
Travis D. Akin The Law Office of Travis Akin 8275 S. Eastern Ave., Suite 200 Las Vegas, NV 89123	Drew J. Starbuck Donald H. Williams Williams Starbuck 612 10 th St. Las Vegas, NV 89101
Thera A. Cooper Melanie D. Morgan Ariel E. Stern Akerman LLP 1635 Village Center Circle, Suite 200 Las Vegas, NV 89134	Bryan Naddafi Elena Nutenko Avalon Legal Group LLC 9480 S. Eastern Ave., Suite 257 Las Vegas, NV 89123

/s/ Yalonda Dekle

An Employee of LEACH KERN
GRUCHOW ANDERSON SONG

Exhibit “A”

Exhibit “A”



CLERK OF THE COURT

1 **COMP**

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7 Attorney for plaintiff

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10
11 SATICOY BAY LLC SERIES 34
INNISBROOK

12 Plaintiff,

13 vs.

14 THORNBURG MORTGAGE SECURITIES
15 TRUST 2007-3; and RECONTRUST
16 COMPANY, N.A. a division of BANK OF
AMERICA

17 Defendants.

CASE NO.: A-14-710161-C

DEPT NO.: XXXI

EXEMPTION FROM ARBITRATION:
Title to real property

18 **COMPLAINT**

19 Plaintiff, Saticoy Bay LLC Series 34 Innisbrook, by and through its attorney, Michael F. Bohn,
20 Esq. alleges as follows:

21 1. Plaintiff is the owner of the real property commonly known as 34 Innisbrook, Las Vegas,
22 Nevada.

23 2. Plaintiff obtained title by a foreclosure sale conducted on November 7, 2014 as evidenced by
24 foreclosure deed recorded on November 10, 2014.

25 3. The plaintiff's title stems from a foreclosure deed arising from a delinquency in assessments
26 due from the former owner to the Spanish Trails Master Association pursuant to NRS Chapter 116.

4. Thornburg Mortgage Securities Trust 2007-3 is the current beneficiary of a deed of trust which was recorded as an encumbrance to the subject property on June 12, 2006.

5. Recontrust Company is the substituted trustee on the deed of trust.

6. The interest of each of the defendants has been extinguished by reason of the foreclosure sale, which was properly conducted with adequate notice given to all persons and entities claiming an interest in the subject property, and resulting from a delinquency in assessments due from the former owner, to the Spanish Trails Master Association, pursuant to NRS Chapter 116.

7. Plaintiff is entitled to a determination from this court, pursuant to NRS 40.010 that the plaintiff is the rightful owner of the property and that the defendants have no right, title, interest or claim to the subject property.

8. The plaintiff is entitled to an award of attorneys fees and costs.

THIRD CLAIM FOR RELIEF

9. Plaintiff repeats the allegations contained in paragraphs 1 through 8.

10. Plaintiff seeks a declaration from this court, pursuant to NRS 40.010, that title in the property is vested in plaintiff free and clear of all liens and encumbrances, that the defendants herein have no estate, right, title or interest in the property, and that defendants are forever enjoined from asserting any estate, title, right, interest, or claim to the subject property adverse to the plaintiff.

11. The plaintiff is entitled to an award of attorneys fees and costs.

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WHEREFORE, plaintiff prays for Judgment as follows:

1. For a determination and declaration that plaintiff is the rightful holder of title to the property, free and clear of all liens, encumbrances, and claims of the defendants.

2. For a determination and declaration that the defendants have no estate, right, title, interest or claim in the property.

3. For a judgment forever enjoining the defendants from asserting any estate, right, title, interest or claim in the property; and

4. For such other and further relief as the Court may deem just and proper.

DATED this 20th day of November 2014.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Jeff Arlitz, Esq. /
Michael F. Bohn, Esq.
Jeff Arlitz, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff

VERIFICATION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

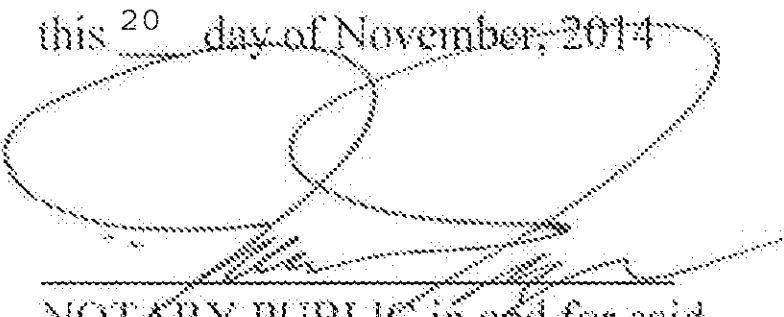
Iyad Haddad, being first duly sworn, deposes and says;

That he is the authorized representative of the plaintiff Limited Liability Company in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein alleged on information and belief, and as to those matters, he believes them to be true.

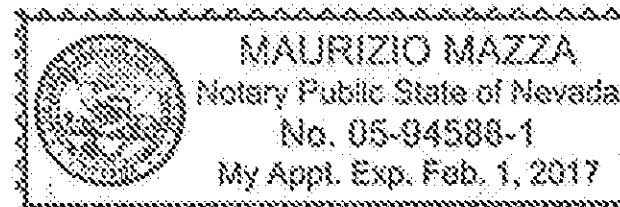


IYAD HADDAD

SUBSCRIBED and SWORN to before me
this ²⁰ day of November, 2014



NOTARY PUBLIC in and for said
County and State



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8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 SATICOY BAY LLC SERIES 34 INNISBROOK
11 Plaintiff,
12 vs.
13 THORNBURG MORTGAGE SECURITIES
14 TRUST 2007-3; and RECONTRUST COMPANY,
N.A. a division of BANK OF AMERICA
15 Defendants.

CASE NO.:
DEPT NO.:

16 **INITIAL APPEARANCE FEE DISCLOSURE**

17 Pursuant to NRS Chapter 19, filing fees are submitted for the party appearing in the above-
18 entitled action as indicated below:

19 SATICOY BAY LLC SERIES 34 INNISBROOK, Plaintiff	\$270.00
20 TOTAL REMITTED:	\$270.00

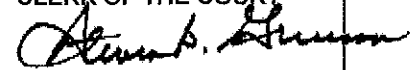
21 DATED this 20th day of November 2014.

22 LAW OFFICES OF
23 MICHAEL F. BOHN, ESQ., LTD.

24
25 By: / s /Michael F. Bohn, Esq. /
MICHAEL F. BOHN, ESQ.
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Las Vegas, Nevada 89119
27 Attorney for plaintiff
28

Exhibit “B”

Exhibit “B”



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10 dnitz@wrightlegal.net
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12 *Attorneys for Defendant/Counterclaimant/Counter-Defendant, Thornburg Mortgage Securities*
13 *Trust 2007-3*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12
13 SATICOY BAY LLC SERIES 34
14 INNISBROOK,

15 Plaintiff,

16 vs.

17 THORNBURG MORTGAGE SECURITIES
18 TRUST 2007-3; RECONTRUST COMPANY,
19 N.A. a division of BANK OF AMERICA;
20 FRANK TIMPA and MADELAINE TIMPA,
21 individually and as trustees of the TIMPA
22 TRUST

23 Defendants.

Case No.: A-14-710161-C
Dept. No.: XV

**THORNBURG MORTGAGE
SECURITIES TRUST 2007-3'S
ANSWER TO SATICOY
BAY LLC SERIES 34 INNISBROOK'S
THIRD AMENDED COMPLAINT AND
COUNTERCLAIMS**

1 THORNBURG MORTGAGE SECURITIES
2 TRUST 2007-3,

3 Counterclaimant,

4 vs.

5 SATICOY BAY LLC SERIES 34
6 INNISBROOK, a Nevada limited-liability
7 company; SPANISH TRAIL MASTER
8 ASSOCIATION, a Nevada Non-Profit
9 Corporation; RED ROCK FINANCIAL
SERVICES, an unknown entity; FRANK
TIMP A, an individual; DOES I through X; and
ROE CORPORATIONS I through X, inclusive,

10 Counter-Defendants.

11 RED ROCK FINANCIAL SERVICES,

12 Counterclaimant,

13 vs.

14 THORNBURG MORTGAGE SERCURITIES
15 TRUST 2007-3; COUNTRYWIDE HOME
16 LOANS, INC.; ESTATES WEST AT
17 SPANISH TRAILS; MORTGAGE
18 ELECTRONIC REGISTRATION SYSTEMS,
19 INC.; REPUBLIC SERVICES; LAS VEGAS
20 VALLEY WATER DISTRICT; FRANK
21 TIMP A and MADELAINE TIMPA,
individually and as trustees of the TIMP A
TRUS U/T/D March 3,1999; and DOES 1-100,
inclusive,

22 Counter-Defendants.

23 Defendant, Thornburg Mortgage Securities Trust 2007-3 ("Thornburg"), by and through
24 its attorneys of record Dana Jonathon Nitz, Esq., and Michael S. Kelley, Esq., of the law firm of
25 Wright, Finlay & Zak, LLP, hereby submits its Answer to Saticoy Bay LLC Series 34
26 Innisbrook's ("Saticoy" or "Plaintiff") Third Amended Complaint. Nothing in this Answer to
27 Third Amended Complaint is intended to disturb Thornburg's previously filed Counterclaims filed
28 on April 10, 2015.

1 **ANSWER TO SECOND AMENDED COMPLAINT**

2 1. Thornburg denies that Plaintiff is the owner of the Property. Thornburg maintains
3 that its interest in the Property is secure and valid.

4 2. Thornburg avers that the allegations contained in Paragraph 3 make reference to
5 recorded documents, quote recorded documents, statutes, or case law, and/or offer opinions or
6 conclusions of law, and therefore cannot be either admitted or denied; however, to the extent a
7 response is necessary to any facts alleged therein, Thornburg admits only that a foreclosure deed
8 recorded November 10, 2014 purports to state that Plaintiff was the highest bidder at a foreclosure
9 sale conducted on November 7, 2014. Thornburg denies that Plaintiff has obtained title to the
10 Property. Thornburg maintains that its interest in the Property is secure and valid.

11 3. Thornburg avers that the allegations contained in Paragraph 3 make reference to
12 recorded documents, quote recorded documents, statutes, or case law, and/or offer opinions or
13 conclusions of law, and therefore cannot be either admitted or denied; however, to the extent a
14 response is necessary to any facts alleged therein, then Thornburg objects to any document
15 referenced in these paragraphs on the ground that the document speaks for itself; and, without
16 waiving the objection, Thornburg otherwise does not possess enough information to admit or deny
17 the allegations in these paragraphs and therefore denies the allegations contained therein on that
18 basis.

19 4. Thornburg admits the allegations contained in Paragraph 4 of the Complaint.

20 5. The allegations contained in Paragraph 5 contain statements directed to entities in
21 which Thornburg is not a party therefore, no response is required. To the extent a response is
22 required; Thornburg admits that Madelaine and Frank Timpa were the former owners of the
23 Property.

24 6. The allegations contained in Paragraph 6 contain statements directed to entities in
25 which Thornburg is not a party therefore, no response is required. To the extent a response is
26 required; Thornburg is without information or knowledge to admit or deny the allegations
27 contained therein, and therefore denies the same.

7. Thornburg avers that the allegations contained in Paragraph 7 of the Complaint contain legal conclusions to which no response is required; provided however, to the extent Paragraph 7 does require a response, Thornburg denies the allegations contained therein.

8. Thornburg avers that the allegations contained in Paragraph 8 of the Complaint contain legal conclusions to which no response is required; provided however, to the extent Paragraph 8 does require a response, Thornburg denies the allegations contained therein.

9. Thornburg avers that the allegations contained in Paragraph 9 of the Complaint contain legal conclusions to which no response is required; provided however, to the extent Paragraph 9 does require a response, Thornburg denies the allegations contained therein.

10. Thornburg denies the allegations contained in Paragraph 10 of the Complaint.

SECOND CLAIM FOR RELIEF

11. Answering Paragraph 11, Thornburg hereby repeats, re-alleges and incorporates each of its admissions, denials, or other responses to all the paragraphs referenced hereinabove as if set forth at length and in full.

12. Thornburg avers that the allegations contained in paragraph 12 state legal conclusions for which no response is required; provided however, to the extent paragraph 40 does require a response, Thornburg denies the allegations contained in Paragraph 12 of the Complaint.

13. Thornburg denies the allegations contained in Paragraph 13 of the Complaint.

SECOND CLAIM FOR RELIEF

14. Answering Paragraph 14, Thornburg hereby repeats, re-alleges and incorporates each of its admissions, denials, or other responses to all the paragraphs referenced hereinabove as if set forth length and in full.

15. Thornburg does not have adequate information or knowledge to admit or deny the allegations contained in Paragraph 15; therefore, Thornburg denies said allegations.

16. Thornburg does not have adequate information or knowledge to admit or deny the allegations contained in Paragraph 16; therefore, Thornburg denies said allegations.

17. Thornburg does not have adequate information or knowledge to admit or deny the allegations contained in Paragraph 17; therefore, Thornburg denies said allegations.

1 18. Thornburg denies the allegations contained in Paragraph 18 of the Complaint.

2 19. Thornburg denies the allegations contained in Paragraph 19 of the Complaint.

3 **FOURTH CLAIM FOR RELIEF**

4 20. Answering Paragraph 20, Thornburg hereby repeats, re-alleges and incorporates
5 each of its admissions, denials, or other responses to all the paragraphs referenced hereinabove as
6 if set forth length and in full.

7 21. Thornburg admits the allegations contained in Paragraph 21 of the Complaint.

8 22. The allegations contained in Paragraph 22 are directed towards entities in which
9 THORNBURG is not a party, therefore no response is required. To the extent a response is
10 required, THORNBURG is without information or knowledge to admit or deny the allegations
11 contained therein and therefore denies the same.

12 23. The allegations contained in Paragraph 23 are directed towards entities in which
13 THORNBURG is not a party, therefore no response is required. To the extent a response is
14 required, THORNBURG is without information or knowledge to admit or deny the allegations
15 contained therein and therefore denies the same.

16 24. The allegations contained in Paragraph 24 are directed towards entities in which
17 THORNBURG is not a party, therefore no response is required. To the extent a response is
18 required, THORNBURG is without information or knowledge to admit or deny the allegations
19 contained therein and therefore denies the same.

20 25. The allegations contained in Paragraph 25 are directed towards entities in which
21 THORNBURG is not a party, therefore no response is required. To the extent a response is
22 required, THORNBURG is without information or knowledge to admit or deny the allegations
23 contained therein and therefore denies the same.

24 26. The allegations contained in Paragraph 26 are directed towards entities in which
25 THORNBURG is not a party and contain legal conclusions, therefore no response is required. To
26 the extent a response is required, THORNBURG is without information or knowledge to admit or
27 deny the allegations contained therein and therefore denies the same.

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1 27. The allegations contained in Paragraph 27 are directed towards entities in which
2 THORNBURG is not a party, therefore no response is required. To the extent a response is
3 required, THORNBURG is without information or knowledge to admit or deny the allegations
4 contained therein and therefore denies the same.

5 28. Thornburg denies the allegations contained in Paragraph 28 of the Complaint.

6 **FIFTH CLAIM FOR RELIEF**

7 29. Answering Paragraph 29, Thornburg hereby repeats, re-alleges and incorporates
8 each of its admissions, denials, or other responses to all the paragraphs referenced hereinabove as
9 if set forth length and in full.

10 30. The allegations contained in Paragraph 30 are directed towards entities in which
11 THORNBURG is not a party, therefore no response is required. To the extent a response is
12 required, THORNBURG is without information or knowledge to admit or deny the allegations
13 contained therein and therefore denies the same.

14 31. The allegations contained in Paragraph 31 are directed towards entities in which
15 THORNBURG is not a party, therefore no response is required. To the extent a response is
16 required, THORNBURG is without information or knowledge to admit or deny the allegations
17 contained therein and therefore denies the same.

18 32. Thornburg denies the allegations contained in Paragraph 32 of the Complaint.

19 **AFFIRMATIVE DEFENSES**

20 **FIRST AFFIRMATIVE DEFENSE**

21 **(Failure to State a Claim)**

22 Plaintiffs Complaint fails to state a claim against Thornburg upon which relief can be
23 granted.

24 **SECOND AFFIRMATIVE DEFENSE**

25 **(Priority)**

26 Plaintiff took title of the Property subject to Thornburg's first priority Deed of Trust,
27 thereby forestalling any enjoinder/extinguishment of Thornburg's interest in the Property.
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THIRD AFFIRMATIVE DEFENSE

(Assumption of Risk)

Plaintiff, at all material times, calculated, knew and understood the risks inherent in the situations, actions, omissions, and transactions upon which they now base their various claims for relief, and with such knowledge, Plaintiff undertook and thereby assumed such risks and is consequently barred from all recovery by such assumption of risk.

FOURTH AFFIRMATIVE DEFENSE

(Commercial Reasonableness and Violation of Good Faith- NRS 116.1113)

The HOA lien foreclosure sale by which Plaintiff took its interest was commercially unreasonable if it eliminated Defendant's Deed of Trust, as PJ contends. The sales price, when compared to the outstanding balance of First Note and Deed of Trust and the fair market value of the Property, demonstrates that the sale was not conducted in good faith as a matter of law. The circumstances of sale of the property violated the HOA's obligation of good faith under NRS 116.1113 and duty to act in a commercially reasonable manner.

FIFTH AFFIRMATIVE DEFENSE

(Equitable Doctrines)

Thornburg alleges that the Plaintiffs claims are barred by the equitable doctrines of laches, unclean hands, equitable estoppel, and failure to do equity.

SIXTH AFFIRMATIVE DEFENSE

(Acceptance)

Plaintiff asserts that any acceptance of any portion of possible excess proceeds does not "satisfy" the amount due and owing on the Loan and would not constitute a waiver of its rights under the Loan and Deed of Trust, or statute.

SEVENTH AFFIRMATIVE DEFENSE

(Waiver and Estoppel)

Thornburg asserts that by reason of Plaintiffs acts and omissions, Plaintiff has waived its rights and is estopped from asserting the claims against Thornburg.

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EIGHTH AFFIRMATIVE DEFENSE

(Void for Vagueness, Ambiguity, Violation of Due Process)

To the extent that Plaintiffs interpretation of NRS 116.3116 is accurate, the statute and Chapter 116 as a whole are void for vagueness, ambiguity, and violation of due process.

NINTH AFFIRMATIVE DEFENSE

(Due Process Violations)

A senior deed of trust beneficiary cannot be deprived of its property interest in violation of the Procedural Due Process Clause of the 14 Amendment of the United States Constitution and Article 1, Sec. 8, of the Nevada Constitution.

TENTH AFFIRMATIVE DEFENSE

(Violation of Procedural Due Process)

The HOA sale is void or otherwise does not operate to extinguish the first Deed of Trust pursuant to the Due Process Clause of the Nevada Constitution and United States Constitution.

ELEVENTH AFFIRMATIVE DEFENSE

(Supremacy Clause)

The HOA sale is void or otherwise does not operate to extinguish the first Deed of Trust pursuant to the Supremacy Clause of the United States Constitution.

TWELFTH AFFIRMATIVE DEFENSE

(Property Clause)

The HOA sale is void or otherwise does not operate to extinguish the first Deed of Trust pursuant to the Property Clause of the United States Constitution.

THIRTEENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

Plaintiff alleges that the PJ's claims are barred in whole or in part because of the Plaintiffs failure to take reasonable steps to mitigate the damages, if any, in this case.

1 **FOURTEENTH AFFIRMATIVE DEFENSE**

2 **(Contracts Clause)**

3 The HOA Sale is void or otherwise does not operate to extinguish the first Deed of
4 Trust pursuant to the Contracts Clause of both the United States Constitution and the Nevada
5 Constitution.

6 **FIFTEENTH AFFIRMATIVE DEFENSE**

7 **(Additional Affirmative Defenses)**

8
9 Plaintiff reserves the right to assert additional affirmative defenses in the event
10 discovery and/or investigation indicates that additional affirmative defenses are applicable.

11 WHEREFORE, Thornburg prays as follows:

- 12 1. That the Court make a judicial determination that Thornburg's Deed of Trust is superior
13 to Plaintiff's claim of title;
14 2. That the Court make a judicial determination that Thornburg's Deed of Trust survived
15 the HOA Sale;
16 3. That the Court make a judicial determination that Plaintiff took title subject to
17 Thornburg's Deed of Trust;
18 4. That Plaintiff recovers nothing on account of the claims made in the Second Amended
19 complaint and each of their purported claims;
20 5. For reasonable attorney's fees and costs; and
21 6. For any such other and further relief as the Court may deem just and proper in the case.

22 **THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S COUNTERCLAIM**

23 Defendant/Counterclaimaint, Thornburg Mortgage Securities Trust 2007-3
24 ("Thornburg") by and through its attorneys of record, Dana Jonathon Nitz, Esq. and Michael S.
25 Kelley, Esq. of the law firm of Wright Finlay & Zak, LLP hereby submits its Counterclaims
26 against Saticoy Bay LLC Series 34 Innisbrook ("Saticoy" or "Buyer"), Spanish Trail Master
27 Association ("HOA"), and Red Rock Financial Services ("HOA Trustee").
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2. The real property which is the subject of this civil action consists of a residence commonly known as 34 Innisbrook Ave., Las Vegas, Nevada 89113, APN No. 163-28-614-00 (hereinafter "Property").

3. Venue and jurisdiction is proper in this judicial district because Counter-Defendants reside in this district; a substantial part of the events or omissions giving rise to Thornburg's claims occurred in this district; and the property that is the subject of this action is situated in this district, in Las Vegas, Clark County, Nevada.

4. Thornburg is an entity authorized to do business in the state of Nevada. THORNBURG is the Beneficiary under the Deed of Trust executed by Frank A. Timpa (hereinafter "Timpa"), recorded on June 12, 2006, (hereinafter "Deed of Trust"), which encumbers the Property and secures a promissory note.

6. Upon information and belief, Spanish Trail Master Association (hereinafter "HOA") is a Nevada Non-Profit Corporation and at all times relevant was doing business in the State of Nevada, and is the HOA that foreclosed upon the property that is the subject of this litigation.

7. Upon information and belief, Red Rock Financial Services, LLC (hereinafter "HOA Trustee" or "RRFS") is a Nevada Limited Liability Company and at all times relevant was doing business in the State of Nevada, and is the HOA Trustee that foreclosed upon the property that is the subject of this litigation.

8. Upon information and belief, HOA Trustee was the agent of the HOA, and the HOA is responsible for their acts and omissions under the doctrine of respondeat superior

9. Thornburg does not know the true names, capacities or bases of liability of fictitious defendants sued as Does I through X, Roe Corporations XI through XX, inclusive (collectively "fictitious Defendants"). Each fictitiously named defendant is in some way liable to Thornburg or claims some rights, title, or interest in the Subject Property that is subsequent to or subject to the interests of Thornburg, or both. Thornburg will amend this Counterclaim to reflect the true names of said defendants when the same have been ascertained.

GENERAL ALLEGATIONS

1. On or about December 21, 2006, Borrower Frank Timpa purchased the Property.

2. The Deed of Trust executed by Timpa identified Countrywide Home Loans, Inc., as the lender, Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Lender and Lender's assigns as Beneficiary, and Recontrust Company, N.A. as the Trustee, securing loan in the amount of \$3,780,000.00 (hereinafter the "Borrower's Loan").¹

3. The borrower became delinquent on his payment obligations under the Deed of Trust on or about February 1, 2008.

4. On June 9, 2010, Countrywide Home Loans, Inc. assigned all beneficial interest in the Deed of Trust to Thornburg.²

5. Thornburg is the current beneficiary of the Deed of Trust.

6. Public records show that on August 4, 2011, a Notice of Delinquent Assessment Lien was recorded against the Property by HOA Trustee, as agent for HOA.³

7. Public records show that on December 6, 2011, a Notice of Default and Election to Sell under Homeowners Association Lien was recorded against the Property by the HOA Trustee, on behalf of the HOA.⁴

¹ A true and correct copy of the Deed of Trust recorded as Book and Instrument Numbers 20060612-0001581 is attached hereto as **Exhibit 1**.

² A true and correct copy of the Assignment of Deed of Trust recorded as Book and Instrument Numbers 20100609-0003189 is attached hereto as **Exhibit 2**.

³ A true and correct copy of the Notice of Delinquent Assessment Lien recorded as Book and Instrument Number 20110804-0002324, is attached hereto as **Exhibit 3**.

1 8. Public records show that on September 15, 2014, a Notice of Foreclosure Sale
2 was recorded against the Property by the HOA Trustee on behalf of the HOA.⁵

3 9. Upon information and belief, pursuant to that Notice of Foreclosure Sale, a non-
4 judicial foreclosure sale occurred on November 7, 2014 (hereinafter the "HOA Sale"), whereby
5 Saticoy acquired its interest in the Property, if any, for \$1,201,000.00.

6 10. On November 10, 2014, a Foreclosure Deed was recorded by which Saticoy
7 claims its interest.⁶

8 11. A homeowner's association sale conducted pursuant to NRS Chapter 116 must
9 comply with all notice provisions as stated in NRS 116.31162 through NRS 116.31168 and
10 NRS 107.090.

11 12. The documents identified as the HOA's Notice of Delinquent Assessment Lien,
12 Notice of Default, and Notice of Sale (collectively "HOA Foreclosure Notices") failed to
13 identify what proportion of the claimed lien was for alleged assessments, late fees, interest,
14 fines/violations, or collection fees/costs.

15 13. A recorded notice of default must "describe the deficiency in payment."

16 14. The HOA Sale occurred without notice to The Trust or its predecessors, agents,
17 servicers or trustees what portion of the lien, if any, that the HOA and HOA Trustee claimed
18 constituted a "super-priority" lien.

19 15. None of the HOA Foreclosure Notices discloses what portion of the lien, if any,
20 the HOA claimed to be the "super-priority" portion of the HOA lien.

21 16. None of the HOA Foreclosure Notices specified whether HOA was foreclosing
22 on the "super-priority" portion of its lien, if any, or under the non-super-priority portion of the
23 lien.

24
25 ⁴ A true and correct copy of the Notice of Default and Election to Sell Under Homeowners
26 Association Lien recorded as Book and Instrument Number 20111206-0001106 is attached
hereto as **Exhibit 4**.

27 ⁵ A true and correct copy of the Notice of Foreclosure Sale recorded as Book and Instrument
Number 20140915-0001527 is attached hereto as **Exhibit 5**.

28 ⁶ A true and correct copy of the Foreclosure Deed recorded as Book and Instrument Numbe
20141110-0002475 is attached hereto as **Exhibit 6**.

1 17. None of the HOA Foreclosure Notices provided notice of a right to protect the
2 senior trust deed position by cure or payment of the super priority amount owed.

3 18. A lender or holder, such as The Trust and/or its predecessors ("Lender"), has a
4 right to cure a delinquent homeowner's association lien in order to protect their security interest.

5 19. Prior to the HOA Sale, Thornburg and its predecessors demanded an accounting
6 of the HOA liens, including what portion of said lien(s) constituted the super-priority amount.

7 20. HOA Trustee responded with an accounting of the claimed lien, but did not
8 specify what portion of the lien constituted the super priority lien.⁷

9 21. HOA Trustee demanded payment of the full lien, including amounts not legally
10 included in the super-priority lien.

11 22. Prior to the HOA Sale, Thornburg and its predecessors tendered payment of 9
12 months of assessments to the HOA and its agents, thus satisfying the super-priority lien prior to
13 the HOA's foreclosure of the remaining lien amount.⁸

14 23. Thornburg's satisfaction of the HOA super-priority lien prevented
15 extinguishment of its First Deed of Trust, thereby preserving its first lien position and security
16 interest in the Property.

17 24. The HOA Sale violated Thornburg's rights and harmed it because the HOA
18 Trustee failed to inform potential buyers at the lien sale that actual tender of the HOA super-
19 priority lien had been made prior to the sale.

20 25. The HOA Sale was invalid and could not have extinguished Thornburg's security
21 interest because Thornburg had in fact tendered the 9 month super-priority lien prior to the
22 HOA Sale.

23 26. The HOA Sale occurred without notice to Thornburg, or its predecessors, agents,
24 servicers or trustees what portion of the lien, if any, that the HOA and HOA Trustee claimed
25 constituted a super-priority lien.

27 ⁷ HOA Trustee Letter and Ledger dated January 26, 2012 is attached hereto as **Exhibit 7**.

28 ⁸ Tender letter and tender check dated February 9, and February 6, 2012 respectively, is
attached hereto as **Exhibit 8**.

1 27. The HOA Sale occurred without notice to Thornburg, or its predecessors, agents,
2 servicers or trustees whether the HOA was foreclosing on the super-priority portion of its lien,
3 if any, or under the non-super priority portion of the lien.

4 28. Extinguishment of Thornburg's Deed of Trust would deprive it of its right to due
5 process because, upon information and belief, the HOA included amounts in its super-priority
6 lien, such as fines, late fees, interest, dues, and costs of collection that are not allowed to be
7 included in its super-priority lien, if any, under Nevada law.

8 29. Extinguishment of Thornburg's Deed of Trust would deprive it of its right to due
9 process because the HOA Trustee and/or the HOA failed to describe the deficiency in payment
10 as required by Nevada law and failed to give the Trust or its predecessors, agents or servicers
11 any reasonable opportunity to satisfy the super-priority lien, if any.

12 30. The Property is located within a common interest community, and is governed
13 by CC&R's that appear of record from and after August 10, 1988.

14 31. The CC&Rs require reasonable notice of delinquency to all lien holders on the
15 Property.

16 32. Further, the CC&Rs provide for the priority of a first mortgage of record made in
17 good faith and for value (Sections 10.7) and 11.3).

18 33. Upon information and belief, the Lender never received copies of the HOA
19 Foreclosure Notices from the HOA or the HOA Trustee.

20 34. Upon information and belief, the HOA and its agent, the HOA Trustee, did not
21 comply with all mailing, curing, and noticing requirements stated in NRS 116.31162 through
22 NRS 116.31168 and the CC&Rs.

23 35. The HOA Sale occurred without notice to Lender whether HOA was foreclosing
24 on the "super-priority" portion of its lien, if any, or under the non-super-priority portion of the
25 lien.

26 36. The HOA Sale occurred without notice to Lender of a right to cure the
27 delinquent assessment and the super-priority lien, if any.

28

1 37. The HOA Sale violated Lender's rights to due process because it was not given
2 proper, adequate notice and the opportunity to cure the deficiency or default in the payment of
3 the HOA's assessments and the super-priority lien, if any.

4 38. The HOA Sale was an invalid sale and could not have extinguished The Trust's
5 secured interest because of defects in the notices given, if any, to Lender.

6 39. Extinguishment of The Trust's Deed of Trust would deprive it of its right to due
7 process because, upon information and belief, the HOA included amounts in its super-priority
8 lien, such as fines, late fees, interest, dues, and costs of collection that are not allowed to be
9 included in its super-priority lien, if any, under Nevada law.

10 40. Extinguishment of The Trust's Deed of Trust would deprive it of its right to due
11 process because the HOA Trustee and/or the HOA failed to describe the deficiency in payment
12 as required by Nevada law and failed to give The Trust or its predecessors, agents, servicers or
13 trustees any reasonable opportunity to satisfy the super-priority lien, if any.

14 41. Under NRS Chapter 116 a lien under NRS 116.3116(1) can only include costs
15 and fees that are specifically enumerated in the statute.

16 42. A homeowner's association may only collect as a part of the super priority lien
17 (a) nuisance abatement charges incurred by the association pursuant to NRS 116.310312 and (b)
18 nine months of common assessments which became due prior to the institution of an action to
19 enforce the lien, unless Fannie Mae and Freddie Mac regulations require a shorter period of not
20 less than six months.

21 43. Upon information and belief, the HOA Foreclosure Notices included improper
22 fees and costs in the amount demanded.

23 44. The attorney's fees and the costs of collecting on a homeowner's association lien
24 cannot be included in the super-priority lien.

25 45. Upon information and belief, the HOA assessment lien and foreclosure notices
26 included fines, interest, late fees, dues, attorney's fees, and costs of collection that are not
27 properly included in a super-priority lien under Nevada law and that are not permissible under
28 NRS116.3102 et seq.

1 46. The HOA Sale is unlawful and void under NRS 116.3102 et seq.

2 47. The HOA Sale deprived The Trust or its predecessor of its right to due process
3 because the Foreclosure Notices failed to identify the super-priority amount, to adequately
4 describe the deficiency in payment, to provide The Trust or its predecessor notice of the correct
5 super-priority amount, and to provide a reasonable opportunity to satisfy that amount.

6 48. A homeowner's association sale must be done in a commercially reasonable
7 manner and in good faith.

8 49. Upon information and belief, at the time of the HOA Sale, the fair market value
9 of the Property exceeded \$3,000,000.

10 50. Upon information and belief, at the time of the HOA Sale, the secured
11 indebtedness against the Property exceeded \$4,000,000.00.

12 51. The amount allegedly paid by Buyer at the HOA Sale was \$1,021,000.00.

13 52. The sale price at the HOA Sale is not commercially reasonable, and not done in
14 good faith, when compared to the debt owed to The Trust on the Venegas Loan and the fair
15 market value of the Property.

16 53. The HOA Sale was commercially unreasonable if it extinguished The Trust's
17 Deed of Trust.

18 54. In the alternative, the HOA Sale was an invalid sale and could not have
19 extinguished The Trust's secured interest because it was not a commercially reasonable sale.

20 55. Without providing Lender notice of the correct super-priority amount and a
21 reasonable opportunity to satisfy that amount, including the failure to identify the super-priority
22 amount and its failure to adequately describe the deficiency in payment as required by Nevada
23 law, the HOA Trustee did not discharge its legal duties, and the HOA Sale is commercially
24 unreasonable and deprived Lender of its right to due process.

25 56. Because Lender was not given proper notice that the HOA intended to foreclose
26 on the super-priority portion of the dues owing, Lender did not know that it had to attend the
27 HOA Sale to protect its security interest.

28

1 57. Because proper notice that the HOA intended to foreclose on the super-priority
2 portion of the dues owing was not given, prospective bidders did not appear for the HOA Sale,
3 making the HOA Sale commercially unreasonable.

4 58. The Buyer, HOA, and HOA Trustee knew that Lender would not know that the
5 HOA was foreclosing on super-priority amounts because of the failure of the HOA and HOA
6 Trustee to provide such notice. Lender's absence from the HOA Sale allowed Buyer to appear at
7 the HOA Sale and purchase the Property for a fraction of market value, making the HOA Sale
8 commercially unreasonable.

9 59. The Buyer, HOA, and HOA Trustee knew that prospective bidders would be less
10 likely to attend the HOA Sale because the public at large did not receive notice, constructive or
11 actual, that the HOA was foreclosing on a super-priority portion of its lien since the HOA
12 improperly failed to provide such notice. The general public's belief therefore was that a buyer
13 at the HOA Sale would take title to the Property subject to The Trust's Deed of Trust. This
14 general belief resulted in the absence of prospective bidders at the HOA Sale, which allowed
15 the Buyer to appear at the HOA Sale and purchase the Property for a fraction of market value,
16 making the HOA Sale commercially unreasonable.

17 60. The circumstances of the HOA Sale of the Property breached the HOA's and
18 HOA Trustee's obligation of good faith under NRS 116.1113 and their duty to act in a
19 commercially reasonable manner.

20 61. The Trust is informed and believes that Buyer is a professional property
21 purchaser.

22 62. The circumstances of the HOA Sale of the Property and the status as a
23 professional property purchaser, prevents Buyer from being deemed a bona fide purchaser or
24 lender for value.

25 63. Upon information and belief, the Buyer had actual, constructive or inquiry notice
26 of The Trust's first Deed of Trust, which prevents Buyer from being deemed a bona fide
27 purchaser or lender for value.

28

64. In the event The Trust's interest in the Property is not reaffirmed or restored, The Trust will have suffered damages in the amount of the fair market value of the Property or the unpaid balance of the Venegas Loan secured by the Deed of Trust, at the time of the HOA Sale, whichever is greater, as a proximate result of the HOA and HOA Trustee's acts and omissions.

65. Because the CC&R's contain a Mortgagee Protection Clause in Sections 10.7 and 11.3 and because proper notice that the HOA intended to foreclose on the super-priority portion of the dues owing was not given, prospective bidders did not appear at the HOA sale, making it commercially unreasonable.

66. The Buyer, HOA, and HOA Trustee knew that Thornburg would rely on the Mortgagee Protection Clause and knew Thornburg or its predecessors, agents, servicers, or trustees would not know that the HOA was foreclosing on the super-priority amount because of failure of the HOA and HOA Trustee to provide such notice. Thornburg's absence from the HOA Sale allowed Saticoy to appear at the HOA Sale and acquire the Property for a fraction of its market value, making the Sale commercially unreasonable.

FIRST CAUSE OF ACTION

(Quiet Title/Declaratory Relief Pursuant to NRS 30.010 et seq. and NRS 40.010)

versus all Parties)

67. The Trust incorporates by reference the allegations of all previous paragraphs, as if fully set forth herein.

68. Pursuant to NRS 30.010 et seq. and NRS 40.010, this Court has the power and authority to declare The Trust's rights and interests in the Property and to resolve the Buyer's adverse claims in the Property.

69. Further, pursuant to NRS 30.010 et seq., this Court has the power and authority to declare the rights and interests of the parties following the acts and omissions of the HOA and HOA Trustee in foreclosing the Property.

70. The Trust's Deed of Trust is a first secured interest on the Property as intended by NRS 116.3116(2)(b).

71. The Trust is the current beneficiary of the Deed of Trust.

1 72. The Trust's interest still encumbers the Property, retains its first position status in
2 the chain of title for the Property after the HOA Sale and is superior to the interest, if any,
3 acquired by the Buyer, or held or claimed by any other party.

4 73. The Buyer claims an interest in the Property through a Foreclosure Deed
5 recorded in the Clark County Recorder's Office that is adverse to The Trust's interest.

6 74. As alleged, the HOA and HOA Trustee failed to provide proper, adequate notices
7 required by Nevada statutes, the CC&R's and due process to Lender, and therefore the HOA
8 Sale is void and should be set aside or rescinded.

9 75. Further, the CC&R's provide for the priority of a first-position mortgage or deed
10 of trust over the HOA lien, so that Buyer took title subject to the Deed of Trust.

11 76. Based on the adverse claims and conduct by the parties, The Trust is entitled to a
12 judicial determination regarding the rights and interests of the respective parties to the case.

13 77. For all the reasons set forth above and in the General Allegations, The Trust is
14 entitled to a determination from this Court, pursuant to NRS 30.010 and NRS 40.010, that The
15 Trust is the beneficiary of a first position Deed of Trust which still encumbers the Property and
16 which is superior to the interest, if any, acquired by the Buyer.

17 78. In the alternative, for all the reasons set forth above and in the General
18 Allegations, The Trust is entitled to a determination from this Court, pursuant to NRS 30.010
19 and NRS 40.010, that the HOA Sale is unlawful and void.

20 79. The Trust has been required to retain counsel and is entitled to recover
21 reasonable attorney's fees and costs to prosecute this action.

22 **SECOND CAUSE OF ACTION**

23 **(Permanent and Preliminary Injunction versus the Buyer)**

24 80. The Trust incorporates by reference the allegations of all previous paragraphs, as
25 if fully set forth herein.

26 81. As set forth above, the Buyer may claim an ownership interest in the Property
27 that is adverse to The Trust.

1 82. Any sale or transfer of the Property, prior to a judicial determination concerning
2 the respective rights and interests of the parties to the case, may be rendered invalid if The
3 Trust's Deed of Trust still encumbered the Property in first position and was not extinguished by
4 the HOA Sale.

5 83. The Trust has a reasonable probability of success on the merits, for which
6 compensatory damages will not compensate The Trust for the irreparable harm of the loss of
7 title to a bona fide purchaser or loss of the first position priority status secured by the Property.

8 84. The Trust has no adequate remedy at law due to the uniqueness of the Property
9 involved in the case.

10 85. The Trust is entitled to a preliminary and permanent injunction prohibiting the
11 Buyer, their successors, assigns, and agents from conducting a sale, transfer or encumbrance of
12 the Property if it is claimed to be superior to The Trust's Deed of Trust or not subject to that
13 Deed of Trust.

14 86. The Trust is entitled to a preliminary injunction requiring the Buyer to pay all
15 taxes, insurance and homeowner's association dues during the pendency of this action.

16 87. The Trust is entitled to a preliminary requiring the Buyer to segregate and
17 deposit with the Court or a Court-approved trust account over which the Buyer has no control
18 during the pendency of this action.

19 88. The Trust has been required to retain counsel to prosecute this action and is
20 entitled to recover reasonable attorney's fees to prosecute this action.

21 **THIRD CAUSE OF ACTION**

22 **(Wrongful Foreclosure versus the HOA, HOA Trustee, and fictitious Defendants)**

23 89. The Trust incorporates by reference the allegations of all previous paragraphs, as
24 if fully set forth herein.

25 90. Because the HOA, HOA Trustee, and fictitious Defendants did not give the Trust
26 or its predecessors, agents, servicers or trustees the proper, adequate notice and the opportunity
27 to cure the deficiency or default in the payment of the HOA's assessments and super-priority
28

1 lien (if any) required by Nevada statutes, the CC&R's and due process, the HOA Sale was
2 wrongfully conducted and should be set aside.

3 91. Because the HOA, HOA Trustee, and fictitious Defendants did not give notice to
4 the bidders that the title conveyed would be subject to the Deed of Trust, the HOA Sale was
5 wrongfully conducted and should be set aside.

6 92. Because the HOA Sale was not done in accordance with Nevada statutes and the
7 CC&R's, the HOA Sale was wrongfully conducted and should be set aside.

8 93. Because, upon information and belief, the HOA Foreclosure Notices included
9 improper fees and costs in the amount demanded, the HOA Sale was wrongfully conducted and
10 should be set aside.

11 94. As a proximate result of the HOA's, HOA Trustee's, and the fictitious
12 Defendants' wrongful foreclosure of the Property by the HOA Sale, The Trust has suffered
13 general and special damages in an amount in excess of \$10,000.00.

14 95. The Trust has been required to retain counsel to prosecute this action and is
15 entitled to recover reasonable attorney's fees to prosecute this action.

16 **FOURTH CAUSE OF ACTION**

17 **(Negligence versus the HOA, HOA Trustee, and fictitious Defendants)**

18 96. The Trust incorporates by reference the allegations of all previous paragraphs, as
19 if fully set forth herein

20 97. The HOA, HOA Trustee, and fictitious Defendants owed a duty to the Trust
21 and/or its predecessors and subordinate lienholders to conduct the HOA foreclosure sale at issue
22 in this case properly and in a manner that would fairly allow them an opportunity to protect
23 their interest and cure the super-priority lien threatening their security interests.

24 98. The HOA, HOA Trustee, and fictitious Defendants breached their duty by failing
25 to disclose the amount of the super-priority lien, if any, by failing to specify that it was f
26 foreclosing on the super-priority portion of its lien as opposed to the non-super-priority portion,
27 by failing to provide notice that The Trust and/or its predecessors and subordinate lienholders
28

1 had an opportunity to cure, and by failing to announce at the sale that the Buyer took title
2 subject to the Deed of Trust.

3 99. As a proximate result of the HOA's, HOA Trustee's, and fictitious Defendants'
4 breach of their duties, The Trust and/or its predecessors were either unable to cure by tendering
5 a pay-off of the super-priority lien threatening its security interest, or the tender was refused, so
6 that the Trust is therefore forced to defend their title in the Property, incurring attorney's fees
7 and costs to do so.

8 100. As an actual and proximate result of the HOA's, HOA Trustee's, and fictitious
9 Defendants' breach of their duties, the Trust has incurred general and special damages in an
10 amount in excess of \$10,000.00.

11 101. If The Trust is found to have lost its first secured interest in the Property, it was
12 the proximate result of the HOA's, HOA Trustee's, and fictitious Defendants' breach of their
13 duties, and The Trust has thereby suffered general and special damages in an amount in excess
14 of \$10,000.00.

15 102. The Trust has been required to retain counsel to prosecute this action and is
16 entitled to recover reasonable attorney's fees to prosecute this action.

17 **FIFTH CAUSE OF ACTION**

18 **(Negligence Per Se versus the HOA, HOA Trustee, and fictitious Defendants)**

19 103. The Trust incorporates by reference the allegations of all previous paragraphs, as
20 if fully set forth herein.

21 104. NRS Chapter 116 imposes a duty on homeowner's associations and their agents
22 to conduct their foreclosure sales in a manner that is consistent with its provisions.

23 105. The HOA, HOA Trustee, and fictitious Defendants breached the duties imposed
24 by NRS Chapter 116.

25 106. The HOA, HOA Trustee, and fictitious Defendants violated NRS
26 116.31162(1)(b)(1) by failing to properly and adequately describe the deficiency in payment of
27 a super-priority lien.

107. The Trust is a member of the class of persons whom NRS Chapter 116 is intended to protect.

108. The injury that The Trust faces-extinguishment of its first-position deed of trust-is the type against which NRS Chapter 116 is intended to protect.

109. As a proximate result of the HOA's, HOA Trustee's, and fictitious Defendants' breach of their statutory duties, The Trust was unable to cure by tendering a pay-off of the super-priority lien threatening its security interest.

110. As a proximate result of the HOA's, HOA Trustee's, and fictitious Defendants' breach of their duties, The Trust has incurred general and special damages in an amount in excess of \$10,000.00.

111. If The Trust is found to have lost its first secured interest in the Property, it was the proximate result of the HOA's, HOA Trustee's, and fictitious Defendants' breach of their statutory duties, and The Trust has thereby suffered general and special damages in an amount in excess of \$10,000.00.

112. The Trust has been required to retain counsel to prosecute this action and is entitled to recover reasonable attorney's fees to prosecute this action.

SIXTH CAUSE OF ACTION

(Breach of Contract versus the HOA and HOA Trustee)

113. The Trust incorporates by reference the allegations of all previous paragraphs, as if fully set forth herein.

114. The Trust was an intended beneficiary of the HOA's CC&Rs.

115. The HOA, the HOA Trustee and fictitious Defendants breached the obligations, promises, covenants and conditions of the CC&Rs owed to The Trust by the circumstances under which they conducted the HOA Sale of the Property.

116. The HOA, the HOA Trustee and fictitious Defendants' breaches of the obligations, promises, covenants and conditions of the CC&Rs proximately caused The Trust general and special damages in an amount in excess of \$10,000.00.

1 117. The Trust has been required to retain counsel to prosecute this action and is
2 entitled to recover reasonable attorney's fees to prosecute this action.

3 **SEVENTH CAUSE OF ACTION**

4 **(Misrepresentation versus the HOA, HOA Trustee and Fictitious Defendants)**

5 118. The Trust incorporates by reference the allegations of all previous paragraphs, as
6 if fully set forth herein.

7 119. The Trust is within the class or persons or entities the HOA intended or had
8 reason to expect to act or to refrain from action in reliance upon the provisions of the CC&Rs,
9 including without limitation, the Mortgage Protection Clause.

10 120. The Trust and its predecessors in interest, justifiably relied upon the provisions
11 of the CC&Rs and NRS 116.3116(2)(b) in giving consideration for the Deed of Trust, and the
12 promissory note it secures, and the HOA intended or had reason to expect their conduct would
13 be influenced.

14 121. The HOA's representations in the provisions of the CC&Rs, including without
15 limitation, the Mortgage Protection Clause, were false.

16 122. The HOA had knowledge or a belief that the representations in the provisions of
17 the CC&Rs, including without limitation, the Mortgage Protection Clause, were false or it had
18 an insufficient basis for making the representations.

19 123. The HOA had a pecuniary interest in having The Trust and its predecessors in
20 interest rely on the provisions of the CC&Rs, including without limitation, the Mortgage
21 Protection Clause.

22 124. The HOA failed to exercise reasonable care or competence in communicating the
23 information within the provisions of the CC&Rs, including without limitation, the Mortgage
24 Protection Clause, which was false or it had an insufficient basis for making.

25 125. The HOA, the HOA Trustee and fictitious Defendants acted in contravention to
26 the provisions of the CC&Rs, including without limitation, the Mortgage Protection Clause,
27 when it conducted the HOA Sale in a manner that could lead the bidders to believe they would
28 acquire the Property free and clear of The Trust's Deed of Trust.

1 126. The Trust suffered general and special damages in an amount in excess of
2 \$10,000.00 as a proximate result of its reliance.

3 127. The Trust has been required to retain counsel to prosecute this action and is
4 entitled to recover reasonable attorney's fees to prosecute this action.

5 **EIGHTH CAUSE OF ACTION**

6 **(Unjust Enrichment versus the Buyer, HOA, HOA Trustee, and fictitious Defendants)**

7 128. The Trust incorporates by reference the allegations of all previous paragraphs, as
8 if fully set forth herein.

9 129. The Trust has been deprived of the benefit of the Deed of Trust by the actions of
10 the Buyer, HOA, and HOA's Trustee.

11 130. The Buyer, HOA, HOA Trustee, and fictitious Defendants have benefitted from
12 the unlawful HOA Sale and nature of the real property.

13 131. Should The Trust's action be successful in quieting title and/or obtaining
14 declaratory relief against the Buyer, HOA, HOA Trustee, and fictitious Defendants, and setting
15 aside the HOA Sale; the Buyer, HOA, and HOA Trustee will have been unjustly enriched by the
16 HOA

17 132. Sale, usage of the Property and advancements by The Trust.

18 133. The Trust will have suffered damages if the Buyer, HOA, HOA Trustee, and
19 fictitious Defendants are allowed to retain their interests in the Property and the funds received
20 from the HOA Sale.

21 134. The Trust is entitled to general and special damages in excess of \$10,000.00.

22 135. The Trust has furthermore been required to retain counsel and is entitled to
23 recover reasonable attorney's fees for having brought the underlying action.

24 **NINTH CAUSE OF ACTION**

25 **(Breach of the Covenant of Good Faith and Fair Dealing versus the HOA and HOA**
26 **Trustee, and the fictitious Defendants)**

27 136. The Trust incorporates by reference the allegations of all previous paragraphs, as
28 if fully set forth herein.

137. Implicit in every contract in the state of Nevada is an implied covenant of good faith and fair dealing.

138. The Trust was an intended beneficiary of the HOA's CC&Rs.

139. The HOA, the HOA Trustee, and fictitious Defendants breached the duties, obligations, promises, covenants and conditions, express and implied, in the CC&Rs owed to The Trust by the circumstances under which they conducted the HOA Sale of the Property.

140. The HOA, the HOA Trustee, and fictitious Defendants took affirmative action to convey the Property a third party without disclosing the sale was subject to The Trust's Deed of Trust, in direct contravention of the HOA's duties to The Trust as promised in the CC&Rs.

141. The HOA, the HOA Trustee, and fictitious Defendants' breaches of the obligations, promises, covenants and conditions of the CC&Rs, and to act in good faith regarding same, proximately caused The Trust general and special damages in an amount in excess of \$10,000.00.

142. The Trust has been required to retain counsel to prosecute this action and is entitled to recover reasonable attorney's fees to prosecute this action.

PRAYER

Wherefore, Thornburg prays for judgment against all Counter-defendants, jointly and severally, as follows:

1. For a declaration and determination that The Trust's interest is secured against the Property, and that the Deed of Trust was not extinguished by the HOA Sale;

2. For a declaration and determination that The Trust's interest is superior to the interest, if any, acquired by the Buyer, or held or claimed by any other Counter-defendant;

3. For a declaration and determination that the HOA Sale was invalid to the extent it purports to convey the Property free and clear to the Buyer;

4. In the alternative, for a declaration and determination that the HOA Sale was invalid and conveyed no legitimate interest to the Buyer;

5. For a preliminary and permanent injunction that the Buyer, its successors, assigns, and agents are prohibited from conducting a sale, transfer or encumbrance of the Property;

6. For a preliminary injunction that the Buyer, its successors, assigns, and agents pay all taxes, insurance and homeowner's association dues during the pendency of this action.

7. For a preliminary injunction that the Buyer be required to segregate and deposit with the Court or a Court-approved trust account over which the Buyer has no control during the pendency of this action.

8. If it is determined that The Trust's Deed of Trust has been extinguished by the HOA Sale, for special damages in the amount equal to the fair market value of the Property or the unpaid balance of the Venegas Loan and Deed of Trust, at the time of the HOA Sale, whichever is greater.

9. For general and special damages in an amount in excess of \$10,000.00.

10. For costs incurred herein, including post-judgment costs;

11. For attorney's fees; and

12. For any and all further relief deemed appropriate by this Court.

DATED this 30th day of May, 2017.

WRIGHT, FINLAY & ZAK, LLP

/s/ Michael S. Kelley

Dana Jonathon Nitz, Esq.

Nevada Bar No. 0050

Michael S. Kelley, Esq.

Nevada Bar No. 10101

7785 W. Sahara Ave., Suite 200

Las Vegas, Nevada 89117

Attorney for Defendant/Counterclaimant/Counter-
Defendant, Thornburg Mortgage Securities Trust
2007-3

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AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S ANSWER TO SATICOY BAY LLC SERIES 34 INNISBROOK'S THIRD AMENDED COMPLAINT AND COUNTERCLAIMS** filed in Case No. A-14-710161-C does not contain the social security number of any person.

DATED this 30th day of May, 2017.

WRIGHT, FINLAY & ZAK, LLP

/s/ Michael S. Kelley

Dana Jonathon Nitz, Esq.

Nevada Bar No. 0050

Michael S. Kelley, Esq.

Nevada Bar No. 10101

7785 W. Sahara Ave., Suite 200

Las Vegas, Nevada 89117

Attorney for Defendant/Counterclaimant/Counter-Defendant, Thornburg Mortgage Securities Trust 2007-3

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CERTIFICATE OF MAILING

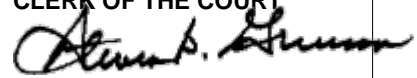
I certify that I am an employee of WRIGHT, FINLAY & ZAK, LLP, and that on this 30th day of May, 2017, I did cause a true copy of **THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S ANSWER TO SATICOY BAY LLC SERIES 34 INNISBROOK'S THIRD AMENDED COMPLAINT AND COUNTERCLAIMS** to be e-served through the CM/ECF system and/or by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

"Bryan Naddafi, Esq." . bryan@olympialawpc.com
"Donald H. Williams, Esq." . dwilliams@dhwlawlv.com
David R. Koch . dkoch@kochscow.com
Eserve Contact . office@bohnlawfirm.com
Michael F Bohn Esq . mbohn@bohnlawfirm.com
Robin Gullo . rgullo@dhwlawlv.com
Staff . aeshenbaugh@kochscow.com
Steven B. Scow . sscow@kochscow.com

/s/ Jason Craig
An Employee of WRIGHT, FINLAY & ZAK, LLP

Exhibit “C”

Exhibit “C”



1 **NEO**
2 **LEACH JOHNSON SONG & GRUCHOW**
3 SEAN L. ANDERSON
Nevada Bar No. 7259
4 RYAN D. HASTINGS
Nevada Bar No. 12394
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Las Vegas, Nevada 89148
5 Telephone: (702) 538-9074
Facsimile: (702) 538-9113
6 *Attorneys for Counter-Defendant*
7 *Spanish Trail Master Association*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 SATICOY BAY LLS SERIES 34
INNISBROOK,

11 Plaintiff,

12 vs.

13 THORNBURG MORTGAGE
14 SECURITIES TRUST 2007-3;
RECONSTRUST COMPANY, N.A. a
15 division of BANK OF AMERICA; FRANK
TIMPA and MADELAINE TIMPA,
16 individually and as trustees of the TIMPA
TRUST,

17 Defendants.

18 THORNBURG MORTGAGE SECURITIES
19 TRUST 2007-3,

20 Counterclaimant

21 vs.

22 SATICOY BAY LLC SERIES 34
INNISBROOK, a Nevada limited-liability
23 company; SPANISH TRAIL MASTER
ASSOCIATION, a Nevada Non-Profit
24 Corporation; RED ROCK FINANCIAL
SERVICES, an unknown entity; FRANK
25 TIMPA, an individual; DOES I through X;
and ROE CORPORATIONS I through X,
26 inclusive,

27 Counter-Defendants.
28

Case No.: A-14-710161-C
Dept. No.: XXVI

**NOTICE OF ENTRY OF
ORDER GRANTING IN PART
AND DENYING IN PART**

LEACH JOHNSON SONG & GRUCHOW
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

RED ROCK FINANCIAL SERVICES,

Counterclaimant

vs.

THORNBURG MORTGAGE SECURITIES
TRUST 2007-3; COUNTRYWIDE HOME
LOANS, INC.; ESTATES WEST AT
SPANISH TRAILS; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.; REPUBLIC SERVICES;
LAS VEGAS VALLEY WATER
DISTRICT; FRANK TIMPA and
MADELAINE TIMPA, individually and as
trustees of the TIMPA TRUS U/T/D March
3, 1999; and DOES 1-100, inclusive,

Counter-Defendants.

Please take notice that an *Order Granting in Part and Denying in Part Counter-Defendant Spanish Trail Master Association's Motion to Dismiss Defendant/Counter-Claimant Thornburg Mortgage Securities Trust 2007-3's Third Amended Counterclaims and Red Rock Financial Service's Joinder*, was entered in the above-entitled matter and Court on October 9, 2017, a copy of which is attached hereto.

Dated this 3rd day of November, 2017.

LEACH JOHNSON SONG & GRUCHOW

/s/ Ryan D. Hastings

SEAN L. ANDERSON
Nevada Bar No. 7259
RYAN D. HASTINGS
Nevada Bar No. 12394
8945 West Russell Road, Suite 330
Las Vegas, Nevada 89148
*Attorneys for Counter-Defendant
Spanish Trail Master Association*

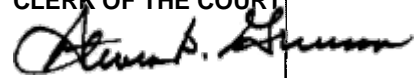
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the undersigned, an employee of LEACH JOHNSON SONG & GRUCHOW, hereby certifies that service of the foregoing, *Notice of Entry of Order Granting in Part and Denying in Part Counter-Defendant Spanish Trail Master Association's Motion to Dismiss Defendant/Counter-Claimant Thornburg Mortgage Securities Trust 2007-3's Third Amended Counterclaims and Red Rock Financial Service's Joinder*, was made this 3rd day of November, 2017, via electronic service on all parties through the Court's CM/ECF System as follows:

Koch & Scow LLC		
	Contact	Email
	David R. Koch	dkoch@kochscow.com
	Staff	aeshenbaugh@kochscow.com
	Steven B. Scow	sscow@kochscow.com
Law Offices of Michael F. Bohn, Esq.		
	Contact	Email
	Eserve Contact	office@bohnlawfirm.com
	Michael F Bohn Esq	mbohn@bohnlawfirm.com
Olympia Law PC		
	Contact	Email
	Bryan Naddafi, Esq.	bryan@olympialawpc.com
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Wright, Finlay & Zak, LLP		
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	Sarah Greenberg Davis	sgreenberg@wrightlegal.net

/s/ Gina M. LaCascia

An Employee of LEACH JOHNSON
SONG & GRUCHOW



1 **ORDR**
2 **LEACH JOHNSON SONG & GRUCHOW**
3 **SEAN L. ANDERSON**
4 Nevada Bar No. 7259
5 **RYAN D. HASTINGS**
6 Nevada Bar No. 12394
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9 Telephone: (702) 538-9074
10 Facsimile: (702) 538-9113
11 Attorneys for Counter-Defendant
12 Spanish Trail Master Association

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 **SATICOY BAY LLS SERIES 34**
16 **INNISBROOK,**

17 Plaintiff,

18 vs.

19 **THORNBURG MORTGAGE**
20 **SECURITIES TRUST 2007-3;**
21 **RECONSTRUST COMPANY, N.A. a**
22 **division of BANK OF AMERICA; FRANK**
23 **TIMPA and MADELAINE TIMPA,**
24 **individually and as trustees of the TIMPA**
25 **TRUST,**

26 Defendants.

27 **THORNBURG MORTGAGE SECURITIES**
28 **TRUST 2007-3,**

Counterclaimant

vs.

SATICOY BAY LLC SERIES 34
INNISBROOK, a Nevada limited-liability
company; SPANISH TRAIL MASTER
ASSOCIATION, a Nevada Non-Profit
Corporation; RED ROCK FINANCIAL
SERVICES, an unknown entity; FRANK
TIMPA, an individual; DOES I through X;
and ROE CORPORATIONS I through X,
inclusive,

Counter-Defendants.

Case No.: A-14-710161-C

Dept. No.: ~~XV~~ XXVI

ORDER GRANTING IN PART AND
DENYING IN PART COUNTER-
DEFENDANT SPANISH TRAIL
MASTER ASSOCIATION'S MOTION
TO DISMISS DEFENDANT/COUNTER-
CLAIMANT THORNBURG
MORTGAGE SECURITIES TRUST
2007-3'S THIRD AMENDED
COUNTERCLAIMS AND RED ROCK
FINANCIAL SERVICES' JOINDER

PLEASE NOTE
DEPARTMENT CHANGE

LEACH JOHNSON SONG & GRUCHOW
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

1 RED ROCK FINANCIAL SERVICES,

2 Counterclaimant

3 vs.

4 THORNBURG MORTGAGE SECURITIES
5 TRUST 2007-3; COUNTRYWIDE HOME
6 LOANS, INC.; ESTATES WEST AT
7 SPANISH TRAILS; MORTGAGE
8 ELECTRONIC REGISTRATION
9 SYSTEMS, INC.; REPUBLIC SERVICES;
10 LAS VEGAS VALLEY WATER
11 DISTRICT; FRANK TIMPA and
12 MADELAINE TIMPA, individually and as
13 trustees of the TIMPA TRUS U/T/D March
14 3, 1999; and DOES 1-100, inclusive,

15 Counter-Defendants.

16 On August 9, 2017, Counter-Defendant Spanish Trail Master Association, (the
17 "Association"), by and through its attorneys of record, Leach Johnson Song & Gruchow, filed its
18 Motion to Dismiss Defendant/Counter-Claimant Thornburg Mortgage Securities Trust 2007-3's
19 Third Amended Complaint ("Motion"). On August 15, 2017 Counter-Defendant Red Rock
20 Financial Services filed its Joinder to the Association's Motion to Dismiss. On August 28, 2017,
21 Defendant/Counterclaimant/Counter-Defendant, Thornburg Mortgage Securities Trust 2007-3
22 Nationstar Mortgage LLC ("Bank") by and through its attorneys of record, Wright, Finlay &
23 Zak, LLP, filed its Opposition to Spanish Trail's Motion to Dismiss Counterclaim
24 ("Opposition"). On September 12, 2017, the Association filed its Reply in Support of Motion to
25 Dismiss Defendant/Counter-Claimant Thornburg Mortgage Securities Trust 2007-3's Third
26 Amended Complaint ("Reply"). The Motion came on for hearing on September 19, 2017, the
27 Honorable Gloria Sturman presiding. The Court, having considered all of the pleadings and
28 papers on file, and orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Association's
Motion to Dismiss Defendant/Counter-Claimant Thornburg Mortgage Securities Trust 2007-3's
Third Amended Complaint GRANTED in part and DENIED in part.

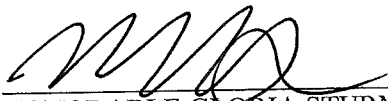
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Bank's claims for

LEACH JOHNSON SONG & GRUCHOW
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148
Telephone: (702) 538-9074 - Facsimile (702) 538-9113

1 quiet title/declaratory relief, negligence *per se*, breach of contract, and breach of covenant of
2 good faith and fair dealing are DISMISSED without prejudice.

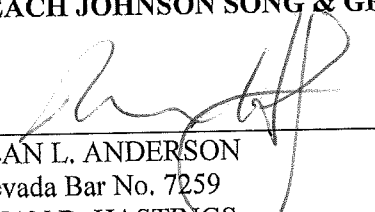
3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's
4 request to dismiss the Bank's claims for negligence, wrongful foreclosure, misrepresentation and
5 unjust enrichment is DENIED.

6
7 IT IS SO ORDERED this 5th day of October, 2017.

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9
10 
11 HONORABLE GLORIA STURMAN
12 DISTRICT COURT JUDGE

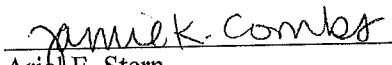
13 Submitted By:

14 LEACH JOHNSON SONG & GRUCHOW

15 
16 SEAN L. ANDERSON
17 Nevada Bar No. 7259
18 RYAN D. HASTINGS
19 Nevada Bar No. 12394
20 8945 West Russell Road, Suite 300
21 Las Vegas, Nevada 89148
22 *Attorneys for Spanish Trail Master Association*


Approved As To Form And Content:

AKERMAN LLP

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24 Ariel E. Stern
25 Nevada Bar No. 8276
26 Jamie Combs
27 Nevada Bar No. 13088
28 Karen Whelan
Nevada Bar No. 10466
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Securities Trust 2007-3*

Approved As To Form And Content:

KOCH & SCOW

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25
26 DAVID R. KOCH
27 Nevada Bar No. 1598
28 STEPHEN B. SCOW
Nevada Bar No. 1046

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Telephone: (702) 538-9074 -- Facsimile (702) 538-9113

1 quiet title/declaratory relief, negligence *per se*, breach of contract, and breach of covenant of
2 good faith and fair dealing are DISMISSED without prejudice.

3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's
4 request to dismiss the Bank's claims for negligence, wrongful foreclosure, misrepresentation and
5 unjust enrichment is DENIED.

6
7 IT IS SO ORDERED this _____ day of _____, 2017.


8
9
10 
11 HONORABLE GLORIA STURMAN
12 DISTRICT COURT JUDGE


13 Submitted By:

14 LEACH JOHNSON SONG & GRUCHOW

Approved As To Form And Content:


15 AKERMAN LLP

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17 SEAN L. ANDERSON
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Attorneys for Thornburg Mortgage
Securities Trust 2007-3

22 Approved As To Form And Content:

23 KOCH & SCOW

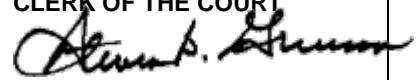
24 
25 DAVID R. KOCH
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28 Nevada Bar No. 1046

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1 11500 S. Eastern Avenue, Suite 210
2 Henderson, Nevada 89052
3 *Attorneys for Red Rock Financial*
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Exhibit “D”

Exhibit “D”



NEFF
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
THERA A. COOPER, ESQ.
Nevada Bar No. 13468
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
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Facsimile: (702) 380-8572
Email: melanie.morgan@akerman.com
Email: thera.cooper@akerman.com

*Attorneys for defendant, counterclaimant, and counter-
defendant Thornburg Mortgage Securities Trust 2007-3*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34
INNISBROOK,

Plaintiff,

vs.

THORNBURG MORTGAGE SECURITIES
TRUST 2007-3, *et al.*,

Defendants.

Case No.: A-14-710161-C

Division: XXVI

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
ORDER GRANTING THORNBURG
MORTGAGE SECURITIES TRUST
2007-3'S MOTION FOR SUMMARY
JUDGMENT**

AND ALL RELATED ACTIONS

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1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that a **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND**
3 **ORDER GRANTING THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S**
4 **MOTION FOR SUMMARY JUDGMENT** has been entered by this Court on the 3rd day of
5 December, 2018, in the above-captioned matter. A copy of said Order is attached hereto as
6 **Exhibit A.**

7
8 DATED: DECEMBER 5, 2018
9

10 **AKERMAN LLP**

11 /s/ Thera A. Cooper

12 MELANIE D. MORGAN, ESQ.

13 Nevada Bar No. 8215

14 THERA A. COOPER, ESQ.

15 Nevada Bar No. 13468

16 1635 Village Center Circle, Suite 200

17 Las Vegas, Nevada 89134

18
19 *Attorneys for Thornburg Mortgage Securities*
20 *Trust 2007-3*
21
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 5th day of December, 2018, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S MOTION FOR SUMMARY JUDGMENT**, in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List as follows:

LEACH JOHNSON SONG & GRUCHOW

Robin Callaway	rcallaway@leachjohnson.com
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Ryan Hastings	rhastings@leachjohnson.com
Gina LaCascia	glacascia@leachjohnson.com
Sean Anderson	sanderson@leachjohnson.com

OLYMPIA LAW

Bryan Naddafi, Esq.	bryan@olympialawpc.com
---------------------	------------------------

WILLIAMS & ASSOCIATES

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Robin Gullo	rgullo@dhwlawlv.com

KOCH & SCOW, LLC

David R. Koch	dkoch@kochscow.com
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Steven B. Scow	sscow@kochscow.com

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.

Eserve Contact	office@bohnlawfirm.com
Michael F Bohn Esq.	mbohn@bohnlawfirm.com

LEGAL AID CENTER OF SOUTHERN NEVADA

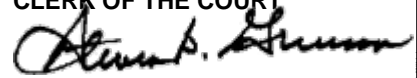
Venicia Considine	vconsidine@lacsns.org
Gregory Walch	greg.walch@lvvwd.com

/s/ Christine Weiss

An employee of AKERMAN LLP

EXHIBIT A

EXHIBIT A



1 **ORD**

2 MELANIE D. MORGAN, ESQ.

3 Nevada Bar No. 8215

4 THERA A. COOPER, ESQ.

5 Nevada Bar No. 13468

6 **AKERMAN LLP**

7 1635 Village Center Circle, Suite 200

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10 Facsimile: (702) 380-8572

11 Email: melanie.morgan@akerman.com

12 Email: theracooper@akerman.com

13 *Attorneys for defendant, counterclaimant, and counter-*
14 *defendant Thornburg Mortgage Securities Trust 2007-3*

15 **EIGHTH JUDICIAL DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 SATICOY BAY LLC SERIES 34
18 INNISBROOK,

19 Plaintiff,

20 vs.

21 THORNBURG MORTGAGE SECURITIES
22 TRUST 2007-3, *et al.*,

23 Defendants.

Case No.: A-14-710161-C

Division: XXVI

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
THORNBURG MORTGAGE
SECURITIES TRUST 2007-3'S
MOTION FOR SUMMARY
JUDGMENT**

24 AND ALL RELATED ACTIONS

25 The court having considered Thornburg Mortgage Securities Trust 2007-3 (**Thornburg**)'s
26 motion for reconsideration, the opposition thereto, and the argument of counsel converts the motion
27 into a motion for summary judgment and makes the following findings of fact, conclusion of law
28 and order **GRANTING** summary judgment in Thornburg's favor.¹

¹ The Court denied the parties' competing motions for summary judgment by oral order on July 3, 2018. The order denying the motions for summary judgment had not been entered when Thornburg moved to reconsider based on *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 134 Nev. Adv. Op. 72, *2 (Nev. Sept. 13, 2018).

1 **I. FINDINGS OF FACT**

2 1. Frank Timpa executed a deed of trust securing a \$3,780,000 loan to purchase the
3 property located at 34 Innisbrook Ave, Las Vegas, Nevada on June 2, 2006. The deed of trust lists
4 Countrywide Home Loans, Inc. as the lender and Mortgage Electronic Registration System, Inc.
5 (**MERS**) as beneficiary and lender's nominee and was recorded on June 6, 2006. *Id.*

6 2. Section 9 of the deed of trust provides if "there is a...lien which may attain priority
7 over the [deed of trust]...then Lender may do and pay for whatever is reasonable or appropriate to
8 protect Lender's interest in the property." *Id.* The deed of trust's planned unit development rider
9 (**PUD rider**) provides "[i]f Borrower does not pay PUD dues and assessments when due, then
10 Lender may pay them." *Id.* The loan securing the deed of trust matures on July 1, 2046 and has an
11 unpaid balance of \$6,279,233.20.

12 3. On June 9, 2010, a corporate assignment of deed of trust was recorded assigning the
13 beneficial interest in the deed of trust to Thornburg.

14 4. The property is within the Spanish Trail Master Association (the **HOA**) and is subject
15 to its declaration of covenants, conditions, and restrictions recorded March 7, 1984 (the **CC&Rs**).

16 5. Art. IV, Section 6, "Subordination to First Mortgages," provides:

17
18 The lien of the assessments provided for herein shall be prior to all other liens recorded
19 subsequent to the recordation of the Notice of delinquent Assessment, except that the lien of
20 the assessment provided for herein, shall be subordinate to the lien of any first Mortgage
21 given for value, and the sale or transfer of any Lot pursuant to the first Mortgage foreclosure
22 shall extinguish the lien of such assessments as to payments which became due prior to such
23 sale or transfer. No sale or transfer shall relieve such lot from liability for any assessments
24 thereafter becoming due or from the lien thereon.

25 6. Art. IX Section 1, permits "Mortgagees [to], jointly or severally, pay taxes or other
26 charges which are in default and which may or have become a charge against the Association
27 property, unless such taxes or other charges are separately assessed against the Owners, in which
28 case, the rights of Mortgages shall be governed by the provisions of their Mortgages..."

...

...

1 7. Art. X Section 3, provides:

2
3 A breach of any of the covenants, conditions, restrictions or other provisions of this
4 Declaration shall not affect or impair the lien or charge of any bona fide Mortgage made in
5 good faith and for value on any lot provided however, that any subsequent owner of the lot
6 shall be bound by the provisions of this Declaration, whether such Owner's title was acquired
7 by foreclosure or by a trustee's sale or otherwise.

8 8. On August 4, 2011, Red Rock Financial Services (**Red Rock**), on behalf of the HOA,
9 recorded a lien for delinquent assessments indicating borrower owed \$5,543.92 (the **Lien**). The Lien
10 indicated it was recorded "in accordance with" the CC&Rs.

11 9. At the time the Lien was recorded, the HOA's assessments were \$225.00 per month.
12 There were no nuisance abatement charges. The superpriority amount of the HOA's lien was \$2,025
13 (\$225.00 x 9) for the assessments coming due December 1, 2010 through August 1, 2011.

14 10. From July 9, 2013 through December 13, 2013, borrower made payments totaling
15 \$2,350. Red Rock accepted the payments and applied the payments to the delinquent assessments
16 coming due December 1, 2010 through August 1, 201.²

17 11. On December 6, 2011, Red Rock recorded a notice of default and election to sell
18 pursuant to the lien for delinquent assessments asserting the HOA was owed \$8,312.52.

19 12. On December 23, 2011, BAC Home Loan Servicing (**BANA**), then the loan servicer,
20 through its counsel Miles, Bauer, Bergstorm & Winters (**Miles Bauer**) sent correspondence to Red
21 Rock seeking to determine the superpriority amount and offered to "pay that sum upon adequate
22 proof." Red Rock received the letter on December 27, 2011.

23 13. On January 26, 2012, Red Rock responded with a ledger indicating the total amount
24 due was \$9,255.44.

25 14. On February 10, 2012, Miles Bauer, by courier sent correspondence to Red Rock
26 enclosing a \$2,025 check. Red Rock received the check on February 10, 2012. Red Rock rejected the
27 payment without explanation at the time of the rejection.

28 ...

² Throughout the collection process Timpa paid in excess of \$10,000 toward the HOA's lien. Timpa's final payment of \$500.00 occurred on October 14, 2014, mere weeks before the HOA's sale.

1 15. Then on February 12, 2012, after rejecting BANA's payment, Red Rock sent
2 correspondence to Thornburg asserting the Red Rock's belief that the HOA's lien was junior to the
3 deed of trust.

4 16. Red Rock recorded a notice of foreclosure sale on September 15, 2014 stating the
5 HOA would sell the property on October 8, 2014 and the amount then due was \$20,309.95. The
6 notice asserted the sale would "be made without covenant or warrant, express or implied
7 regarding...title or possession, encumbrance, obligations to satisfy any secured or unsecured liens."

8 17. On November 10, 2014, a foreclosure deed recorded indicating the HOA sold the
9 property to Saticoy Bay LLC Series 34 Innisbrook on November 7, 2014 for \$1,201,000.

10 18. At the time of the HOA's sale the property was worth \$2,000,000.

11 19. Since the sale Saticoy has leased the property and obtained rental income.

12 **II. CONCLUSIONS OF LAW**

13 1. "Summary judgment is appropriate...when the pleadings, depositions, answers to
14 interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that
15 no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter
16 of law." *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1031 (Nev. 2005). "While the pleadings and other
17 evidence must be construed in the light most favorable to the nonmoving party, that party has the
18 burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts
19 to defeat a motion for summary judgment." *Id.* at 1031 (*quoting Matsushita Elec. Indus. Co. v.*
20 *Zenith Radio*, 475 U.S. 574, 586 (1986)). The governing law determines which "factual disputes are
21 material and will preclude summary judgment; other factual disputes are irrelevant." *Id.* Nevada
22 courts follow the federal summary judgment standard, not the "slightest doubt" standard previously
23 applicable before *Wood*. *Id.* at 1031, 1037.

24 2. Parties must prove their claims and affirmative defenses by a preponderance of the
25 evidence. *See Nev. J.I. 2EV.1.* Under Nevada law, "[t]he term 'preponderance of the evidence'
26 means such evidence as, when weighed with that opposed to it, has more convincing force, and from
27 which it appears that the greater probability of truth lies therein." *Nev. J.I. 2EV.1; Corbin v. State*,
28 111 Nev. 378, 892 P.2d 580 (1995) (regarding entrapment, "[p]reponderance of the evidence means

1 such evidence as, when weighed with that opposed to it, has more convincing force and the greater
2 probability of truth.").

3 3. Nevada law draws no distinction between circumstantial and direct evidence.
4 *Deveroux v. State*, 96 Nev. 388, 391 (1980); Nev. J.I. 2EV.3 ("The law makes no distinction
5 between the weight to be given to either direct or circumstantial evidence. Therefore, all of the
6 evidence in the case, including circumstantial evidence, should be considered . . .").

7 4. *Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP, f/k/a*
8 *Countrywide Home Loans Servicing, LP v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 134 Nev.
9 Adv. Op. 72, *2 (Nev. Sept. 13, 2018) confirms Thornburg is entitled to summary judgment.
10 Thornburg submitted admissible evidence BANA tendered the full super-priority amount before the
11 sale. Pursuant to *Bank of America's* binding precedent, Saticoy's interest, if any, is subject to the
12 deed of trust.

13 5. "[T]he superpriority lien granted by NRS 116.3116(2) does not include an amount for
14 collection fees and foreclosure costs incurred; rather it is limited to an amount equal to the common
15 expense assessments due during the nine months before foreclosure." *Horizon at Seven Hills*
16 *Homeowners Association, Inc. v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, at 13, 2016 WL
17 1704199 at *6 ; *See Bank of America*, *4.

18 6. A mortgagee's pre-foreclosure tender of the superpriority amount protects the deed of
19 trust. *SFR Investments*, 334 P.3d 408, 414 ("[A]s junior lienholder, [the holder of the first deed of
20 trust] could have paid off the [HOA] lien to avert loss of its security[.]"); *id.*, at 413 ("[S]ecured
21 lenders will most likely pay the [9] months' assessments demanded by the association rather than
22 having the association foreclose on the unit.") (emphasis added).

23 7. BANA's tender is evidenced in Miles Bauer's (Thornburg's Motion at Ex. I) and Red
24 Rock's business records (Thornburg's Motion at Ex. G) eliminating any question of fact regarding
25 delivery of the check. The records were properly authenticated by affidavits.

26 8. *Bank of America* concluded BANA's check and letter – like the check and letter here
27 – were not impermissibly conditional. *Bank of America* at * 7. BANA was not required to record the
28 tender (*id.* at * 10) or "keep the tender good" (*id.* at * 11). Sending a check for the full super-priority

1 amount extinguished the super-priority lien. *Id.* * 2. SFR's purported *bona fide* purchaser status was
2 irrelevant. *Id.* at * 13. SFR purchased the property subject to the deed of trust. *Id.* * 14.

3 9. The court finds Saticoy is a *bona fide* purchaser, but that status is "irrelevant when a
4 defect in the foreclosure proceedings renders the sale void." *Id.*, citing *Henke v. First S. Props, Inc.*,
5 586 S.W.2d 617, 620 (Tex. App. 1979). "[A]fter a valid tender of the superpriority portion of an
6 HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it
7 cannot extinguish the first deed of trust." *Id.*

8 JUDGMENT

9 The Court having made its Findings of Fact and Conclusions of Law:

10 **IT IS ORDERED, ADJUDGED, and DECREED** the HOA foreclosed on only the sub-
11 priority portion of its lien;

12 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED**, Saticoy purchased an
13 interest in the Property, located at 34 Innisbrook Ave, Las Vegas, Nevada subject to the deed of trust
14 which remains a first position encumbrance against the Property;

15 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED** that the deed of trust
16 recorded on June 12, 2006 remains a first position lien against the Property and is superior to the
17 interest conveyed in the Foreclosure Deed;

18 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED** that all remaining claims
19 not specifically mentioned, including all claims in Thornburg's counterclaim and crossclaims and
20 Saticoy's complaint, are dismissed with prejudice; and

21 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED** that the lis pendens
22 recorded June 16, 2015, as Instrument No. 20150616-0000991 is hereby expunged;

23 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED** that any party may record
24 this Findings of Fact, Conclusions of Law, and Judgment in the Property's records; and

25 ...

26 ...

27 ...

28 ...

1 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED** that Thornburg shall have
2 its cost of suit, any issues regarding attorneys' fees to be deferred pending motion practice.

3 DATED November 30 2018.

4 
DISTRICT COURT JUDGE

5 Respectfully submitted by:

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Attorneys for Republic Services, Inc.


1 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED** that Thornburg shall have
2 its cost of suit, any issues regarding attorneys' fees to be deferred pending motion practice.

3 DATED _____, 2018.

4 
DISTRICT COURT JUDGE

5 Respectfully submitted by:

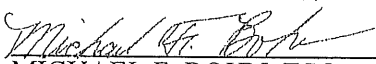
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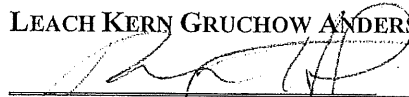
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Las Vegas, NV 89101

Attorneys for Republic Services, Inc.


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2 its cost of suit, any issues regarding attorneys' fees to be deferred pending motion practice.

3 DATED _____, 2018.

4 
DISTRICT COURT JUDGE

5 Respectfully submitted by:

6 AKERMAN LLP


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15 Approved as to form and content:

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17 LEACH KERN GRUCHOW ANDERSON SONG


18 /s/ 
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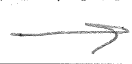
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3 DATED _____, 2018.

4 
DISTRICT COURT JUDGE

5 Respectfully submitted by:

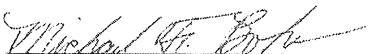
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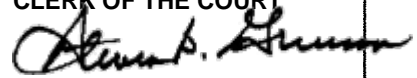
42 **WILLIAMS STARBUCK**

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Exhibit “E”

Exhibit “E”



MOT
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Attorney for Plaintiff
SATICOY BAY LLC, SERIES 34
INNISBROOK

DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC, SERIES 34
INNISBROOK,

Plaintiff,

vs.

THORNBURG MORTGAGE SECURITIES
TRUST 2007-3; FRANK TIMPA and
MADELAINE TIMPA, individually and as
trustees of the TIMPA TRUST,

Defendants.

AND ALL RELATED ACTIONS.

Case No.: A-14-710161-C
Dept. No.: XXVI

**MOTION TO REINSTATE
STATISTICALLY CLOSED CASE**

(Hearing Requested)

MOTION TO REINSTATE STATICALLY CLOSED CASE

COMES NOW, Plaintiff, SATICOY BAY LLC, SERIES 34 INNISBROOK, ("*Saticoy*")
by and through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and hereby submits
it Motion to Reinstate Statistically Closed Case as follows:

I. FACTUAL BACKGROUND.

On April 15, 2019, this Court entered an order statistically closing this lengthy and
complicated litigation. That order was apparently issued in response to the March 29, 2019 Status
Memo filed by Madeline Timpa and the Timpa Trust ("*Timpa Trust*"), which incorporated the
Court's Order of December 3, 2018, Granting Defendant Thornburg Mortgage Securities Trust's
("*Thornburg*") Motion for Reconsideration of the denial of its earlier Motion for Summary
Judgment. (Exhibit 1). The case was closed without a hearing or written response from Plaintiff to

1 Timpa's Status Report. The April 15, 2019 Order, however, did not resolve all issues in the case.
2 As such, the order of statistical closure of this case was entered prematurely and this matter should
3 be reopened to allow for the final resolution of the remaining claims and issues not addressed.

4 **II. THE INSTANT ACTION SHOULD BE REOPENED AND REINSTATED.**

5 Despite the Status Reports' claim to the contrary, not all pending matters in this case have
6 been finally adjudicated and resolved. At least one issue remains. That is; the matter of the
7 Interpleader claims to the excess proceeds from the foreclosure sale. Counter-Defendant Red Rock
8 Financial Services' ("*Red Rock*") Counterclaim for Interpleader and Timpa's Trust's Interpleader
9 Claim to Surplus Funds have never been heard or ruled upon by the Court.

10 Red Rock filed its initial Interpleader claim on May 21, 2015 (Exhibit 2), and restated that
11 claim on June 12, 2017. (Exhibit 3). Thornburg filed its Answer to Red Rock's Interpleader on July
12 5, 2017. (Exhibit 4). However, Timpa Trust only recently filed its Answer to Red Rock's
13 Interpleader on January 31, 2019, which included Timpa Trust's own Claim To Surplus Funds.
14 (Exhibit 5). This was well after the Court's ruling on Thornburg's Motion for Summary Judgment,
15 thus leaving the Interpleader claims to the excess funds open and unadjudicated. Counsel for both
16 Red Rock and Thornburg have indicated their agreement that these issues remain. *See*, Declaration
17 of Roger P. Croteau, Esq. attached hereto.

18 Pursuant to the Findings of Fact, Conclusions of Law and Order Granting Thornburg's
19 Motion for Summary Judgment, all of Saticoy's and Thornburg's claims, including counterclaims
20 and crossclaims were dismissed with prejudice. Based upon the Order, Saticoy, Timpa Trust, and
21 Red Rock are remaining parties to this litigation. Saticoy would need to file an amended complaint
22 to assert its claim to Interpleader funds. It is Saticoy's understanding that the Interpleader excess
23 proceed funds have not been deposited into the Court yet.

24 The yet to be determined issues before the Court involve Saticoy, Timpa Trust and Red Rock
25 and the Interpleader claims and the rights to the excess funds. Under these circumstances,

26 / / /

27 / / /

28 / / /

/ / /

1 Saticoy maintains that this case was closed prematurely, and therefore, respectfully requests that the
2 Court reinstate and reopen this case.

3 DATED this 10th day of May, 2019.

4 ROGER P. CROTEAU & ASSOCIATES, LTD.

5 /s/ Roger P. Croteau
6 ROGER P. CROTEAU, ESQ.
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10 (702) 254-7775
11 *Attorney for Plaintiff*
12 SATICOY BAY LLC, SERIES 34
13 INNISBROOK
14
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CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that I am an employee of
ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 4th day of April, 2019, I
caused a true and correct copy of the foregoing document to be served on all parties as follows:

X VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's eflex e-file and serve
system.

LEACH JOHNSON SONG & GRUCHOW
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Patty Guttierrez - pgutierrez@leachjohnson.com
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____ VIA U.S. MAIL: by placing a true copy hereof enclosed in a sealed envelope with
postage thereon fully prepaid, addressed as indicated on service list below in the United
States mail at Las Vegas, Nevada.

____ VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated
on the service list below.

____ VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this
date to the addressee(s) at the address(es) set forth on the service list below.

Hewes
ROGER P. CROTEAU &

/s/ Kristi L.

An employee of

ASSOCIATES, LTD.

DECL
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Attorney for Plaintiff
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DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC, SERIES 34)	Case No.: A-14-710161-C
INNISBROOK,)	Dept. No.: XXVI
)	
Plaintiff,)	
)	
vs.)	
)	DECLARATION OF ROGER P.
THORNBURG MORTGAGE SECURITIES)	CROTEAU IN SUPPORT OF
TRUST 2007-3; FRANK TIMPA and)	MOTION TO REINSTATE
MADELAINE TIMPA, individually and as)	STATISTICALLY CLOSED CASE
trustees of the TIMPA TRUST,)	
Defendants.)	
)	
AND ALL RELATED ACTIONS.)	
)	

ROGER P. CROTEAU, ESQ., being first duly sworn, deposes and says, that:

1. I am an attorney licensed to practice law in Nevada, employed by the law office of Roger P. Croteau & Associates, Ltd., attorney for Plaintiff, Las Vegas Development Group, in this action.
2. I make this declaration in support of Plaintiff's Motion to Reinstate Statistically Closed Case ("Motion").
3. Plaintiff's Motion is based on the Plaintiff's position that this matter be reopened because the Order of Statistical Closure was entered prematurely, and the matter

1 should be reopened to allow for the final resolution of the claims and issues not
2 addressed. Specifically, claims for Interpleader regarding excess funds remain
3 open and unjudicated.

- 4 4. I have spoken telephonically with Steve Scow, Esq., counsel for Defendant Red
5 Rock Financial Services, and Melanie Morgan, Esq., counsel for Defendant
6 Thornburg, who both agree and concur that these issues have not been resolved
7 and this matter should be reopened and reinstated.
- 8 5. A reinstatement of this matter will allow the Plaintiff to file an amended
9 complaint to assert its claim to Interpleader funds that have not been deposited
10 with the Court yet.
- 11 6. Plaintiff respectfully suggests that the Motion states good cause for the
12 reinstatement of this matter and that no party would be adversely affected by the
13 reinstatement.
- 14 8. I declare under penalty of perjury under the laws of the State of Nevada that the
15 foregoing is true and correct to the best of my knowledge.

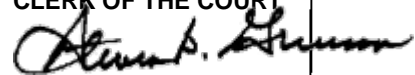
16 DATED this 10th day of May, 2019.

17 ROGER P. CROTEAU & ASSOCIATES, LTD.

18
19 /s/ Roger Croteau
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Exhibit “F”

Exhibit “F”



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*Attorneys for Todd Timpa and Stuart
Timpa, Successor Co-Trustees to
the Timpa Trust*

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34
INNISBROOK,

Plaintiff,

vs.

THORNBURG MORTGAGE SECURITIES
TRUST 2007-3, *et al.*,

Defendants.

Case No.: A-14-710161-C

Department No.: XXVI

AND ALL RELATED ACTIONS

ORDER

A hearing having been held on the 11th day of June, 2019 at 9:00 a.m., on Saticoy Bay LLC, Series 34 Innisbrook's Motion to Reinstate Statistically Closed Case filed on May 10, 2019, with appearances by Bryan Naddafi and Travis Akin on behalf of Timpa Trust, Melanie Morgan on behalf of Thornburg Mortgage Securities Trust 2007-3, and Ryan Hastings on behalf of Spanish Trail Master Association. The Court having trailed the matter towards the end of its 9:00 a.m. docket, with there being no appearance by Roger Croteau, the attorney for

1 moving party Saticoy Bay LLC, Series 34 Innisbrook, and no appearance by Steven Scow on
2 behalf of Red Rock Financial Services LLC, with the Court being advised that Mr. Scow was
3 appearing on an unrelated matter in another courtroom. The Court, having considered the
4 moving papers, there being no opposition, and the representations of counsel present at the
5 hearing, and for good cause appearing:
6

7 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Saticoy Bay LLC,
8 Series 34 Innisbrook's Motion to Reinstate Statistically Closed Case is GRANTED, and the
9 matter is reinstated.

10 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the remaining
11 outstanding issue on this matter requiring adjudication is the interpleader of the surplus funds
12 remaining from the non-judicial foreclosure sale of real property commonly known as 34
13 Innisbrook Ave., Las Vegas, NV 89113 (hereafter "Surplus Funds").
14

15 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that Red Rock
16 Financial Services is directed to deposit the Surplus Funds within thirty (30) days of the date of
17 this hearing with the Clerk of the Court, thereby making the deadline Thursday, July 11, 2019.
18

19 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that an evidentiary
20 hearing on the claims in interpleader of the Surplus Funds is set for this Court's October 14,
21 2019 trial stack.


22 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that any of the
23 parties/claimants may proceed via written motion for summary adjudication pursuant to
24 N.R.C.P. 56 with regard to their claims in interpleader of the Surplus Funds.
25

26 DATED this 8th day of June 2019
27
28


DISTRICT COURT JUDGE

1 Respectfully submitted by:

2 **AVALON LEGAL GROUP LLC**

3 

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11 *Successor Co-Trustees to the Timpa Trust*

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20 *Securities Trust 2007-3*

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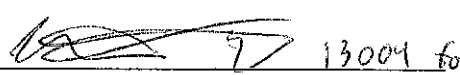
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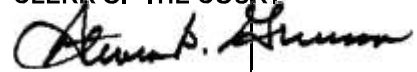
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Exhibit “G”

Exhibit “G”



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Attorneys for TIMPA TRUST
U/T/D MARCH 3, 1999

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34
INNISBROOK,

Plaintiff,

vs.

THORNBURG MORTGAGE SECURITIES
TRUST 2007-3, *et al.*,

Defendants.

Case No.: A-14-710161-C

Department No.: XXVI

HEARING REQUESTED

**TIMPA TRUST'S MOTION FOR
SUMMARY JUDGMENT**

AND ALL RELATED ACTIONS

COMES NOW, claimant TIMPA TRUST U/T/D MARCH 3, 1999, by and through its attorneys Bryan Naddafi, Esq. and Travis Akin, Esq., and, pursuant to Rule 56 of the Nevada Rules of Civil Procedure, hereby files this Motion for Summary Judgment.

This Motion is based upon the pleadings and papers on file herein, the attached exhibits, the attached Points and Authorities, and any oral arguments the Court may wish to entertain at a hearing on this matter.

DATED this 25th day of June 2019.

AVALON LEGAL GROUP LLC

/s/ Bryan Naddafi

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Attorneys for TIMPA TRUST

U/T/D MARCH 3, 1999

1 **POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The instant action involved the non-judicial foreclosure sale of real property commonly
4 known as 34 Innisbrook Ave., Las Vegas, NV 89113 (hereafter “Subject Property”) which was
5 sold pursuant to Nevada Revised Statutes (hereafter “NRS”) 116.3116. At the time of the sale,
6 the Subject Property belonged to claimant TIMPA TRUST U/T/D MARCH 3, 1999 (hereafter
7 “Timpa Trust”). On September 15, 2014, SATICOY BAY LLC SERIES 34 INNISBROOK
8 (hereafter “Saticoy”) purchased the Subject Property at the NRS 116.3116 non-judicial
9 foreclosure sale (“hereafter “Foreclosure Sale”). RED ROCK FINANCIAL SERVICES
10 (hereafter “Trustee”) conducted the Foreclosure Sale for the benefit of homeowner association
11 SPANISH TRAIL MASTER ASSOCIATION (hereafter “HOA”), which was owed dues by
12 Timpa Trust, the owner of the Subject Property. At the Foreclosure Sale, Saticoy tendered an
13 amount in excess of the debt owed by Timpa Trust to HOA. The proceeds from the Foreclosure
14 Sale paid off the debt owed by Timpa Trust to HOA along with other associated fees, and the
15 remaining proceeds (hereafter “Surplus Proceeds”) have been ordered to be deposited by the
16 Trustee with this Court. This Court has already decided that, as a result of the Foreclosure Sale,
17 Saticoy purchased and now owns the Subject Property subject to a Deed of Trust held for the
18 benefit of THORNBURG MORTGAGE SECURITIES TRUST 2007-3 (hereafter “Thornburg”).
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22 The only issue now remaining before this Court is who is entitled to the Surplus Proceeds
23 pursuant to NRS 116.31164(7)(b).¹ As the owner of the Subject Property at the time of the
24 Foreclosure Sale, Timpa Trust has made a claim to the Surplus Proceeds. As a matter of law,
25

26
27 ¹ At the time of the Foreclosure Sale, the operative statute was numbered as NRS 116.31164(3)(c). The statute,
28 which was in place since 2005, has since been renumbered as NRS 116.31164(7)(b) but reads the same. For
purposes of this motion, Timpa Trust will refer to the statute by its current numbering, NRS 116.31164(7)(b).

1 Timpa Trust is entitled to the Surplus Proceeds, and Thornburg and Saticoy are not entitled to
2 any portion of the Surplus Proceeds. Thornburg has no claim to the Surplus Proceeds as its
3 interest in the Subject Property was not subordinate to the HOA's lien, and Saticoy has no claim
4 as it was neither a subordinate lien holder nor owner of the Subject Property at the time of the
5 Foreclosure Sale. The Court therefore should issue an order finding that as a matter of law Timpa
6 Trust is entitled to receive the Surplus Proceeds, and/or that Thornburg and Saticoy are not
7 entitled to receive the Surplus Proceeds.
8

9 **II. STATEMENT OF UNDISPUTED FACTS**

10 **Undisputed Fact Number 1:**

11 On or about July 18, 2006, Timpa Trust became the record holder of title to the Subject
12 Property, via the recording of a document titled "Grant, Bargain, Sale Deed" with the Office of
13 the County Recorder Clark County, Nevada (hereafter "Recorded Timpa Trust Deed"). The
14 Timpa Trust Deed was recorded as instrument number 200607180000604. Attached hereto as
15 **Exhibit 1** is a true and correct copy of the Recorded Timpa Trust Deed, which is a certified copy
16 of a public record presumed to be authentic pursuant to NRS 52.125.
17

18 **Undisputed Fact Number 2:**

19 On or about August 4, 2011, the Trustee recorded a Lien for Delinquent Assessments
20 (hereafter "HOA Lien") with the Office of the County Recorder Clark County, Nevada. The
21 HOA Lien was recorded as instrument number 201108040002324. Attached hereto as **Exhibit**
22 **2** is a true and correct copy of the recorded HOA Lien, which is a certified copy of a public record
23 presumed to be authentic pursuant to NRS 52.125.
24

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1 Undisputed Fact Number 3:

2 The HOA Lien specifically references Timpa Trust as the owner of the Subject Property.
3 See Exhibit 2.

4 Undisputed Fact Number 4:

5 On or about November 20, 2011, the Trustee recorded a Notice of Default and Election
6 to Sell Pursuant to the Lien for Delinquent Assessments (hereafter “HOA Notice of Default”)
7 with the Office of the County Recorder Clark County, Nevada. The HOA Notice of Default was
8 recorded as instrument number 201112060001106. Attached hereto as **Exhibit 3** is a true and
9 correct copy of the recorded HOA Notice of Default, which is a certified copy of a public record
10 presumed to be authentic pursuant to NRS 52.125.
11

12 Undisputed Fact Number 5:

13 The HOA Notice of Default makes specific reference to the HOA Lien (Exhibit 2) and to
14 the fact that Timpa Trust is the record owner of title of the Subject Property. See Exhibit 3.
15

16 Undisputed Fact Number 6:

17 On or about September 15, 2014, the Trustee recorded a Notice of Foreclosure Sale Under
18 the Lien for Delinquent Assessments (hereafter “Notice of HOA Sale”) with the Office of the
19 County Recorder Clark County, Nevada. The Notice of HOA Sale was recorded as instrument
20 number 201409150001527. Attached hereto as **Exhibit 4** is a true and correct copy of the
21 recorded Notice of HOA Sale, which is a certified copy of a public record presumed to be
22 authentic pursuant to NRS 52.125.
23

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1 Undisputed Fact Number 7:

2 The Notice of HOA Sale makes specific reference to the HOA Lien (Exhibit 2), the HOA
3 Notice of Default (Exhibit 3), and to the fact that Timpa Trust is the record owner of title of the
4 Subject Property. See Exhibit 4.
5

6 Undisputed Fact Number 8:

7 On November 7, 2014, the Subject Property was sold at a non-judicial foreclosure sale as
8 a result of the dues owed by Timpa Trust to HOA, as reflected in the HOA Lien (Exhibit 2), the
9 HOA Notice of Default (Exhibit 3), and the Notice of HOA Sale (Exhibit 4). Attached hereto as
10 **Exhibit 5** is a true and correct copy of the recorded Foreclosure Deed (hereafter “Foreclosure
11 Deed”), which is a certified copy of a public record presumed to be authentic pursuant to NRS
12 52.125.
13

14 Undisputed Fact Number 9:

15 On or about November 10, 2014, the Foreclosure Deed was recorded by the Trustee with
16 the Office of the County Recorder Clark County, Nevada as instrument number
17 201411100002475. See Exhibit 5.
18

19 Undisputed Fact Number 10:

20 Pursuant to the Foreclosure Deed, Saticoy became the record holder of title to the Subject
21 Property on November 10, 2014. See Exhibit 5.
22

23 Undisputed Fact Number 11:

24 On December 3, 2018, approximately four (4) years after the non-judicial foreclosure of
25 the Subject Property, this Court entered Findings of Fact, Conclusions of Law, and Order
26 Granting Thornburg Mortgage Securities Trust 2007-3’s Motion for Summary Judgment
27
28

1 (hereafter “December 2018 Court Order”). Attached hereto as **Exhibit 6** is a true and correct
2 copy of the December 2018 Court Order.²

3 Undisputed Fact Number 12:

4 Saticoy owns the Subject Property subject to a Deed of Trust (hereafter “Surviving Deed
5 of Trust”) for which Thornburg is the beneficiary. See Exhibit 6, page 6.

6 Undisputed Fact Number 13:

7 The Surviving Deed of Trust was recorded on June 12, 2006. It remains a first position
8 lien against the Subject Property and is superior to the interest conveyed in the Foreclosure Deed.
9 See Exhibit 6, page 6.

10 Undisputed Fact Number 14:

11 On June 19, 2019, the Court ordered the Trustee to deposit the Surplus Proceeds with the
12 Clerk of the Court by July 11, 2019. Attached hereto as **Exhibit 7** is a true and correct copy of
13 the Court’s Order filed on June 19, 2019.

14 Undisputed Fact Number 15:

15 On or about May 21, 2015, the Trustee filed a Counterclaim for Interpleader requesting
16 adjudication of any claims to the Surplus Proceeds pursuant to NRCp 22. Attached hereto as
17 **Exhibit 8** is a true and correct copy of Trustee’s Counterclaim for Interpleader (hereafter
18 “Interpleader Complaint”).

19 \\\n

20 \\\n

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26 ² Timpa Trust respectfully submits as undisputed facts all of the findings/orders in the December 2018 Court
27 Order (see Exhibit 6) as per the law-of-the-case doctrine. *See Recontrust Co. v. Zhang*, 130 Nev. 1, 7-8, 317 P.3d
28 814, 818 (2014) (“The law-of-the-case doctrine refers to a family of rules embodying the general concept that a court
involved in later phases of a lawsuit should not re-open questions decided (i.e., established as law of the case) by
that court or a higher one in earlier phases.”) (internal quotation marks omitted).

1 Undisputed Fact Number 16:

2 Neither HOA nor the Trustee have any claim to the Surplus Proceeds. See Interpleader
3 Complaint, ¶ 15.

4 Undisputed Fact Number 17:

5 On July 24, 2018, Saticoy filed a Joint Pre-Trial Memorandum with this Court. Attached
6 hereto as **Exhibit 9** is a true and correct copy of the Joint Pre-Trial Memorandum filed on July
7 24, 2018. The Joint Pre-Trial Memorandum was signed by attorneys for Saticoy, Thornburg,
8 HOA, and the Trustee. See Exhibit 9, page 25. Pasted below is an excerpt from the Joint Pre-
9 Trial Memorandum under the heading “Issues of Law to be Contested at the Time of Trial”:
10

11
12 **8. What Party should receive the excess proceeds of the foreclosure sale that are
13 now being held by RRFS in its counsel’s client trust account.**

- 14 a. Should the Court hold that the foreclosure sale extinguished Thornburg’s
15 Deed of Trust, the excess proceeds of the sale should be paid to Thornburg.
16 On the other hand, if the Court holds that Thornburg’s Deed of Trust
17 survived the foreclosure sale, the excess proceeds should be paid to the
18 previous homeowners on the Property.

19 Exhibit 9, page 25, lines 9-15.

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1 Undisputed Fact Number 18:

2 In the December 2018 Court Order, the Court held that Thornburg's Deed of Trust
3 survived the foreclosure sale. Pasted below is an excerpt from the December 2018 Court Order.
4

5 **JUDGMENT**

6 The Court having made its Findings of Fact and Conclusions of Law:

7 **IT IS ORDERED, ADJUDGED, and DECREED** the HOA foreclosed on only the sub-
8 priority portion of its lien;

9 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED**, Saticoy purchased an
10 interest in the Property, located at 34 Innisbrook Ave, Las Vegas, Nevada subject to the deed of trust
11 which remains a first position encumbrance against the Property;

12 **IT IS FURTHER ORDERED, ADJUDGED, and DECREED** that the deed of trust
13 recorded on June 12, 2006 remains a first position lien against the Property and is superior to the
14 interest conveyed in the Foreclosure Deed;

15 Exhibit 6, page 6, lines 8-17.

16 **III. LEGAL ANALYSIS**

17 **A. SUMMARY JUDGMENT STANDARD**

18 When there is no genuine issue of material fact and the moving party is entitled to
19 judgment as a matter of law, summary judgment is proper. *See, Charlie Brown Constr. Co. v.*
20 *Boulder City*, 106 Nev. 497, 499, 797 P.2d 946, 947 (1990) (*citing Witsie v. Baby Grand Corp.*,
21 105 Nev. 291, 774 P.2d 432, 433 (1989)). A genuine issue of material fact exists where the
22 evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *See*
23 *Valley Bank v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1279 (1989) (*citing Anderson v.*
24 *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). The substantive law at issue determines which facts
25 are material in a given case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct.
26 2505, 91 L. Ed. 2d 202 (1986). "Only disputes over facts that might affect the outcome of the
27
28

1 suit under the governing law will properly preclude the entry of summary judgment.” *Id.* See
2 also, *id.* at 247-48, 106 5.Ct. at 2510. (“The mere existence of some alleged factual dispute
3 between the parties will not defeat an otherwise properly supported motion for summary
4 judgment; the requirement is that there be no genuine issue of material fact.”)

5
6 A court must accept the nonmoving party’s properly supported factual allegations as true,
7 and it must draw all reasonable inferences in the nonmoving party’s favor. See *Michaels v.*
8 *Sudeck*, 107 Nev. 332, 334, 810 P.2d 1212, 1213 (1991). A judge, however, is not required to
9 divorce herself from reality and “must necessarily bring some real life experiences into the
10 courtroom.” *Trent v. Trent*, 111 Nev. 309, 313 n.5, 890 P.2d 1309, 1311 n.5 (1995).

11 The nonmoving party “is not entitled to build a case on the gossamer threads of whimsy,
12 speculation and conjecture.” *Collins v. Union Fed. Sav. & Loan*, 99 Nev. 284, 302, 662 P.2d
13 610, 621 (1983). “Conclusory statements along with general allegations do not create an issue
14 of material fact.” *Michaels*, 107 Nev. At 334, 818 P.2d at 1213. Nor is the nonmoving party
15 entitled to have summary judgment denied “on the mere hope that at trial (it) will be able to
16 discredit the movant’s evidence” *Id.* at 334, 818 P.2d at 214 (*quoting Hickman v. Meadow*
17 *Wood Reno*, 96 Nev. 782, 784, 617 P.2d 71, 872 (1980)) (citation omitted). “The party opposing
18 such a motion must set forth specific facts showing there is a genuine issue for trial.” *Id.* at 334,
19 818 P.2d 213-14 (*citing Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 67, 70, 624 P.2d 17, 19
20 (1981)). (“Specific facts, rather than general allegations and conclusions, presenting a genuine
21 issue of material fact must be shown to preclude summary judgment.”) (*citing Adamson v.*
22 *Bowker*, 85 Nev. 115, 118-120, 450 P.2d 796, 800-801 (1969)).

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1 **B. TIMPA TRUST IS ENTITLED TO SUMMARY JUDGMENT BECAUSE**
2 **TIMPA TRUST IS LAWFULLY ENTITLED TO THE SURPLUS**
3 **PROCEEDS PURSUANT TO NRS 116.31164(7)**

4 “Interpleader is an equitable proceeding to determine the rights of rival claimants to
5 property held by a third person having no interest therein” and “each claimant is treated as a
6 plaintiff and must recover on the strength of his own right or title and not upon the weakness of
7 his adversary's.” *Balish v. Farnham*, 92 Nev. 133, 137, 546 P.2d 1297, 1299 (1976). Because
8 the Foreclosure Sale took place pursuant to NRS 116.3116, NRS 116.31164 guides the use of the
9 proceeds of the sale. Specifically, NRS 116.31164(7)(b) discusses how the Trustee is to utilize
10 the proceeds obtained from the Foreclosure Sale and reads as follows:

- 11 7. After the sale, the person conducting the sale shall:
- 12 (a) Comply with the provisions of subsection 2 of NRS
- 13 116.31166; and
- 14 (b) Apply the proceeds of the sale for the following purposes
- 15 in the following order:
- 16 (1) The reasonable expenses of sale;
- 17 (2) The reasonable expenses of securing possession
- 18 before sale, holding, maintaining, and preparing the unit for sale,
- 19 including payment of taxes and other governmental charges,
- 20 premiums on hazard and liability insurance, and, to the extent
- 21 provided for by the declaration, reasonable attorney’s fees and
- 22 other legal expenses incurred by the association;
- 23 (3) Satisfaction of the association’s lien;
- 24 (4) Satisfaction in the order of priority of any subordinate
- 25 claim of record; and
- 26 (5) Remittance of any excess to the unit’s owner.

27 NRS 116.31164(7). Here, both the Trustee and HOA have already received the benefit of the
28 proceeds of the Foreclosure Sale (Undisputed Fact No. 16), in compliance with NRS
29 116.31164(7)(b) subsections (1)-(3). Therefore, the only remaining issues to the distribution of
30 the Surplus Proceeds are for the Court to determine if there are junior encumbrances (pursuant
31 to NRS 116.31164(7)(b) subsection 4) and who is the unit’s owner (pursuant to NRS
32 116.31164(7)(b) subsection 5).

1 i. **PURSUANT TO NRS 116.31164(7)(B) SUBSECTION 4, NEITHER**
2 **THORNBURG NOR SATICOY IS ENTITLED TO ANY PORTION**
3 **OF THE SURPLUS PROCEEDS AS SUBORDINATE CLAIMANTS**

4 Neither Thornburg nor Saticoy can be considered subordinate claimants pursuant to NRS
5 116.31164(7)(b) subsection 4. As was previously decided in this matter, as a result of the
6 Foreclosure Sale, Saticoy owns the Subject Property subject to the Deed of Trust for which
7 Thornburg is the beneficiary. Undisputed Fact No. 12. Thornburg's interest in the Subject
8 Property is superior to the interest conveyed in the Foreclosure Deed. Undisputed Fact No. 13.
9 Accordingly, Thornburg has no interest that is subordinate or junior to the HOA's foreclosing
10 lien. Moreover, because Saticoy's interest in the Subject Property stems from its purchase of the
11 Subject Property at the Foreclosure Sale, Saticoy is estopped from making a claim as a
12 subordinate claimant to the HOA's foreclosing lien. Accordingly, neither Thornburg nor Saticoy
13 can make a claim to the Surplus Proceeds as having subordinate claims of record.
14

15 ii. **PURSUANT TO NRS 116.31164(7)(B) SUBSECTION 5, TIMPA**
16 **TRUST IS ENTITLED TO THE SURPLUS PROCEEDS AS IT WAS**
17 **THE UNIT'S OWNER AT THE TIME OF THE FORECLOSURE**
18 **SALE**

19 Pursuant to NRS 116.31164(7)(b) subsection 5, once reasonable sale expenses, any liens,
20 and any subordinate claims have been paid, the remaining surplus proceeds should be paid to the
21 "unit's owner." NRS 116.31164(7)(b) subsection 5. NRS 116.095 defines "unit's owner" as "a
22 declarant or other person who owns a unit..." NRS. 116.095. A unit is defined as "a physical
23 portion of the common-interest community designated for separate ownership or occupancy, the
24 boundaries of which are described pursuant to paragraph (e) of subsection 1 of NRS 116.2105."
25 NRS 116.093.

26 Timpa Trust has been the owner of the Subject Property since July 18, 2006. Undisputed
27 Fact No. 1, Exhibit 1. Moreover, the HOA Lien (Exhibit 2), the HOA Notice of Default (Exhibit
28

1 3), and the Notice of HOA Sale (Exhibit 4) all identified Timpa Trust as the record holder of title
2 of the Subject Property. Undisputed Fact No.'s 3, 5, and 7. As the sole owner of the Subject
3 Property at the time of the Foreclosure Sale, Timpa Trust was the "unit's owner" and is entitled
4 to the Surplus Proceeds pursuant to NRS 116.31164(7)(b) section (5).
5

6 While Saticoy became the owner of the Subject Property as a result of the Foreclosure
7 Sale, it was not the owner of the Subject Property at the time of the Foreclosure Sale on November
8 7, 2014. Undisputed Fact Nos. 9 and 10. Saticoy, along with Thornburg, HOA, and the Trustee,
9 already acknowledged that the party who was the owner of the Subject Property at the time of
10 the Foreclosure Sale should receive the Surplus Proceeds. To wit, pasted below is an excerpt
11 from the Joint Pre-Trial Memorandum signed by Saticoy, Thornburg, HOA and the Trustee:
12

13 **8. What Party should receive the excess proceeds of the foreclosure sale that are**
14 **now being held by RRFS in its counsel's client trust account.**

- 15 a. Should the Court hold that the foreclosure sale extinguished Thornburg's
16 Deed of Trust, the excess proceeds of the sale should be paid to Thornburg.
17 On the other hand, if the Court holds that Thornburg's Deed of Trust
18 survived the foreclosure sale, the excess proceeds should be paid to the
19 previous homeowners on the Property.

20 Undisputed Fact No. 17, Exhibit 9, page 25, lines 9-15.

21 Clearly, all parties have already agreed that if Thornburg's Deed of Trust did not survive
22 the Foreclosure Sale (which it clearly did not, as already determined by this Court - Exhibit 6,
23 page 6, lines 8-17) – then the previous homeowner of the Subject Property should receive the
24 Surplus Proceeds. Undisputed Fact No. 17. The previous homeowner was Timpa Trust.
25 Undisputed Fact No.'s 3, 5, and 7.
26
27
28

1 Therefore, as the legal owner of the Subject Property at the time of the Foreclosure Sale,
2 Timpa Trust requests that this Court disburse the Surplus Proceeds to it pursuant to NRS
3 116.31164(7)(b) subsection 5.

4 **IV. CONCLUSION**

5
6 For the foregoing reasons, Timpa Trust respectfully requests that this Court summarily
7 adjudicate its claim to the Surplus Proceeds pursuant to NRCP 22 and NRS 116.31164. Timpa
8 Trust was the owner of the Subject Property at the time of the Foreclosure Sale and is entitled to
9 the Surplus Proceeds pursuant to NRS 116.31164(7)(b). Neither Thornburg nor Saticoy is
10 entitled to receive any portion of the Surplus Proceeds. Accordingly, Timpa Trust respectfully
11 requests that the Court enter an Order directing the Clerk of the Court to immediately issue a
12 check for the entirety of the Surplus Proceeds to Timpa Trust.
13

14 Dated this 25th day of June 2019

15 **AVALON LEGAL GROUP LLC**

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Attorneys for TIMPA TRUST
U/T/D MARCH 3, 1999

CERTIFICATE OF SERVICE

The undersigned hereby certifies on June 25th, 2019, a true and correct copy of TIMPA TRUST'S MOTION FOR SUMMARY JUDGMENT was served to the following at their last known address(es), facsimile numbers and/or e-mail/other electronic means, pursuant to:

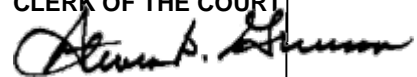
E-MAIL AND/OR ELECTRONIC MEANS: N.R.C.P. 5(b)(2)(D) and addresses(s) having consented to electronic service, via e-mail or other electronic means to the e-mail address(es) of the addressee(s).

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/s/ Luz Garcia
An employee of Avalon Legal Group LLC

Exhibit “H”

Exhibit “H”



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*Attorneys for Todd Timpa and Stuart
Timpa, Successor Co-Trustees of
the Timpa Trust*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34
INNISBROOK,

Plaintiff,

vs.

THORNBURG MORTGAGE SECURITIES
TRUST 2007-3, *et al.*,

Defendants.

Case No.: A-14-710161-C

Department No.: XXVI

AND ALL RELATED ACTIONS

ORDER

A hearing having been held on the 20th day of August 2019 at 9:30 a.m., on Timpa Trust
U/T/D March 3, 1999's (hereafter "Timpa Trust") Motion for Summary Judgment. Appearances

<input checked="" type="checkbox"/> Summary Judgment	<input type="checkbox"/> Motion to Dismiss by Def(s)
<input type="checkbox"/> Stipulated Judgment	<input type="checkbox"/> Stipulated Dismissal
<input type="checkbox"/> Default Judgment	<input type="checkbox"/> Involuntary Dismissal
<input type="checkbox"/> Judgment of Arbitration	<input type="checkbox"/> Voluntary Dismissal

1 by Bryan Naddafi, Travis Akin, and Elena Nutenko on behalf of Timpa Trust, Melanie Morgan
2 on behalf of Thornburg Mortgage Securities Trust 2007-3 (hereafter "Thornburg"), Roger
3 Croteau on behalf of Saticoy Bay LLC, Series 34 Innisbrook (hereafter "Saticoy"), and Brody
4 Wight on behalf of Red Rock Financial Services LLC (hereafter "Red Rock"). There having
5 been no appearance by Spanish Trail Master Association (hereafter "Spanish Trail"). The Court,
6 having considered the moving papers, and the representations of counsel present at the hearing,
7 makes the following findings of fact and conclusions of law:
8

9 **I. Findings of Fact**

- 10 1. The property located at 34 Innisbrook Ave., Las Vegas, Nevada (hereafter "Subject
11 Property") was sold via non-judicial foreclosure sale on November 7, 2014 as a result
12 of homeowners' association delinquencies under NRS 116 (hereafter "HOA
13 Foreclosure Sale").
14
- 15 2. At the time of the HOA Foreclosure Sale, Timpa Trust was the record holder of title
16 of the Subject Property.
17
- 18 3. Saticoy purchased the Subject Property at the HOA Foreclosure Sale for
19 \$1,201,000.00.
20
- 21 4. Saticoy's purchase of the Subject Property at the HOA Foreclosure Sale resulted in
22 Saticoy owning the Subject Property subject to a deed of trust securing a loan in the
23 original amount of \$3,780,000.00, of which Thornburg is the current beneficiary
24 (hereafter "Thornburg Deed of Trust"). This finding was the result of a previously
25 granted Summary Judgment Motion in favor of Thornburg.
26
27
28

- 1 5. Red Rock, the party which conducted the HOA Foreclosure Sale, deposited funds in
2 the amount of \$1,168,865.05 with this Court on June 20, 2019 (hereafter "HOA
3 Excess Proceeds").
- 4 6. The HOA Excess Proceeds are the result of the money tendered by Saticoy at the
5 HOA Foreclosure Sale minus the amount Spanish Trail was owed by Timpa Trust.
- 6 7. On June 25, 2019, Timpa Trust filed a Motion for Summary Judgment seeking
7 adjudication of the order of the disbursement of the HOA Excess Proceeds.
- 8 8. On July 9, 2019, Red Rock filed a Limited Response to Timpa Trust's Motion for
9 Summary Judgment seeking a portion of the HOA Excess Proceeds.
- 10 9. On July 9, 2019, Timpa Trust filed a Reply to Red Rock's Limited Response.
- 11 10. On July 26, 2019, Saticoy filed an Opposition to Timpa Trust's Motion for Summary
12 Judgement stating that the HOA Excess Proceeds were to go directly to Thornburg
13 as a result of the HOA Foreclosure Sale.
- 14 11. On August 6, 2019, Timpa Trust filed a Reply to Saticoy's Opposition.
- 15 12. No other parties filed responsive pleadings to Timpa Trust's Motion for Summary
16 Judgment.
- 17 13. Thornburg has not foreclosed on the Subject Property via the Thornburg Deed of
18 Trust.
- 19 14. It appears likely that if Thornburg forecloses on the Thornburg Deed of Trust,
20 Thornburg will establish a substantial deficiency between what is owed to Thornburg
21 and how much Thornburg will receive from the sale.
- 22 15. Thornburg has not attempted to interfere with the deposit of the HOA Excess
23 Proceeds in recognition of Nevada's one-action rule and its relation to pursuit of a
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1 deficiency judgment. Accordingly, Thornburg has waived its claim to receive the
2 HOA Excess Proceeds. However, Thornburg has not waived any claim to a
3 deficiency balance after it forecloses on the Thornburg Deed of Trust, if it chooses to
4 do so. Moreover, Thornburg has not waived a claim that the HOA Excess Proceeds
5 could potentially satisfy such a deficiency.


6 16. Despite Thornburg's waiver of its claim to receive the HOA Excess Proceeds, Saticoy
7 has standing to assert where or how the HOA Excess Proceeds are to be utilized
8 because there will arguably be a substantial deficiency on the Subject Property if
9 Thornburg seeks to foreclose the Subject Property on the Thornburg Deed of Trust
10 and because Saticoy holds the Subject Property subject to the Thornburg Deed of
11 Trust.
12
13

14 17. Red Rock, as the trustee who conducted the HOA Foreclosure Sale, submitted a claim
15 to receive \$29,161.69 in attorney fees and costs from the HOA Excess Proceeds.

16 18. No party objected to Red Rock's request for \$29,161.69 of the HOA Excess Proceeds.

17 19. Moreover, considering this matter has lasted approximately five (5) years, Red
18 Rock's request for \$29,161.69 is reasonable.
19

20 20. Thornburg is not a subordinate interest holder in the HOA Foreclosure Sale.

21 21. The original borrowers are deceased the property was
22 held in trust and the Successor Co-Trustees are
Todd Timpa and Stuart Timpa. 

23 II. Conclusions of Law

24 1. When there is no genuine issue of material fact and the moving party is entitled to
25 judgment as a matter of law, summary judgment is proper. See, *Charlie Brown*
26 *Constr. Co. v. Boulder City*, 106 Nev. 497, 499, 797 P.2d 946, 947 (1990) (citing
27 *Witsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432, 433 (1989)).
28

- 1 2. "Interpleader is an equitable proceeding to determine the rights of rival claimants to
2 property held by a third person having no interest therein" and "each claimant is
3 treated as a plaintiff and must recover on the strength of his own right or title and not
4 upon the weakness of his adversary's." *Balish v. Farnham*, 92 Nev. 133, 137, 546
5 P.2d 1297, 1299 (1976).
- 6 3. NRS 116.31164 governs the disbursement of the proceeds recovered from sales made
7 in accordance with NRS 116 such as Red Rock's HOA Foreclosure Sale.
- 8 4. NRS 116.31164 is clear and "the way the statute reads is the way the statute reads."
9 Typically, this Court will dispense remaining excess proceeds from NRS 116 sales
10 to the former homeowner.
- 11 5. What makes this matter somewhat unique is that the amount in question is larger than
12 other matters this Court has previously handled.
- 13 6. When there is a potential, albeit speculative, deficiency judgment for a future sale by
14 the lender that has yet to take place (as we have here), how shall the Court rule to
15 dispense excess foreclosure proceeds from an NRS 116 sale? The answer is to strictly
16 apply the statutory scheme.
- 17 7. Accordingly, Red Rock is entitled to receive the fees and costs it has submitted to be
18 paid from a portion of the HOA Excess Proceeds under NRS 116.31164.
- 19 8. Moreover, because there are no subordinate lienholders after Red Rock, the
20 remainder of the HOA Excess Proceeds, after payment to Red Rock, shall go to the
21 former homeowners Timpa Trust.
- 22
- 23
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1 9. Saticoy has not conceded any argument regarding the utilization of the HOA Excess
2 Proceeds under the doctrine of judicial estoppel based on previous filings in this
3 matter.

4 10. Although the Court accepted Saticoy's Opposition as late filed, no such arguments
5 presented by Saticoy in its Opposition are deemed waived by this Court.

6
7 11. The thirty (30) day automatic stay enumerated in NRCP 62(a) is applicable to a
8 decision regarding disbursement of interpleader funds.

9 **JUDGMENT**

10 The Court having made its Findings of Fact and Conclusions of Law:

11 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Timpa Trust's
12 Motion for Summary Judgment is GRANTED.

13
14 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Clerk of the
15 Court is to issue a check in the amount of \$29,161.69 from the funds previously deposited with
16 this Court on June 20, 2019, written payable to "Koch & Scow LLC" as payment for the attorney
17 fees and costs Red Rock is due under NRS 116.31164.

18
19 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Clerk of the
20 Court is to issue a check in the amount of \$1,139,703.36 from the funds previously deposited
21 with this Court on June 20, 2019, written payable to "Bryan Naddafi and Travis Akin" as
22 collection of the portion of HOA Excess Proceeds due and owing to Timpa Trust under NRS
23 116.31164.

24
25 *"Todd Timpa and Stewart Timpa successors co-trustees
26 of the Timpa Trust, and Bryan Naddafi and
27 Travis Akin, their attorneys."*
28

1 **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** issuance of any
2 checks by the Clerk of the Court can only be made until thirty (30) days have passed after service
3 of written notice of entry of this Order as required under NRCP 62(a).

4 DATED this 9th day of September 2019

6
7 
8 **HON. JUDGE GLORIA STURMAN**
9 **DISTRICT COURT JUDGE**

10 Respectfully submitted by:

11 **AVALON LEGAL GROUP LLC**

12 /s/ Bryan Naddafi

13 _____
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20 Reviewed by:

21 **AKERMAN LLP**

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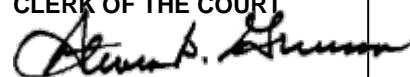
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Exhibit “I”

Exhibit “I”



MRCN
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DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34
INNISBROOK,

Plaintiff,

vs.

THORNBURG MORTGAGE SECURITIES
TRUST 2007-3 *et al.*,

Defendants.

AND ALL RELATED ACTIONS

Case No.: A-14-710161-C
Dept.: XXVI

Hearing Requested

**PLAINTIFF'S MOTION FOR RECONSIDERATION UNDER NRCP 59(e) AND 60(b) OF
(I) THE COURT'S SUMMARY JUDGMENT ORDER OF DECEMBER 3, 2018 AND (II)
THE COURT'S ORDER CONCERNING THE DISTRIBUTION OF EXCESS PROCEEDS**

COMES NOW, Plaintiff, SATICOY BAY LLC SERIES 34 INNISBROOK ("*Plaintiff*" or "*Saticoy*"), by and through its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and hereby presents the *Plaintiff's Motion for Reconsideration Under NRCP 59(e) and 60(b) of (I) the Court's Summary Judgment Order of December 3, 2018 and (II) the Court's Order Concerning the Distribution of Excess Proceeds* (the "*MRCN*"). This MRCN is made and based upon the attached

Memorandum of Points and Authorities, the papers and pleadings on file herein, and any oral argument that this Honorable Court may entertain at the time of hearing of this matter.

Dated this 24 th day of September, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD

By: /s/ *Roger Croteau*

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Attorney for Plaintiff

Saticoy Bay LLC Series 34 Innisbrook

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Court's order of December 3, 2018 granting summary judgment (the "*Summary Judgment Order*") to Thornburgh Mortgage Securities Trust 2007-3 (the "*Bank*") should be vacated by this Court. The same holds true for the Court's order of September 11, 2019 governing the distribution of excess sale proceeds at issue here (the "*Excess Proceeds Order*"), directing that almost \$1.2 million in excess sale proceeds (the "*Excess Proceeds*") be paid to the Timpa Trust (the "*Trust*"). NRC's 59(e) and 60(b) authorize the Court to grant such relief to Plaintiff, and the Court should do so.

Throughout its adjudication of the Bank's efforts to impair Plaintiff's title to that certain real property located at 34 Innisbrook Avenue, Las Vegas, Nevada 89113 (the "*Property*"), the Court sat as a court of equity. *See, e.g., Shadow Wood Homeowners Assoc. v. New York Cmty. Bancorp, Inc.*, 366 P.3d 1105, 1112 (Nev. 2016) ("The long-standing and broad inherent power of a court to sit in equity and quiet title, including setting aside a foreclosure sale if the circumstances support such action...lead us to the conclusion that the Legislature, through NRS 116.3116's enactment, did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals.") (emphasis added) ("*Shadow*

1 *Wood*¹). To date, the exercise of that jurisdiction has culminated in the Court's entry of the
2 Summary Judgment Order and the Excess Proceeds Order. These two results, however, should be
3 reversed and the MRCN should be granted because neither the Summary Judgment Order nor the
4 Excess Proceeds Order can be reconciled with governing principles of either law or equity. First
5 the law, as equity is generally said to follow the law.

6
7 The Court clearly erred under the law in entering the Excess Proceeds Order. The Trust's
8 statutory arguments in its motion practice related to the issue of the Excess Proceeds only purported
9 to pay fidelity to the governing and, indeed, dispositive statutory text at issue here. Indeed, given
10 the confidence reposed by the Trust in what it characterizes in its motion practice on the issue of
11 Excess Proceeds as the plain, clear, and unambiguous meaning of NRS 116.31164(7)(b) (codified
12 at NRS 116.31164(3)(c) under the governing version of the statute in place at the time of the
13 foreclosure sale of the property), one would have expected the actual text of that statute to have
14 been featured repeatedly and prominently throughout the Trust's motion practice with respect to the
15 Excess Proceeds. But it was not. Perhaps this was an oversight on the Trust's part. No matter.
16 Plaintiff now places the statutory text of both NRS 116.31164(3)(c) and NRS 116.31164(7)(b) front
17 and center:
18

- 19
20 • 116.31164(3)(c)(4): Satisfaction in the order of priority of any subordinate claim *of record*
21 • 116.31164(7)(b)(4): Satisfaction in the order of priority of any subordinate claim *of record*¹

22 By command of the Nevada Legislature, the determination of the priority of subordinate
23 claims by a reviewing court for purposes of distributing the proceeds of the NRS 116 foreclosure
24 sale *must be made by reference to the claim priorities set forth in the publicly recorded documents.*

25 A critical fact overlooked by the Trust is that, under governing Nevada law, a bank's purported
26

27 ¹ For present purposes, these two statutes are virtually the same in all material respects, so Plaintiff shall simply refer to
28 them using the current version of the statute solely in the interests of simplifying the discussion.

1 tender of the super-priority component of an association's statutory lien under NRS 116.3116(2)
2 does not have to be recorded to have the legally operative effect of discharging the super-priority
3 component of an association's statutory lien—nor was such a tender recorded in this case. Thus,
4 by reference to the priority of subordinate claims as determined by the publicly recorded
5 documents with respect to the Property, the HOA's lien remains in the first position as a matter of
6 public record, and the deed of trust on the Property remained a subordinate claim of record with
7 respect to the Property. Thus, the Excess Proceeds should have been awarded to the Bank as a pay
8 down of the First Deed of Trust as Plaintiff previously advocated before this Court. The MRCN
9 should, therefore, be granted, the Excess Proceeds Order should be vacated, and the Court should
10 award the Excess Proceeds to the Bank in this case.
11

12
13 The Trust's arguments do not fare any better under equitable principles of Nevada law.
14 Here, the Court sat as a court of equity and impaired Plaintiff's title to the Property based on the
15 Bank's purported tender of the super-priority component of the HOA's super-priority lien prior to
16 the NRS 116 foreclosure sale of the Property by the HOA to Plaintiff. For its part, the Trust would
17 apparently have this Court believe that its exercise of equitable jurisdiction ceases with that result.
18 It does not. Plaintiff respectfully submits that what equity starts, equity must finish, as well.
19 Plaintiff now calls upon the Court to do just that: complete the adjudication of this matter as a court
20 of equity, including its determination regarding the appropriate disposition of the Excess Proceeds.
21 NRS 116.1108 supplements the entirety of NRS 116 with equitable principles of Nevada law,
22 including the distribution statute set forth in NRS 116.3116(4)(7)(b).
23

24 The Court's application of equitable principles here is urgently needed as the Court's
25 Excess Proceeds Order achieves two results that are abhorrent to, and shock the conscience of, a
26 court of equity. First, the Excess Proceeds Order visits forfeiture upon Plaintiff because its
27 payment of sale consideration does not result in any corresponding reduction in debt owed against
28

1 the Property. Second and relatedly, the Excess Proceeds Order bestows an unwarranted and,
2 indeed, unconscionable windfall upon the Trust. The Trust never stood to receive any money—let
3 alone the Excess Proceeds—from the Property. By mere happenstance of the tender at issue here,
4 the Trust now seeks to benefit from an unconscionable windfall at Plaintiff’s expense. This Court
5 sitting as a court of equity cannot and should not allow this to happen. Fortunately, there are
6 established principles of equity in Nevada that the Court should employ here to avoid such an
7 unconscionable result: namely, the law of equitable subrogation. Under established principles of
8 equitable subrogation, the Excess Proceeds should be awarded to the Plaintiff to avoid windfall
9 upon the Trust.
10

11 Unfortunately, the inequitable results flowing from the Court’s Excess Proceeds Order do
12 not stop there; indeed, they adversely affect the Bank’s interests, as well. The Excess Proceeds
13 Order effectively works a kind of *de facto* forfeiture with respect to the Bank by leaving the Bank
14 without a meaningful remedy. The Bank’s position with respect to the Excess Proceeds Order is
15 complicated by public policy considerations raised by the specter of Nevada’s one-action rule. The
16 Court’s order states in error with respect to the one-action rule and its purported—albeit
17 incorrect—application to the Bank that, “Thornburgh has not attempted to interfere with the deposit
18 of the HOA Excess Proceeds in recognition of Nevada’s one-action rule and its relation to the
19 pursuit of a deficiency judgment. Accordingly, Thornburgh has waived its claim to receive the
20 Excess Proceeds. *See Excess Proceeds Order* at pgs. 3-4 of 8, ¶15. If the Bank pursues the Excess
21 Proceeds, it runs the risk of running afoul of the one-action rule. On the other hand, if the Bank
22 does nothing, then it runs the risk of having the Excess Proceeds distributed pursuant to the Excess
23 Proceeds Order distributed to the Trust and, subsequently, to the beneficiaries of the Trust. The
24 near-certain dissipation of the Excess Proceeds will leave the Bank without any meaningful
25 recourse as neither the Trust nor its beneficiaries are counterparties with respect to the Bank’s
26
27
28

1 asserted indebtedness with respect to the Property, and the original borrowers are deceased. The
2 reservation of the Bank's rights in the Excess Proceeds Order to pursue those proceeds at a later
3 date to satisfy any foreclosure deficiency is of little solace as the Excess Proceeds—like the snows
4 of yesteryear—will, in all likelihood, disappear from the face of the Earth.

5
6 If the Court is not inclined to award the Excess Proceeds to the Bank, as previously argued
7 by the Plaintiff, then the Court should apply principles of equitable subrogation and award the
8 Excess Proceeds to Plaintiff. Nevada law on equitable subrogation is designed for just such a
9 circumstance as is presented here: namely, preventing a purported junior-interest holder in the
10 Property from receiving an unwarranted windfall at the expense of the Plaintiff. When Plaintiff
11 tendered the sale consideration for the Property, it did so with the legitimate expectation set in
12 place by the publicly recorded documents that the Excess Proceeds would be distributed in
13 accordance with identified subordinate claims against the Property that were of record. Plaintiff
14 did not, however, tender the sale consideration that resulted in the Excess Proceeds in order to
15 bestow a windfall upon the Trust and be saddled with the Property encumbered by the first deed of
16 trust that as of September 12, 2019, totaled \$6,643,306.90 [See Exhibit A] without any
17 corresponding reduction in the outstanding indebtedness claimed by the Bank that should otherwise
18 be reduced through the application of the Excess Proceeds, with Property only be worth
19 approximately \$2,700,000.00. Additionally, the Trust is not a party to the Note and Deed of Trust,
20 and the borrowers are now deceased. This is unjust. But this unconscionable result should be
21 avoided through the application of principles of equitable subrogation. The Court's Excess
22 Proceeds Order should be vacated on this basis, as well.

23
24
25 Finally, Plaintiff maintains that the Supreme Court of Nevada's decision in *Bank of*
26 *America v. Thomas Jessup, LLC*, 435 P.3d 1217, 1221 n.5 (Nev. 2019), represents an intervening
27 change in law within the meaning of NRCp 60(b) that permits Plaintiff to seek to have the sale of
28

1 the Property set aside or rescinded in light of the Court’s determination that the Bank’s purported
2 tender and alleged deed of trust continue to encumber the Property. *See id.* (“As the Bank’s deed
3 of trust was not extinguished, we need not address the viability of the Bank’s claims against ACS
4 and Foxfield. Similarly, we need not address the Bank’s remaining arguments in support of its
5 deed of trust remaining intact; as neither the Bank nor the Purchaser have expressed whether they
6 would prefer to have the sale set aside or have the Purchaser take title to the property subject to
7 the first deed of trust.”) (emphasis added). Here, Plaintiff would prefer to have the sale of the
8 Property rescinded/set aside, rather than take the Property subject to the deed of trust and having to
9 endure the unconscionable windfall resulting from the Excess Proceeds being awarded to the Trust.
10 Plaintiff will move separately under NRCP 15(c)(2) to include a claim seeking to set aside/rescind
11 the sale in light of the intervening change in law brought about by *Jessup*, in addition to the fact
12 that requests to rescind/set aside the sale were made by the Bank as far back as April of 2015.
13 Therefore, no party to these proceedings can claim to have been prejudiced by any such
14 amendment. The MRCN should be granted, and the Summary Judgment Order and the Excess
15 Proceeds Order should be vacated on this basis, as well.

18 **STATEMENT OF RELEVANT FACTS²**

19
20 1. On April 10, 2015, the Bank filed an answer and counterclaims (the “*Answer*”) in this case,
21 including a claim seeking to set aside the foreclosure sale of the Property to Plaintiff. *See Answer*,
22 pgs. 17-18 of 28.

23 2. Based upon the most recent correspondence received from the Bank and upon information
24 and belief, the outstanding indebtedness claimed in the aggregate by the Bank with respect to the
25 Property is in excess of \$6,643,306.90 million as of September 12, 2019.

26 **LEGAL ARGUMENT**

27
28 ² As the Court has already been apprised of most of the relevant facts here through prior motion practice, both with respect to the Summary Judgment Order and Excess Proceeds Order, Plaintiff’s statement of relevant facts is necessarily brief. Again, the relevant factual allegations of the Saticoy Opposition are incorporated by reference.

1 **A. STATEMENT OF THE LAW**

2 Plaintiff’s requested relief in the MRCN is supported by NRCP 59(a)(1)(G) and 59(e). The
3 MRCN is further predicated on NRCP 60(b)(6) based on the intervening change in law brought
4 about by the Supreme Court of Nevada’s decision in *Jessup*.

5 When there is a reasonable probability that the court may have reached an erroneous
6 conclusion, reconsideration and rehearing of a motion is proper and may include re-argument.
7 *Geller v. McCowan*, 64 Nev. 106, 178 P.2d 380 (1947). When a motion has been denied and
8 further hearing is sought, the proper procedure is to ask leave to renew the motion or to receive a
9 rehearing. *Murphy v. Murphy*, 64 Nev. 440, 183 P.2d 632 (1947). Rule 59(e) provides an
10 opportunity, within a limited time, to seek correction at the trial court level of an erroneous order or
11 judgment, thereby initially avoiding the time and expense of an appeal. *Chiara v. Belaustegui*, 86
12 Nev. 856, 859, 477 P.2d 857 (1970). Rule 59(e) provides the remedy that, where the issues have
13 been litigated and resolved, a motion may be made to alter or amend a judgment. The primary
14 purpose of a petition for rehearing is to inform the court that it has overlooked an important
15 argument or fact or misread or misunderstood a statute, case, or fact in the record. *See In re Ross*,
16 99 Nev. 657, 668 P.2d 1089 (1983). In a concise and non-argumentative manner, such a petition
17 should direct attention to some controlling matter which the court has overlooked or
18 misapprehended. *Id.* It is with the utmost respect for this Court that Plaintiff respectfully submits
19 that the Court appears to have overlooked important arguments and/or misunderstood the law
20 and/or the facts in the record. Relief under NRCP 59 and/or 60(b) is therefore warranted here.

21 **B. THE COURT CLEARLY ERRED UNDER NEVADA LAW BY AWARDING THE**
22 **EXCESS PROCEEDS TO THE TRUST.**

23 In its Excess Proceeds Order, the Court’s conclusions of law expressly state that the Court
24 was applying the distribution scheme set forth in NRS 116.31164 “strictly.” *See Excess Proceeds*
25 *Order*, pg. 5 of 8, ¶ 6. In addition, the Court’s conclusions of law state with respect to NRS
26 116.31164, “the way the statute reads is the way the statute reads.” *See id.* at ¶ 5. For its part, the
27 Trust’s reply in support of its motion for summary judgment with respect to the disposition of the
28

1 Excess Proceeds (the “*Trust Reply*”) made multiple references to the unambiguous, plain, and/or
2 clear nature of NRS 116.31164(7)(b). *See, e.g., Trust Reply* at pg. 2 of 9, lines 25-26 (describing
3 the distribution statute as clear and unambiguous); pg. 4 of 9; line 24 (“NRS 116.3116(7)(b) is a
4 clear and unambiguous statute.”) (emphasis added); pg. 6 of 9, lines 21-24 (mistakenly assigning
5 error to Plaintiff in connection with NRS 116’s statute governing the distribution of sale proceeds
6 and so forth and admitting, once again, that NRS 116.31164(7)(b) is unambiguous); pg. 7 of 9, line
7 16 (referencing plain and unambiguous nature of the NRS 116.31164(7)(b); pg. 8 of 9, lines 11-12
8 (noting the plain language of the statute).

10 Governing principles of statutory construction require this Court to give effect to all parts of
11 this statutory enactment, including, importantly, the language setting forth the mandatory
12 requirement that the determination of subordinate claims with respect to the publicly recorded
13 documents recorded in the County recorder’s office—i.e. the subordinate claims must be of record.
14 *See Pawlik v. Shyang-Fenn Dang*, 412 P.3d 68, 76 (Nev. 2018) (“The only reasonable
15 interpretation of the statute is the one that gives full effect to the plain language of ALL of the
16 provisions of a statute...”) (emphasis added). Now, recall the teaching of the Supreme Court of
17 Nevada that tenders do not have to be recorded in order to have the legally operative effect of
18 discharging the super-priority component of an association’s statutory lien under NRS 116.3116(2).
19 *Bank of America, N.A. v. SFR Invs. Pool I, LLC*, 427 P.3d 113, 119-120 (Nev. 2018) (“*Diamond*
20 *Spur*”). And, the Bank’s alleged tender at issue here was not recorded.

23 Now, the Court has no doubt noticed the insurmountable problem with the Trust’s
24 arguments with respect to the disposition of the Excess Proceeds under a plain meaning/strict
25 construction of the distribution statute. Paying fidelity to the statutory text set forth in NRS
26 116.31164(7)(b)(4) requires the Court to give effect to the critical statutory language requiring
27 subordinate claims to be “of record.” Since the Bank’s alleged tender at issue here was not “of
28

1 record,” the statutory scheme incorporates—as Plaintiff argued in its opposition to the Trust’s
2 motion for summary judgment (the “*Saticoy Opposition*”)³—the subordinate claims that were of
3 record at the time of the Property’s foreclosure by the Spanish Trail Master Association (the
4 “*HOA*”). Simply put, given that (i) the Bank’s alleged tender did not have to be recorded—and, in
5 fact, was not recorded—and (ii) what the Trust admits repeatedly in the Trust Reply is the plain,
6 clear, and unambiguous command that the distribution scheme under NRS 116.3116(7)(b)(4) must
7 be determined by reference to subordinate claims that are “of record,” the Plaintiff’s position in the
8 *Saticoy Opposition* was and is emphatically correct. The Bank’s claim “of record” was
9 subordinate to the claims of the HOA at the time of filing of the Notice of Delinquent Assessment
10 and at the HOA’s NRS 116 foreclosure sale of the Property, and the Bank’s alleged tender and its
11 subsequent adjudication by this Court does not change the priority of subordinate claims under
12 NRS 116.3116(7)(b)(4) as they existed on the date of the HOA’s foreclosure sale of the Property.
13 The emphatic command of the Nevada Legislature is, in the words of the Trust, plain, clear, and
14 unambiguous: the Excess Proceeds were required to be distributed to the Bank to pay down the
15 debt secured by the deed of trust, and not to the Trust. For its part, the Trust pretends to pay
16 fidelity to the statutory text set forth in NRS 116.3116(7)(b)(4), but it never contends with the
17 express and mandatory requirement that subordinate claims must be determined by reference to
18 such claims that are “of record.”
19
20
21

22 And, the question of which date—the notice of delinquent assessment lien was filed by the
23 HOA, the date of the HOA’s foreclosure sale of the Property, or the date of the Court’s entry of the
24 Summary Judgment Order—is of no help to the Trust, either. If the Court selects either the date of
25 the HOA’s filing of its notice of delinquent assessment lien or the foreclosure date, then the Bank’s
26 claims “of record” were subordinate to those of the HOA. *See, e.g., SFR Invs. Pool I, LLC v. U.S.*
27

28 ³ The *Saticoy Opposition* filed by Plaintiff on July 26, 2019 is expressly incorporated herein by this reference.

1 *Bank., N.A.*, 334 P.3d 408, 409 (authoritatively construing NRS 116.3116(2) and stating, “We must
2 decide whether this [NRS 116.3116(2)] is a true priority lien such that its foreclosure extinguishes a
3 first deed of trust on the property and, if so, whether it can be foreclosed non-judicially. We
4 answer both questions in the affirmative and reverse.”). If the Court selects, in the alternative, the
5 date of either the entry of the Summary Judgment or the Excess Proceeds Orders, then Plaintiff, not
6 the Trust, was the owner of Property on each of those respective dates and, under the very analysis
7 advanced here by the Trust, would be the entity entitled to receive the Excess Proceeds pursuant to
8 NRS 116.31164(7)(b)(4). The issue of timing, therefore, places the Trust on the horns of a
9 dilemma traversing life’s difficult acre—east of the rock, and west of the hard place.

11 Clearly, the Trust is seeking to have it both ways. This is not a result that should be
12 countenanced by any court, let alone a court sitting in equity. On the one hand, the Trust wants to
13 have its position fixed as the former owner of the Property on the date of the HOA’s foreclosure of
14 the Property for purposes of the distribution statute; on the other hand, the Trust wants to use the
15 Court’s Summary Judgment Order on the Bank’s alleged tender to change the priority of
16 distribution scheme that was “of record” on the date of the HOA’s foreclosure of the Property to
17 essentially elevate the Bank impermissibly out of the distribution position that is actually “of
18 record” on that date in order to clear the path for the Trust to receive an impermissible windfall and
19 visit an impermissible forfeiture upon Plaintiff. In a recurring theme, this Court as a court of equity
20 should not countenance a state of affairs that gives the Trust a windfall and visits a forfeiture upon
21 Plaintiff in express derogation of the requirement that subordinate claims under NRS
22 116.31164(7)(b)(4) must be of record. The Trust’s whiplash-inducing display of equivocation on
23 this critical statutory language, and its head-spinning lines of argument on the issue of timing as a
24 factor, demonstrates just how utterly meritless and irreconcilable the Trust’s position is with
25 respect to—to, once again, borrow the Trust’s own description of NRS 116.31164(7)(b)(4)—the
26
27
28

1 plain, clear, and unambiguous requirement that subordinate claims must be of record. Under
2 governing Nevada law, therefore, the Excess Proceeds should have been paid to the Bank, not the
3 Trust. The MRCN should be granted on this basis alone. Unfortunately for the Trust, its
4 arguments in support of the Court’s Excess Proceeds Order do not fare any better under equitable
5 principles of Nevada law.

6
7 **C. ALTERNATIVELY, THE EXCESS PROCEEDS SHOULD BE AWARDED TO**
8 **PLAINTIFF UNDER NRS 116.1108 AND PRINCIPLES OF EQUITABLE SUBROGATION**

9 Nevada law recognizes as a maxim the proposition that equity abhors a forfeiture. *See, e.g.,*
10 *International Indus., Inc. v. United Mortg. Co.*, 606 P.2d 163, 167 (Nev. 1980). Similarly, the
11 Supreme Court of Nevada has recognized the fundamentally irreconcilable nature of a litigant’s
12 receipt of a windfall with the concept of equity. *See, e.g., Home Savings Assoc. v. Bigelow*, 779
13 P.2d 85, 86 (Nev. 1989) (“Further, rather than doing equity, in our view, the dismissal of the third-
14 party complaint grants Bigelow a windfall.”) (emphasis added). As Plaintiff noted at the outset of
15 the MRCN, this Court sat as a court of equity under Nevada law in entertaining the Bank’s
16 arguments that Plaintiff’s Property continued to be encumbered by a deed of trust notwithstanding
17 the HOA’s NRS 116 foreclosure sale. Stated plainly, Plaintiff respectfully submits that what equity
18 starts, equity must finish. It is simply inconsistent with traditional notions of fair play and
19 substantial justice to impair Plaintiff’s title to the Property in equity only to then pull a complete
20 180-degree turn and rely—albeit in legal error discussed and established both immediately above
21 and below—upon what the Court viewed in the Excess Proceeds Order as a strict application of the
22 distribution scheme set forth in NRS 116.31164(7)(b)(4) to visit a forfeiture on Plaintiff and a
23 windfall upon the Trust. Equity simply cannot tolerate this result, and neither should this Court.

24
25
26 The Court’s continued exercise of its equity jurisdiction, and the related ability to apply
27 equitable principles to avoid such unjust results as those visited upon Plaintiff by both the
28 Summary Judgment and Excess Proceeds Orders, has been authorized expressly by the Nevada

1 Legislature in NRS 116.1108. The Court’s application of the distribution scheme set forth in the
2 Excess Proceeds Order also fails to take into consideration this statute. Specifically, NRS 116.1108
3 supplements the provisions of NRS 116 with, among other general bodies of established Nevada
4 law, Nevada’s law on equity. *See, e.g., Shadow Wood*, 366 P.3d at 1112 (authoritatively construing
5 NRS 116.1108 as a legislative mandate to apply both principles of law and equity to NRS 116
6 cases). The operation of equitable principles does not stop at the doorstep of NRS 116 distribution
7 scheme set forth in NRS 116.31164(7)(b)(4), and the Trust’s motion practice to this point did not
8 give this Court sufficient reason—let alone legally valid justification—to refuse to avoid the
9 windfall to the Trust and the forfeiture visited upon Plaintiff, even if such a result was compelled
10 by the law—which, of course, the Plaintiff has already established is clearly not the case.
11

12
13 In addition to the legal arguments above that direct the Excess Proceeds be distributed to the
14 Bank as the holder of a subordinate claim of record to the HOA’s Lien consistent with Plaintiff’s
15 position in the Saticoy Opposition, the Court can also apply principles of established principles of
16 equity in connection with its continued exercise of its jurisdiction in equity to avoid the
17 windfall/forfeiture scenario contemplated by the Excess Proceeds Order—at least to the extent the
18 MRCN is not granted or the Excess Proceeds Order is not reversed on appeal. For instance,
19 Plaintiff calls upon the Court as a court of equity and pursuant to NRS 116.1108 to apply
20 established and on-point principles of equitable subrogation vigorously to avoid both the unjust
21 forfeiture visited upon Plaintiff through the Excess Proceeds Order and the unconscionable
22 windfall that will inure to the unjust benefit of the Trust.

23 “Nevada recognizes the doctrine of equitable subrogation as formulated in section 7.6 of the
24 Restatement (Third) of Property: Mortgages (1997).” *Recontrust Co., N.A. v. Zhang*, 317 P.3d 814,
25 817 (Nev. 2014); *see also Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 245 P.3d 535, 539 (Nev.
26 2010). The doctrine of equitable subrogation “is a remedy to avoid receiving an unearned
27 windfall at the expense of another. If there were no subrogation, a junior lien holder would be
28 promoted in priority, giving that creditor/lien holder an unwarranted and unjust windfall. Neither

1 negligence nor constructive notice is relevant as to whether the junior lienholder will be unjustly
2 enriched.” *Houston v. Bank of America, N.A.*, 78 P.3d 71, 74 (Nev. 2003) (emphasis added)
3 (citations omitted). The two elements of an equitable subrogation claim are (i) that the payor
4 reasonably expected to receive a security interest in the real estate with the priority of the mortgage
5 being discharged and (ii) that the subrogation does not materially prejudice the interests of
6 intervening holders in the real estate. *See, e.g., Zhang*, 317 P.3d at 817. The analysis of these
7 element proceeds out of order as the second element is by far and away the easier of the two
8 elements to establish.

9 Here, the Trust cannot credibly claim that it will be prejudiced by the Court equitably
10 subrogating the Plaintiff to the position of the remaining portion of the HOA’s statutory lien in
11 light of the Bank’s elevation—albeit incorrect—out of the distribution statute’s priority scheme.
12 The Trust never stood to receive anything from the sale of the Property—let alone realization of
13 any sale consideration on the order of magnitude of the Excess Proceeds. This is precisely the
14 exact type of windfall the doctrine of equitable subrogation is designed to prevent and should be
15 applied to this analogous context here to avoid an impermissible and unjust windfall from being
16 given to the Trust.

17 Plaintiff also satisfies the first portion of the test, as well, on the discrete facts presented by
18 this analogous context. When Plaintiff tendered the sale consideration for the Property that
19 ultimately resulted in the Excess Proceeds, Plaintiff legitimate expectations were twofold. First and
20 obviously, Plaintiff expected to receive the Property free and clear from any interest claimed by the
21 Bank. To date, that expectation has not been satisfied by virtue of the Court’s entry of the
22 Summary Judgment Order. As second legitimate expectation that Plaintiff reasonably had is that,
23 in the event that the HOA’s sale of the Property were to be set aside for any reason, that the sale
24 consideration paid by the Plaintiff would be impressed with a constructive trust in favor of Plaintiff
25 to prevent the HOA, or anyone else, for that matter from being unjustly enriched at Plaintiff’s
26 expense. This legitimate expectation on the part of the Plaintiff, therefore, has the analogous effect
27 of the Plaintiff expecting to, in effect, be in a secured position vis-à-vis the Property—at least to the
28 extent of the sale consideration paid which would include the Excess Proceeds. Here, Plaintiff only

1 seeks to be equitably subrogated to the extent of the Excess Proceeds, and the Court should apply
2 this doctrine vigorously to the analogous facts presented here in order to serve the purpose for
3 which the doctrine was conceived in the first place: to prevent the unjust enrichment of an alleged
4 junior interest holder in the Property, like the Trust. The MRCN should be granted on this basis, as
5 well.

6 **D. ALTERNATIVELY, THE SALE SHOULD BE SET ASIDE UNDER *JESSUP***

7 Plaintiff maintains that the Supreme Court of Nevada's decision in *Jessup*, 435 P.3d at 1221
8 n.5, represents an intervening change in law within the meaning of NRCP 60(b) that permits
9 Plaintiff to seek to have the sale of the Property set aside or rescinded in light of the Court's
10 determination that the Bank's purported tender and alleged deed of trust continue to encumber the
11 Property. *See id.* ("As the Bank's deed of trust was not extinguished, we need not address the
12 viability of the Bank's claims against ACS and Foxfield. Similarly, we need not address the
13 Bank's remaining arguments in support of its deed of trust remaining intact; as neither the Bank
14 nor the Purchaser have expressed whether they would prefer to have the sale set aside or have the
15 Purchaser take title to the property subject to the first deed of trust.") (emphasis added). Here,
16 Plaintiff would prefer and in fact hereby request to have the sale of the Property rescinded/set aside,
17 rather than take the Property subject to the deed of trust and having to endure the unconscionable
18 windfall resulting from the Excess Proceeds being awarded to the Trust. Plaintiff will move
19 separately under NRCP 15(c)(2) to include a claim seeking to set aside/rescind the sale in light of
20 the intervening change in law brought about by *Jessup*, in addition to the fact that requests to
21 rescind/set aside the sale were made by the Bank as far back as April of 2015. Therefore, no party
22 to these proceedings can claim to have been prejudiced by any such amendment. The MRCN
23 should be granted, and the Summary Judgment Order and the Excess Proceeds Order should be
24 vacated on this basis, as well.

25 **CONCLUSION**

26 Based upon the foregoing, this Court should grant the MRCN as good cause for such relief
27 exists, and, as necessary, vacate either the Excess Proceeds Order, the Summary Judgment Order,
28 or both.

1 Dated this 24th day of September, 2019.

2 ROGER P. CROTEAU & ASSOCIATES, LTD

3 By: /s/ Roger Croteau

4 ROGER P. CROTEAU, ESQ.

5 Nevada Bar No.: 4958

6 2810 W. Charleston Blvd., Ste. 75

7 Las Vegas, Nevada 89102

8 *Attorney for Plaintiff*

9 *Saticoy Bay LLC Series 34 Innisbrook*

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that I am an employee of
3 ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 24th day of September, 2019, I
4 caused a true and correct copy of the foregoing document to be served on all parties as follows:

5 X VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's efile e-file and serve
6 system.

7 Thornburg Mortgage Securities Trust 2007-3 - Defendant

8 Akerman LLP AkermanLAS@akerman.com

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11 Spanish Trail Master Association - Counter Defendant

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29 VIA U.S. MAIL: by placing a true copy hereof enclosed in a sealed envelope with
30 postage thereon fully prepaid, addressed as indicated on service list below in the United
31 States mail at Las Vegas, Nevada.

32 VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated
33 on the service list below.

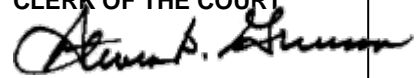
34 VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this
35 date to the addressee(s) at the address(es) set forth on the service list below.

36 /s/ Jennifer Lee

37 An employee of ROGER P. CROTEAU &
38 ASSOCIATES, LTD.

Exhibit “J”

Exhibit “J”



1 **NOAS**
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12 *Attorneys for Plaintiff*
13 *Saticoy Bay LLC Series 34 Innisbrook*

14 **DISTRICT COURT**
15
16 **CLARK COUNTY, NEVADA**

17 *****

18 SATICOY BAY LLC SERIES 34
19 INNISBROOK,

20 Plaintiff,

21 vs.

22 THORNBURG MORTGAGE SECURITIES
23 TRUST 2007-3 *et al.*,

24 Defendants.

25 AND ALL RELATED ACTIONS

Case No.: A-14-710161-C
Dept.: XXVI

NOTICE OF APPEAL

26 Notice is hereby given that Saticoy Bay, LLC Series 34 Innisbrook, Plaintiff above named,
27 hereby appeals to the Supreme Court of the State of Nevada from the Court's *Order* entered in this
28 action on the 18th day of November, 2019, and *Notice of Entry of the Order* entered on the 19th day
November, 2019, and any order made appealable thereby.

The Court's Order entered in this action on the 11th day of September, 2019 and *Notice of Entry of the Order* entered in this action on the 11th day of September, 2019, and any order made appealable thereby.

The Court's *Findings of Fact, Conclusions of Law, and Order Granting Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment*, entered on the 3rd day of December, 2018 and *Notice of Entry of Fact, Conclusions of Law, and Order Granting Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment* entered in this action on the 5th day of December, 2018, and any order made appealable thereby.

Dated this 19th day of November, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD

By: /s/ Roger Croteau

ROGER P. CROTEAU, ESQ.

Nevada Bar No.: 4958

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Las Vegas, Nevada 89102

Attorney for Plaintiff

Saticoy Bay LLC Series 34 Innisbrook

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 19th day of November, 2019, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

 X VIA ELECTRONIC SERVICE: through the Court's e-file and serve system.

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VIA U.S. MAIL: by placing a true copy hereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated on the service list below.

VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the service list below.

/s/ Anna Gresl

An employee of ROGER P. CROTEAU &
ASSOCIATES, LTD.