

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
Sep 24 2020 04:57 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
RENEWED MOTION TO DISMISS APPEAL**

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Nevada Bar No. 7259
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RESPONDENT’S RENEWED 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**. On December 2, 2019 this case was referred to settlement program pursuant to Nevada Rule of Appellate Procedure ("NRAP") 16(a).

On May 12, 2020 the Association filed a motion to dismiss appeal arguing that Saticoy's appeal of the November 30, 2018 FFCL was untimely because it was filed well beyond the time period set forth in Nevada Rule of Appellate Procedure ("NRAP") 4(a)(1). *See* Motion to Dismiss Appeal, **Exhibit K**. On June 2, 2020, this Court denied the Association's Motion to Dismiss without prejudice

specifically noting the Association's right to renew the motion after completing a settlement conference that was scheduled for June 30, 2020.

The parties participated in a settlement conference on June 30, 2020. Ultimately, the settlement conference was unsuccessful in resolving the dispute. *See* Settlement Program Status Report, **Exhibit L**. On July 16, 2020, the Bank filed a motion to dismiss appeal in which the Bank also argued that Saticoy's appeal of the November 30, 2018 FFCL was untimely and should be dismissed. *See* Bank's Motion to Dismiss Appeal, **Exhibit M**.

On August 3, 2020 the Bank and Saticoy filed a stipulation in which Saticoy waived its appeal as to the district courts finding that the Bank's deed survived the HOA foreclosure sale and the Bank vacated its motion to dismiss the appeal. *See* Stipulation Regarding Survival of the Deed of Trust and Withdrawal of Motion to Dismiss Appeal, **Exhibit N**.

II. ARGUMENT

A. Saticoy's Appeal of the November 30, 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 on December 3, 2018 and notice of the same was 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.

As noted by the Bank in its motion to dismiss appeal, the district court did not extend the deadline for Saticoy to appeal its November 30, 2018 FFCL nor could it have done so under the rules. *Southworth v. Eighth Judicial Dist. Court*, 134 Nev. 149, 414 P.3d 311 (2018) ("exercising such discretionary authority is inappropriate in the context of appeal time limits"); *Walker v. Scully*, 99 Nev. 45, 46, 657 P.2d 94, 94 (1983) (a district court lacks authority to extend the 30-day period to file a notice of appeal set forth by the Nevada Rules of Appellate Procedure).

The Association does not dispute this Court's jurisdiction to consider Saticoy's appeal of the district court's September 11, 2019 and November 19, 2019 orders related to the distribution of excess proceeds from the foreclosure sale. However, to the extent jurisdiction exists, this appeal should be limited to those orders.

B. Saticoy Cannot Pursue an Appeal Related to Unwinding the Foreclosure Sale on Equity Grounds.

In its stipulation with the Bank, Saticoy makes clear its intent to pursue an appeal of “[a]ll other assignments of error listed in Saticoy’s Docketing Statement..., including, but not limited to, unwinding the subject homeowners’ association foreclosure on equity grounds.” *See* Stipulation at 1, **Exhibit N**. However, Saticoy should be judicially estopped from arguing on appeal that the district court committed error in not setting aside the foreclosure sale in this case because Saticoy Bay specifically argued against such a remedy in its summary judgment briefing before the district court.

“The primary purpose of judicial estoppel is to protect the judiciary’s integrity, and a court may invoke the doctrine at its discretion.” *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). Judicial estoppel applies when the following five criteria are met:

“(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; **469 (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.”

Marcuse v. Del Webb Communities, Inc., 123 Nev. 278, 287, 163 P.3d 462, 468–69 (2007).

At the summary judgment stage in this case, Saticoy specifically noted this Court's decision in *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 741, 405 P.3d 641, 643 (2017) ("Shadow Canyon") arguing that there was no evidence in this case that would support setting aside the foreclosure sale on equitable grounds. See Saticoy Motion for Summary Judgment at 15-16, **Exhibit O**. Saticoy's apparent attempt to now appeal the decision of the district court by arguing that the court should have set aside the sale clearly meets all of the criteria set forth in *Marcuse*.

Saticoy has clearly taken two positions on whether the HOA sale can be set aside which are directly opposite of each other. Before the district court, Saticoy argued there was no evidence to support setting aside the foreclosure sale on equitable grounds. Now, Saticoy is putting this Court on notice that it intends to argue that the district court erred by failing to set aside the sale on equitable grounds. Both these positions were taken in judicial proceedings and Saticoy was successful in arguing that the sale could not be set aside as the district court did not grant the Bank that remedy. There can be no argument that Saticoy's position at summary judgment was a result of ignorance as counsel for Saticoy has represented Saticoy and others in hundreds of cases dealing with HOA foreclosure sales over the past several years and has frequently briefed both state

district courts and federal courts as to the applicability of this Court's decision in *Shadow Canyon*.

CONCLUSION

Saticoy failed to file a timely appeal of the district court's November 30, 2018 FFCL. Moreover, Saticoy should be judicially estopped from arguing that the district court erred in refusing to set aside the foreclosure sale. Therefore, the Association's motion to dismiss Saticoy's appeal should be granted.

DATED this 24th day of September, 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, September 24, 2020, I submitted the foregoing **RESPONDENT SPANISH TRAIL MASTER ASSOCIATION'S RENEWED 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:

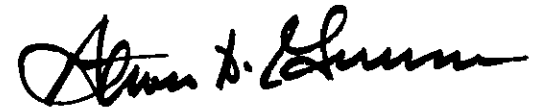
| | |
|--|--|
| Roger P. Croteau Timothy E. Rhoda Roger P. Croteau & Associates, Ltd. 2810 W. Charleston Blvd., Suite 75 Las Vegas, NV 89102 | David R. Koch Daniel G. Scow Steven B. Scow Brody R. Wight Koch & Scow, LLC 11500 S. Eastern Ave., Suite 210 Henderson, NV 89052 |
| Travis D. Akin The Law Office 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/ Robin Callaway

An Employee of LEACH KERN
GRUCHOW ANDERSON SONG

Exhibit “A”

Exhibit “A”



CLERK OF THE COURT

1 **COMP**

2 MICHAEL F. BOHN, ESQ.

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5 JEFF ARLITZ, ESQ.

6 Nevada Bar No.: 6558

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14 Attorney for plaintiff

15

DISTRICT COURT

16

CLARK COUNTY, NEVADA

17

18 SATICOY BAY LLC SERIES 34

19 INNISBROOK

20

21

Plaintiff,

22

23 vs.

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25 THORNBURG MORTGAGE SECURITIES
26 TRUST 2007-3; and RECONTRUST
27 COMPANY, N.A. a division of BANK OF
28 AMERICA

29

30

Defendants.

CASE NO.: A-14-710161-C

DEPT NO.: XXXI

EXEMPTION FROM ARBITRATION:

Title to real property

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COMPLAINT

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

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

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

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

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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)

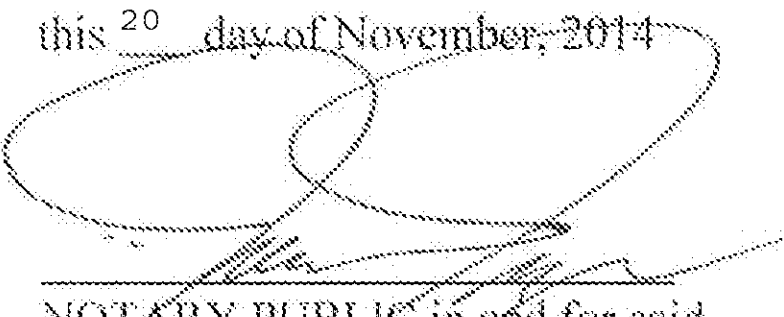
Iyad Haddad, being first duly sworn, deposes and says;

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.

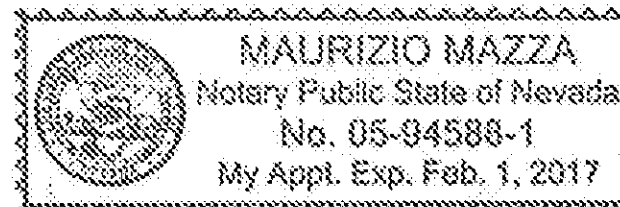


IYAD HADDAD

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



NOTARY PUBLIC in and for said
County and State



1 **IAFD**
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7 Attorney for plaintiff

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

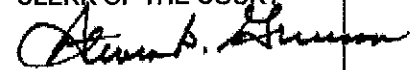
21 DATED this 20th day of November 2014.

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

24
25 By: / s / Michael F. Bohn, Esq. /
MICHAEL F. BOHN, ESQ.
26 376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
27 Attorney for plaintiff
28

Exhibit “B”

Exhibit “B”



1 **AANS**
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11 mkelley@wrightlegal.net
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
ELECTRONIC REGISTRATION SYSTEMS,
INC.; REPUBLIC SERVICES; LAS VEGAS
18 VALLEY WATER DISTRICT; FRANK
19 TIMP A and MADELAINE TIMPA,
individually and as trustees of the TIMP A
20 TRUS U/T/D March 3,1999; and DOES 1-100,
inclusive,

21 Counter-Defendants.
22

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.

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

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

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

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

11 **SECOND CLAIM FOR RELIEF**

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

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

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

19 **SECOND CLAIM FOR RELIEF**

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

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

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

27 17. Thornburg does not have adequate information or knowledge to admit or deny the
28 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.

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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.

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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.

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.

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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.

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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.

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

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

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

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

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

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

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

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

SECOND CAUSE OF ACTION

(Permanent and Preliminary Injunction versus the Buyer)

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

81. As set forth above, the Buyer may claim an ownership interest in the Property 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
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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
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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;

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

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

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

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

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

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

15 11. For attorney's fees; and

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

17 DATED this 30th day of May, 2017.

18
19 WRIGHT, FINLAY & ZAK, LLP

20 /s/ Michael S. Kelley

21 Dana Jonathon Nitz, Esq.

22 Nevada Bar No. 0050

23 Michael S. Kelley, Esq.

24 Nevada Bar No. 10101

25 7785 W. Sahara Ave., Suite 200

26 Las Vegas, Nevada 89117

27 Attorney for Defendant/Counterclaimant/Counter-
28 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

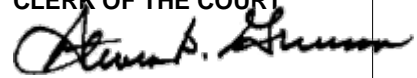
I certify that I am an employee of WRIGHT, FINLAY & ZAK, LLP, and that on this 30th day of May, 2017, I did cause a true copy of **THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S ANSWER TO SATICOY BAY LLC SERIES 34 INNISBROOK'S THIRD AMENDED COMPLAINT AND COUNTERCLAIMS** to be e-served through the CM/ECF 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
8945 West Russell Road, Suite 330
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
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Las Vegas, Nevada 89148
*Attorneys for Counter-Defendant
Spanish Trail Master Association*

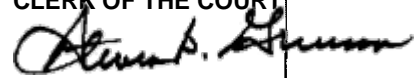
CERTIFICATE OF SERVICE

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 |
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| | Staff | aeshenbaugh@kochscow.com |
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| Law Offices of Michael F. Bohn, Esq. | | |
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| Wright, Finlay & Zak, LLP | | |
| | Contact | Email |
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| | Sarah Greenberg Davis | sgreenberg@wrightlegal.net |

/s/ Gina M. LaCascia

An Employee of LEACH JOHNSON
SONG & GRUCHOW



ORDR
LEACH JOHNSON SONG & GRUCHOW
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Facsimile: (702) 538-9113
Attorneys for Counter-Defendant
Spanish Trail Master Association

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLS SERIES 34
INNISBROOK,

Plaintiff,

vs.

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

Defendants.

THORNBURG MORTGAGE SECURITIES
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.

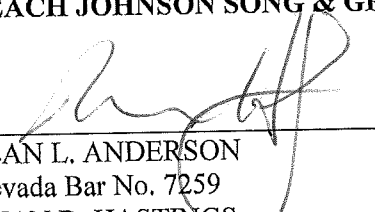
3 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's
4 request to dismiss the Bank's claims for negligence, wrongful foreclosure, misrepresentation and
5 unjust enrichment is DENIED.

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

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10 
11 HONORABLE GLORIA STURMAN
12 DISTRICT COURT JUDGE

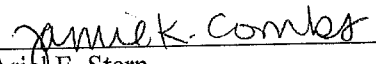
13 Submitted By:

14 LEACH JOHNSON SONG & GRUCHOW

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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
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Attorneys for Thornburg Mortgage
Securities Trust 2007-3

Approved As To Form And Content:

KOCH & SCOW

24 
25
26 DAVID R. KOCH
27 Nevada Bar No. 1598
28 STEPHEN B. SCOW
Nevada Bar No. 1046

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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
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10 
11 HONORABLE GLORIA STURMAN
12 DISTRICT COURT JUDGE


13 Submitted By:

14 LEACH JOHNSON SONG & GRUCHOW

Approved As To Form And Content:

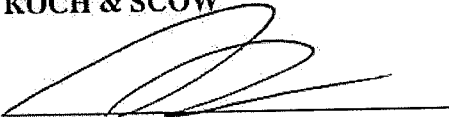
AKERMAN LLP

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22 Approved As To Form And Content:

23 KOCH & SCOW

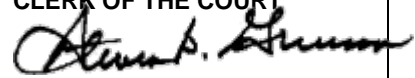
24 
25 DAVID R. KOCH
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28 Nevada Bar No. 1046

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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
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Nevada Bar No. 8215
THERA A. COOPER, ESQ.
Nevada Bar No. 13468
AKERMAN LLP
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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

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|-----------------|-----------------------------|
| Robin Callaway | rcallaway@leachjohnson.com |
| Patty Gutierrez | pgutierrez@leachjohnson.com |
| Ryan Hastings | rhastings@leachjohnson.com |
| Gina LaCascia | glacascia@leachjohnson.com |
| Sean Anderson | sanderson@leachjohnson.com |

OLYMPIA LAW

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| Bryan Naddafi, Esq. | bryan@olympialawpc.com |
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WILLIAMS & ASSOCIATES

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KOCH & SCOW, LLC

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| David R. Koch | dkoch@kochscow.com |
| Staff | aeshenbaugh@kochscow.com |
| 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

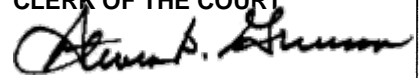
| | |
|-------------------|-----------------------|
| Venicia Considine | vconsidine@lacsns.org |
| Gregory Walch | greg.walch@lvvwd.com |

/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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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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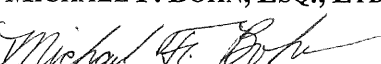
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Las Vegas, NV 89101

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.

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DISTRICT COURT JUDGE

5 Respectfully submitted by:

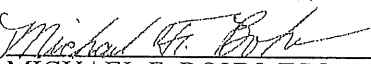
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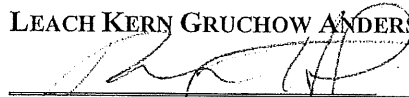
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DATED _____, 2018.

DISTRICT COURT JUDGE

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3 DATED _____, 2018.

4 
DISTRICT COURT JUDGE

5 Respectfully submitted by:

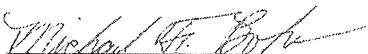
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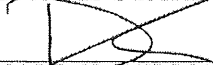
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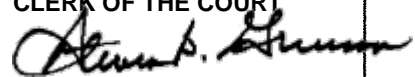
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Attorneys for Republic Services, Inc.

Exhibit “E”

Exhibit “E”



MOT
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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 / / /

/ / /

ROGER P. CROTEAU & ASSOCIATES, LTD.

• 2810 W. Charleston Blvd., Suite 75 • Las Vegas, Nevada 89102 •
Telephone: (702) 254-7775 • Facsimile (702) 228-7719

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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11 *Attorney for Plaintiff*

12 SATICOY BAY LLC, SERIES 34
13 INNISBROOK
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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.

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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
SATICOY BAY LLC, SERIES 34 INNISBROOK

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.

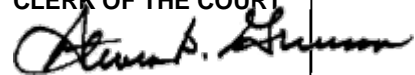
16 DATED this 10th day of May, 2019.

17 ROGER P. CROTEAU & ASSOCIATES, LTD.

18
19 /s/ Roger Croteau
20 ROGER P. CROTEAU, ESQ.
21 Nevada Bar No. 4958
22 TIMOTHY E. RHODA, ESQ.
23 Nevada Bar No. 7878
24 2810 West Charleston Blvd., Suite 75
25 Las Vegas, Nevada 89102
26 (702) 254-7775
27 *Attorney for Plaintiff*
28 **SATICOY BAY LLC, SERIES 34 INNISBROOK**

Exhibit “F”

Exhibit “F”



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Telephone: (702) 522-6450
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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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7 Las Vegas, NV 89123

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11 *Successor Co-Trustees to the Timpa Trust*

12 Reviewed by:

13 **AKERMAN LLP**

14 
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18 Las Vegas, NV 89134

19 *Attorneys for Thornburg Mortgage*
20 *Securities Trust 2007-3*

21 **LEACH KERN GRUCHOW ANDERSON SONG**

22 
23 RYAN D. HASTINGS, ESQ.

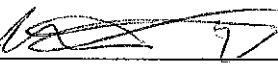
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27 *Attorneys for Spanish Trail Master Association*

28 **THE LAW OFFICE OF TRAVIS AKIN**

1  13004 for

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6 *Attorney for Todd Timpa and Stuart Timpa,*
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11 *Successor Co-Trustees to the Timpa Trust*

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19 *Attorneys for Thornburg Mortgage*
20 *Securities Trust 2007-3*

21 **LEACH KERN GRUCHOW ANDERSON SONG**

22 **RYAN D. HASTINGS, ESQ.**

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28 **TRAVIS AKIN, ESQ.**

Nevada Bar No. 13059

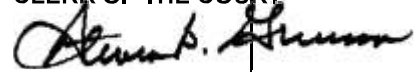
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Attorney for Todd Timpa and Stuart Timpa,
Successor Co-Trustees to the Timpa Trust

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”).
19
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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 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 **8. What Party should receive the excess proceeds of the foreclosure sale that are**
12 **now being held by RRFS in its counsel’s client trust account.**

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

18 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
 116.31164(7)(b) subsections (1)-(3). Therefore, the only remaining issues to the distribution of
 the Surplus Proceeds are for the Court to determine if there are junior encumbrances (pursuant
 to NRS 116.31164(7)(b) subsection 4) and who is the unit’s owner (pursuant to NRS
 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**
 SALE

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

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:

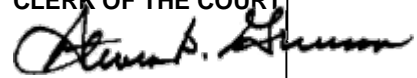
E-MAIL AND/OR ELECTRONIC MEANS: N.R.C.P. 5(b)(2)(D) and addresses(s) having consented to electronic service, via e-mail or other electronic means to the e-mail address(es) of the addressee(s).

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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

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
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- 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 statue reads."
9 Typically, this Court will dispense remaining excess proceeds from NRS 116 sales
10 to the former homeowner.
11
- 12 5. What makes this matter somewhat unique is that the amount in question is larger than
13 other matters this Court has previously handled.
- 14 6. When there is a potential, albeit speculative, deficiency judgment for a future sale by
15 the lender that has yet to take place (as we have here), how shall the Court rule to
16 dispense excess foreclosure proceeds from an NRS 116 sale? The answer is to strictly
17 apply the statutory scheme.
18
- 19 7. Accordingly, Red Rock is entitled to receive the fees and costs it has submitted to be
20 paid from a portion of the HOA Excess Proceeds under NRS 116.31164.
- 21 8. Moreover, because there are no subordinate lienholders after Red Rock, the
22 remainder of the HOA Excess Proceeds, after payment to Red Rock, shall go to the
23 former homeowners Timpa Trust.
24
25
26
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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 11. The thirty (30) day automatic stay enumerated in NRCP 62(a) is applicable to a
7 decision regarding disbursement of interpleader funds.
8

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 successor 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:

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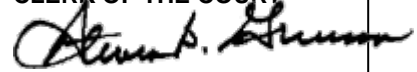
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Exhibit “I”

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
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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 PLAINTIFF UNDER NRS 116.1108 AND PRINCIPLES OF EQUITABLE SUBROGATION**

8
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 eflex e-file and serve
6 system.

7 Thornburg Mortgage Securities Trust 2007-3 - Defendant

8 Akerman LLP AkermanLAS@akerman.com

9 Melanie Morgan melanie.morgan@akerman.com

10 Jared Sechrist jared.sechrist@akerman.com

11 Spanish Trail Master Association - Counter Defendant

12 Sean L. Anderson sanderson@leachjohnson.com

13 Robin Callaway rcallaway@lkglawfirm.com

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15 Ryan D Hastings rhastings@lkglawfirm.com

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27 Steven B. Scow sscow@kochscow.com

28 Travis Akin travisakin8@gmail.com

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.

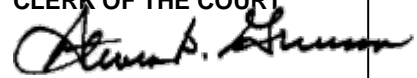
34 VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this
35 date to the addressee(s) at the address(es) set forth on the service list below.

36 /s/ Jennifer Lee

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

Exhibit “J”

Exhibit “J”



1 **NOAS**
2 ROGER P. CROTEAU, ESQ.
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5 Nevada Bar No. 7878
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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

2810 W. Charleston Blvd., Ste. 75

Las Vegas, Nevada 89102

Attorney for Plaintiff

Saticoy Bay LLC Series 34 Innisbrook

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 19th day of November, 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 Court's e-file and serve system.

6 Thornburg Mortgage Securities Trust 2007-3 - Defendant

7 Akerman LLP AkermanLAS@akerman.com
8 Melanie Morgan melanie.morgan@akerman.com
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10 Spanish Trail Master Association - Counter Defendant

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28 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.

26 /s/ Anna Gresl

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

Exhibit “K”

Exhibit “K”

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
Nevada Bar No. 12394
LEACH KERN GRUCHOW ANDERSON SONG
2525 Box Canyon Drive
Las Vegas, Nevada 89128
Phone: (702) 538-9074
Attorneys for Respondent

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 “L”

Exhibit “L”

IN THE SUPREME COURT OF THE STATE OF NEVADA

SATICOY BAY, LLC SERIES 34
INNISBROOK,
Appellant,
vs.
THORNBURG MORTGAGE SECURITIES
TRUST 2007-3; FRANK TIMPA;
MADELAINE TIMPA; TIMPA TRUST; RED
ROCK FINANCIAL SERVICES, LLC;
SPANISH TRAIL MASTER ASSOCIATION;
REPUBLIC SERVICES; AND LAS VEGAS
VALLEY WATER DISTRICT,
Respondents.

No. 80111

Electronically Filed
Jun 30 2020 04:13 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SETTLEMENT PROGRAM STATUS REPORT

A mediation session was held in this matter on June 30,, 2020.

I make the following report to the court:

(check one box)

- ☐ The parties have agreed to a settlement of this matter.
- ☒ The parties were unable to agree to a settlement of this matter.
- ☐ The settlement process is continued as follows:

Date: _____ Time: _____

Location: _____

☐ Other: _____

Additional Comments: _____



Settlement Judge

Patrick N. Chapin

Exhibit “M”

Exhibit “M”

IN THE SUPREME COURT OF THE STATE OF NEVADA

SATICOY BAY, LLC SERIES 34
INNISBROOK,

Appellant,

v.

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

Respondents.

Case No. 80111

Electronically Filed
Jul 16 2020 03:26 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S
MOTION TO DISMISS APPEAL

Thornburg Mortgage Securities Trust 2007-3 (**Thornburg**) moves to dismiss this appeal for lack of jurisdiction or, alternatively, dismiss the quiet title portion of this appeal as frivolous. *See* NRAP 4(a); NRAP 38.

I. Saticoy Bay Failed to Timely Appeal the December 5, 2018 Order

This is superpriority tender/quiet title action arising out of an HOA foreclosure sale. On December 5, 2018, the district court entered an order granting Thornburg's summary judgment motion on the basis of pre-sale tender. **Ex. A.** The district court dismissed all remaining claims. *Id.* at 6. The court's order provided notice to Saticoy Bay, LLC Series 34 Innisbrook that it was a final appealable order. *See In re Duong*, 118 Nev. 920, 922, 59 P.3d 1210, 1212 (2002).

Saticoy had the opportunity to file a notice of appeal (or one of many tolling motions), but failed to do so within the 30-day deadline. NRAP 4(a)(1). This court does not have jurisdiction, at least over this portion of the appeal, because Saticoy filed a notice of appeal 349 days after notice of entry of the summary judgment order on November 19, 2019. **Ex. B.** This order adjudicated all claims and was a final order for purposes of appeal. **Ex. A.**

Subsequently, the district court statistically closed the case. **Ex. C.** On May 10, 2019, Saticoy moved to reinstate the statistically closed case on the basis the court did not address the interpleader claims. **Ex. D** (exhibits excluded). On June 20, 2019, the district court reopened the case to adjudicate the interpleader claims. **Ex. E.** The district court ultimately resolved the interpleader claims against Saticoy on September 11, 2019, and November 19, 2019. **Exs. F and G.** Saticoy's notice of appeal, filed on November 19, 2019, may be timely with respect to the interpleader claims, but is not timely as to the primary quiet title claims between Saticoy and Thornburg. **Ex. B.**

The district court lacked the authority or discretion to extend the thirty-day period for Saticoy to file its notice of appeal with respect to non-interpleader claims. *Southworth v. Eighth Judicial Dist. Court*, 134 Nev. 149, 414 P.3d 311 (2018) ("exercising such discretionary authority is inappropriate in the context of appeal time limits"); *Walker v. Scully*, 99 Nev. 45, 46, 657 P.2d 94, 94 (1983) (a

district court lacks authority to extend the 30-day period to file a notice of appeal set forth by the Nevada Rules of Appellate Procedure).

The notice of appeal was untimely as to the summary judgment order and, as such, this court is without jurisdiction to entertain this portion of the appeal. *See Healy v. Volkswagenwerk Aktiengesellschaft*, 103 Nev. 329, 330, 741 P.2d 432, 432 (1987) ("An untimely notice of appeal fails to vest jurisdiction in this court."); *Scherer v. State*, 89 Nev. 372, 374, 513 P.2d 1232, 1233 (1973) ("The timely filing of a notice of appeal is jurisdictional and is an essential prerequisite to the perfection of an appeal.").

Saticoy's motion to reopen the case did not toll the time within which to file its notice of appeal. Nor was it brought as an NRCP 59 or 60 motion. It was brought simply to reopen the case for the district court to distribute excess proceeds from the sale. Saticoy waited approximately six months after the district court granted summary judgment and closed the case to ask for reinstatement. The motion to reopen should not be considered a tolling motion. Said in another way, this court should not, by judicial fiat, transmute the motion to reopen into one that tolls the quiet title judgment. *See* NRAP 4(a). Even if a motion to reopen is considered a tolling motion in some circumstances, it is not here since Saticoy did not timely file its motion. Allowing tolling under these facts would provide

Saticoy nearly a year of a mortgage-free home and would incentivize other HOA-sale purchasers to delay litigation through the tactics employed by Saticoy.

Although Thornburg believes it was appropriate for the district court to reopen the case to distribute over a \$1,000,000 in excess proceeds from the foreclosure sale, it expresses no opinion as to the timeliness of the appeal in the context of the interpleader claims. To the extent jurisdiction exists as to the interpleader claims, this appeal should be limited to the propriety of the interpleader orders dated September 11, 2019 and November 19, 2019. *See, e.g., Holiday Inn Downtown v. Barnett*, 103 Nev. 60, 63, 732 P.2d 1376, 1379 (1987).

These amended judgments were directed solely at the interpleader claims and did not affect title, legal rights, or obligations concerning the subject property. Consequently, the interpleader judgments have no significance in determining the timeliness of the appeal as to the quiet title claims between Saticoy and Thornburg. *See Morrell v. Edwards*, 98 Nev. 916, 922-23, 40 P.2d 1322, 1324 (1982).

II. The Quiet Title Portion of this Appeal is Frivolous

This court should alternatively dismiss the appeal as frivolous under NRAP 38 because the former loan servicer, through Miles Bauer Bergstrom & Winters, tendered the superpriority portion of the HOA's lien in advance of the sale. **Exs. H** (Miles Bauer Affidavit) **and I** (Excerpt from Red Rock's Collection File). This court has adjudicated virtually the same tender facts many times, including cases

involving Saticoy. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018); *see, e.g., Saticoy Bay LLC Series 1011 Rainbow Rock v. Green Tree Servicing LLC*, No. 76327 (Nev. Oct. 24, 2019); *Saticoy Bay LLC Series 5413 Bristol Bend Ct. v. Bank of Am., N.A.*, No. 75272, 2019 WL 1875606 (Nev. April 25, 2019) (all unpublished dispositions).

Saticoy knows how this court rules when presented with tender facts yet appealed the quiet title portion of this litigation to delay foreclosure. *See* NRAP 38(b).¹ Its appeal as to quiet title is frivolous and was not brought in good faith. Thornburg is not requesting attorney's fees or costs, just that the quiet title portion of this litigation is dismissed either on jurisdictional or frivolous grounds so that it may proceed with foreclosure on the property.

III. This Court Should Bifurcate the Issues if this Motion is Denied

Should this motion be denied, Thornburg requests this court adjudicate the quiet title portion separately from the novel excess proceeds issues so Saticoy does not reap an unjust windfall for delaying litigation. Whereas superpriority tender cases are automatically affirmed (absent extraordinary circumstances not present here), the excess proceeds issues that stem from the interpleader judgments center on complex statutory interpretation, lean on equitable principles, and pose

¹ According to Zillow, Saticoy receives approximately \$6,000-\$7,000 per month in rental income and the property's fair market value is estimated to be about \$5,000,000. https://www.zillow.com/homedetails/34-Innisbrook-Ave-Las-Vegas-NV-89113/7147860_zpid/.

questions this court has yet to see in NRS 116 quiet title litigation. Delaying adjudication financially benefits Saticoy and significantly prejudices Thornburg. It also encourages HOA-sale purchasers to misuse the appellate processes of this court for the sole purpose of delaying a final resolution. This court must deter appeals that address issues this court has answered *over and over* again—like superpriority tender.

DATED this 16th day of July, 2020.

AKERMAN LLP

/s/ Scott R. Lachman

ARIEL E. STERN, ESQ.

Nevada Bar No. 8276

MELANIE D. MORGAN, ESQ.

Nevada Bar No. 8515

SCOTT R. LACHMAN, ESQ.

Nevada Bar No. 12016

1635 Village Center Circle, Suite 200

Las Vegas, NV 89134

*Attorneys for Thornburg Mortgage
Securities Trust 2007-3*

CERTIFICATE OF SERVICE

I certify that I electronically filed on the 16th day of July, 2020, the foregoing **THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S MOTION TO DISMISS APPEAL**, with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[] By placing a true copy enclosed in sealed envelope(s) addressed as follows: Not applicable.

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of AKERMAN LLP

Exhibit “N”

Exhibit “N”

IN THE SUPREME COURT OF NEVADA

SATICOY BAY, LLC 34
INNISBROOK,

Appellant,

vs.

THORNBURG MORTGAGE
SECURITIES TRUST 2007-3;
FRANK TIMPA; MADELAINE
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

Electronically Filed
Aug 03 2020 03:05 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**STIPULATION REGARDING
SURVIVAL OF THE DEED OF
TRUST AND WITHDRAWAL OF
MOTION TO DISMISS APPEAL**

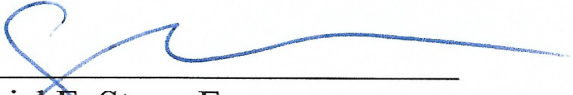
Appellant Saticoy Bay, LLC Series 34 Innisbrook (“**Saticoy**”) and Respondent Thornburg Mortgage Securities Trust 2007-3 (“**Thornburg**”), by and through their respective counsel of record, stipulate and agree as follows:

1. The subject deed of trust survived the homeowners’ association foreclosure sale that is the subject of this appeal and Saticoy is not challenging in this appeal the district court’s ruling on that issue (i.e. the effect of Bank of America, N.A.’s tender).

2. All other assignments of error listed in Saticoy’s Docketing Statement remain the subject of this appeal, including, but not limited to, unwinding the subject homeowners’ association foreclosure on equity grounds.

3. In light of the foregoing, Thornburg withdraws its Motion to Dismiss

Appeal filed on July 16, 2020.

| | |
|---|--|
| <p>ROGER P. CROTEAU & ASSOCIATES, LTD.</p> <p>Dated this 3rd day of August, 2020.</p> <p><u>/s/ Chet A. Glover</u></p> <p>Roger P. Croteau, Esq. Nevada Bar No. 4958 Chet A. Glover, Esq. Nevada Bar No. 10054 Christopher L. Benner, Esq. Nevada Bar No. 8963 2810 West Charleston Blvd., Suite 75 Las Vegas, Nevada 89102 Attorneys for Saticoy</p> | <p>AKERMAN LLP</p> <p>Dated this <u>3</u> day of August, 2020.</p> <p></p> <p>Ariel E. Stern, Esq. Nevada Bar No. 8276 Melanie D. Morgan, Esq. Nevada Bar No. 8515 Scott R. Lachman, Esq. Nevada Bar No. 12016 1635 Village Center Circle, Suite 200 Las Vegas, Nevada 89134 Attorneys for Thornburg</p> |
|---|--|

CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on August 3, 2020, I caused a copy of the **STIPULATION REGARDING SURVIVAL OF THE DEED OF TRUST AND WITHDRAWAL OF MOTION TO DISMISS APPEAL** to be filed and served electronically via the Court's E-Flex System to the following:

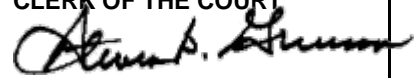
| | |
|---|--|
| David R. Koch Daniel G. Scow Steven B. Scow Brody R. Wight Koch & Scow, LLC 11500 S. Eastern Ave., Suite 210 Henderson, NV 89052 | Drew J. Starbuck Donald H. Williams Williams Starbuck 612 10th St. Las Vegas, NV 89101 |
| Travis D. Akin The Law Office of Travis Akin 8275 S. Eastern Ave., Suite 200 Las Vegas, NV 89123 | Bryan Naddafi Elena Nutenko Avalon Legal Group LLC 9480 S. Eastern Ave., Suite 257 Las Vegas, NV 89123 |
| Thera A. Cooper Melanie D. Morgan Ariel E. Stern Scott R. Lachman Akerman LLP 1635 Village Center Circle, Suite 200 Las Vegas, NV 89134 | Sean L. Anderson Nevada Bar No. 7259 Ryan D. Hastings Nevada Bar No. 12394 Leach Kern Gruchow Anderson Song 2525 Box Canyon Drive Las Vegas, Nevada 89128 |

/s/ Joe Koehle

An Employee of ROGER P. CROTEAU &
ASSOCIATES

Exhibit “O”

Exhibit “O”



1 MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
2 mbohn@bohnlawfirm.com
LAW OFFICES OF
3 MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Ste. 480
4 Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX
5
6 Attorney for plaintiff/counterdefendant
Saticoy Bay LLC Series 34 Innisbrook

7
8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 SATICOY BAY LLC SERIES 34
INNISBROOK,

11 Plaintiff,

12 vs.

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

16 Defendants.

17
18 THORNBURG MORTGAGE SECURITIES
TRUST 2007-3,

19 Counterclaimant,

20 vs.

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

25 Counter-defendants.

26 And All related claims
27
28

CASE NO.: A-14-710161-C
DEPT NO.: XXVI

MOTION FOR SUMMARY JUDGMENT

1 Plaintiff/Counterdefendant Saticoy Bay LLC Series 34 Innisbrook , by and through its attorneys,
2 the Law Offices of Michael F. Bohn, Esq. moves this court for summary judgment against the defendant
3 bank and the granting of quiet title to the plaintiff. This motion is based upon the points and authorities
4 contained herein.

5 DATED this 4th day of May, 2018.

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

8 By: /s/ Adam R. Trippiedi, Esq.
9 Michael F. Bohn, Esq.
10 Adam R. Trippiedi, Esq.
11 2260 Corporate Circle., Ste. 480
12 Henderson, NV 89074
13 Attorney for plaintiff
14 Saticoy Bay LLC Series 34 Innisbrook

12 **NOTICE OF MOTION**

13 TO: Defendants above named; and

14 TO: Their respective counsel of record.

15 YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the
16 above and foregoing Motion on for hearing before the above entitled Court, Department 26, on the
17 **12** day of **JUNE**, 2018 at **9:30A** a.m. or as soon thereafter as counsel can be heard.

18 DATED this 4th day of May, 2018.

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

22 By: /s/ Adam R. Trippiedi, Esq.
23 Michael F. Bohn, Esq.
24 Adam R. Trippiedi, Esq.
25 2260 Corporate Circle., Ste. 480
26 Henderson, NV 89074
27 Attorney for plaintiff
28 Saticoy Bay LLC Series 34 Innisbrook

FACTS

1. Facts regarding the foreclosure sale

Plaintiff Saticoy Bay LLC Series 34 Innisbrook (“plaintiff” or “Saticoy Bay”) is the owner of real property commonly known as 34 Innisbrook Avenue, Las Vegas, Nevada. Plaintiff acquired title by way of foreclosure deed recorded on November 10, 2014. A copy of the foreclosure deed is attached as Exhibit 1. The plaintiff’s title stems from a foreclosure deed arising from a delinquency in assessments due from the former owner to the Sunrise Ridge HOA (“the HOA”) pursuant to NRS Chapter 116. As a result, the interest of each defendant has been extinguished by reason of the foreclosure.

Defendant Thornburg Mortgage Securities Trust 2007-3 (“defendant bank” or “defendant”) is the beneficiary of a deed of trust that was recorded as an encumbrance to the Property on June 12, 2006. Defendant Recontrust Company, N.A. is the trustee of the deed of trust. Defendants Frank and Madelaine Timpa are the former owners of the Property. A copy of the deed of trust is attached as Exhibit 2. An assignment to defendant was recorded on June 9, 2010 as Instrument #201006090003189. The Assignment is attached as Exhibit 3.

On December 21, 2010, the foreclosure agent sent the former owners the pre-lien letter and a copy of the notice of lien. A copy of the letter and the proof of mailing is Exhibit 4.

On August 4, 2011, the foreclosure agent recorded the notice of lien. A copy of the notice of lien is attached as Exhibit 5.

On December 6, 2011, the foreclosure agent recorded a notice of default and election to sell under homeowners association lien. The foreclosure agent also mailed the notice to the former owner and the defendant bank. A copy of the notice of default and the proof of mailing is Exhibit 6.

On September 15, 2014, the foreclosure agent recorded a notice of foreclosure sale. A copy of the notice of foreclosure Sale is attached as Exhibit 7. The foreclosure agent also mailed a copy of the notice of foreclosure sale to the former owner and defendant bank. The proof of mailing is attached as part of Exhibit 8.

The foreclosure agent also posted the notice on the property and in three locations throughout the county. A copy of the affidavit of posting is Exhibit 9. The foreclosure agent also published the notice

1 of sale in the Nevada Legal News. A copy of the affidavit of publication is Exhibit 10.

2 As evidenced by the foreclosure deed attached hereto as Exhibit 1, the public auction was held
3 on November 7, 2014. Plaintiff, being the highest bidder at the sale, became the purchaser of the subject
4 property.

5 These exhibits demonstrate that the defendant bank was on actual notice of the HOA foreclosure
6 and failed to take any action to avoid a sale to its own detriment, eventually resulting in the
7 extinguishment of the deed of trust.

8 **2. Discovery conducted during litigation**

9 During discovery, defendant Red Rock Financial Services, the foreclosure agent, produced their
10 foreclosure file as part of their initial disclosures. Exhibits 4 through 10 were in this initial disclosure
11 of documents.

12 During discovery in this case, the defendant bank was served with interrogatories regarding the
13 plaintiffs status as a bona fide purchaser, and for proof of fraud, oppression or unfairness or irregularities
14 regarding the noticing or the sale of the property. The defendant bank's answers contained objections
15 and were otherwise non-responsive. A copy of the answers to interrogatories is Exhibit 11.

16 In the interrogatories, the plaintiff propounded interrogatory 13:

17 **INTERROGATORY NO. 13:** Identify all facts, information, and evidence of which you
18 are aware that contradicts Plaintiff's assertion that it was a bona fide purchaser for value
at the Association foreclosure sale.

19 The defendant responded:

20 **RESPONSE:** Objection. This request calls for a legal conclusion to which no response is
21 required. This request is subject to the attorney work-product doctrine. Subject to the foregoing
22 objections and without waiving the same, Thornburg intends to produce an expert report regarding
23 Plaintiff's bona fide purchaser status. Moreover, Thornburg contends that Plaintiff was aware of
Thornburg's competing interest in the Property and recorded Deed of Trust prior to sale thus
negating its bond fide purchaser status. Discovery is ongoing. Thornburg reserves the right to
supplement its response as information becomes known or available.

24 The plaintiff propounded interrogatory 15:

25 **INTERROGATORY NO. 15:** Identify all facts, information, and evidence of which you
26 are aware which evidences any fraud, oppression or unfairness in regards to the
association foreclosure sale.

27 The defendant responded:

1 **RESPONSE:** Objection. This request calls for a legal conclusion to which no response is
2 required. This request is subject to the attorney work-product doctrine. This request calls for an
3 incomplete hypothetical. This request is unlimited in time and scope. Subject to the foregoing
4 objections and without waiving the same, the (sic).

5 The plaintiff propounded interrogatory 17:

6 **INTERROGATORY NO. 17:** Identify all facts, information, and evidence of which you
7 are aware which evidences that the association foreclosure sale was not properly
8 conducted.

9 The defendant responded:

10 **RESPONSE:** See response to Interrogatory No. 16.

11 The plaintiff propounded interrogatory 18:

12 **INTERROGATORY NO. 18:** Identify all facts, information, and evidence of which you
13 are aware which evidences that the association foreclosure sale was not properly noticed.

14 The defendant responded:

15 **RESPONSE:** Objection. This request calls for a legal conclusion to which no response is
16 required. This request is vague and ambiguous as to the term “properly noticed.” This request
17 is overly broad and unduly burdensome. Subject to the foregoing objections and without waiving
18 the same, Thornburg is currently unaware of whether the foreclosure notices were properly mailed
19 or received. Thornburg also contends the foreclosure notices contained improper super-priority
20 lien amounts, thus the sale was at a minimum, subject to Thornburg’s first deed of trust.
21 Discovery is ongoing, Thornburg reserves the right to supplement its response as information
22 becomes known or available.

23 The defendant has shown no facts which the plaintiff could have been on notice of to deprive it
24 of bona fide purchaser status. The defendant has also failed to identify any fraud, oppression or
25 unfairness. For these reasons, the court should grant summary judgment granting quiet title and
26 declaratory relief to the plaintiff.

27 **POINTS AND AUTHORITIES**

28 **A. The new Shadow Canyon case**

The new case of Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133
Nev. Adv. Op. 91 (Nov. 22, 2017) clarified a large numbers of issues regarding real property foreclosure
sales in Nevada.

1. The commercial reasonableness standard from Article 9 of the UCC is not applicable to real
property foreclosures.

1 2. The court re-affirmed what it said in Shadow Wood, that price alone, however gross, is not
2 sufficient grounds to set aside a foreclosure sale, but there must be some element of fraud, oppression or
3 unfairness as accounts for and brings about the inadequate price.”

4 3. The 20% standard contained in the Restatement (Third) of Property: Mortgages §8.3 (1997)
5 was outright rejected by the court.

6 4. The bank has the burden to show that the sale should be set aside in light of the purchaser’s
7 status as record title holder.

8 5. There is a presumption in favor of the record title holder.

9 6. There is the statutory presumption that the foreclosure sale complied with the provisions of
10 NRS Chapter 116, citing to NRS 47.250(16) providing for a rebuttable presumption “[that] the law has
11 been obeyed”) and NRS 116.31166, providing for the conclusiveness of the deed containing the recitals
12 of the required steps for a valid sale.

13 7. There must be “actual” evidence of fraud, unfairness or oppression.

14 8. Fines may be included in an assessment lien and foreclosed upon

15 9. The fact that the notice of lien stated the current amount due rather than the estimated amount
16 as of the scheduled sale date does not invalidate the sale when there was no evidence in the record to
17 show that the bank was prejudiced by the error.

18 10. Post foreclosure activities do not affect the validity of the sale.

19 11. The class of persons who signed the recorded notices is very broad.

20 **B. General principles of law and equity apply to sales under NRS Chapter 116**

21 NRS 116.1108 provides:

22 **Supplemental general principles of law applicable.** The principles of **law and equity**,
23 including the law of corporations and any other form of organization authorized by law
24 of this State, the law of unincorporated associations, **the law of real property**, and the
25 law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud,
misrepresentation, duress, coercion, mistake, receivership, substantial performance, or
to the extent inconsistent with this chapter. (emphasis added)

26 The principles of equity and real property are applicable to this foreclosure sale, and preclude
27
28

1 relief to the defendant.

2 **C. Equitable relief is not available because the defendant was on notice of the sale and failed to**
3 **take any steps to protect its interests.**

4 The court in Shadow Wood, noted that equitable relief is not available to a party that was on
5 notice but failed to act. Footnote 7 to the decision states:

6 Consideration of harm to potentially innocent third parties is especially pertinent here
7 where NYCB did not use the legal remedies available to it to prevent the property from
8 being sold to a third party, such as by seeking a temporary restraining order and
9 preliminary injunction and filing a lis pendens on the property. *See* NRS 14.010; NRS
10 40.060. *Cf. Barkley's Appeal, Bentley's Estate*, 2 Monag. 274, 277 (Pa.1888) (“**In the case**
11 **before us, we can see no way of giving the petitioner the equitable relief she asks**
12 **without doing great injustice to other innocent parties who would not have been in**
13 **a position to be injured by such a decree as she asks if she had applied for relief at**
14 **an earlier day.”). (emphasis added)**

15 The Shadow Wood court also cited the case of Nussbaumer v. Superior Court in & for Yuma City,
16 107 Ariz. 504, 489 P.2d 843, 846 (Ariz. 1971) “Where the complaining party has access to all the facts
17 surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his
18 act, equity should normally not interfere, especially where the rights of third parties might be prejudiced
19 thereby,”

20 Also in Shadow Wood, the court cited several cases refusing to grant equitable relief where the
21 rights of third persons are affected, invoking the bona fide purchaser doctrine.

22 When sitting in equity, however, courts must consider the entirety of the circumstances
23 that bear upon the equities....
24 This includes considering the status and actions of all parties involved, including whether
25 an innocent party may be harmed by granting the desired relief.⁷ *Smith v. United States*,
26 373 F.2d 419, 424 (4th Cir.1966) (“Equitable relief will not be granted to the possible
27 detriment of innocent third parties.”); *see also In re Vlasek*, 325 F.3d 955, 963 (7th
28 Cir.2003) (“[I]t is an age-old principle that in formulating equitable relief a court must
consider the effects of the relief on innocent third parties.”); *Riganti v. McElhinney*, 248
Cal.App.2d 116, 56 Cal.Rptr. 195, 199 (Ct.App.1967) (“[E]quitable relief should not be
granted where it would work a gross injustice upon innocent third parties.”).

29 The defendant received the foreclosure notices and failed to act, and the property was acquired
30 by a third party. The defendant is not entitled to equitable relief.

31 **D. Equitable relief is not available because there is an adequate remedy at law**

1 The common law rule is that there is no equity jurisdiction when a party has available to itself an
2 adequate remedy at law. See Las Vegas Valley Water District v. Curtis Park Manor Water Users
3 Association, 98 Nev. 275, 646 P.2d 549 (1982) “The district court was without authority to grant
4 equitable relief since an adequate remedy exists at law.”

5 In Washoe County v. City of Reno 77 Nev. 152, 360 P.2d 602 (1961), the court held that the fact
6 that the judgment may not be collectable is not an issue to be considered. The court stated:

7 During oral argument, counsel for respondents suggested that an action at law would not
8 be adequate because it could not be enforced by a writ of execution against a county fund.
9 Whether this be true or not, it is hardly to be supposed that an execution would be
10 necessary in the event a judgment at law were obtained against the county in this type of
11 case any more than a contempt proceeding would be required in the event a peremptory
12 writ of mandamus were issued. **In answer to this suggestion however it is necessary to
say only that our concern is with the existence of a remedy and not whether it will
be unproductive in this particular case,** Hughes v. Newcastle Mutual Insurance Co., 13
U.C.Q.B. (Ont.) 153, or inconvenient, Gulf Research & Development Co. v. Harrison, 9
Cir., 185 F.2d 457, or ineffectual, United States ex rel. Crawford v. Addison, 22 How.
174, 63 U.S. 174, 16 L.Ed. 304.

13 In Stewart v. Manget, 132 Fla. 498, 181 So. 370, in affirming an order dismissing a bill
14 in equity on the ground that the plaintiff had an adequate remedy at law, the Florida
Supreme Court cited with approval the following language from Tampa & G. C. R. Co.
v. Mulhern, 73 Fla. 146, 74 So. 297, 299:

15 ‘The inadequacy of a remedy at law to produce money is not the test of the
16 applicability of the rule. **All remedies, whether at law or in equity,
frequently fail to do that; and to make that the test of equity
jurisdiction would be substituting the result of a proceeding for the
proceeding which is invoked to produce the result. The true test is,
17 could a judgment be obtained in a proceeding at law, and not, would
the judgment procure pecuniary compensation.’**

18
19 (Emphasis added)

20
21 In the case of Moeller v. Lien, 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994), the respondent
22 allowed a trustee’s sale to go forward even though it had available cash deposits to pay off the loan. Id.
23 at 828. The trial court set aside the sale because “[t]he value of the property was four times the amount
24 of the debt/sales price.” Id. at 829. The Court of Appeals reversed the trial court’s order and stated:

25 **Thus as a general rule, a trustor has no right to set aside a trustee’s deed as against**
26 **a bona fide purchaser for value by attacking the validity of the sale.** (Homestead
27 Savings v. Damiento, supra, 230 Cal. App. 3d at p. 436.) The conclusive presumption
precludes an attack by the trustor on a trustee’s sale to a bona fide purchaser **even though**
28 **there may have been a failure to comply with some required procedure which**

1 **deprived the trustor of his right of reinstatement or redemption.** (4 Miller & Starr,
2 supra, § 9:141, p. 463; cf. Homestead v. Damiento, supra, 230 Cal. App. 3d at p. 436.)
3 The conclusive presumption precludes an attack by the trustor on the trustee's sale to a
4 bona fide purchaser even where the trustee wrongfully rejected a proper tender of
reinstatement by the trustor. **Where the trustor is precluded from suing to set aside
the foreclosure sale, the trustor may recover damages from the trustee.** (Munger v.
Moore (1970) 11 Cal. App. 3d 1, 9, 11 [89 Cal. Rptr. 323].)

5 Id. at 831-832. (emphasis added)

6 Under the Shadow Wood factors, the defendant must show there is some defect with the sales
7 process to justify equitable relief, and if the plaintiff is a bona fide purchaser, the bank's remedy is against
8 the foreclosure agent.

9 There has been no defect with the sales process, however, even assuming there was some defect
10 in the sale (which the plaintiff denies) the defendant has no remedies against plaintiff because any
11 damages which the defendant may have sustained as a result of any alleged wrongful foreclosure can be
12 compensated with money damages against the foreclosure agent.

13 The Restatement (Third) of Prop.: Mortgages § 8.3, Comment (b) recognizes that where the
14 property has been purchased by a bona fide purchaser, "the real estate is unavailable" and that "price
15 inadequacy" may be raised in a suit against the foreclosing mortgagee for damages, stating:

16 On the other hand, where foreclosure is by power of sale, judicial confirmation of the sale
17 is usually not required and the issue of price inadequacy will therefore arise only if the
18 party attacking the sale files an independent judicial action. Typically this will be an
19 action to set aside the sale; it may be brought by the mortgagor, junior lienholders, or the
20 holders of other junior interests who are prejudiced by the sale. **If the real estate is**
21 **unavailable because title has been acquired by a bona fide purchaser,** the issues of
price inadequacy may be raised by the mortgagor or a junior interest holder in a suit
against the foreclosing mortgagee for damages for wrongful foreclosure. **This latter**
remedy, however, is not available based on gross price inadequacy alone. In addition,
the mortgagee must be responsible for a defect in the foreclosure process of the type
described in Comment c of this section. (emphasis added)

22 Shadow Wood, consistent with this stated:

23 "The decisions are uniform that the bona fide purchaser of a legal title is not affected by
24 any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has
25 no notice, actual or constructive." citing Moore v. De Bernardi, 47 Nev. 33, 54, 220 P.
544, 547 (1923)

26 There is no defect with the sales process and fore, if the purchaser is a bona fide purchaser, the
27 sale cannot be set aside. The bank, however, is not without a remedy, providing, of course, that there was

1 a prejudicial defect with the sale (which has not been shown here). It has an claim for money damages
2 against the foreclosure agent for any defect in the sale process.

3 **E. Equitable relief is not available because of the bona fide purchaser doctrine**

4 Miller & Starr, California Real Estate §10.51 (4th Ed. 2016) provides:

5 **Evidence required.** The person claiming to be a bona fide purchaser satisfies the burden
6 of proof when it is proved that he or she paid value for the title or lien. It is then
7 presumed that the lien or interest was received in good faith and without notice, and the
8 burden shifts to the other person to prove that the alleged bona fide purchaser had notice.

...

9 In a commentary to this section, the treatise states:

10 As a practical matter, it makes little difference who has the burden of proof. The alleged
11 bona fide purchaser usually testifies that he or she did not have notice, and the other party
12 must prove that he or she did.

13 Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon 133 Nev. Adv. Op. 91
14 (2017) clarified that the bank has the burden to show that the sale should be set aside in light of the
15 purchaser's status as record title holder, and there is a presumption in favor of the record title holder.

16 In Shadow Wood Homeowners Association v. New York Community Bank, 132 Nev. Adv. Op
17 5, 366 P.3d 1105 (2016) the court stated:

18 The question remains whether NYCB demonstrated sufficient grounds to justify the
19 district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for
20 summary judgment.

21 Similarly, in First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 71 Cal.
22 Rptr. 2d 295 (1998), the court recognized that where a party is seeking equitable relief, the burden is on
23 the party seeking equitable relief to allege and prove that the person holding legal title is not a bona fide
24 purchaser:

25 **That Alliance had knowledge of First Fidelity's equitable claim for reinstatement of
26 its reconveyed deed of trust was an element of First Fidelity's case.** "The general rule
27 places the burden of proof upon a person claiming bona fide purchaser status to present
28 evidence that he or she acquired interest in the property without notice of the prior
interest. (Bell v. Pleasant (1904) 145 Cal. 410, 413-414, 78 P. 957; Alcorn v. Buschke
(1901) 133 Cal. 655, 657-658, 66 P. 15; Hodges v. Lochhead (1963) 217 Cal. App.2d 199,
203, 31 Cal. Rptr. 879; 2 Miller & Starr, Current Law of Cal. Real Estate [1977] § 11:28,
p. 51.) ... [¶] If the prior party claims an equitable rather than a legal title, however, the
burden of proof is upon the person asserting that title. (Bell v. Pleasant, *supra*, 145 Cal.
410, 414-415, 78 P. 957; Garber v. Gianella (1893) 98 Cal. 527, 529-530, 33 P. 458; 2
Miller & Starr, Current Law of Cal. Real Estate, *supra*, § 11:28, pp. 52-53.)" (Gates

1 Rubber Co. v. Ulman (1989) 214 Cal. App. 3d 356, 366, fn. 6, 262 Cal. Rptr. 630.) (2b)
2 **Showing that Alliance was not an innocent purchaser for value was hence an element**
3 **of First Fidelity's claim.** (Firato v. Tuttle, *supra*, 48 Cal.2d 136, 138, 308 P.2d 333.)
(emphasis added)

4 60 Cal. App. 4th at 1442, 71 Cal. Rptr. at 301.

5 The defendant has the burden to prove a defect with the sale, and that the purchaser knew of the
6 defect at or before the time of the sale. The defendant has failed in both counts.

7 The concept of bona fide purchaser has more application in voluntary sales in which title is
8 transferred by deed. In these cases, a purchaser takes subject to any matters which are recorded against
9 the property. However, in foreclosure cases, the bona fide purchaser doctrine rarely comes into play
10 because all interests on the property which are junior to the lien being foreclosed upon are extinguished.
11 This is even more so with an HOA foreclosure because it is senior to all other liens other than prior
12 existing debts and taxes are extinguished by the foreclosure. In these situations, the purchaser would be
13 precluded from bona fide purchaser status in HOA foreclosure cases only if there was some irregularity
14 in the sale AND the purchaser knew of the irregularity.

15 The treatise 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhardt & R. Wilson Freyermuth,
16 *Real Estate Finance Law* (6th ed. 2014) was cited in the Shadow Wood decision.

17 Section 7.21 of this treatise is entitled “defective power of sale foreclosure-“void-
18 voidable” distinction. The treatise explains there are three types of defects which may affect the validity
19 of foreclosure sales, void, voidable, or inconsequential.

20 The treatise then explains:

21 Most defects render the foreclosure voidable and not void. When a voidable error occurs,
22 bare legal title passes to the sale purchaser, subject to the redemption rights of those
23 injured by the defective foreclosure. Typically, a voidable error is “an irregularity in the
24 execution of a foreclosure sale” and must be “substantial or result in a probably
25 unfairness.”

26 If the defect only renders the sale voidable, the redemption rights can be cut off if a bona
27 fide purchase for value acquires the land. When this occurs, an action for damages against
28 the foreclosing mortgagee or trustee may be the only remaining remedy.

29 The treatise then goes on to explain who is a bona fide purchaser in a foreclosure context:

30 If the defective sale is only voidable, who is a bona fide purchaser? A mortgagee

1 purchaser should rarely, if every, qualify as a bona fide purchaser, because the mortgagee
2 or its attorney normally manages the power of sale foreclosure and should be responsible
3 for defects. The result should be the same when a deed of trust is foreclosed. Although
4 the trustee, rather than the lender, normally is in charge of the proceedings, the court
5 probably will treat the trustee as the lender's agent for purposes of determining BFP
6 status. **If the sale purchaser paid value and is unrelated to the mortgagee, he should
take free of voidable defects if : (a) he has no actual knowledge of he defects; (b) he
is not on reasonable notice from recorded instruments; and © the defects are such
of the defects....**

(emphasis added, footnotes omitted)

7
8 The defendant answered an interrogatory about the plaintiff's status as bona fide purchaser. The
9 plaintiff propounded interrogatory 13:

10 **INTERROGATORY NO. 13:** Identify all facts, information, and evidence of which you
11 are aware that contradicts Plaintiff's assertion that it was a bona fide purchaser for value
at the Association foreclosure sale.

12 The defendant responded:

13 **RESPONSE:** Objection. This request calls for a legal conclusion to which no response is
14 required. This request is subject to the attorney work-product doctrine. Subject to the
15 foregoing objections and without waiving the same, Thornburg intends to produce an
16 expert report regarding Plaintiff's bona fide purchaser status. Moreover, Thornburg
17 contends that Plaintiff was aware of Thornburg's competing interest in the Property and
recorded Deed of Trust prior to sale thus negating its bond fide purchaser status. Discovery
is ongoing. Thornburg reserves the right to supplement its response as information
becomes known or available.

18 The defendant's answers to interrogatories regarding the issue of bona fide purchaser do not allege
19 any defect in the sales process or that the purchaser knew of the defect in the sales process.

20 From the three factors listed here, the purchaser would be a bona fide purchaser. The purchaser's
21 representative, Eddie Haddad's affidavit is attached. It states in part:

22 6. Prior to and at the time of the foreclosure sale, there was nothing recorded in
23 the public record to put me on notice of any claims or notices that any portion of the lien
had been paid.

24 7. Prior to and at the time of the foreclosure sale, there is no way for myself or any
25 other potential bidder at the foreclosure sale to research if the notices were sent to the
26 proper parties at the proper address. I, and other potential bidders are forced to rely only
27 on the professional foreclosure agent to have obtained a trustee's sale guarantee issued by
28 a local title and escrow company and to serve the notices upon the parties who are entitled
to notice.

1 8. As a result of the limited information available to myself and other potential
2 bidders, I, on behalf of the plaintiff, am a bona fide purchaser of the property, for
3 value, without notice of any claims on the title to the property or any alleged defects in
4 the sale itself.

5 The mailing of notices, the addresses to where they are sent, or even an attempted tender of
6 the super priority lien are not matters to be found in the public record.

7 Additionally, the defendant's answers to interrogatories regarding the issue of bona fide
8 purchaser do not allege any defect in the sales process or that the purchaser knew of the defect in the
9 sales process. The court should therefore find that the plaintiff purchaser is a bona fide purchaser, and
10 its title should not be affected.

11 The answers set forth two basis to claim that the plaintiff is not a bona fide purchaser. The
12 price paid and his knowledge of the existing deed of trust. Neither of these are appropriate grounds.
13 The court in Shadow Wood specifically stated:

14 Although, as mentioned, NYCB might believe that Gogo Way purchased the property
15 for an amount lower than the property's actual worth, that Gogo Way paid "valuable
16 consideration" cannot be contested. *Fair v. Howard*, 6 Nev. 304, 308 (1871) ("The
17 question is not whether the consideration is adequate, but whether it is valuable."); see
18 also *Poole v. Watts*, 139 Wash.App. 1018 (2007) (unpublished disposition) (stating
19 that the fact that the foreclosure sale purchaser purchased the property for a "low
20 price" did not in itself put the purchaser on notice that anything was amiss with the
21 sale).

22 The fact that the plaintiff knew of the trust deed is of no consequence. Under 116.3116 as
23 interpreted by the SFR case, the foreclosure sale extinguishes the deed of trust. It does not survive
24 simply because it was recorded and known to exist to the world.

25 Shadow Wood discusses bona fide purchaser in detail. The many points contained in the
26 decision can be summarized as:

- 27 1. A bona fide purchase is without notice of any **prior equity**.
- 28 2. "The decisions are uniform" that the title of a bona fide purchaser is not affected by any
matter of which he has no notice.
3. The bona fide purchaser must pay **valuable** consideration, not "adequate" consideration.
4. The fact that the foreclosure price may be "low" is not sufficient to put the purchaser on

1 notice of any alleged defects with the sale.

2 5. The fact that the court retains equitable power to void the sale does deprive the purchaser
3 of bona fide purchaser status.

4 6. The time to determine the status of bona fide purchaser is at the time of the sale.

5 The defendant has failed to produce any evidence or basis during discovery to deprive the
6 plaintiff of its status as a bona fide purchaser

7 **F. The failure of the defendant to protect its interest before the sale precludes relief in its favor**

8 The defendant created the situation by letting the property go to sale without doing anything to
9 satisfy the lien or stop the sale, and permitted an innocent third party purchase the property. The
10 Supreme Court in both SFR and Shadow Wood noted that the defendant banks were responsible for
11 their own damages.

12 In SFR Investments Pool 1 v. U.S. Bank 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014) the
13 court said not once, but twice, that the price paid at the foreclosure sale was not an issue because the
14 bank could simply have paid the super priority amount to preserve its interest in the property. The
15 Court stated at page 414:

16 U.S. Bank's final objection is that it makes little sense and is unfair to allow a
17 relatively nominal lien—nine months of HOA dues—to extinguish a first deed of trust
18 securing hundreds of thousands of dollars of debt. But as a junior lienholder, U.S.
19 Bank could have paid off the SHHOA lien to avert loss of its security; it also could
20 have established an escrow for SHHOA assessments to avoid having to use its own
funds to pay delinquent dues. 1982 UCIOA § 3116 cmt. 1; 1994 & 2008 UCIOA §
3–116 cmt. 2. **The inequity U.S. Bank decries is thus of its own making and not a
reason to give NRS 116.3116(2) a singular reading at odds with its text and the
interpretation given it by the authors and editors of the UCIOA.** (emphasis added)

21 The Court also stated at page 418:

22 U.S. Bank further complains about the content of the notice it received. It argues that
23 due process requires specific notice indicating the amount of the superpriority piece of
the lien and explaining how the beneficiary of the first deed of trust can prevent the
24 superpriority foreclosure sale. But it appears from the record that specific lien amounts
were stated in the notices, ranging from \$1,149.24 when the notice of delinquency was
25 recorded to \$4,542.06 when the notice of sale was sent. The notices went to the
homeowner and other junior lienholders, not just U.S. Bank, so it was appropriate to
26 state the total amount of the lien. As U.S. Bank argues elsewhere, dues will typically
comprise most, perhaps even all, of the HOA lien. *See supra* note 3. **And from what
27 little the record contains, nothing appears to have stopped U.S. Bank from
determining the precise superpriority amount in advance of the sale or paying the**

1 **entire amount and requesting a refund of the balance.** *Cf. In re Medaglia*, 52 F.3d
2 451, 455 (2d Cir.1995) (“[I]t is well established that due process is not offended by
3 requiring a person with actual, timely knowledge of an event that may affect a right to
exercise due diligence and take necessary steps to preserve that right.”). (Emphasis
added)

4 In the case of *Shadow Wood Homeowners Association v. New York Community Bank*, 132
5 Nev. Ad. Op. 5, 366 P.3d 1105 (2016), the Supreme Court stated other ways that a bank could
6 protect itself.

7 Against these inconsistencies, however, must be weighed NYCB's (in)actions. The
8 NOS was recorded on January 27, 2012, and the sale did not occur until February 22,
9 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount,
yet it did not attend the sale, request arbitration to determine the amount owed, or seek
10 to enjoin the sale pending judicial determination of the amount owed. The NOS
included a warning as required by NRS 116.311635(3)(b):

11

12 366 P.3d at 1114

13 The defendant had remedies available to it to protect its interests before the foreclosure sale
14 and failed to avail itself of these remedies. It cannot now seek relief from this court.

15 **G. Presumptions**

16 Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. Adv. Op. 91
17 (Nov. 22, 2017) recognized the presumptive validity of the foreclosure sales, citing the statutory
18 disputable presumption that “the law has been obeyed.” in NRS 47.250(16) and the recitals in the
19 deed are sufficient and conclusive proof that the required notices were complied with. NRS
20 116.31166.

21 The purpose of the presumption of validity and the public policy of finality is to encourage
22 prospective purchasers to participate in the foreclosure process and to maximize the prices paid at
23 foreclosure sale. See Moeller v. Lien 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994).

24 **H. Fraud, oppression or unfairness and price paid**

25 The case of Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev.
26 Adv. Op. 91 (Nov. 22, 2017) re-affirmed the standard to set aside a sale is in inadequate sales price,
27 inadequacy of price, and additional proof of some fraud, oppression or unfairness **that accounts for**

1 **and brings about the inadequacy of price.** The 20% rule of the Restatement was specifically
2 rejected.

3 The bank's answers to interrogatories do not set forth any evidence or contentions of any
4 defect in the sale that would constitute fraud, oppression or unfairness.

5 **I. The Trust Deed has been Extinguished.**

6 In its decision in the case of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv.
7 Op. 75, 334 P.3d 408 (2014), the Nevada Supreme Court stated:

8 NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual
9 homeowner's property for up to nine months of unpaid HOA dues. With limited exceptions,
10 this lien is "prior to all other liens and encumbrances" on the homeowner's property, even a
11 first deed of trust recorded before the dues became delinquent. NRS 116.3116(2). We must
12 decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of
13 trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both
14 questions in the affirmative and therefore reverse.

15 334 P.3d at 409.

16 At the conclusion of its opinion, the Nevada Supreme Court stated:

17 NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which
18 will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial
19 foreclosure of HOA liens, and because SFR's complaint alleges that proper notices
20 were sent and received, we reverse the district court's order of dismissal. In view of
21 this holding, we vacate the order denying preliminary injunctive relief and remand for
22 further proceedings consistent with this opinion.

23 334 P.3d at 419.

24 Because the facts in the present case are substantially the same as the facts in SFR
25 Investments Pool 1, LLC v. U.S. Bank, N.A., this Honorable Court should reach the same conclusion
26 that the nonjudicial foreclosure arising from the HOA's super priority lien extinguished the deed of
27 trust held by the plaintiff bank on the date of sale. As a result, this Court should rule that the deed of
28 trust held by defendant was extinguished by the HOA's foreclosure sale.

29 **J. Defendant's attempted tender does not affect Saticoy Bay's title.**

30 Defendant's Answer and Counterclaims, filed on April 10, 2015, on page 10, paragraph 31,
31 states that "Prior to the HOA Sale, THORNBURG and its predecessors tendered payment of 9 months
32 of assessments to HOA and its agents, thus satisfying the super-priority lien prior to HOA's
33

1 foreclosure of the remaining lien amount.”

2 However, defendant’s Answer and Counterclaims contains no allegations that defendant did
3 anything to keep the remaining amount of the super-priority amount “good.”

4 The concept of tender is discussed in the Restatement (Third) of Prop.: Mortgages §6.4 and
5 persuasive California case law. The rules regarding payments made by a person not primarily liable
6 on the debt are as follows:

7 **§ 6.4 Redemption from Mortgage by Performance or Tender**

8 ...
9 (e) A performance in full of the obligation secured by a mortgage, or a
10 performance that is accepted by the mortgagee in lieu of payment in full, **by**
11 **one who holds an interest in the real estate subordinate to the mortgage**
12 **but is not primarily responsible for performance, does not extinguish the**
13 **mortgage**, but redeems the interest of the person performing from the
14 mortgage and entitles the person performing to subrogation to the mortgage
15 under the principles of §7.6. Such performance may not be made until the
16 obligation secured by the mortgage is due, but may be made at or after the time
17 the obligation is due but prior to foreclosure.

18 (f) Upon receipt of performance as provided in Subsection (e), the mortgagee has a
19 duty to provide to the person performing, within a reasonable time, an
20 appropriate assignment of the mortgage in recordable form. If the mortgagee
21 fails to do so upon reasonable request, the person performing may obtain
22 judicial relief ordering the mortgage assigned and, unless the mortgagee acted
23 in good faith in rejecting the request, awarding against the mortgagee any
24 damages resulting from the delay.

25 (g) An **unconditional tender of performance in full by a person described in**
26 **Subsection (e)**, even if rejected by the mortgagee, **if kept good** has the effect
27 of performance under Subsections (e) and (f) above. (emphasis added)

28 A photocopy of this section from the Restatement is attached as Exhibit 12.

 At the threat of foreclosure by a senior lien, a junior lienor is entitled, even without express
contractual authority, to reinstate the loan by making a payment sufficient to cure the default or to pay
off the senior lien and become subrogated to the rights of the senior lienholder as against the owner of
the property. See Restatement (Third) of Prop.: Mortgages §7.6; American Sterling Bank v. Johnny
Management LV, Inc., 126 Nev. 423, 245 P.3d 535 (2010); Houston v. Bank of America 119 Nev.
485, 78 P.3d 71 (2003).

 The Restatement (Third) of Prop.: Mortgages §6.4 , comment a, explains the distinction
between payment or tender by someone primarily liable for the debt, and payment or tender by a party

1 seeking to protect its interest in the property. It states in part:

2 Equitable redemption is ultimately accomplished by performance in full of the
3 obligation secured by the mortgage. **However, redemption has two quite distinct**
4 **results, depending on whether the performance is made by a person who is**
5 **primarily responsible for payment of the mortgage obligation, or by someone else**
6 **who holds an interest in the land subordinate to the mortgage.** In the first of these
7 situations, the mortgage is simply extinguished, as provided in Subsection (a) of this
8 section. **In the second, the mortgage is not extinguished, but by virtue of**
9 **Subsection (e) is assigned by operation of law to the payor under the doctrine of**
10 **subrogation;** see §7.6. Subrogation does not occur in the first situation, since one
11 who is primarily responsible for payment of a debt cannot have subrogation by
12 performing that duty; see §7.6, Comment b. (emphasis added)

13 Subrogation is a device adopted by equity which applies in a great variety of cases and is
14 broad enough to include every instance in which one party pays a debt for which another is primarily
15 liable, and which in equity and good conscience should have been discharged by the latter.

16 Laffranchini v. Clark 39 Nev. 48, 153 P. 250 (1915).

17 Comment g to §6.4 of the Restatement further explains the significance when payment is
18 made by a subordinate lienholder:

19 The second distinction, mentioned above, is that redemption by a person who is not
20 primarily responsible for payment of the debt **does not extinguish the mortgage, but**
21 **rather assigns both the mortgage and the debt to the payor by operation of law**
22 **under the doctrine of subrogation;** See §7.6 (emphasis added)

23 Paragraph F on page 2 of 4 of the Planned Unit Development Rider to the deed of trust
(Exhibit 2 attached) states:

24 If Borrower does not pay PUD dues and assessments when due, then Lender may pay
25 them. Any amounts disbursed by Lender under this paragraph F shall become
26 additional debt of Borrower secured by the Security Instrument. Unless Borrower and
27 Lender agree to other terms of payment, these amounts shall bear interest from the date
28 of disbursement at the Note rate and shall be payable, with interest, upon notice from
Lender to Borrower requesting payment.

This language is consistent with Restatement (Third) of Prop.: Mortgages §6.4(e) and (f) that
treat any payment offered by plaintiff as an assignment.

**K. After the tender was sent to the foreclosure agent, plaintiff did nothing
to keep the tender good.**

As set forth above, Restatement (Third) of Prop.: Mortgages §6.4 (g) provides that where an
unconditional tender is rejected by the mortgagee, the tender must be “kept good” in order to have

1 “the effect of performance under Subsections (e) and (f) above.”

2 Comment d to section 6.4 further explains:

3 *d. Tender of payment rejected by mortgagee.* Under Subsection ©, a mortgage
4 is extinguished by mere *tender* of full payment **by the person primarily responsible**
5 **for payment**, even if the mortgagee rejects it. **The tender must be kept good in the**
6 **sense that the person making the tender must continue at all times to be ready,**
7 **willing, and able to make the payment.** If the payor brings an action to have the
8 mortgage canceled, the money must be paid into the court to keep the tender good.

9 **The tender must be unconditional.** However, the payor’s demand that the
10 mortgagee return the mortgagor’s promissory note, mark it “paid,” or execute a
11 discharge of the mortgage is not a condition of the sort that will invalidate the tender.
12 See Illustration 5.

13 The rule extinguishing the mortgage when a tender is rejected has only limited
14 modern significance. The reason is that mortgages are virtually always recorded, and
15 **the payor derives little benefit, merely from the theoretical extinction of the**
16 **mortgage if it is in fact still present, and apparently undischarged in the public**
17 **records. . . .**

18 Nonetheless, the tender of full payment *per se* relieves the real estate of the
19 mortgage lien. Tender is significant in at least two ways. First, the tender stops the
20 accrual of interest, late fees, and any other charges that might otherwise result from the
21 passage of additional time. **Second, under Subsection (b) the mortgagee who**
22 **wrongfully refuses a tender may be held liable for damages flowing from any**
23 **unreasonable delay that results in clearing the mortgage from the real estate’s**
24 **title.** See Illustrations 5 and 6. (emphasis added)

25 The last section from this comment shows that defendant’s remedy, if any, is for money
26 damages against the party that wrongfully refused the tender if the tender was valid. Because this
27 claim for money damages is an adequate remedy at law, it precludes the court from invoking its
28 equitable powers to affect the title of the bona fide purchaser.

Illustration 5 to §6.4 of the Restatement contains an example of how to keep a tender good:

5. Mortgagor is indebted to Mortgagee for the principal sum of \$100,000,
secured by a mortgage on Blackacre. Mortgagor sends a check to Mortgagee for
\$100,000, purporting to pay the debt, but Mortgagee refuses to accept the check or
execute a discharge of the mortgage. Mortgagor then deposits \$100,000 in an escrow
account established for the purpose of paying the debt, and informs Mortgagee that the
funds are available upon Mortgagee’s request and execution of a document discharging
the mortgage. Mortgagor’s tender is effective, continuing, and conditional. The
mortgage is extinguished, and no further interest will accrue on the debt.

The statements in comment d relate only to a tender made by “the person primarily
responsible for payment.” Defendant has produced no evidence that the former owner ever made

1 such a payment.

2 The Nevada Supreme Court has previously adopted the position that a tender must be “kept
3 good” in several cases.

4 In the case of Rhodes v. O’Farrell 2 Nev. 60 (1866), Respondent Rhodes attempted to pay his
5 property taxes to the Storey County tax collector in legal tender notes. The tax collector refused the
6 tender and insisted in payment in gold coin. The court stated:

7 Respondent ought not to be restrained from selling **unless the tender is kept good.**

8 As it does not appear from the transcript whether that has been done or not, the court
9 will retain this case until that is ascertained. Upon the respondent producing
10 satisfactory evidence, either by receipt of appellant, or by the certificate of the clerk,
11 **that he has either paid the money tendered to the appellant, or that he has**
12 **deposited it in court subject to the disposal of the appellant,** the judgment of the
13 court below will be affirmed, with costs.

14 The case of State v. Central Pacific Railroad 21 Nev. 247, 30 P. 686 (1892) also dealt with the
15 payment of property taxes. The court stated:

16 *Tender.* In our judgment, the tender of the taxes to the treasurer as ex officio tax
17 receiver, and their subsequent payment to the district attorney, were sufficient to avoid
18 the penalties. The defendant, at the proper time, tendered all the taxes due upon all its
19 property, except land. We held upon the former appeal that it had a right to make such
20 payment, and need not tender the full amount due upon the entire assessment, which
21 included other subdivisions of property. The tender was doubtless refused upon the
22 theory that the defendant must pay upon all or none. ...The money being promptly paid
23 to the district attorney when demanded by him, **it must be presumed that the tender**
24 **was kept good.** The judgment and orders overruling motions for new trial are
25 affirmed.

26 The case of State v. Ernst 26 Nev. 113, 65 P.7 (1901) also dealt with the payment of taxes.
27 The court stated:

28 It appears from the record that the appellants Ernst & Esser have tendered (and kept
good their tender) the amount of taxes due upon the property assessed to them, and that
a retrial of the case will not be necessary.

**L. To be effective against plaintiff, defendant was required to record the claim that the
party had tendered the amount of the HOA’s superpriority lien.**

Because the alleged tender creates an assignment of an interest in real property, it must be
recorded to be effective as to subsequent purchasers.

NRS 116.1108 provides:

1 **Supplemental general principles of law applicable.** The principles of law and
2 equity, including the law of corporations and any other form of organization
3 authorized by law of this State, the law of unincorporated associations, **the law of real**
4 **property**, and the law relative to capacity to contract, principal and agent, eminent
5 domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership,
6 substantial performance, or other validating or invalidating cause supplement the
7 provisions of this chapter, except to the extent inconsistent with this chapter.
8 (emphasis added)

9 Nevada law requires that interests in real property must be recorded. An unrecorded interest
10 in real property is void against a subsequent purchaser if the subsequent purchaser's interest is first
11 duly recorded. Tae-Si Kim v. Kearney, 838 F. Supp. 2d 1077, 1087-1088 (D. Nev. 2012).

12 The word "conveyance" is defined in NRS 111.010(1) to include "every instrument in
13 writing" by which "any estate or interest in lands is created, aliened, **assigned** or surrendered."
14 (emphasis added)

15 NRS 111.315 states:

16 **Every conveyance of real property**, and every instrument of writing setting forth an
17 agreement to convey any real property, or **whereby any real property may be**
18 **affected**, proved, acknowledged and certified in the manner prescribed in this chapter,
19 **to operate**
20 **as notice to third persons, shall be recorded** in the office of the recorder of the
21 county in which the real property is situated or to the extent permitted by NR 105.010
22 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and
23 binding between the parties thereto without such record. (emphasis added)

24 NRS 111.325 provides that an unrecorded satisfaction of lien on the part of the plaintiff is
25 void against a subsequent purchaser, such as defendant:

26 Every conveyance of real property within this State hereafter made, which shall not be
27 recorded as provided in this chapter, **shall be void as against any subsequent**
28 **purchaser, in good faith and for valuable consideration**, of the same real property,
or any portion thereof, where his or her own conveyance shall be first duly recorded.
(emphasis added)

M. If tender discharges a lien, it must be recorded to be effective.

Even if the alleged tender of payment by defendant is not viewed as the basis for equitable
subrogation and is instead viewed as extinguishing the superpriority lien, the payment must still be
recorded because an extinguishment or surrender of the debt owed by the lien is also a "conveyance."

Because the satisfaction of a lien is a form of conveyance, surrender or discharge, NRS
111.315 requires that the plaintiff bank's satisfaction be recorded in order to be effective as to Saticoy

1 Bay.

2 Likewise, NRS 111.325, makes it abundantly clear that an unrecorded satisfaction of lien on
3 the part of the defendant is void against a subsequent purchaser, such as plaintiff.

4 Additionally, to the extent that the purported tender is claimed to have worked to discharge or
5 extinguish the HOA's lien, such a discharge or release must also be recorded in the office of the
6 county recorder. Separate and apart from "conveyances," all discharges of liens must be recorded.

7 **NRS 106.260 Discharge and assignment: Marginal entries; discharge or release**
8 **must be recorded when mortgage or lien recorded by microfilm.**

9 1. Any mortgage or lien, that has been or may hereafter be recorded, may be
10 discharged or assigned by an entry on the margin of the record thereof, signed by the
11 mortgagee or the mortgagee's personal representative or assignee, acknowledging the
12 satisfaction of or value received for the mortgage or lien and the debt secured thereby,
in the presence of the recorder or the recorder's deputy, who shall subscribe the same
as a witness, and such entry shall have the same effect as a deed of release or
assignment duly acknowledged and recorded. Such marginal discharge or assignment
shall in each case be properly indexed by the recorder.

13 2. In the event that the mortgage or lien has been recorded by a microfilm or other
14 photographic process, a marginal release may not be used and **a duly acknowledged**
discharge or release of such mortgage or lien must be recorded. (emphasis added)

15 The super-priority lien under NRS 116.3116(2) is a true priority lien and is superior to a first
16 deed of trust. SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d at 412-414. The Nevada
17 Supreme Court relied, in part, on the holding in 7912 Limbwood Court Trust v. Wells Fargo Bank,
18 N.A., 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013). Limbwood recognizes that in order to avoid the
19 extinguishment of the first deed of trust, the first deed of trust holder needs to pay the HOA to obtain
20 the priority position.

21 NRS 111.325 mandates that any claimed interest on the part of the plaintiff bank is void as a
22 matter of law. The purpose of recording documents is to provide notice to all persons of the
23 recording party's interest in the property. An unrecorded or other instrument required to be recorded
24 is not valid and effective against a bona fide purchaser.

25 As shown above, whether regarded as an assignment, subrogation or subordination, an
26 instrument must be recorded with the Clark County Recorder's office in order to be effective as to
27 subsequent purchasers, such as plaintiff. Defendant does not allege nor can it show any evidence that

1 defendant recorded this property interest. The purported tender of payment of the super-priority
2 interest is void as a matter of law against the foreclosure deed to Saticoy Bay LLC Series 34
3 Innisbrook because evidence of the payment was not recorded in accordance with Nevada's recording
4 laws. As a result of the failure to record any evidence of this property interest prior to the date that
5 the foreclosure deed was recorded, any property interest created by the payment offered by defendant
6 is void as against Saticoy Bay LLC Series 34 Innisbrook.

7 This analysis is consistent with the recent amendment to the statute by the Nevada Legislature
8 which requires recording of evidence of the payments and announcement of the payment at the
9 auction, prior to bidding.

10 **N. Any change in priority must be recorded.**

11 Further, because the purported tender of payment would have the effect of changing the
12 priority of the HOA's lien, versus the deed of trust, it is required to be recorded as well.

13 **NRS 106.220 Filing and recording of instruments subordinating or waiving**
14 **priority of mortgages or deeds of trust; constructive notice; effect of unrecorded**
15 **instruments.**

16 1. **Any instrument by which any mortgage or deed of trust of, lien upon or**
17 **interest in real property is subordinated or waived as to priority,** must, in case it
18 concerns only one or more mortgages or deeds of trust of, liens upon or interests in real
19 property, together with, or in the alternative, one or more mortgages of, liens upon or
20 interests in personal property or crops, the instruments or documents evidencing or
21 creating which have been recorded prior to March 27, 1935, be recorded in the office
22 of the recorder of the county in which the property is located, and from the time any of
23 the same are so filed for record operates as constructive notice of the contents thereof
24 to all persons. **The instrument is not enforceable under this chapter or chapter 107**
25 **of NRS unless and until it is recorded.**

26 2. Each such filing or recording must be properly indexed by the recorder.
27 (Emphasis added)

28 Thus, in order to be effective, any subordination of the HOA's superpriority lien must be recorded.

29 A foreclosure agent has a duty to act impartially and in good faith. By analogy, NRS
30 107.028(5), involving the duties of a trustee under a deed of trust, provides in part:

31 The trustee does not have a fiduciary obligation to the grantor or any other person
32 having an interest in the property which is subject to the deed of trust. **The trustee**
33 **shall act impartially and in good faith with respect to the deed of trust and shall**
34 **act in accordance with the laws of this State.** A rebuttable presumption that a trustee
35 has acted impartially and in good faith exists if the trustee acts in compliance with the

1 provisions of NRS 107.080. (emphasis added)

2 As verified by the affidavit of Iyad Haddad filed herewith, Saticoy Bay LLC Series 34
3 Innisbrook had no notice of defendant's attempted payment prior to entering and paying its high bid
4 of \$1,201,000.00 to purchase the Property.

5 **O. Notice to third parties is of utmost significance.**

6 Notice to potential third party bidders who could otherwise claim status of a bona fide
7 purchaser is critical to this court's evaluation of this case. Defendant had actual knowledge that the
8 property was in foreclosure and that third persons would likely bid on the Property. For the nominal
9 cost of recording a notice at \$17.00 for the first page with the Clark County Recorder, defendant
10 could have simply recorded a one page notice with the recorder and put the world on notice.

11 In evaluating the equities between the various parties, the court should keep in mind that
12 defendant, had a simple and inexpensive method to notify the world, including plaintiff, of its
13 attempted payment and alleged preservation of its deed of trust. Because defendant failed to do so,
14 the equities weigh in favor of plaintiff as the bona fide purchaser without knowledge of the rejected
15 tender.

16 **P. The foreclosure statutes are constitutional**

17 As recognized by the Nevada Supreme Court in Saticoy Bay LLC Series 350 Durango 104 v.
18 Wells Fargo Home Mortgage, 133 Nev., Adv. Op. 5, at *10 (Jan. 26, 2017), the foreclosure statutes as
19 found in NRS Chapter 116 are constitutional. The court found that the statutes do not involve either
20 state action or a state actor and does not constitute a taking.

21 **Q. The fact that the deed has no warranties has no effect on the purchasers title**

22 The only warranties recognized at law are contained in NRS 111.170 which provides:

23 **Construction of words "grant, bargain and sell" in conveyances; suit upon covenants.**

24 1. The words "grant, bargain and sell" in all conveyances made after December 2,
25 1861, in and by which any estate of inheritance or fee simple is to be passed, shall,
26 unless restrained by express terms contained in such conveyances, be construed to be
27 the following express covenants, and none other, on the part of the grantor, for the
28 grantor and the heirs of the grantor to the grantee, the heirs of the grantee, and assigns:

(a) That previous to the time of the execution of the conveyance the grantor has not
conveyed the same real property, or any right, title, or interest therein, to any person
other than the grantee.

1 (b) That the real property is, at the time of the execution of the conveyance, free
2 from encumbrances, done, made or suffered by the grantor, or any person claiming
3 under the grantor.

2. Such covenants may be sued upon in the same manner as if they had been
expressly inserted in the conveyance.

4 The covenants in a grant deed have nothing to do with a representation of the validity of the
5 sale or the condition of the title conveyed.

6 CONCLUSION

7 The HOA's foreclosure sale extinguished both the defendant's deed of trust, and its interest in
8 the subject property. The foreclosure sale is presumed to be valid by statute, the and the recitals in
9 the foreclosure deed are conclusive proof the HOA's foreclosure sale complied with all requirements
10 of Nevada law. The burden of proof is on the bank to set the sale aside, and the purchaser, as record
11 title holder has the presumption of validity title in its favor. The defendant has not produced any
12 evidence to show that the defendant is not a bona fide purchaser, and has failed to demonstrate any
13 defect in the sale to justify setting aside the foreclosure sale. Additionally, the defendant has failed to
14 take any steps to protect its interests, and permitted the sale to go forward. Further, defendant bank
15 failed to record anything putting potential purchasers, such as defendants, on notice of its alleged
16 tender.

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1 Accordingly, it is respectfully requested that this Court enter an order granting the plaintiff's
2 motion for summary judgment and quieting title to the Property in the name of the plaintiff, free and
3 clear of all liens and encumbrances and forever enjoining defendant from asserting any estate, title,
4 right, interest, or claim to the property adverse to the plaintiff.

5 DATED this 4th day of May, 2018

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

8
9 By: / s / Michael F. Bohn, Esq. /
10 Michael F. Bohn, Esq.
11 2260 Corporate Circle, Ste. 480
12 Henderson, Nevada 89074
13 Attorney for Plaintiff
14 Saticoy Bay LLC Series 34 Innisbrook
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9
10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 SATICOY BAY LLC SERIES 34
INNISBROOK,

13 Plaintiff,

14 vs.

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

19 Defendants.

20 And all related matters.

CASE NO.: A-14-710161-C
DEPT NO.: XV

**AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

21
22 **AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

23 STATE OF NEVADA)
) ss:
24 COUNTY OF CLARK)

25 IYAD HADDAD being first duly sworn, deposes and says;

26 1. Affiant is the person most knowledgeable for Saticoy Bay LLC Series 34 Innisbrook, the
27 plaintiff/counterdefendant herein, and makes this affidavit based on personal knowledge.

1 2. Plaintiff/Counterdefendant, Saticoy Bay LLC Series 34 Innisbrook, is the owner of the real
2 property commonly known as 34 Innisbrook Avenue, Las Vegas, Nevada.

3 3. Plaintiff/Counterdefendant, Saticoy Bay LLC Series 34 Innisbrook, acquired title to the
4 property at foreclosure sale conducted on November 7, 2014 as evidenced by the foreclosure deed
5 recorded on November 10, 2014.

6 4. The foreclosure deed reflects that valuable consideration in the sum of \$1,201,000.00 was paid
7 for the property.

8 5. The plaintiff/counterdefendant's title stems from a foreclosure deed arising from a delinquency
9 in assessments due from the former owner to the Spanish Trail Master Association pursuant to NRS
10 Chapter 116.

11 6. Prior to and at the time of the foreclosure sale, there was nothing recorded in the public record
12 to put me on notice of any claims or notices that any portion of the lien had been paid.

13 7. Prior to and at the time of the foreclosure sale, there is no way for myself or any other potential
14 bidder at the foreclosure sale to research if the notices were sent to the proper parties at the proper
15 address. I, and other potential bidders are forced to rely only on the professional foreclosure agent to have
16 obtained a trustee's sale guarantee issued by a local title and escrow company and to serve the notices
17 upon the parties who are entitled to notice.

18 8. As a result of the limited information available to myself and other potential bidders at
19 foreclosure sale, I, on behalf of the plaintiff/counterdefendant, am a bona fide purchaser of the
20 property, for value, without notice of any claims on the title to the property or any alleged defects in
21 the sale itself.

22 9. At no time prior to the foreclosure sale did I receive any information from the HOA or the
23 foreclosure agent about the property or the foreclosure sale.

24 10. Neither myself or anyone associated with plaintiff/counterdefendant, Saticoy Bay LLC
25 Series 34 Innisbrook, have any affiliation with the HOA board or the foreclosure agent.

26 ///

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28

1 11. Any attempt to contact the bank to find anything out about payment of the super priority
2 amount would have been futile. The banks have a very long hold time, and agents will not speak to
3 anyone except the borrower, and they require the borrowers social security number for identification.
4 In addition, the banks have many departments, and it is impossible to get through to anyone with any
5 information.

6 12. Any attempt to find out any information about a tender or payment of the super priority lien
7 at the auction would also be a futile act. Asking questions during the auctions would be considered to
8 be a disruption. I would not get a response and would be prohibited from bidding the rest of the day.
9 In addition, often, the persons crying the sale are third party contractors without any knowledge of
10 what is in the file other than what is provided to cry the sale.

11 13. If called upon to testify to the above facts, affiant could do so competently.

12
13
14 IYAD HADDAD

15 SUBSCRIBED and SWORN to before me
16 this 7th day of March, 2018.

17 Marc Sameroff
18 NOTARY PUBLIC in and for said
County and State

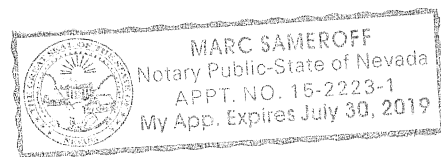
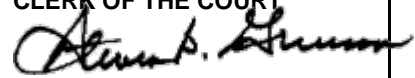


Exhibit “O”

Exhibit “O”



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6 Attorney for plaintiff/counterdefendant
Saticoy Bay LLC Series 34 Innisbrook

7
8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 SATICOY BAY LLC SERIES 34
INNISBROOK,

11 Plaintiff,

12 vs.

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

16 Defendants.

17
18 THORNBURG MORTGAGE SECURITIES
TRUST 2007-3,

19 Counterclaimant,

20 vs.

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

25 Counter-defendants.

26 And All related claims
27
28

CASE NO.: A-14-710161-C
DEPT NO.: XXVI

MOTION FOR SUMMARY JUDGMENT

1 Plaintiff/Counterdefendant Saticoy Bay LLC Series 34 Innisbrook , by and through its attorneys,
2 the Law Offices of Michael F. Bohn, Esq. moves this court for summary judgment against the defendant
3 bank and the granting of quiet title to the plaintiff. This motion is based upon the points and authorities
4 contained herein.

5 DATED this 4th day of May, 2018.

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

8 By: /s/ Adam R. Trippiedi, Esq.
9 Michael F. Bohn, Esq.
10 Adam R. Trippiedi, Esq.
11 2260 Corporate Circle., Ste. 480
12 Henderson, NV 89074
Attorney for plaintiff
Saticoy Bay LLC Series 34 Innisbrook

12 **NOTICE OF MOTION**

13 TO: Defendants above named; and

14 TO: Their respective counsel of record.

15 YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the
16 above and foregoing Motion on for hearing before the above entitled Court, Department 26, on the
17 **12** day of **JUNE**, 2018 at **9:30A** a.m. or as soon thereafter as counsel can be heard.

18 DATED this 4th day of May, 2018.

19
20 LAW OFFICES OF
21 MICHAEL F. BOHN, ESQ., LTD.

22 By: /s/ Adam R. Trippiedi, Esq.
23 Michael F. Bohn, Esq.
24 Adam R. Trippiedi, Esq.
25 2260 Corporate Circle., Ste. 480
26 Henderson, NV 89074
27 Attorney for plaintiff
28 Saticoy Bay LLC Series 34 Innisbrook

FACTS

1. Facts regarding the foreclosure sale

Plaintiff Saticoy Bay LLC Series 34 Innisbrook (“plaintiff” or “Saticoy Bay”) is the owner of real property commonly known as 34 Innisbrook Avenue, Las Vegas, Nevada. Plaintiff acquired title by way of foreclosure deed recorded on November 10, 2014. A copy of the foreclosure deed is attached as Exhibit 1. The plaintiff’s title stems from a foreclosure deed arising from a delinquency in assessments due from the former owner to the Sunrise Ridge HOA (“the HOA”) pursuant to NRS Chapter 116. As a result, the interest of each defendant has been extinguished by reason of the foreclosure.

Defendant Thornburg Mortgage Securities Trust 2007-3 (“defendant bank” or “defendant”) is the beneficiary of a deed of trust that was recorded as an encumbrance to the Property on June 12, 2006. Defendant Recontrust Company, N.A. is the trustee of the deed of trust. Defendants Frank and Madelaine Timpa are the former owners of the Property. A copy of the deed of trust is attached as Exhibit 2. An assignment to defendant was recorded on June 9, 2010 as Instrument #201006090003189. The Assignment is attached as Exhibit 3.

On December 21, 2010, the foreclosure agent sent the former owners the pre-lien letter and a copy of the notice of lien. A copy of the letter and the proof of mailing is Exhibit 4.

On August 4, 2011, the foreclosure agent recorded the notice of lien. A copy of the notice of lien is attached as Exhibit 5.

On December 6, 2011, the foreclosure agent recorded a notice of default and election to sell under homeowners association lien. The foreclosure agent also mailed the notice to the former owner and the defendant bank. A copy of the notice of default and the proof of mailing is Exhibit 6.

On September 15, 2014, the foreclosure agent recorded a notice of foreclosure sale. A copy of the notice of foreclosure Sale is attached as Exhibit 7. The foreclosure agent also mailed a copy of the notice of foreclosure sale to the former owner and defendant bank. The proof of mailing is attached as part of Exhibit 8.

The foreclosure agent also posted the notice on the property and in three locations throughout the county. A copy of the affidavit of posting is Exhibit 9. The foreclosure agent also published the notice

1 of sale in the Nevada Legal News. A copy of the affidavit of publication is Exhibit 10.

2 As evidenced by the foreclosure deed attached hereto as Exhibit 1, the public auction was held
3 on November 7, 2014. Plaintiff, being the highest bidder at the sale, became the purchaser of the subject
4 property.

5 These exhibits demonstrate that the defendant bank was on actual notice of the HOA foreclosure
6 and failed to take any action to avoid a sale to its own detriment, eventually resulting in the
7 extinguishment of the deed of trust.

8 **2. Discovery conducted during litigation**

9 During discovery, defendant Red Rock Financial Services, the foreclosure agent, produced their
10 foreclosure file as part of their initial disclosures. Exhibits 4 through 10 were in this initial disclosure
11 of documents.

12 During discovery in this case, the defendant bank was served with interrogatories regarding the
13 plaintiffs status as a bona fide purchaser, and for proof of fraud, oppression or unfairness or irregularities
14 regarding the noticing or the sale of the property. The defendant bank's answers contained objections
15 and were otherwise non-responsive. A copy of the answers to interrogatories is Exhibit 11.

16 In the interrogatories, the plaintiff propounded interrogatory 13:

17 **INTERROGATORY NO. 13:** Identify all facts, information, and evidence of which you
18 are aware that contradicts Plaintiff's assertion that it was a bona fide purchaser for value
at the Association foreclosure sale.

19 The defendant responded:

20 **RESPONSE:** Objection. This request calls for a legal conclusion to which no response is
21 required. This request is subject to the attorney work-product doctrine. Subject to the foregoing
22 objections and without waiving the same, Thornburg intends to produce an expert report regarding
23 Plaintiff's bona fide purchaser status. Moreover, Thornburg contends that Plaintiff was aware of
Thornburg's competing interest in the Property and recorded Deed of Trust prior to sale thus
negating its bond fide purchaser status. Discovery is ongoing. Thornburg reserves the right to
supplement its response as information becomes known or available.

24 The plaintiff propounded interrogatory 15:

25 **INTERROGATORY NO. 15:** Identify all facts, information, and evidence of which you
26 are aware which evidences any fraud, oppression or unfairness in regards to the
association foreclosure sale.

27 The defendant responded:

1 **RESPONSE:** Objection. This request calls for a legal conclusion to which no response is
2 required. This request is subject to the attorney work-product doctrine. This request calls for an
3 incomplete hypothetical. This request is unlimited in time and scope. Subject to the foregoing
4 objections and without waiving the same, the (sic).

5 The plaintiff propounded interrogatory 17:

6 **INTERROGATORY NO. 17:** Identify all facts, information, and evidence of which you
7 are aware which evidences that the association foreclosure sale was not properly
8 conducted.

9 The defendant responded:

10 **RESPONSE:** See response to Interrogatory No. 16.

11 The plaintiff propounded interrogatory 18:

12 **INTERROGATORY NO. 18:** Identify all facts, information, and evidence of which you
13 are aware which evidences that the association foreclosure sale was not properly noticed.

14 The defendant responded:

15 **RESPONSE:** Objection. This request calls for a legal conclusion to which no response is
16 required. This request is vague and ambiguous as to the term “properly noticed.” This request
17 is overly broad and unduly burdensome. Subject to the foregoing objections and without waiving
18 the same, Thornburg is currently unaware of whether the foreclosure notices were properly mailed
19 or received. Thornburg also contends the foreclosure notices contained improper super-priority
20 lien amounts, thus the sale was at a minimum, subject to Thornburg’s first deed of trust.
21 Discovery is ongoing, Thornburg reserves the right to supplement its response as information
22 becomes known or available.

23 The defendant has shown no facts which the plaintiff could have been on notice of to deprive it
24 of bona fide purchaser status. The defendant has also failed to identify any fraud, oppression or
25 unfairness. For these reasons, the court should grant summary judgment granting quiet title and
26 declaratory relief to the plaintiff.

27 **POINTS AND AUTHORITIES**

28 **A. The new Shadow Canyon case**

The new case of Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133
Nev. Adv. Op. 91 (Nov. 22, 2017) clarified a large numbers of issues regarding real property foreclosure
sales in Nevada.

1. The commercial reasonableness standard from Article 9 of the UCC is not applicable to real
property foreclosures.

1 2. The court re-affirmed what it said in Shadow Wood, that price alone, however gross, is not
2 sufficient grounds to set aside a foreclosure sale, but there must be some element of fraud, oppression or
3 unfairness as accounts for and brings about the inadequate price.”

4 3. The 20% standard contained in the Restatement (Third) of Property: Mortgages §8.3 (1997)
5 was outright rejected by the court.

6 4. The bank has the burden to show that the sale should be set aside in light of the purchaser’s
7 status as record title holder.

8 5. There is a presumption in favor of the record title holder.

9 6. There is the statutory presumption that the foreclosure sale complied with the provisions of
10 NRS Chapter 116, citing to NRS 47.250(16) providing for a rebuttable presumption “[that] the law has
11 been obeyed”) and NRS 116.31166, providing for the conclusiveness of the deed containing the recitals
12 of the required steps for a valid sale.

13 7. There must be “actual” evidence of fraud, unfairness or oppression.

14 8. Fines may be included in an assessment lien and foreclosed upon

15 9. The fact that the notice of lien stated the current amount due rather than the estimated amount
16 as of the scheduled sale date does not invalidate the sale when there was no evidence in the record to
17 show that the bank was prejudiced by the error.

18 10. Post foreclosure activities do not affect the validity of the sale.

19 11. The class of persons who signed the recorded notices is very broad.

20 **B. General principles of law and equity apply to sales under NRS Chapter 116**

21 NRS 116.1108 provides:

22 **Supplemental general principles of law applicable.** The principles of **law and equity**,
23 including the law of corporations and any other form of organization authorized by law
24 of this State, the law of unincorporated associations, **the law of real property**, and the
25 law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud,
misrepresentation, duress, coercion, mistake, receivership, substantial performance, or
to the extent inconsistent with this chapter. (emphasis added)

26 The principles of equity and real property are applicable to this foreclosure sale, and preclude
27
28

1 relief to the defendant.

2 **C. Equitable relief is not available because the defendant was on notice of the sale and failed to**
3 **take any steps to protect its interests.**

4 The court in Shadow Wood, noted that equitable relief is not available to a party that was on
5 notice but failed to act. Footnote 7 to the decision states:

6 Consideration of harm to potentially innocent third parties is especially pertinent here
7 where NYCB did not use the legal remedies available to it to prevent the property from
8 being sold to a third party, such as by seeking a temporary restraining order and
9 preliminary injunction and filing a lis pendens on the property. *See* NRS 14.010; NRS
10 40.060. *Cf. Barkley's Appeal, Bentley's Estate*, 2 Monag. 274, 277 (Pa.1888) (“**In the case**
11 **before us, we can see no way of giving the petitioner the equitable relief she asks**
12 **without doing great injustice to other innocent parties who would not have been in**
13 **a position to be injured by such a decree as she asks if she had applied for relief at**
14 **an earlier day.”). (emphasis added)**

15 The Shadow Wood court also cited the case of Nussbaumer v. Superior Court in & for Yuma City,
16 107 Ariz. 504, 489 P.2d 843, 846 (Ariz. 1971) “Where the complaining party has access to all the facts
17 surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his
18 act, equity should normally not interfere, especially where the rights of third parties might be prejudiced
19 thereby,”

20 Also in Shadow Wood, the court cited several cases refusing to grant equitable relief where the
21 rights of third persons are affected, invoking the bona fide purchaser doctrine.

22 When sitting in equity, however, courts must consider the entirety of the circumstances
23 that bear upon the equities....
24 This includes considering the status and actions of all parties involved, including whether
25 an innocent party may be harmed by granting the desired relief.⁷ *Smith v. United States*,
26 373 F.2d 419, 424 (4th Cir.1966) (“Equitable relief will not be granted to the possible
27 detriment of innocent third parties.”); *see also In re Vlasek*, 325 F.3d 955, 963 (7th
28 Cir.2003) (“[I]t is an age-old principle that in formulating equitable relief a court must
consider the effects of the relief on innocent third parties.”); *Riganti v. McElhinney*, 248
Cal.App.2d 116, 56 Cal.Rptr. 195, 199 (Ct.App.1967) (“[E]quitable relief should not be
granted where it would work a gross injustice upon innocent third parties.”).

29 The defendant received the foreclosure notices and failed to act, and the property was acquired
30 by a third party. The defendant is not entitled to equitable relief.

31 **D. Equitable relief is not available because there is an adequate remedy at law**

1 The common law rule is that there is no equity jurisdiction when a party has available to itself an
2 adequate remedy at law. See Las Vegas Valley Water District v. Curtis Park Manor Water Users
3 Association, 98 Nev. 275, 646 P.2d 549 (1982) “The district court was without authority to grant
4 equitable relief since an adequate remedy exists at law.”

5 In Washoe County v. City of Reno 77 Nev. 152, 360 P.2d 602 (1961), the court held that the fact
6 that the judgment may not be collectable is not an issue to be considered. The court stated:

7 During oral argument, counsel for respondents suggested that an action at law would not
8 be adequate because it could not be enforced by a writ of execution against a county fund.
9 Whether this be true or not, it is hardly to be supposed that an execution would be
10 necessary in the event a judgment at law were obtained against the county in this type of
11 case any more than a contempt proceeding would be required in the event a peremptory
12 writ of mandamus were issued. **In answer to this suggestion however it is necessary to
say only that our concern is with the existence of a remedy and not whether it will
be unproductive in this particular case,** Hughes v. Newcastle Mutual Insurance Co., 13
U.C.Q.B. (Ont.) 153, or inconvenient, Gulf Research & Development Co. v. Harrison, 9
Cir., 185 F.2d 457, or ineffectual, United States ex rel. Crawford v. Addison, 22 How.
174, 63 U.S. 174, 16 L.Ed. 304.

13 In Stewart v. Manget, 132 Fla. 498, 181 So. 370, in affirming an order dismissing a bill
14 in equity on the ground that the plaintiff had an adequate remedy at law, the Florida
Supreme Court cited with approval the following language from Tampa & G. C. R. Co.
v. Mulhern, 73 Fla. 146, 74 So. 297, 299:

15 ‘The inadequacy of a remedy at law to produce money is not the test of the
16 applicability of the rule. **All remedies, whether at law or in equity,
frequently fail to do that; and to make that the test of equity
jurisdiction would be substituting the result of a proceeding for the
proceeding which is invoked to produce the result. The true test is,
17 could a judgment be obtained in a proceeding at law, and not, would
the judgment procure pecuniary compensation.’**

18
19 (Emphasis added)

20
21 In the case of Moeller v. Lien, 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994), the respondent
22 allowed a trustee’s sale to go forward even though it had available cash deposits to pay off the loan. Id.
23 at 828. The trial court set aside the sale because “[t]he value of the property was four times the amount
24 of the debt/sales price.” Id. at 829. The Court of Appeals reversed the trial court’s order and stated:

25 **Thus as a general rule, a trustor has no right to set aside a trustee’s deed as against**
26 **a bona fide purchaser for value by attacking the validity of the sale.** (Homestead
27 Savings v. Damiento, supra, 230 Cal. App. 3d at p. 436.) The conclusive presumption
precludes an attack by the trustor on a trustee’s sale to a bona fide purchaser **even though**
28 **there may have been a failure to comply with some required procedure which**

1 **deprived the trustor of his right of reinstatement or redemption.** (4 Miller & Starr,
2 supra, § 9:141, p. 463; cf. Homestead v. Damiento, supra, 230 Cal. App. 3d at p. 436.)
3 The conclusive presumption precludes an attack by the trustor on the trustee's sale to a
4 bona fide purchaser even where the trustee wrongfully rejected a proper tender of
reinstatement by the trustor. **Where the trustor is precluded from suing to set aside
the foreclosure sale, the trustor may recover damages from the trustee.** (Munger v.
Moore (1970) 11 Cal. App. 3d 1, 9, 11 [89 Cal. Rptr. 323].)

5 Id. at 831-832. (emphasis added)

6 Under the Shadow Wood factors, the defendant must show there is some defect with the sales
7 process to justify equitable relief, and if the plaintiff is a bona fide purchaser, the bank's remedy is against
8 the foreclosure agent.

9 There has been no defect with the sales process, however, even assuming there was some defect
10 in the sale (which the plaintiff denies) the defendant has no remedies against plaintiff because any
11 damages which the defendant may have sustained as a result of any alleged wrongful foreclosure can be
12 compensated with money damages against the foreclosure agent.

13 The Restatement (Third) of Prop.: Mortgages § 8.3, Comment (b) recognizes that where the
14 property has been purchased by a bona fide purchaser, "the real estate is unavailable" and that "price
15 inadequacy" may be raised in a suit against the foreclosing mortgagee for damages, stating:

16 On the other hand, where foreclosure is by power of sale, judicial confirmation of the sale
17 is usually not required and the issue of price inadequacy will therefore arise only if the
18 party attacking the sale files an independent judicial action. Typically this will be an
19 action to set aside the sale; it may be brought by the mortgagor, junior lienholders, or the
20 holders of other junior interests who are prejudiced by the sale. **If the real estate is**
21 **unavailable because title has been acquired by a bona fide purchaser,** the issues of
price inadequacy may be raised by the mortgagor or a junior interest holder in a suit
against the foreclosing mortgagee for damages for wrongful foreclosure. **This latter**
remedy, however, is not available based on gross price inadequacy alone. In addition,
the mortgagee must be responsible for a defect in the foreclosure process of the type
described in Comment c of this section. (emphasis added)

22 Shadow Wood, consistent with this stated:

23 "The decisions are uniform that the bona fide purchaser of a legal title is not affected by
24 any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has
25 no notice, actual or constructive." citing Moore v. De Bernardi, 47 Nev. 33, 54, 220 P.
544, 547 (1923)

26 There is no defect with the sales process and fore, if the purchaser is a bona fide purchaser, the
27 sale cannot be set aside. The bank, however, is not without a remedy, providing, of course, that there was

1 a prejudicial defect with the sale (which has not been shown here). It has an claim for money damages
2 against the foreclosure agent for any defect in the sale process.

3 **E. Equitable relief is not available because of the bona fide purchaser doctrine**

4 Miller & Starr, California Real Estate §10.51 (4th Ed. 2016) provides:

5 **Evidence required.** The person claiming to be a bona fide purchaser satisfies the burden
6 of proof when it is proved that he or she paid value for the title or lien. It is then
7 presumed that the lien or interest was received in good faith and without notice, and the
8 burden shifts to the other person to prove that the alleged bona fide purchaser had notice.

9 ...

10 In a commentary to this section, the treatise states:

11 As a practical matter, it makes little difference who has the burden of proof. The alleged
12 bona fide purchaser usually testifies that he or she did not have notice, and the other party
13 must prove that he or she did.

14 Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon 133 Nev. Adv. Op. 91
15 (2017) clarified that the bank has the burden to show that the sale should be set aside in light of the
16 purchaser's status as record title holder, and there is a presumption in favor of the record title holder.

17 In Shadow Wood Homeowners Association v. New York Community Bank, 132 Nev. Adv. Op
18 5, 366 P.3d 1105 (2016) the court stated:

19 The question remains whether NYCB demonstrated sufficient grounds to justify the
20 district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for
21 summary judgment.

22 Similarly, in First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 71 Cal.
23 Rptr. 2d 295 (1998), the court recognized that where a party is seeking equitable relief, the burden is on
24 the party seeking equitable relief to allege and prove that the person holding legal title is not a bona fide
25 purchaser:

26 **That Alliance had knowledge of First Fidelity's equitable claim for reinstatement of**
27 **its reconveyed deed of trust was an element of First Fidelity's case.** "The general rule
28 places the burden of proof upon a person claiming bona fide purchaser status to present
evidence that he or she acquired interest in the property without notice of the prior
interest. (Bell v. Pleasant (1904) 145 Cal. 410, 413-414, 78 P. 957; Alcorn v. Buschke
(1901) 133 Cal. 655, 657-658, 66 P. 15; Hodges v. Lochhead (1963) 217 Cal. App.2d 199,
203, 31 Cal. Rptr. 879; 2 Miller & Starr, Current Law of Cal. Real Estate [1977] § 11:28,
p. 51.) ... [¶] If the prior party claims an equitable rather than a legal title, however, the
burden of proof is upon the person asserting that title. (Bell v. Pleasant, *supra*, 145 Cal.
410, 414-415, 78 P. 957; Garber v. Gianella (1893) 98 Cal. 527, 529-530, 33 P. 458; 2
Miller & Starr, Current Law of Cal. Real Estate, *supra*, § 11:28, pp. 52-53.)" (Gates

1 Rubber Co. v. Ulman (1989) 214 Cal. App. 3d 356, 366, fn. 6, 262 Cal. Rptr. 630.) (2b)
2 **Showing that Alliance was not an innocent purchaser for value was hence an element**
3 **of First Fidelity's claim.** (Firato v. Tuttle, *supra*, 48 Cal.2d 136, 138, 308 P.2d 333.)
(emphasis added)

4 60 Cal. App. 4th at 1442, 71 Cal. Rptr. at 301.

5 The defendant has the burden to prove a defect with the sale, and that the purchaser knew of the
6 defect at or before the time of the sale. The defendant has failed in both counts.

7 The concept of bona fide purchaser has more application in voluntary sales in which title is
8 transferred by deed. In these cases, a purchaser takes subject to any matters which are recorded against
9 the property. However, in foreclosure cases, the bona fide purchaser doctrine rarely comes into play
10 because all interests on the property which are junior to the lien being foreclosed upon are extinguished.
11 This is even more so with an HOA foreclosure because it is senior to all other liens other than prior
12 existing debts and taxes are extinguished by the foreclosure. In these situations, the purchaser would be
13 precluded from bona fide purchaser status in HOA foreclosure cases only if there was some irregularity
14 in the sale AND the purchaser knew of the irregularity.

15 The treatise 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhardt & R. Wilson Freyermuth,
16 *Real Estate Finance Law* (6th ed. 2014) was cited in the Shadow Wood decision.

17 Section 7.21 of this treatise is entitled “defective power of sale foreclosure-“void-
18 voidable” distinction. The treatise explains there are three types of defects which may affect the validity
19 of foreclosure sales, void, voidable, or inconsequential.

20 The treatise then explains:

21 Most defects render the foreclosure voidable and not void. When a voidable error occurs,
22 bare legal title passes to the sale purchaser, subject to the redemption rights of those
23 injured by the defective foreclosure. Typically, a voidable error is “an irregularity in the
24 execution of a foreclosure sale” and must be “substantial or result in a probably
25 unfairness.”

26 If the defect only renders the sale voidable, the redemption rights can be cut off if a bona
27 fide purchase for value acquires the land. When this occurs, an action for damages against
28 the foreclosing mortgagee or trustee may be the only remaining remedy.

29 The treatise then goes on to explain who is a bona fide purchaser in a foreclosure context:

30 If the defective sale is only voidable, who is a bona fide purchaser? A mortgagee

1 purchaser should rarely, if every, qualify as a bona fide purchaser, because the mortgagee
2 or its attorney normally manages the power of sale foreclosure and should be responsible
3 for defects. The result should be the same when a deed of trust is foreclosed. Although
4 the trustee, rather than the lender, normally is in charge of the proceedings, the court
5 probably will treat the trustee as the lender's agent for purposes of determining BFP
6 status. **If the sale purchaser paid value and is unrelated to the mortgagee, he should
take free of voidable defects if : (a) he has no actual knowledge of he defects; (b) he
is not on reasonable notice from recorded instruments; and © the defects are such
of the defects....**

(emphasis added, footnotes omitted)

7
8 The defendant answered an interrogatory about the plaintiff's status as bona fide purchaser. The
9 plaintiff propounded interrogatory 13:

10 **INTERROGATORY NO. 13:** Identify all facts, information, and evidence of which you
11 are aware that contradicts Plaintiff's assertion that it was a bona fide purchaser for value
at the Association foreclosure sale.

12 The defendant responded:

13 **RESPONSE:** Objection. This request calls for a legal conclusion to which no response is
14 required. This request is subject to the attorney work-product doctrine. Subject to the
15 foregoing objections and without waiving the same, Thornburg intends to produce an
16 expert report regarding Plaintiff's bona fide purchaser status. Moreover, Thornburg
17 contends that Plaintiff was aware of Thornburg's competing interest in the Property and
recorded Deed of Trust prior to sale thus negating its bond fide purchaser status. Discovery
is ongoing. Thornburg reserves the right to supplement its response as information
becomes known or available.

18 The defendant's answers to interrogatories regarding the issue of bona fide purchaser do not allege
19 any defect in the sales process or that the purchaser knew of the defect in the sales process.

20 From the three factors listed here, the purchaser would be a bona fide purchaser. The purchaser's
21 representative, Eddie Haddad's affidavit is attached. It states in part:

22 6. Prior to and at the time of the foreclosure sale, there was nothing recorded in
23 the public record to put me on notice of any claims or notices that any portion of the lien
had been paid.

24 7. Prior to and at the time of the foreclosure sale, there is no way for myself or any
25 other potential bidder at the foreclosure sale to research if the notices were sent to the
26 proper parties at the proper address. I, and other potential bidders are forced to rely only
27 on the professional foreclosure agent to have obtained a trustee's sale guarantee issued by
28 a local title and escrow company and to serve the notices upon the parties who are entitled
to notice.

1 8. As a result of the limited information available to myself and other potential
2 bidders, I, on behalf of the plaintiff, am a bona fide purchaser of the property, for
3 value, without notice of any claims on the title to the property or any alleged defects in
4 the sale itself.

5 The mailing of notices, the addresses to where they are sent, or even an attempted tender of
6 the super priority lien are not matters to be found in the public record.

7 Additionally, the defendant's answers to interrogatories regarding the issue of bona fide
8 purchaser do not allege any defect in the sales process or that the purchaser knew of the defect in the
9 sales process. The court should therefore find that the plaintiff purchaser is a bona fide purchaser, and
10 its title should not be affected.

11 The answers set forth two basis to claim that the plaintiff is not a bona fide purchaser. The
12 price paid and his knowledge of the existing deed of trust. Neither of these are appropriate grounds.
13 The court in Shadow Wood specifically stated:

14 Although, as mentioned, NYCB might believe that Gogo Way purchased the property
15 for an amount lower than the property's actual worth, that Gogo Way paid "valuable
16 consideration" cannot be contested. *Fair v. Howard*, 6 Nev. 304, 308 (1871) ("The
17 question is not whether the consideration is adequate, but whether it is valuable."); see
18 also *Poole v. Watts*, 139 Wash.App. 1018 (2007) (unpublished disposition) (stating
19 that the fact that the foreclosure sale purchaser purchased the property for a "low
20 price" did not in itself put the purchaser on notice that anything was amiss with the
21 sale).

22 The fact that the plaintiff knew of the trust deed is of no consequence. Under 116.3116 as
23 interpreted by the SFR case, the foreclosure sale extinguishes the deed of trust. It does not survive
24 simply because it was recorded and known to exist to the world.

25 Shadow Wood discusses bona fide purchaser in detail. The many points contained in the
26 decision can be summarized as:

- 27 1. A bona fide purchase is without notice of any **prior equity**.
- 28 2. "The decisions are uniform" that the title of a bona fide purchaser is not affected by any
matter of which he has no notice.
3. The bona fide purchaser must pay **valuable** consideration, not "adequate" consideration.
4. The fact that the foreclosure price may be "low" is not sufficient to put the purchaser on

1 notice of any alleged defects with the sale.

2 5. The fact that the court retains equitable power to void the sale does deprive the purchaser
3 of bona fide purchaser status.

4 6. The time to determine the status of bona fide purchaser is at the time of the sale.

5 The defendant has failed to produce any evidence or basis during discovery to deprive the
6 plaintiff of its status as a bona fide purchaser

7 **F. The failure of the defendant to protect its interest before the sale precludes relief in its favor**

8 The defendant created the situation by letting the property go to sale without doing anything to
9 satisfy the lien or stop the sale, and permitted an innocent third party purchase the property. The
10 Supreme Court in both SFR and Shadow Wood noted that the defendant banks were responsible for
11 their own damages.

12 In SFR Investments Pool 1 v. U.S. Bank 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014) the
13 court said not once, but twice, that the price paid at the foreclosure sale was not an issue because the
14 bank could simply have paid the super priority amount to preserve its interest in the property. The
15 Court stated at page 414:

16 U.S. Bank's final objection is that it makes little sense and is unfair to allow a
17 relatively nominal lien—nine months of HOA dues—to extinguish a first deed of trust
18 securing hundreds of thousands of dollars of debt. But as a junior lienholder, U.S.
19 Bank could have paid off the SHHOA lien to avert loss of its security; it also could
20 have established an escrow for SHHOA assessments to avoid having to use its own
funds to pay delinquent dues. 1982 UCIOA § 3116 cmt. 1; 1994 & 2008 UCIOA §
3–116 cmt. 2. **The inequity U.S. Bank decries is thus of its own making and not a
reason to give NRS 116.3116(2) a singular reading at odds with its text and the
interpretation given it by the authors and editors of the UCIOA.** (emphasis added)

21 The Court also stated at page 418:

22 U.S. Bank further complains about the content of the notice it received. It argues that
23 due process requires specific notice indicating the amount of the superpriority piece of
the lien and explaining how the beneficiary of the first deed of trust can prevent the
24 superpriority foreclosure sale. But it appears from the record that specific lien amounts
were stated in the notices, ranging from \$1,149.24 when the notice of delinquency was
25 recorded to \$4,542.06 when the notice of sale was sent. The notices went to the
homeowner and other junior lienholders, not just U.S. Bank, so it was appropriate to
26 state the total amount of the lien. As U.S. Bank argues elsewhere, dues will typically
comprise most, perhaps even all, of the HOA lien. *See supra* note 3. **And from what
27 little the record contains, nothing appears to have stopped U.S. Bank from
determining the precise superpriority amount in advance of the sale or paying the**

1 **entire amount and requesting a refund of the balance.** *Cf. In re Medaglia*, 52 F.3d
2 451, 455 (2d Cir.1995) (“[I]t is well established that due process is not offended by
3 requiring a person with actual, timely knowledge of an event that may affect a right to
exercise due diligence and take necessary steps to preserve that right.”). (Emphasis
added)

4 In the case of *Shadow Wood Homeowners Association v. New York Community Bank*, 132
5 Nev. Ad. Op. 5, 366 P.3d 1105 (2016), the Supreme Court stated other ways that a bank could
6 protect itself.

7 Against these inconsistencies, however, must be weighed NYCB's (in)actions. The
8 NOS was recorded on January 27, 2012, and the sale did not occur until February 22,
9 2012. NYCB knew the sale had been scheduled and that it disputed the lien amount,
yet it did not attend the sale, request arbitration to determine the amount owed, or seek
10 to enjoin the sale pending judicial determination of the amount owed. The NOS
included a warning as required by NRS 116.311635(3)(b):

11

12 366 P.3d at 1114

13 The defendant had remedies available to it to protect its interests before the foreclosure sale
14 and failed to avail itself of these remedies. It cannot now seek relief from this court.

15 **G. Presumptions**

16 Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. Adv. Op. 91
17 (Nov. 22, 2017) recognized the presumptive validity of the foreclosure sales, citing the statutory
18 disputable presumption that “the law has been obeyed.” in NRS 47.250(16) and the recitals in the
19 deed are sufficient and conclusive proof that the required notices were complied with. NRS
20 116.31166.

21 The purpose of the presumption of validity and the public policy of finality is to encourage
22 prospective purchasers to participate in the foreclosure process and to maximize the prices paid at
23 foreclosure sale. See Moeller v. Lien 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994).

24 **H. Fraud, oppression or unfairness and price paid**

25 The case of Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev.
26 Adv. Op. 91 (Nov. 22, 2017) re-affirmed the standard to set aside a sale is in inadequate sales price,
27 inadequacy of price, and additional proof of some fraud, oppression or unfairness **that accounts for**

1 **and brings about the inadequacy of price.** The 20% rule of the Restatement was specifically
2 rejected.

3 The bank's answers to interrogatories do not set forth any evidence or contentions of any
4 defect in the sale that would constitute fraud, oppression or unfairness.

5 **I. The Trust Deed has been Extinguished.**

6 In its decision in the case of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv.
7 Op. 75, 334 P.3d 408 (2014), the Nevada Supreme Court stated:

8 NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual
9 homeowner's property for up to nine months of unpaid HOA dues. With limited exceptions,
10 this lien is "prior to all other liens and encumbrances" on the homeowner's property, even a
11 first deed of trust recorded before the dues became delinquent. NRS 116.3116(2). We must
12 decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of
13 trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both
14 questions in the affirmative and therefore reverse.

15 334 P.3d at 409.

16 At the conclusion of its opinion, the Nevada Supreme Court stated:

17 NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which
18 will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial
19 foreclosure of HOA liens, and because SFR's complaint alleges that proper notices
20 were sent and received, we reverse the district court's order of dismissal. In view of
21 this holding, we vacate the order denying preliminary injunctive relief and remand for
22 further proceedings consistent with this opinion.

23 334 P.3d at 419.

24 Because the facts in the present case are substantially the same as the facts in SFR
25 Investments Pool 1, LLC v. U.S. Bank, N.A., this Honorable Court should reach the same conclusion
26 that the nonjudicial foreclosure arising from the HOA's super priority lien extinguished the deed of
27 trust held by the plaintiff bank on the date of sale. As a result, this Court should rule that the deed of
28 trust held by defendant was extinguished by the HOA's foreclosure sale.

29 **J. Defendant's attempted tender does not affect Saticoy Bay's title.**

30 Defendant's Answer and Counterclaims, filed on April 10, 2015, on page 10, paragraph 31,
31 states that "Prior to the HOA Sale, THORNBURG and its predecessors tendered payment of 9 months
32 of assessments to HOA and its agents, thus satisfying the super-priority lien prior to HOA's
33

1 foreclosure of the remaining lien amount.”

2 However, defendant’s Answer and Counterclaims contains no allegations that defendant did
3 anything to keep the remaining amount of the super-priority amount “good.”

4 The concept of tender is discussed in the Restatement (Third) of Prop.: Mortgages §6.4 and
5 persuasive California case law. The rules regarding payments made by a person not primarily liable
6 on the debt are as follows:

7 **§ 6.4 Redemption from Mortgage by Performance or Tender**

8 ...
9 (e) A performance in full of the obligation secured by a mortgage, or a
10 performance that is accepted by the mortgagee in lieu of payment in full, **by**
11 **one who holds an interest in the real estate subordinate to the mortgage**
12 **but is not primarily responsible for performance, does not extinguish the**
13 **mortgage**, but redeems the interest of the person performing from the
14 mortgage and entitles the person performing to subrogation to the mortgage
15 under the principles of §7.6. Such performance may not be made until the
16 obligation secured by the mortgage is due, but may be made at or after the time
17 the obligation is due but prior to foreclosure.

18 (f) Upon receipt of performance as provided in Subsection (e), the mortgagee has a
19 duty to provide to the person performing, within a reasonable time, an
20 appropriate assignment of the mortgage in recordable form. If the mortgagee
21 fails to do so upon reasonable request, the person performing may obtain
22 judicial relief ordering the mortgage assigned and, unless the mortgagee acted
23 in good faith in rejecting the request, awarding against the mortgagee any
24 damages resulting from the delay.

25 (g) An **unconditional tender of performance in full by a person described in**
26 **Subsection (e)**, even if rejected by the mortgagee, **if kept good** has the effect
27 of performance under Subsections (e) and (f) above. (emphasis added)

28 A photocopy of this section from the Restatement is attached as Exhibit 12.

 At the threat of foreclosure by a senior lien, a junior lienor is entitled, even without express
contractual authority, to reinstate the loan by making a payment sufficient to cure the default or to pay
off the senior lien and become subrogated to the rights of the senior lienholder as against the owner of
the property. See Restatement (Third) of Prop.: Mortgages §7.6; American Sterling Bank v. Johnny
Management LV, Inc., 126 Nev. 423, 245 P.3d 535 (2010); Houston v. Bank of America 119 Nev.
485, 78 P.3d 71 (2003).

 The Restatement (Third) of Prop.: Mortgages §6.4 , comment a, explains the distinction
between payment or tender by someone primarily liable for the debt, and payment or tender by a party

1 seeking to protect its interest in the property. It states in part:

2 Equitable redemption is ultimately accomplished by performance in full of the
3 obligation secured by the mortgage. **However, redemption has two quite distinct**
4 **results, depending on whether the performance is made by a person who is**
5 **primarily responsible for payment of the mortgage obligation, or by someone else**
6 **who holds an interest in the land subordinate to the mortgage.** In the first of these
7 situations, the mortgage is simply extinguished, as provided in Subsection (a) of this
8 section. **In the second, the mortgage is not extinguished, but by virtue of**
9 **Subsection (e) is assigned by operation of law to the payor under the doctrine of**
10 **subrogation;** see §7.6. Subrogation does not occur in the first situation, since one
11 who is primarily responsible for payment of a debt cannot have subrogation by
12 performing that duty; see §7.6, Comment b. (emphasis added)

13 Subrogation is a device adopted by equity which applies in a great variety of cases and is
14 broad enough to include every instance in which one party pays a debt for which another is primarily
15 liable, and which in equity and good conscience should have been discharged by the latter.

16 Laffranchini v. Clark 39 Nev. 48, 153 P. 250 (1915).

17 Comment g to §6.4 of the Restatement further explains the significance when payment is
18 made by a subordinate lienholder:

19 The second distinction, mentioned above, is that redemption by a person who is not
20 primarily responsible for payment of the debt **does not extinguish the mortgage, but**
21 **rather assigns both the mortgage and the debt to the payor by operation of law**
22 **under the doctrine of subrogation;** See §7.6 (emphasis added)

23 Paragraph F on page 2 of 4 of the Planned Unit Development Rider to the deed of trust
24 (Exhibit 2 attached) states:

25 If Borrower does not pay PUD dues and assessments when due, then Lender may pay
26 them. Any amounts disbursed by Lender under this paragraph F shall become
27 additional debt of Borrower secured by the Security Instrument. Unless Borrower and
28 Lender agree to other terms of payment, these amounts shall bear interest from the date
of disbursement at the Note rate and shall be payable, with interest, upon notice from
Lender to Borrower requesting payment.

This language is consistent with Restatement (Third) of Prop.: Mortgages §6.4(e) and (f) that
treat any payment offered by plaintiff as an assignment.

**K. After the tender was sent to the foreclosure agent, plaintiff did nothing
to keep the tender good.**

As set forth above, Restatement (Third) of Prop.: Mortgages §6.4 (g) provides that where an
unconditional tender is rejected by the mortgagee, the tender must be “kept good” in order to have

1 “the effect of performance under Subsections (e) and (f) above.”

2 Comment d to section 6.4 further explains:

3 *d. Tender of payment rejected by mortgagee.* Under Subsection ©, a mortgage
4 is extinguished by mere *tender* of full payment **by the person primarily responsible**
5 **for payment**, even if the mortgagee rejects it. **The tender must be kept good in the**
6 **sense that the person making the tender must continue at all times to be ready,**
7 **willing, and able to make the payment.** If the payor brings an action to have the
8 mortgage canceled, the money must be paid into the court to keep the tender good.

9 **The tender must be unconditional.** However, the payor’s demand that the
10 mortgagee return the mortgagor’s promissory note, mark it “paid,” or execute a
11 discharge of the mortgage is not a condition of the sort that will invalidate the tender.
12 See Illustration 5.

13 The rule extinguishing the mortgage when a tender is rejected has only limited
14 modern significance. The reason is that mortgages are virtually always recorded, and
15 **the payor derives little benefit, merely from the theoretical extinction of the**
16 **mortgage if it is in fact still present, and apparently undischarged in the public**
17 **records. . . .**

18 Nonetheless, the tender of full payment *per se* relieves the real estate of the
19 mortgage lien. Tender is significant in at least two ways. First, the tender stops the
20 accrual of interest, late fees, and any other charges that might otherwise result from the
21 passage of additional time. **Second, under Subsection (b) the mortgagee who**
22 **wrongfully refuses a tender may be held liable for damages flowing from any**
23 **unreasonable delay that results in clearing the mortgage from the real estate’s**
24 **title.** See Illustrations 5 and 6. (emphasis added)

25 The last section from this comment shows that defendant’s remedy, if any, is for money
26 damages against the party that wrongfully refused the tender if the tender was valid. Because this
27 claim for money damages is an adequate remedy at law, it precludes the court from invoking its
28 equitable powers to affect the title of the bona fide purchaser.

Illustration 5 to §6.4 of the Restatement contains an example of how to keep a tender good:

5. Mortgagor is indebted to Mortgagee for the principal sum of \$100,000,
secured by a mortgage on Blackacre. Mortgagor sends a check to Mortgagee for
\$100,000, purporting to pay the debt, but Mortgagee refuses to accept the check or
execute a discharge of the mortgage. Mortgagor then deposits \$100,000 in an escrow
account established for the purpose of paying the debt, and informs Mortgagee that the
funds are available upon Mortgagee’s request and execution of a document discharging
the mortgage. Mortgagor’s tender is effective, continuing, and conditional. The
mortgage is extinguished, and no further interest will accrue on the debt.

The statements in comment d relate only to a tender made by “the person primarily
responsible for payment.” Defendant has produced no evidence that the former owner ever made

1 such a payment.

2 The Nevada Supreme Court has previously adopted the position that a tender must be “kept
3 good” in several cases.

4 In the case of Rhodes v. O’Farrell 2 Nev. 60 (1866), Respondent Rhodes attempted to pay his
5 property taxes to the Storey County tax collector in legal tender notes. The tax collector refused the
6 tender and insisted in payment in gold coin. The court stated:

7 Respondent ought not to be restrained from selling **unless the tender is kept good.**

8 As it does not appear from the transcript whether that has been done or not, the court
9 will retain this case until that is ascertained. Upon the respondent producing
10 satisfactory evidence, either by receipt of appellant, or by the certificate of the clerk,
11 **that he has either paid the money tendered to the appellant, or that he has**
12 **deposited it in court subject to the disposal of the appellant,** the judgment of the
13 court below will be affirmed, with costs.

14 The case of State v. Central Pacific Railroad 21 Nev. 247, 30 P. 686 (1892) also dealt with the
15 payment of property taxes. The court stated:

16 *Tender.* In our judgment, the tender of the taxes to the treasurer as ex officio tax
17 receiver, and their subsequent payment to the district attorney, were sufficient to avoid
18 the penalties. The defendant, at the proper time, tendered all the taxes due upon all its
19 property, except land. We held upon the former appeal that it had a right to make such
20 payment, and need not tender the full amount due upon the entire assessment, which
21 included other subdivisions of property. The tender was doubtless refused upon the
22 theory that the defendant must pay upon all or none. ...The money being promptly paid
23 to the district attorney when demanded by him, **it must be presumed that the tender**
24 **was kept good.** The judgment and orders overruling motions for new trial are
25 affirmed.

26 The case of State v. Ernst 26 Nev. 113, 65 P.7 (1901) also dealt with the payment of taxes.
27 The court stated:

28 It appears from the record that the appellants Ernst & Esser have tendered (and kept
good their tender) the amount of taxes due upon the property assessed to them, and that
a retrial of the case will not be necessary.

**L. To be effective against plaintiff, defendant was required to record the claim that the
party had tendered the amount of the HOA’s superpriority lien.**

Because the alleged tender creates an assignment of an interest in real property, it must be
recorded to be effective as to subsequent purchasers.

NRS 116.1108 provides:

1 **Supplemental general principles of law applicable.** The principles of law and
2 equity, including the law of corporations and any other form of organization
3 authorized by law of this State, the law of unincorporated associations, **the law of real**
4 **property**, and the law relative to capacity to contract, principal and agent, eminent
5 domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership,
6 substantial performance, or other validating or invalidating cause supplement the
7 provisions of this chapter, except to the extent inconsistent with this chapter.
8 (emphasis added)

9 Nevada law requires that interests in real property must be recorded. An unrecorded interest
10 in real property is void against a subsequent purchaser if the subsequent purchaser's interest is first
11 duly recorded. Tae-Si Kim v. Kearney, 838 F. Supp. 2d 1077, 1087-1088 (D. Nev. 2012).

12 The word "conveyance" is defined in NRS 111.010(1) to include "every instrument in
13 writing" by which "any estate or interest in lands is created, aliened, **assigned** or surrendered."
14 (emphasis added)

15 NRS 111.315 states:

16 **Every conveyance of real property**, and every instrument of writing setting forth an
17 agreement to convey any real property, or **whereby any real property may be**
18 **affected**, proved, acknowledged and certified in the manner prescribed in this chapter,
19 **to operate**
20 **as notice to third persons, shall be recorded** in the office of the recorder of the
21 county in which the real property is situated or to the extent permitted by NR 105.010
22 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and
23 binding between the parties thereto without such record. (emphasis added)

24 NRS 111.325 provides that an unrecorded satisfaction of lien on the part of the plaintiff is
25 void against a subsequent purchaser, such as defendant:

26 Every conveyance of real property within this State hereafter made, which shall not be
27 recorded as provided in this chapter, **shall be void as against any subsequent**
28 **purchaser, in good faith and for valuable consideration**, of the same real property,
or any portion thereof, where his or her own conveyance shall be first duly recorded.
(emphasis added)

29 **M. If tender discharges a lien, it must be recorded to be effective.**

30 Even if the alleged tender of payment by defendant is not viewed as the basis for equitable
31 subrogation and is instead viewed as extinguishing the superpriority lien, the payment must still be
32 recorded because an extinguishment or surrender of the debt owed by the lien is also a "conveyance."

33 Because the satisfaction of a lien is a form of conveyance, surrender or discharge, NRS
34 111.315 requires that the plaintiff bank's satisfaction be recorded in order to be effective as to Saticoy

1 Bay.

2 Likewise, NRS 111.325, makes it abundantly clear that an unrecorded satisfaction of lien on
3 the part of the defendant is void against a subsequent purchaser, such as plaintiff.

4 Additionally, to the extent that the purported tender is claimed to have worked to discharge or
5 extinguish the HOA's lien, such a discharge or release must also be recorded in the office of the
6 county recorder. Separate and apart from "conveyances," all discharges of liens must be recorded.

7 **NRS 106.260 Discharge and assignment: Marginal entries; discharge or release**
8 **must be recorded when mortgage or lien recorded by microfilm.**

9 1. Any mortgage or lien, that has been or may hereafter be recorded, may be
10 discharged or assigned by an entry on the margin of the record thereof, signed by the
11 mortgagee or the mortgagee's personal representative or assignee, acknowledging the
12 satisfaction of or value received for the mortgage or lien and the debt secured thereby,
in the presence of the recorder or the recorder's deputy, who shall subscribe the same
as a witness, and such entry shall have the same effect as a deed of release or
assignment duly acknowledged and recorded. Such marginal discharge or assignment
shall in each case be properly indexed by the recorder.

13 2. In the event that the mortgage or lien has been recorded by a microfilm or other
14 photographic process, a marginal release may not be used and **a duly acknowledged**
discharge or release of such mortgage or lien must be recorded. (emphasis added)

15 The super-priority lien under NRS 116.3116(2) is a true priority lien and is superior to a first
16 deed of trust. SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d at 412-414. The Nevada
17 Supreme Court relied, in part, on the holding in 7912 Limbwood Court Trust v. Wells Fargo Bank,
18 N.A., 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013). Limbwood recognizes that in order to avoid the
19 extinguishment of the first deed of trust, the first deed of trust holder needs to pay the HOA to obtain
20 the priority position.

21 NRS 111.325 mandates that any claimed interest on the part of the plaintiff bank is void as a
22 matter of law. The purpose of recording documents is to provide notice to all persons of the
23 recording party's interest in the property. An unrecorded or other instrument required to be recorded
24 is not valid and effective against a bona fide purchaser.

25 As shown above, whether regarded as an assignment, subrogation or subordination, an
26 instrument must be recorded with the Clark County Recorder's office in order to be effective as to
27 subsequent purchasers, such as plaintiff. Defendant does not allege nor can it show any evidence that
28

1 defendant recorded this property interest. The purported tender of payment of the super-priority
2 interest is void as a matter of law against the foreclosure deed to Saticoy Bay LLC Series 34
3 Innisbrook because evidence of the payment was not recorded in accordance with Nevada's recording
4 laws. As a result of the failure to record any evidence of this property interest prior to the date that
5 the foreclosure deed was recorded, any property interest created by the payment offered by defendant
6 is void as against Saticoy Bay LLC Series 34 Innisbrook.

7 This analysis is consistent with the recent amendment to the statute by the Nevada Legislature
8 which requires recording of evidence of the payments and announcement of the payment at the
9 auction, prior to bidding.

10 **N. Any change in priority must be recorded.**

11 Further, because the purported tender of payment would have the effect of changing the
12 priority of the HOA's lien, versus the deed of trust, it is required to be recorded as well.

13 **NRS 106.220 Filing and recording of instruments subordinating or waiving**
14 **priority of mortgages or deeds of trust; constructive notice; effect of unrecorded**
15 **instruments.**

16 1. **Any instrument by which any mortgage or deed of trust of, lien upon or**
17 **interest in real property is subordinated or waived as to priority,** must, in case it
18 concerns only one or more mortgages or deeds of trust of, liens upon or interests in real
19 property, together with, or in the alternative, one or more mortgages of, liens upon or
20 interests in personal property or crops, the instruments or documents evidencing or
21 creating which have been recorded prior to March 27, 1935, be recorded in the office
22 of the recorder of the county in which the property is located, and from the time any of
23 the same are so filed for record operates as constructive notice of the contents thereof
24 to all persons. **The instrument is not enforceable under this chapter or chapter 107**
25 **of NRS unless and until it is recorded.**

26 2. Each such filing or recording must be properly indexed by the recorder.
27 (Emphasis added)

28 Thus, in order to be effective, any subordination of the HOA's superpriority lien must be recorded.

29 A foreclosure agent has a duty to act impartially and in good faith. By analogy, NRS
30 107.028(5), involving the duties of a trustee under a deed of trust, provides in part:

31 The trustee does not have a fiduciary obligation to the grantor or any other person
32 having an interest in the property which is subject to the deed of trust. **The trustee**
33 **shall act impartially and in good faith with respect to the deed of trust and shall**
34 **act in accordance with the laws of this State.** A rebuttable presumption that a trustee
35 has acted impartially and in good faith exists if the trustee acts in compliance with the

1 provisions of NRS 107.080. (emphasis added)

2 As verified by the affidavit of Iyad Haddad filed herewith, Saticoy Bay LLC Series 34
3 Innisbrook had no notice of defendant's attempted payment prior to entering and paying its high bid
4 of \$1,201,000.00 to purchase the Property.

5 **O. Notice to third parties is of utmost significance.**

6 Notice to potential third party bidders who could otherwise claim status of a bona fide
7 purchaser is critical to this court's evaluation of this case. Defendant had actual knowledge that the
8 property was in foreclosure and that third persons would likely bid on the Property. For the nominal
9 cost of recording a notice at \$17.00 for the first page with the Clark County Recorder, defendant
10 could have simply recorded a one page notice with the recorder and put the world on notice.

11 In evaluating the equities between the various parties, the court should keep in mind that
12 defendant, had a simple and inexpensive method to notify the world, including plaintiff, of its
13 attempted payment and alleged preservation of its deed of trust. Because defendant failed to do so,
14 the equities weigh in favor of plaintiff as the bona fide purchaser without knowledge of the rejected
15 tender.

16 **P. The foreclosure statutes are constitutional**

17 As recognized by the Nevada Supreme Court in Saticoy Bay LLC Series 350 Durango 104 v.
18 Wells Fargo Home Mortgage, 133 Nev., Adv. Op. 5, at *10 (Jan. 26, 2017), the foreclosure statutes as
19 found in NRS Chapter 116 are constitutional. The court found that the statutes do not involve either
20 state action or a state actor and does not constitute a taking.

21 **Q. The fact that the deed has no warranties has no effect on the purchasers title**

22 The only warranties recognized at law are contained in NRS 111.170 which provides:

23 **Construction of words "grant, bargain and sell" in conveyances; suit upon covenants.**

24 1. The words "grant, bargain and sell" in all conveyances made after December 2,
25 1861, in and by which any estate of inheritance or fee simple is to be passed, shall,
26 unless restrained by express terms contained in such conveyances, be construed to be
27 the following express covenants, and none other, on the part of the grantor, for the
28 grantor and the heirs of the grantor to the grantee, the heirs of the grantee, and assigns:

(a) That previous to the time of the execution of the conveyance the grantor has not
conveyed the same real property, or any right, title, or interest therein, to any person
other than the grantee.

1 (b) That the real property is, at the time of the execution of the conveyance, free
2 from encumbrances, done, made or suffered by the grantor, or any person claiming
3 under the grantor.

4 2. Such covenants may be sued upon in the same manner as if they had been
5 expressly inserted in the conveyance.

6 The covenants in a grant deed have nothing to do with a representation of the validity of the
7 sale or the condition of the title conveyed.

8 CONCLUSION

9 The HOA's foreclosure sale extinguished both the defendant's deed of trust, and its interest in
10 the subject property. The foreclosure sale is presumed to be valid by statute, the and the recitals in
11 the foreclosure deed are conclusive proof the HOA's foreclosure sale complied with all requirements
12 of Nevada law. The burden of proof is on the bank to set the sale aside, and the purchaser, as record
13 title holder has the presumption of validity title in its favor. The defendant has not produced any
14 evidence to show that the defendant is not a bona fide purchaser, and has failed to demonstrate any
15 defect in the sale to justify setting aside the foreclosure sale. Additionally, the defendant has failed to
16 take any steps to protect its interests, and permitted the sale to go forward. Further, defendant bank
17 failed to record anything putting potential purchasers, such as defendants, on notice of its alleged
18 tender.

19 ///

20 ///

21 ///

22 ///

1 Accordingly, it is respectfully requested that this Court enter an order granting the plaintiff's
2 motion for summary judgment and quieting title to the Property in the name of the plaintiff, free and
3 clear of all liens and encumbrances and forever enjoining defendant from asserting any estate, title,
4 right, interest, or claim to the property adverse to the plaintiff.

5 DATED this 4th day of May, 2018

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

8
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12 Henderson, Nevada 89074
13 Attorney for Plaintiff
14 Saticoy Bay LLC Series 34 Innisbrook
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of
3 Law Offices of Michael F. Bohn., Esq., and on the 4th day of May, 2018, an electronic copy of the
4 **MOTION FOR SUMMARY JUDGMENT** was served on opposing counsel via the Court's
5 electronic service system to the following counsel of record:

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21 /s/ Marc Sameroff /
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9
10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 SATICOY BAY LLC SERIES 34
INNISBROOK,

13 Plaintiff,

14 vs.

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

19 Defendants.

20 And all related matters.

CASE NO.: A-14-710161-C
DEPT NO.: XV

**AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

21
22 **AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

23 STATE OF NEVADA)
) ss:
24 COUNTY OF CLARK)

25 IYAD HADDAD being first duly sworn, deposes and says;

26 1. Affiant is the person most knowledgeable for Saticoy Bay LLC Series 34 Innisbrook, the
27 plaintiff/counterdefendant herein, and makes this affidavit based on personal knowledge.

1 2. Plaintiff/Counterdefendant, Saticoy Bay LLC Series 34 Innisbrook, is the owner of the real
2 property commonly known as 34 Innisbrook Avenue, Las Vegas, Nevada.

3 3. Plaintiff/Counterdefendant, Saticoy Bay LLC Series 34 Innisbrook, acquired title to the
4 property at foreclosure sale conducted on November 7, 2014 as evidenced by the foreclosure deed
5 recorded on November 10, 2014.

6 4. The foreclosure deed reflects that valuable consideration in the sum of \$1,201,000.00 was paid
7 for the property.

8 5. The plaintiff/counterdefendant's title stems from a foreclosure deed arising from a delinquency
9 in assessments due from the former owner to the Spanish Trail Master Association pursuant to NRS
10 Chapter 116.

11 6. Prior to and at the time of the foreclosure sale, there was nothing recorded in the public record
12 to put me on notice of any claims or notices that any portion of the lien had been paid.

13 7. Prior to and at the time of the foreclosure sale, there is no way for myself or any other potential
14 bidder at the foreclosure sale to research if the notices were sent to the proper parties at the proper
15 address. I, and other potential bidders are forced to rely only on the professional foreclosure agent to have
16 obtained a trustee's sale guarantee issued by a local title and escrow company and to serve the notices
17 upon the parties who are entitled to notice.

18 8. As a result of the limited information available to myself and other potential bidders at
19 foreclosure sale, I, on behalf of the plaintiff/counterdefendant, am a bona fide purchaser of the
20 property, for value, without notice of any claims on the title to the property or any alleged defects in
21 the sale itself.

22 9. At no time prior to the foreclosure sale did I receive any information from the HOA or the
23 foreclosure agent about the property or the foreclosure sale.

24 10. Neither myself or anyone associated with plaintiff/counterdefendant, Saticoy Bay LLC
25 Series 34 Innisbrook, have any affiliation with the HOA board or the foreclosure agent.

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1 11. Any attempt to contact the bank to find anything out about payment of the super priority
2 amount would have been futile. The banks have a very long hold time, and agents will not speak to
3 anyone except the borrower, and they require the borrowers social security number for identification.
4 In addition, the banks have many departments, and it is impossible to get through to anyone with any
5 information.

6 12. Any attempt to find out any information about a tender or payment of the super priority lien
7 at the auction would also be a futile act. Asking questions during the auctions would be considered to
8 be a disruption. I would not get a response and would be prohibited from bidding the rest of the day.
9 In addition, often, the persons crying the sale are third party contractors without any knowledge of
10 what is in the file other than what is provided to cry the sale.

11 13. If called upon to testify to the above facts, affiant could do so competently.

12
13
14 IYAD HADDAD

15 SUBSCRIBED and SWORN to before me
16 this 7th day of March, 2018.

17 Marc Sameroff
18 NOTARY PUBLIC in and for said
County and State

