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 Nov 23 2020 01:43 p.m. Elizabeth A. Brown Clerk of Supreme Court **JOINT APPENDIX VOLUME 13**

Counsel for Appellant:

Roger P. Croteau, Esq.
Nevada Bar No. 4958
ROGER P. CROTEAU & ASSOCIATES, LTD.
2810 W. Charleston Blvd., Ste. 75
Las Vegas, Nevada 89102
Tel: (702) 254-7775
Fax: (702) 228-7719
Email: croteaulaw@croteaulaw.com

INDEX OF APPENDIX – CHRONOLOGICAL

DATE	DOCUMENT	VOL	PAGE
11/20/2014	Complaint	1	JA0001-0004
11/25/2014	Amended Complaint	1	JA0005-0008
12/30/2014	Affidavit of Service (Frank Timpa)	1	JA0009
12/30/2014	Affidavit of Service (Madeline Timpa)	1	JA0010
12/30/2014	Affidavit of Service (Frank Timpa; Madeline; Timpa Trust)	1	JA0011
02/02/2015	Affidavit of Service (Recontrust Company)	1	JA0012
02/05/2015	Affidavit of Service (Thornburg Mortgage Securities Trust 2007-3)	1	JA0013
04/10/2015	Thornburg Mortgage Securities Trust 2007-3's Answer and Counter-Claims	1	JA0014-0093
05/21/2015	Red Rock Financial Services' Answer to Thornburg Mortgage Securities Trust 2007-3 Counterclaim; And Red Rock Financial Services' Counterclaim for Interpleader (NRCP22)	1	JA0094-0108
06/11/2015	Second Amended Complaint	1	JA109-112
06/23/2015	Reply to Counterclaim for Interpleader-Republic Services Reply to Counterclaim	1	JA0113-0115
06/24/2015	Thornburg Mortgage Securities Trust 2007-3's Answer to Red Rock Financial Services Counterclaim for Interpleader (NRCP 22)	1	JA0116-0123
06/26/2015	Affidavit of Service (Countrywide Home Loans)	1	JA0124
06/26/2015	Affidavit of Service (Republic Services)	1	JA0125
06/26/2015	Affidavit of Service (Estates at West Spanish Trail	1	JA0126

06/26/2015	Affidavit of Service (Mortgage Electronic Registration System)	1	JA0127
07/27/2015	Affidavit of Service (Las Vegas Valley Water District)	1	JA1028
05/23/2016	Thornburg Mortgage Securities Trust 2007-3's Answer to Second Amended Complaint	1	JA0129-0138
02/10/2017	Third Amended Complaint	1	JA0139-0144
02/24/2017	Answer to Third Amended Complaint (Republic Services)	1	JA0145-0148
03/03/2017	Red Rock Financial Services' Answer to Plaintiff's Third Amended Complaint	1	JA0149-0155
03/19/2017	Thornburg Mortgage Securities Trust 2007-3's Answer to Saticoy Bay LLC Series 34 Innisbrook's Third Amended Complaint	1	JA0156-0166
05/30/2017	Thornburg Mortgage Securities Trust 2007-3's Answer to Saticoy Bay LLC Series 34 Innisbrook's Third Amended Complaint and Counterclaims	2	JA0167-0246
06/12/2017	Red Rock Financial Services' Answer to Thornburg Mortgage Securities Trust 2007-3 Counterclaim; and Red Rock Financial Services' Counterclaim for Interpleader (NRCP 22)	2	JA0247-0259
07/05/2017	Defendant Thornburg Mortgage Securities Trust 2007-3's Answer to Red Rock Financial Services' Counterclaim	2	JA0260-0269
07/11/2017	Affidavit of Service (Spanish Trail Master Association)	2	JA0270
09/07/2017	Answer to Thornburg Mortgage Securities Trust 2007-3's Counterclaims (Saticoy Bay)	2	JA0271-0277

05/04/2018	Motion for Summary Judgment (Saticoy Bay)	3	JA0278-0477
05/04/2018	Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment-Motion through Exhibit "E"	4	JA0478-0613
05/04/2018	Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment-Exhibits "F"-"L"	5	JA0614-0731
05/14/2018	Republic Services, INC's Partial Opposition to Plaintiff Saticoy Bay, LLC Series 34 Innisbrook's Motion for Summary Judgment	5	JA0732-0735
05/21/2018	Thornburg Mortgage Securities Trust 2007-3's Opposition to Saticoy Bay LLC's Series 34 Innisbrook's Motion for Summary Judgment—Motion through Exhibit "I"	6	JA0736-0938
05/21/2018	Thornburg Mortgage Securities Trust 2007-3's Opposition to Saticoy Bay LLC's Series 34 Innisbrook's Motion for Summary Judgment—Exhibit "J" through Exhibit "M"	7	JA0939-0996
05/22/2018	Plaintiff's Opposition to Defendant Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment	7	JA0997-1155
05/22/2018	Counter-Defendant Spanish Trail Master Association's Opposition to Thornburg Mortgage's Motion for Summary Judgment and Countermotion for Summary Judgment	8	JA1156-1196
05/29/2018	Thornburg Mortgage Securities Trust 2007-3's Reply Supporting its Motion for Summary Judgment and Opposition to Spanish Trails Master	8	JA1197-1209

	Association's Countermotion for Summary Judgment		
05/30/2018	Red Rock Financial Services' Joinder to Defendant Spanish Trail Master Association's Countermotion for Summary Judgment	8	JA1210-1212
05/30/2018	Republic Services, INC's Partial Opposition to Counterdefendant, Spanish Trail Master Association's Countermotion for Summary Judgment	8	JA1213-1216
06/04/2018	Reply in Support of Plaintiff's Motion for Summary Judgment (Saticoy Bay)	8	JA1217-1248
06/26/2018	Counter-Defendant Spanish Trail Master Association's Reply in Support of its Countermotion for Summary Judgment	8	JA1249-1270
06/27/2018	Supplement to Plaintiff's Opposition to Defendant Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment	8	JA1271-1275
06/28/2018	Errata to Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment	8	JA1276-1304
06/29/2018	Thornburg Mortgage Securities Trust 2007-3's Reply supporting its Motion to Strike Plaintiff's Supplemental Opposition to its Motion for Summary Judgment or, In the Alternative, Surreply Supporting Summary Judgment	8	JA1305-1350
07/02/2018	Errata to Thornburg Mortgage Securities Trust 2007-3's Reply supporting its Motion to Strike Plaintiff's Supplemental Opposition to its Motion for Summary Judgment	8	JA1351-1358

	or, In the Alternative, Surreply Supporting Summary Judgment		
07/19/2018	Spanish Trail Master Association's Answer to Saticoy Bay's Third Amended Complaint	8	JA1359-1366
07/19/2018	Spanish Trail Master Association's Answer to Thornburg Mortgage's Counterclaims	8	JA1367-1383
09/17/2018	Thornburg Mortgage Securities Trust 2007-3's Motion for Reconsideration of Order Denying Summary Judgment (Motion through Exhibit "K")	9	JA1384-1602
09/17/2018	Thornburg Mortgage Securities Trust 2007-3's Motion for Reconsideration of Order Denying Summary Judgment (Exhibits "L" and "M")	10	JA1603-1650
10/02/2018	Plaintiff's Opposition to Motion for Reconsideration	10	JA1651-1690
10/26/2018	Thornburg Mortgage Securities Trust 2007-3's Reply Supporting its Motion for Reconsideration	10	JA1691-1718
12/03/2018	Findings of Fact, Conclusions of Law, and Order Granting Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment	10	JA1719-1728
12/05/2018	Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment	10	JA1729-1742
01/31/2019	Madelaine Timpa and Timpa Trust's Verified Answer to Red Rock Financial Services' Counterclaim for Interpleader and Madelaine Timpa's Claim to Surplus Funds	10	JA1743-1751

06/25/2019	Timpa Trust's Motion for Summary Judgment	10	JA1752-1849
07/09/2019	Red Rock Financial Services' Limited Response to Timpa Trust's Motion for Summary Judgment	11	JA1850-1866
07/09/2019	Timpa Trust's Reply to Red Rock Financial Services' Limited Response to Timpa Trust's Motion for Summary Judgment	11	JA1867-1870
07/23/2019	Timpa Trust's Opposition to Saticoy Bay LLC Series 34 Innisbrook's Motion to Enlarge Time in which to File Opposition to Timpa Trust's Motion for Summary Judgment	11	JA1871-1885
07/26/2019	Opposition to Timpa Trust's Motion for Summary Judgment and Red Rock Financial Services' Limited Response to Timpa Trust's Motion for Summary Judgment	11	JA1886-2038
08/06/2019	Timpa Trust's reply to Saticoy Bay LLC Series 34 Innisbrook's Opposition to Timpa Trust's Motion for Summary Judgment	12	JA2039-2049
09/11/2019	Order	12	JA2050-2057
09/11/2019	Notice of Entry of Order	12	JA2058-2068
09/24/2019	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	12	JA2069-2090
10/02/2019	Plaintiff's Emergency Motion for a Stay of Execution Pending the Court's Adjudication of Plaintiff's Pending Motion for Reconsideration of the	12	JA2091-2116

	Court's Excess Proceeds Order Pursuant to NRCP 62(b)(3) & (4)		
10/04/2019	Thornburg Mortgage Securities Trust 2007-3's Limited Opposition to Plaintiff's Motion for Reconsideration	12	JA2117-2141
10/04/2019	Thornburg Mortgage Securities Trust 2007-3's Limited Joinder to Plaintiff's Emergency Motion for Stay of Execution Pending the Court's Adjudication of Plaintiff's Pending Motion for Reconsideration of the Court's Excess Proceeds Order Pursuant to 62(b)(3)&(4)	12	JA 2142-2144
10/08/2019	Opposition to 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	12	JA2145-2166
10/16/2019	Plaintiff's Motion to Amend Complaint Pursuant to NRCP 15(b)(2) and 60(b), The Supreme Court of Nevada's Decision in *Jessup*, and EDCR 2.30 to Set Aside/Rescind NRS116 Foreclosure Sale	12	JA2167-2189
10/18/2019	Plaintiff's Reply to Thornburg Mortgage Securities Trust 2007-3's Limited Opposition to Plaintiff's Motion for Reconsideration	12	JA2190-2194
10/25/2019	Thornburg Mortgage Securities Trust 2007-3's Limited Opposition to Plaintiff's Motion to Amend Complaint Pursuant to NRCP 15(b)(2) and 60(b)	12	JA2195-2198

10/25/2019	Plaintiff's Reply in Support of its Motion for Reconsideration	12	JA2199-2211
10/27/2019	Opposition to Plaintiff's Motion to Amend Complaint Pursuant to NRCP 15(b)(2) and 60(b), The Supreme Court of Nevada's Decision in *Jessup*, and EDCR 2.30 to Set Aside/Rescind NRS116 Foreclosure Sale (Timpa Trust)	12	JA2212-2217
10/28/2019	Red Rock Financial Services' Opposition to Plaintiff's Motion to Amend Complaint	12	JA2218-2224
11/18/2019	Order	12	JA2225-2227
11/19/2019	Notice of Entry of Order	12	JA2228-2232
11/19/2019	Notice of Appeal	12	JA2233-2235
08/27/2020	Recorder's Transcript of Hearing: All Pending Motions (07/03/2018)	13	JA2236-2316
10/15/2020	Recorder's Transcript of Hearing: Thornburg Mortgage Securities Trust 2007-3's Motion for Reconsideration of Order Denying Summary Judgment (11/06/2018)	13	JA2317-2337
10/15/2020	Recorder's Transcript of Hearing: Timpa Trust's Motion for Summary Judgment (08/13/2019)	13	JA2338-2343
10/15/2020	Recorder's Transcript of Hearing: Plaintiff's Emergency Motion for a Stay of Execution Pending the Court's Adjudication of Plaintiff's Pending Motion for Reconsideration of the Court's Excess Proceeds Order Pursuant to NRCP 62(b)(3) & (4) (10/10/2019)		JA2344-2364
10/15/2020	Recorder's Transcript of Hearing: All Pending Motions (10/29/2019)	13	JA2365-2427

INDEX OF APPENDIX-ALPHABETICAL

6/26/2018	Counter-Defendant Spanish Trail Master Association's Reply in Support of its Countermotion for Summary Judgment	8	JA1249-1270
7/5/2017	Defendant Thornburg Mortgage Securities Trust 2007-3's Answer to Red Rock Financial Services' Counterclaim	2	JA0260-0269
6/28/2018	Errata to Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment	8	JA1276-1304
7/2/2018	Errata to Thornburg Mortgage Securities Trust 2007-3's Reply supporting its Motion to Strike Plaintiff's Supplemental Opposition to its Motion for Summary Judgment or, In the Alternative, Surreply Supporting Summary Judgment	8	JA1351-1358
12/3/2018	Findings of Fact, Conclusions of Law, and Order Granting Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment	10	JA1719-1728
1/31/2019	Madelaine Timpa and Timpa Trust's Verified Answer to Red Rock Financial Services' Counterclaim for Interpleader and Madelaine Timpa's Claim to Surplus Funds	10	JA1743-1751
5/4/2018	Motion for Summary Judgment (Saticoy Bay)	3	JA0278-0477
11/19/2019	Notice of Appeal	12	JA2233-2235
12/5/2018	Notice of Entry of Findings of Fact, Conclusions of Law, and Order Granting Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment	10	JA1729-1742
9/11/2019	Notice of Entry of Order	12	JA2058-2068
11/19/2019	Notice of Entry of Order	12	JA2228-2232

10/8/2019	Opposition to 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	12	JA2145-2166
10/27/2019	Opposition to Plaintiff's Motion to Amend Complaint Pursuant to NRCP 15(b)(2) and 60(b), The Supreme Court of Nevada's Decision in *Jessup*, and EDCR 2.30 to Set Aside/Rescind NRS116 Foreclosure Sale (Timpa Trust)	12	JA2212-2217
7/26/2019	Opposition to Timpa Trust's Motion for Summary Judgment and Red Rock Financial Services' Limited Response to Timpa Trust's Motion for Summary Judgment	11	JA1886-2038
9/11/2019	Order	12	JA2050-2057
11/18/2019	Order	12	JA2225-2227
9/24/2019	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	12	JA2069-2090
10/16/2019	Plaintiff's Motion to Amend Complaint Pursuant to NRCP 15(b)(2) and 60(b), The Supreme Court of Nevada's Decision in *Jessup*, and EDCR 2.30 to Set Aside/Rescind NRS116 Foreclosure Sale	12	JA2167-2189
5/22/2018	Plaintiff's Opposition to Defendant Thornburg Mortgage Securities Trust	7	JA0997-1155

	2007-3's Motion for Summary Judgment		
10/2/2018	Plaintiff's Opposition to Motion for Reconsideration	10	JA1651-1690
10/25/2019	Plaintiff's Reply in Support of its Motion for Reconsideration	12	JA2199-2211
10/18/2019	Plaintiff's Reply to Thornburg Mortgage Securities Trust 2007-3's Limited Opposition to Plaintiff's Motion for Reconsideration	12	JA2190-2194
10/2/2019	Plaintiff's Emergency Motion for a Stay of Execution Pending the Court's Adjudication of Plaintiff's Pending Motion for Reconsideration of the Court's Excess Proceeds Order Pursuant to NRCP 62(b)(3) & (4)	12	JA2091-2116
8/27/2020	Recorder's Transcript of Hearing: All Pending Motions (07/03/2018)	13	JA2236-2316
10/15/2020	Recorder's Transcript of Hearing: All Pending Motions (10/29/2019)	13	JA2365-2427
10/15/2020	Recorder's Transcript of Hearing: Plaintiff's Emergency Motion for a Stay of Execution Pending the Court's Adjudication of Plaintiff's Pending Motion for Reconsideration of the Court's Excess Proceeds Order Pursuant to NRCP 62(b)(3) & (4) (10/10/2019)	13	JA2344-2364
10/15/2020	Recorder's Transcript of Hearing: Thornburg Mortgage Securities Trust 2007-3's Motion for Reconsideration of Order Denying Summary Judgment (11/06/2018)	13	JA2317-2337
10/15/2020	Recorder's Transcript of Hearing: Timpa Trust's Motion for Summary Judgment (08/13/2019)	13	JA2338-2343

3/3/2017	Red Rock Financial Services' Answer to Plaintiff's Third Amended Complaint	1	JA0149-0155
6/12/2017	Red Rock Financial Services' Answer to Thornburg Mortgage Securities Trust 2007-3 Counterclaim; and Red Rock Financial Services' Counterclaim for Interpleader (NRCP 22)	2	JA0247-0259
5/21/2015	Red Rock Financial Services' Answer to Thornburg Mortgage Securities Trust 2007-3 Counterclaim; And Red Rock Financial Services' Counterclaim for Interpleader (NRCP22)	1	JA0094-0108
5/30/2018	Red Rock Financial Services' Joinder to Defendant Spanish Trail Master Association's Countermotion for Summary Judgment	8	JA1210-1212
7/9/2019	Red Rock Financial Services' Limited Response to Timpa Trust's Motion for Summary Judgment	11	JA1850-1866
10/28/2019	Red Rock Financial Services' Opposition to Plaintiff's Motion to Amend Complaint	12	JA2218-2224
6/4/2018	Reply in Support of Plaintiff's Motion for Summary Judgment (Saticoy Bay)	8	JA1217-1248
6/23/2015	Reply to Counterclaim for Interpleader-Republic Services Reply to Counterclaim	1	JA0113-0115
5/30/2018	Republic Services, INC's Partial Opposition to Counterdefendant, Spanish Trail Master Association's Countermotion for Summary Judgment	8	JA1213-1216

5/14/2018	Republic Services, INC's Partial Opposition to Plaintiff Saticoy Bay, LLC Series 34 Innisbrook's Motion for Summary Judgment	5	JA0732-0735
6/11/2015	Second Amended Complaint	1	JA109-112
7/19/2018	Spanish Trail Master Association's Answer to Saticoy Bay's Third Amended Complaint	8	JA1359-1366
7/19/2018	Spanish Trail Master Association's Answer to Thornburg Mortgage's Counterclaims	8	JA1367-1383
6/27/2018	Supplement to Plaintiff's Opposition to Defendant Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment	8	JA1271-1275
2/10/2017	Third Amended Complaint	1	JA0139-0144
4/10/2015	Thornburg Mortgage Securities Trust 2007-3's Answer and Counter-Claims	1	JA0014-0093
6/24/2015	Thornburg Mortgage Securities Trust 2007-3's Answer to Red Rock Financial Services Counterclaim for Interpleader (NRCP 22)	1	JA0116-0123
3/19/2017	Thornburg Mortgage Securities Trust 2007-3's Answer to Saticoy Bay LLC Series 34 Innisbrook's Third Amended Complaint	1	JA0156-0166
5/30/2017	Thornburg Mortgage Securities Trust 2007-3's Answer to Saticoy Bay LLC Series 34 Innisbrook's Third Amended Complaint and Counterclaims	2	JA0167-0246
5/23/2016	Thornburg Mortgage Securities Trust 2007-3's Answer to Second Amended Complaint	1	JA0129-0138
10/4/2019	Thornburg Mortgage Securities Trust 2007-3's Limited Joinder to	12	JA 2142-2144

	Plaintiff's Emergency Motion for Stay of Execution Pending the Court's Adjudication of Plaintiff's Pending Motion for Reconsideration of the Court's Excess Proceeds Order Pursuant to 62(b)(3)&(4)		
10/4/2019	Thornburg Mortgage Securities Trust 2007-3's Limited Opposition to Plaintiff's Motion for Reconsideration	12	JA2117-2141
10/25/2019	Thornburg Mortgage Securities Trust 2007-3's Limited Opposition to Plaintiff's Motion to Amend Complaint Pursuant to NRCP 15(b)(2) and 60(b)	12	JA2195-2198
9/17/2018	Thornburg Mortgage Securities Trust 2007-3's Motion for Reconsideration of Order Denying Summary Judgment (Exhibits "L" and "M")	10	JA1603-1650
9/17/2018	Thornburg Mortgage Securities Trust 2007-3's Motion for Reconsideration of Order Denying Summary Judgment (Motion through Exhibit "K")	9	JA1384-1602
5/4/2018	Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment-Exhibits "F"-"L"	5	JA0614-0731
5/4/2018	Thornburg Mortgage Securities Trust 2007-3's Motion for Summary Judgment-Motion through Exhibit "E"	4	JA0478-0613
5/21/2018	Thornburg Mortgage Securities Trust 2007-3's Opposition to Saticoy Bay LLC's Series 34 Innisbrook's Motion for Summary Judgment—Exhibit "J" through Exhibit "M"	7	JA0939-0996

5/21/2018	Thornburg Mortgage Securities Trust 2007-3's Opposition to Saticoy Bay LLC's Series 34 Innisbrook's Motion for Summary Judgment—Motion through Exhibit "I"	6	JA0736-0938
10/26/2018	Thornburg Mortgage Securities Trust 2007-3's Reply Supporting its Motion for Reconsideration	10	JA1691-1718
5/29/2018	Thornburg Mortgage Securities Trust 2007-3's Reply Supporting its Motion for Summary Judgment and Opposition to Spanish Trails Master Association's Countermotion for Summary Judgment	8	JA1197-1209
6/29/2018	Thornburg Mortgage Securities Trust 2007-3's Reply supporting its Motion to Strike Plaintiff's Supplemental Opposition to its Motion for Summary Judgment or, In the Alternative, Surreply Supporting Summary Judgment	8	JA1305-1350
6/25/2019	Timpa Trust's Motion for Summary Judgment	10	JA1752-1849
7/23/2019	Timpa Trust's Opposition to Saticoy Bay LLC Series 34 Innisbrook's Motion to Enlarge Time in which to File Opposition to Timpa Trust's Motion for Summary Judgment	11	JA1871-1885
7/9/2019	Timpa Trust's Reply to Red Rock Financial Services' Limited Response to Timpa Trust's Motion for Summary Judgment	11	JA1867-1870
8/6/2019	Timpa Trust's reply to Saticoy Bay LLC Series 34 Innisbrook's Opposition to Timpa Trust's Motion for Summary Judgment	12	JA2039-2049

Electronically Filed
8/27/2020 2:07 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34 INNISBROOK, Plaintiff, vs. THORNBURG MORTGAGE SECURITIES TRUST 2007-3 et al., Defendants.	CASE#: A-14-710161-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN

DISTRICT COURT JUDGE

TUESDAY, JULY 3, 2018

RECORDER'S TRANSCRIPT OF HEARING:
ALL PENDING MOTIONS

APPEARANCES:

For Saticoy Bay:	MICHAEL F. BOHN, ESQ.
For Spanish Trail:	RYAN D. HASTINGS, ESQ.
For Thornburg Mortgage Securities Trust:	MELANIE D. MORGAN, ESQ.
For Red Rock Financial:	BRODY R. WIGHT, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Las Vegas, Nevada, Tuesday, July 3, 2018

[Hearing commenced at 8:18 a.m.]

THE COURT: ...record.

MS. MORGAN: Good morning, Melanie Morgan for Thornburg Mortgage Securities Trust, 2007-3.

MR. BOHN: If she's going to give the whole title, Michael Bohn on behalf of Saticoy Bay, LLC, Series 34 Innisbrook.

MR. HASTINGS: I'm not going to give the whole title, Your Honor, Ryan Hastings, here on behalf of Spanish Trail.

MR. WIGHT: Brody Wight on behalf of Red Rock Financial Services.

THE COURT: Okay. And is there also a sub association? Is that a party or –

MR. BOHN: There is – there are two associations --

THE COURT: -- they're listed.

MR. BOHN: -- but no claims have been asserted against them.

THE COURT: Okay. All right.

MS. MORGAN: Right.

MR. BOHN: And Republic Services is also a party.

THE COURT: Yeah, Mr. Williams. Yeah. So and he did file briefs, so –

MR. BOHN: And he – they're not here yet.

THE COURT: Right. Well it's, it's 10 minutes so, I don't know if we want to call his office and see if he's coming. I guess we could

have Linda call and see if he's – if he's coming, because he did file briefs, so, not sure if he wants to come or not. It is an odd day. We managed to scare off pretty much everybody else by setting it today, but I had – we haven't –

MR. BOHN: We didn't get any calls.

THE COURT: Yeah. So I – have a seat and we'll just see what we can hear and – we could even – we could even talk to him on the phone because he doesn't – he didn't have that big of a – that big of an issue.

[Colloquy between Counsel]

[Hearing trailed at 9:40 a.m.]

[Hearing resumed at 9:46 a.m.]

THE COURT: Okay. Okay. So we'll go back on the record. For the record, my office contacted Mr. Williams' office. He's not expected to be here today, so we'll just note for the record that he, he did file limited oppositions. So I think the Plaintiff's motion was filed first, actually it was filed in 2016. And then I think he stayed for a while, and now we're ready to go forward; so we'll start with that one.

MR. BOHN: I'm going to try to be brief, Your Honor. There's a lot of issues in this case, probably enough to preclude summary judgment and to order the case to trial. And even if you do grant summary judgment, there are still claims that are outstanding. And this is why I stepped out to my office to call my office.

We filed a Third Amended Complaint February 10th of 2017 where we named Spanish Trails and Red Rock Financial. They filed

motions [indiscernible] were denied. Red Rock Financial did answer on March 3rd, 2017. It does not appear that Spanish Trail did file an answer, but neither my office nor Red Rock's Counsel filed summary judgment as to the claims for them. And so, we'd have to go to trial on those claims, in any event, because there's no pending motions for summary judgment.

What's interesting about this case, with all the issues is, there are two HOAs. It appears the tender is made to the incorrect HOA. There's a question regarding the accountings. And what makes this case extra special is, the foreclosure sale happened in November 2014 after the *SFR* decision was entered. And my client paid the sum of 1.2 million dollars, which nobody can claim would be a nominal sum, or the sale price could be commercially unreasonable.

In part, because the entire world, or at least the State of Nevada was on notice of what happens when you allow an HOA to go to foreclosure sale. And because of all these, I just think there's a number of issues, which it's certainly in your discretion, but I'll tell you, this case is going to go to the Supreme Court because of the dollars involved and the issues involved.

And it might, certainly it's your choice – I have been finding a lot of the judges in cases involving tender where reasonableness and good faith is an issue, are declining to grant summary judgment and take the case to trial. So at least we have a full record, so when the case does go on appeal, it's not going to get reversed for, you shouldn't have granted summary judgment, try it again.

I'd be happy to address any of the issues, legal issues, factual issues, but I will submit it and leave it to the other counsel.

THE COURT: Okay.

MR. BOHN: Thank you.

MS. MORGAN: Thank you, Your Honor. I'd like to start with just explaining the scope of our motion if it's – the intent behind our motion and what we're seeking by filing it. One of the purposes of summary judgment isn't necessarily to prevent a trial, but it's –

THE COURT: Well, don't you want to respond to Mr. Bohn?

MS. MORGAN: Yes, that's what I'm –

THE COURT: In the issues that he raised?

MS. MORGAN: Yes. But I – that's what I'm getting at.

THE COURT: Okay.

MS. MORGAN: But is to narrow the issues for trial. And so, in this case, the dollar amount of the property or the amount paid by the Plaintiff is – well, actually irrelevant because it doesn't change the legal analysis. In our motion for summary judgment, we aren't seeking summary judgment on commercial reasonableness alone. That is one defense, but it's not the primary defense.

Our primary defense to extinguishment is tender. And I can go into the substance of our motion or I can just keep it very narrow to what Mr. Bohn said. But either way it brings up, since he did mention the sub association and the tender, I can go ahead and go into that now.

The sub association did not foreclose. Spanish Trail Master Association was the HOA that foreclosed, so that's the tender analysis

that matters in this case. There's no question of fact as to whether the check was received by Red Rock. We know it was received because it's in Red Rock's file. And it's in Red Rock's file as Bate RRFS00535. They got the check.

So the next question is: Is that check for the Master Association, the one that foreclosed or for the sub association? And for that I'd like to point out the exhibit to our errata that was filed on June 28th. And then attached to that errata is a Miles Bauer Bergstrom and Winters affidavit, and it attaches the tender letters and the check. So if we start with the check it's on – towards the end of that exhibit at Bates TMST002537.

That check in the middle references a number 12-H0207. That's Miles Bauer's file number. The letter that accompanied the check on the two pages that proceed the check, and they also reference 12-H0207. The letter also references account number R74507. That's Red Rock's account number.

If we turn back a few pages from the letter we have, the ledger that Red Rock sent to Miles Bauer and that ledger at the top says: Red Rock Financial Services account detail, Spanish Trail Master Association. So we know we're talking about the Master Association. And then below that it says Red Rock Financial Services account number: R74507.

So there's no question of fact as to whether that check is linked to the Master Association. There's also no question of fact as to whether the amount of the check is accurate and proper as far as the

super priority amount. The super priority amount, of course, is the amount of nine months immediately preceding the action to enforce the lien.

Here the nine months at issue go back from the August 2011 lien, so the super priority period is December 2010 through August 2011. At that time, the Association fees were $225 a month times nine; that's $2,025, and that's not a disputed fact in this case. The check is for that exact amount.

So we can prove that the check, no question of fact, right amount, correct association received by the Association. Now, the Association didn't accept the check. And what we have as evidence to show why, the closest we can figure out is a letter that Red Rock sent to Miles Bauer a week after it received the check.

And that letter tells Miles Bauer, the HOA's lien is junior only to the senior lender mortgage holder. So the HOA and the trustee considered it, the entire HOA lien to be junior. They didn't accept –

THE COURT: Well, they're wrong, so what's –

MS. MORGAN: Right.

THE COURT: -- the effect of the letter? I mean –

MS. MORGAN: The effect of the letter is I think, you know, their intent that it was a sub priority sale. They didn't – they never intended to –

THE COURT: Uh-huh.

MS. MORGAN: -- extinguish the deed of trust. But really, that's neither here nor there for the tender analysis, because the tender

itself evidences a readiness, a willingness and an ability to pay the lien, the entire super priority lien, right then and there. And under the *Ferrell Street* case, that discharges the lien. *Ferrell Street* contained a letter much like – or actually, almost exactly like the letter that Miles Bauer sent in this case. Of course the date and the amount and the Association are different.

But in *Ferrell Street*, the Nevada Supreme Court considered that to be – I want to make sure that I'm accurate in the words that I use. *Ferrell Street* was a little different because there were two liens. Here we only have one lien. It's a very clean timeline. There's a lien, notice of default, notice of sale, foreclosure sale. So we don't have multiple liens, multiple defaults like they had in *Ferrell Street*.

But what's important is in *Ferrell Street*, the Nevada Supreme Court says on page 3:

> While Bank of America's tender appears valid, an unconditional offer to pay the super priority portion of the lien in full.

And it goes on to talk about the two liens that we don't have to deal with in this case. And then it goes on to the less and it's on page 3:

> It is unclear why the HOA released the notice of default for which Bank of America gave perfect tender.

And then the sentence goes on. We have the same tender in this case, same tender letter. This is a valid, perfect tender, and there's no question of fact as to the amount or as to the association for which

the tender was intended. The lien was discharged at that point. And the point of time that we're talking about is February 2012. We are still years away from the *SFR* opinion. The lien was discharged years before the *SFR* opinion.

And the lien wasn't only discharged by Bank of America's tender. We have double tender in this case, because the homeowners paid portions to the HOA, and the amounts that they paid exceeded the super priority amount. And I lost my piece of paper here. But it's in our brief. It exceeded the super priority amount, I think by like $100 or so.

So we have both HOA tender – I mean, I'm sorry, we have a Miles Bauer tender for the bank and we have the homeowner's tender. And for that we look at the *Golden Hill* case which rehearing was denied. And in denying that rehearing, the Nevada Supreme Court says:

> Nothing prevents a homeowner from satisfying the super priority portion of the lien.

So here we have satisfaction of the lien by both the homeowner and Bank of America prior to the sale.

THE COURT: Okay, well, doesn't make any difference which of these tender was made, but so what, if that's a valid tender, then why would we apportion the funds that are later paid by the homeowner to paying off the super priority amount, which is clearly what Red Rock thought happened. Because they credited every payment to a payment plan and, you know, last in and attributed to the first delinquency, so they, they did the proper kind of accounting which is, they applied the money that comes into the oldest debt.

So they applied this to that portion of the lien. He was successful and his payment plan didn't work out, so in the end they proceeded, but I don't know, they clearly did. You pay an amount equal to if not slightly more than the super priority amount. So what's the effect of the fact that the – there was an attempt to tender by the bank earlier, how does that – the fact of what you call double tender, how is that evaluated? How do we decide who paid the super priority amount --

MS. MORGAN: Right.

THE COURT: -- or does it matter?

MS. MORGAN: I think they both get us to the same effect, which is that the deed of trust survive the HOA foreclosure sale, but the lien was satisfied. Now whether it was satisfied by the homeowner or the bank, it gets us to the same place. But I think the evidence shows clearly that the homeowner paid it, so there was no super priority lien when Bank of America tendered.

It had already been paid, so it was an extra, you know, extra measure that really didn't need to take place, because the super priority portion had already been paid, and the super priority lien had already been discharged –

THE COURT: Tendered.

MS. MORGAN: -- by that payment.

THE COURT: And they – there was a payment because they never cashed the check, but it had – the legal defense of tender was perfected --

MS. MORGAN: Right.

THE COURT: -- when they sent the check.

MS. MORGAN: You said it much better than I did. Yes, the legal defense was perfected, but as a practical matter, the lien had already been paid off by the homeowner. And I understand there are other claims, but as to this – as to this narrow question of whether the super priority lien had been satisfied at the time that the HOA went to foreclosure. The uncontested evidence shows that it absolutely was satisfied. So we believe summary judgment is proper on that narrow question as to whether the super priority lien had been discharged by the time of the sale. And there's no need for a trial on that issue.

As to the other issues, we can, you know, see how those shake out, but on this issue there is enough here. There's uncontroverted evidence that it was discharged. Now --

THE COURT: All right. So if summary judgment is due to the bank on either of these theories or both, then as Mr. Bohn stated, you know, this is a – this is a million dollars. This is going to have to be litigated. So where does that leave us on what other issues because – or is this, would this be final? Could this be appealed immediately?

MS. MORGAN: I think, I think -- I don't know how Counsel would want to handle it, but I think probably what would happen is the parties would seek 54(b) certification and Saticoy would appeal this portion, so as not to have to go through a trial on other – because the other claims all have to do with this one central issue which is, was the deed of trust extinguished or not? You know, that's the big looming question.

THE COURT: Can I just say that I know that there's a check in here that says a million two – a million six, I think, actually was sent to the Clark County Court. I see it so if – it was I think sent by Red Rock. You know, they tendered it and interpled it in order to avoid. So I don't know if it's recorded in a different file or where it would be recorded because --

MS. MORGAN: I don't know, Red Rock's Counsel may be able to shed some light on –

MR. WIGHT: We -- I'm not sure exactly on this one. I'm not the attorney that goes into that –

THE COURT: Okay.

MR. WIGHT: -- but it could be that we are holding the excess proceeds in our client's trust account.

THE COURT: Okay. Well, there's a check that says a million six was sent to the County, and I just want to make sure that nobody's looking to Clark County to turn over a million six when it doesn't look like it was ever deposited. So I don't know why there's a check that says a million six was sent. I just thought I'd bring that to your attention.

MS. MORGAN: I'm not – I'm not sure.

THE COURT: I don't see a record. It's not – and at least it's not under this case number. If it's deposited somewhere else under a different case number because there's nothing there, it just is a check, and so I don't know, they may never have sent it. They just may have been intending to send it, paid to the order of Clark County District Court. It's on page RRF16 and to Exhibit F.

MS. MORGAN: F to Thornburg's.

THE COURT: To – after your motion.

MS. MORGAN: Yes.

THE COURT: 34 Innisbrook Avenue excess funds, one million 168 thousand –

MS. MORGAN: Uh-huh.

THE COURT: -- 865 dollars.

MS. MORGAN: We'll certainly look into that. If there is a separate case number we should probably consolidate it.

THE COURT: Just – yeah, or maybe as you pointed –

MR. WIGHT: Well –

THE COURT: -- they may never have sent this in and just maybe it had been an accounting entry in the – where this was being held. It left Red Rock Financials trust account. Maybe it's in Counsel's trust account; I don't know. But it doesn't appear to be under this case number in the County's trust account, that's just FYI.

So hopefully somebody can find the million 168 thousand dollars [laughter heard] for us.

MS. MORGAN: Yes.

MR. WIGHT: Yeah, I, I mean, if my – if the partner in my firm are here he'd be able to answer right away.

THE COURT: Okay.

MR. WIGHT: I just don't have that information right now.

THE COURT: Okay.

MR. WIGHT: I'll just – for the record, it's not in my personal

account, so.

THE COURT: Oh.

MR. BOHN: Does it have a memo? Is the case number somewhere on there?

THE COURT: It does not. No.

MR. BOHN: Okay.

THE COURT: Because this was sent November 10th, 2014. This was sent right after the sale when they were doing the accounting.

MR. BOHN: Huh. Okay.

THE COURT: And I guess they were planning to interplead it, and they may not ultimately have. But I mean, so I don't know if this check was voided, but it would – it would seem that Red Rock's records would indicate that it was voided and a different process taken. I mean, maybe there's an interpleader somewhere and maybe just under a different case number and you'd probably want to find it, so –

MR. WIGHT: Yeah.

THE COURT: -- so.

MR. WIGHT: My guess would be that this is voided and that's in our trust account and –

THE COURT: Yeah, just make a record.

MR. WIGHT: -- we're waiting for this litigation to conclude.

MR. BOHN: My experience in interpleaders is that they want a court order before they'll accept a check.

THE COURT: Oh yeah, they wouldn't have taken it. So there had to be another case number for it. The way this is written, you know.

I just don't know, so I just found that odd and thought you guys might want to look at it. Okay, thanks; that's all I have.

MS. MORGAN: All right. So unless you have any additional questions from me, I think, you know, we've briefed every –

THE COURT: Well, the trial isn't in August so –

MS. MORGAN: Yes.

THE COURT: -- I, I guess that's my question is: What's the effect? Because it seems like, even if – as you point out, even if the issues are narrowed for trial, there's still issues to be tried. I think this is Mr. Bohn's entire point. Was that there's lots of issues to be tried, but I appreciate your point that –

MS. MORGAN: And –

THE COURT: -- that anything that goes to tender or payment by the homeowner, that's all backed up by records, not really –

MS. MORGAN: All right. And so I think the issues to be --

THE COURT: -- any question.

MS. MORGAN: -- tried, many of them would be mooted by a decision on the tender.

THE COURT: Okay. Thanks.

MS. MORGAN: Thank you.

THE COURT: Mr. Hastings.

MR. HASTINGS: Your Honor, we, we filed an opposition and countermotion for summary judgment. Our countermotion is limited to the claims that are pending against us from the bank. We, you know have a pretty straight forwarded simple analysis related to our

compliance with the foreclosure procedures. And because the bank's claims which, again, are brought really kind of in the alternative to the extent that Your Honor was going to extinguish the deed of trust, really can't lie when the evidence demonstrates the Association complied with the law. So that's a pretty straightforward analysis.

I do think though that, kind of ashamed to say this, Mr. Bohn's representations regarding claims pending from his client against mine were not even something I was aware of today coming to this hearing. I think that was probably in large part due to my office's failure to calendar and then file an answer to those claims. So procedurally, mechanically, I don't even know how appropriate it is to try to move forward on a trial on those claims from that perspective.

Additionally, if the intent of this Court were to find that the tender protected the deed of trust such that Mr. Bohn would be anxious to potentially proceed on claims against our client, my client rather and Red Rock, related to certain acts or things that would have occurred that, that, you know, resulted in that, that kind of a finding.

But he also intends to appeal this Court's decision, then it would be inappropriate to move forward. You can't proceed on damages claims here in a trial, potentially win, while also appealing the quiet title equitable relief that he's seeking. So under those set of circumstances do I think a trial on Mr. Bohn's clients against our – myself and Red Rock would be appropriate at this time.

But again, you know, until Your Honor kind of tells us I guess what your ruling is on this –

THE COURT: Uh-huh.

MR. HASTINGS: -- dec relief request by the bank.

THE COURT: Uh-huh.

MR. HASTINGS: I think – I think at this point, the Association for purposes of what we actually have on, you know, before you in terms of motion is a motion to grant the Association summary judgment as to the bank's remaining claims against the Association, Your Honor, or you dismiss about half the claims –

THE COURT: Uh-huh.

MR. HASTINGS: -- at the motion to dismiss stage. The remaining claims or, I believe Your Honor's intent was to, to see what discovery produced.

THE COURT: Uh-huh.

MR. HASTINGS: And we've done discovery and discovery has shown that the Association conducted the sale properly. And so that's why we – we believe we're entitled to summary judgment on those remaining claims.

THE COURT: And when you say Association, you mean they turned it over to an agent who handled it, looked to me pretty normally, I mean –

MR. HASTINGS: Correct. The –

THE COURT: So I guess the – if we're talking about questions of fact, one question would be: Was the HOA given notice of the attempt to tender?

MR. HASTINGS: Well, I think it's, it's laid out pretty clearly in

our brief. The statute's silent as to tender.

THE COURT: Uh-huh.

MR. HASTINGS: It just is. The claims that the bank are, still maintain namely wrongful foreclosure or negligence. These claims allege that the Association violated the statute in conducting the sale. And so because there is no statute that says an HOA must accept a tender prior to the sale, the bank has not shown that there's any evidence that the Association violated statute.

In fact, the Association has shown that the evidence demonstrates we complied with the statute. So those –

THE COURT: Uh-huh. I'll go back and ask Ms. Morgan about this because there are some things, because of course it started in 2016 –

MR. HASTINGS: Uh-huh.

THE COURT: -- that have since been chiseled away in this whole body of law. And, you know, some of those are, yes, you have the right to rely on those recorded documents. Appears the notices were all sent. The – there's no – there – I – I've seen nothing. I don't know if we've got a decision on this yet. I – but I just, I never thought that there was a duty owed between the HOA and the bank.

MR. HASTINGS: Right.

THE COURT: It's – they don't owe any duty to the bank.

MR. HASTINGS: Right. Right. That –

THE COURT: How could they?

MR. HASTINGS: That's what we're saying. We're basically

saying Your Honor –

THE COURT: I mean, you need a Third-Party beneficiary to see what –

MR. HASTINGS: Yeah, we're saying, "Look, the Legislature has said, 'HOA, this is what you must do –

THE COURT: Right.

MR. HASTINGS: -- when you foreclose.'

THE COURT: Uh-huh.

MR. HASTINGS: And in our motion we're saying, "We did those things." And we checked, checked them all off. I mean, there's –

THE COURT: Right. And it --

MR. HASTINGS: -- several requirements.

THE COURT: There's, you know, it's public policy. It's a --

MR. HASTINGS: Right.

THE COURT: -- uniform act. I mean, it is – it is what it is, and it's just to protect these HOAs so they can continue to operate when their – when their homeowners leave.

MR. HASTINGS: Right. And so the big question is now – what, what effect do these tenders have? And those are all very interesting questions and need to be ferreted out as it relates to quiet title claims between these parties. But, again, we're talking now in a different context within a damage claim being asserted against the Association.

And while a bank's tender may, you know, indeed influence this Court's decision one way or another as to quiet title claims between

these parties. Allegations regarding tender just don't simply have anything to do with damages claims. The Supreme Court has never said, nor are there any statutes that say an HOA that rejects a bank's payment or attempted payment of an amount less than what was due at the time, is somehow wrongful; they're somehow liable for that. That's just – there's nothing that exists to that extent so, you know, so –

THE COURT: I, you know, I think that we were still in the phase when this was initially filed.

MR. HASTINGS: Uh-huh.

THE COURT: We were still in the phase of fighting over whether it was constitutional.

MR. HASTINGS: I agree.

THE COURT: So –

MR. HASTINGS: I agree, so –

THE COURT: So a lot of this stuff that starts in the motion for summary judgment is mooted. I -- and that's why I think why counsel didn't even go into any of it.

MR. HASTINGS: Yeah.

THE COURT: You know, your clients have the right to rely on the statute, they did. His client had the right to go to the sale and I – but one thing that, you know, is an issue that I know Mister, Mr. Bohn's client. I actually did a settlement conference with these guys a couple of weeks ago. We didn't settle, but where we talk about this whole idea of what's the requirement of a bank to, you know, to record some sort of a notice? I mean, since they're so big at the Supreme Court on record

notice.

MR. HASTINGS: Uh-huh.

THE COURT: I mean, I don't know, no. I think it's been.

MS. MORGAN: Mr. Brenner.

THE COURT: Oh no, it was – yeah, it was an *SFR* case where we – like there's a race to record. And I thought they reached a long time, the bank had foreclosed before the HOA went for a bench foreclosure, didn't record it though.

MR. HASTINGS: Yeah.

THE COURT: So a little bank and a staff.

MR. HASTINGS: Right.

THE COURT: Because they're very big on record notice, but what's the – yeah, as you point out there's – tender's not statutory. Tender is an equitable defense.

MR. HASTINGS: Right.

THE COURT: So there's no requirement to record?

MR. HASTINGS: And we all have to -- correct, and we all have to remember, I mean, at the time it's not as if anyone knew or agreed on what that super priority amount was. I mean, that was a hotly debated issue, contested issue. Again, the Association's and its collection company's opinion at the time was that when banks made these tenders that these were conditional offers that, you know, would restrict the Association's ability to collect amounts down the road. And so, they absolutely had a good faith belief that more was due.

And in fact, there's, you know, I -- we didn't cite this because

it's not, you know, we don't believe in citing unpublished opinions, but because we're kind of talking about it, generally, there's an unpublished opinion by the Supreme Court months ago that talked about an – if an association or its collection company believed or had an honest belief that more was due at the time, that that tender wasn't sufficient, for example.

So again, that's not something that we're saying should weigh in on Your Honor's decision on the dec relief claim here, but –

THE COURT: So now we're getting to the one that I do have to ask about: Is there some obligation on the part of the HOA? Again this decision, unpublished, came down very recently. It does involve myself and, and Mr. Bohn's client and that's *Golden Hill*, unpublished, I grant you. But that – if you follow that through to its logical end, that is based on the statutory scheme.

And that once the super priority portion is, is – has been cleared, you know, the – yes, the HOA can add all these other things on –

MR. HASTINGS: Uh-huh.

THE COURT: -- but they need to start over with an entirely new procedure to foreclose on, ongoing – because the lien notices always say, "Additional funds are going to accrue."

MR. HASTINGS: Uh-huh.

THE COURT: And so this is our – this is our notice of delinquency and, and intent to -- we, we are – here it is. And then only they would know that their super priority amount of that lien was paid off.

So at that point they need to start over because – or they just can't collect anything in the future, I guess. But the requirement of *Golden Hill* is they – and I, I think I remember, but this is like from the facts of the case who, who this -- it was an attorney that we know who had picked, had also done the same thing we have here, entered into a payment plan. It was a little closer in time.

That's what's unusual about this case is, you have a tender in February 2002 and then in 2014 he's trying to make payments –

MR. HASTINGS: Uh-huh.

THE COURT: -- and he keeps, you know, falling behind.

MR. HASTINGS: Yeah, there were more payments on this than what I typically see –

THE COURT: Right.

MR. HASTINGS: -- in these cases. I mean, it's just kind of unfortunate. I mean what, you know. You know, associations never, I don't – I've never come across an association whose board ever wanted, vindictively, to foreclose on someone's home. It was always – it's always been, frankly, to their detriment, decisions made to delay, delay, delay, delay --

THE COURT: Uh-huh.

MR. HASTINGS: -- to try to get everyone, you know, any opportunity possible. So with regards to the homeowner's payment I, you know, I – look, I don't think I'm as familiar with *Golden Hill* probably as you all are since it was involving, you know –

THE COURT: Uh-huh.

MR. HASTINGS: -- Your Honor's – maybe Your Honor's decisions and things like that.

THE COURT: Yeah, his client. Yeah.

MR. HASTINGS: I, I may have read it but, you know, I try to keep up on them --

THE COURT: Come on.

MR. HASTINGS: -- unpublished decisions. So it's tough for me to try exactly –

THE COURT: This isn't published. They only publish things where I get overturned.

MR. HASTINGS: Yeah. So, so I can't say that I, I can really stand here today and feel like I'm adequately prepared to answer questions you may have about that, but what I think you were asking is, well, the Association in *Golden Hill*, it seems to be that the Court's opinion may be that there needs to be a restarting of something; was that correct, Your Honor? Restarting the –

THE COURT: Well, yeah, that's actually what it reads.

MR. HASTINGS: Okay.

THE COURT: The conclusion is that:

> Under the pre 2015 version or NRS 116.3116, serving a notice of delinquent assessments constitutes institution of an action to enforce the lien.

MR. HASTINGS: Okay.

THE COURT: So you have to restart the foreclosure process in order to enforce a second super priority.

MR. HASTINGS: Okay. Well, I don't think that –

THE COURT: So we -- but we disagreed with the respondent that, in that case, J. P. Morgan, that the Morgan dates the recorded documents showing the former home owner had satisfied the super priority component of the HOA's lien.

MR. HASTINGS: Well, and –

THE COURT: I think it's on the – I think it's on the HOA to say –

MR. HASTINGS: Well, so the Association's not making any unnecessary claims, not making any allegations or arguments that, that it did that so. So in terms of whether or not I, you know, the, the Court's decision, it sounds to me based on what you're reading to me, Your Honor, is that in order for someone like Mr. Bohn to be able to benefit –

THE COURT: His client.

MR. HASTINGS: -- from a, a new super priority amount, which would only go to the quiet title claim between those parties, then the Association would need to do what you, you described. But again, my point, and the only thing I'm wanting to make sure I'm – myself is clear on here is, that has nothing to do with the damage claim against an Association. So there are no statutes and that case doesn't seem to stand for the proposition that if an Association does not do that they're somehow liable to someone, so.

THE COURT: No, but it is – it is based on an analysis which they don't really – it's a short opinion, they don't really elaborate on –

MR. HASTINGS: Uh-huh.

THE COURT: -- but it's clearly based on pre-2015, 116.3116.

MR. HASTINGS: Right. So, so –

THE COURT: So it's --

MR. HASTINGS: -- I think this is just –

THE COURT: -- that's their view of statutorily what you need to do, pre-2015.

MR. HASTINGS: I think that that's what you would need to do in order for a new super priority amount to come up. That's up to the Association on whether or not –

THE COURT: Uh-huh.

MR. HASTINGS: -- it's going to act in a way to create a new super priority amount. That does not mean that if an Association doesn't do that it's violated the statute. So associations aren't forced to take actions to reinstate super priority amounts after a first one --

THE COURT: Okay.

MR. HASTINGS: -- that's not a requirement.

THE COURT: So although appellant correctly points out that there were new unpaid monthly assessments at the time of the sale, these new unpaid monthly assessments could not have comprised a new super priority lien --

MR. HASTINGS: Right.

THE COURT: -- absent a new notice of delinquent assessment?

MR. HASTINGS: So that's the effect of not doing that is, you just don't get new super priority amounts.

THE COURT: Uh-huh.

MR. HASTINGS: It doesn't mean that you're liable for violating the statute.

THE COURT: So the super priority amount is clear if you want to look at it one way or the other. Whether it's the bank or, or the homeowners clearing the super priority amount, when you then hold a sale you're only selling a sub lien.

MR. HASTINGS: Right. And so this is all, you know, hindsight 20/20. I'm sure associations would have acted differently if they would have been able to look into their crystal ball and see that at least there are some justices on the Supreme Court that believe that's what you should do.

THE COURT: Uh-huh.

MR. HASTINGS: And of course, we're going to have to wait for a published decision before we can actually really rely on any of that. But, you know, for our purposes today we've identified claims that the bank has still pending against the Association.

THE COURT: Uh-huh.

MR. HASTINGS: Those claims really are limited to allegations that if in the event, Your Honor, does extinguish their deed of trust, they will have been damaged because the Association violated the statute. And that's just simply not what the evidence shows in this case. The evidence shows in this case that the Association actually complied with the statute.

There are a lot of interesting nuances and factual things that

occurred here that may ultimately affect who, who wins on the quiet title battle between these parties. But those, those interesting things have, have really nothing to do with the claims against the Association, so –

THE COURT: Okay.

MR. HASTINGS: -- so we're asking for summary judgment on the claims by the bank. We're also, you know, as we mentioned earlier wanting to, to be clear on our position that, that if Your Honor is inclined to grant the bank the declaratory relief it seeks; namely, that its deed of trust survive the Association's sale because of its tender, prior to the sale, then moving forward on a trial between myself or between these parties, the Association, Red Rock and Mr. Bohn would be inappropriate, because you wouldn't be able to seek damages and an appeal of an equitable remedy at the same time.

THE COURT: Okay.

MR. WIGHT: It may be best for me to go so you can –

MS. MORGAN: Okay. Yeah, go ahead.

MR. WIGHT: -- address us both at the same time. On behalf of Red Rock, we filed a joinder to the HOA's countermotion for summary judgment and just to touch upon a few things really quickly. The bank, in their opposition to the HOA's motion for summary judgment asked the Court, in the alternative, to hold that the HOA is liable to them for damages for rejecting the tender. That would incorporate Red Rock too. That, that was basically a motion for summary judgment within the opposition that, that Red Rock was unable to address. For many of the reasons that the HOA mentioned, Red Rock has many arguments

against imposing liability on the HOA or Red Rock on behalf of the judge – on behalf -- because of the tender.

The main reason being as we've spoken, that there is no clear theory of liability to establish any liability on the HOA or Red Rock, just because they rejected a payment. If we look at it what, what the bank is really asking for there is that the HOA and Red Rock be liable to them for millions of dollars for rejecting one check. In order to do that they have to establish a clear theory of liability.

And what -- we do have a lot of precedent to show that, yeah, if we rejected a tender wrongfully that the deed of trust, that it would extinguish the super priority lien. But there's no precedent to show that any rejected tender would ever result in damages. And especially if – even if the court were to say, "Well, there is some possible theory of liability where the HOA and Red Rock could be liable for damages."

The bank would also have to show that we wrongfully rejected that tender. And if we get into precedent, as we are unable to do, because the opposition was not positioned. It wasn't actually in their motion for summary judgment, but we would have presented evident – we would have presented case law to show that a wrongful rejection is more than just simply rejecting a tender. The bank would have to show an order to show that we wrongfully rejected a tender.

They'll have to show that we basically had mal intent when we were rejecting a tender. Because there is a lot of case law out there that says, "When a tender is rejected, even if the rejecting party was ignorant of the law, as long as they had a good faith belief that the tendered

amount was not adequate, then they did not wrongfully reject.

And I think the evidence would come out in trial that we had a good faith belief that the amount tendered to us was not the full amount of the super priority lien. And even if we turned out to be wrong on that, we were not wrongfully rejecting that tender. And there's no way we could be held liable to the bank for these millions of dollars for that wrongful rejection.

And then moving to *Golden Hill*, I think what, what *Golden Hill* states is that, when a party, be it the homeowner or the bank. When either of those parties tenders the super priority amount of the lien, the HOA has a choice. They can either continue on with the foreclosure process and just foreclose on the sub priority amount, or they can renotice the sale and, again, put the fire to the bank's feet and foreclose on the super priority amount.

And here, if we look at what happened when the homeowner tendered the super priority amount, the bank, or sorry, the HOA chose to just continue with the sub priority foreclosure sale. So if the Court –

THE COURT: And so that, again, is this question of notice. I mean, if, you know, by 2014, November 2014 we were two months after *SFR*, so at that point we know that there's a super priority that's going to wipe out the bank's interest. And so, the question at that point is, then at that point should HOAs or their foreclosure agents had proceeded differently. Because you now know that there's a super priority lien that's going to wipe out the bank's interest, and what are you going to do?

You know that you've had your homeowner, because it's recorded. I mean, I could follow – this is like congratulations to your client. The easiest accounting I ever thought I'd follow. Most of them are horrible. But this was a really good system and I was able to follow every payment that the – that the actual homeowner made. You could see where he's like he was in his little payment plan and he wasn't working. It was real easy to follow their accounting records. I mean, it's very clear that the – how much they had paid. And they knew what was in their original notice of delinquency; and that amount had been paid.

So then – so then what because --

MR. WIGHT: So –

THE COURT: -- we know that there's a super priority that's going to wipe out the bank at that point in time.

MR. WIGHT: Right, so –

THE COURT: What do you do?

MR. WHTIE: I mean, I would look at the statute. And there's nothing in NRS 116 that would require the HOA, once a super priority lien is satisfied, to renotice the sale if they wish to continue the foreclosure on the second portion of the lien; right?

THE COURT: Uh-huh.

MR. WIGHT: Because under *SFR,* we know that the lien is split into two portions, the super priority amount and the sub priority amount.

THE COURT: Right.

MR. WIGHT: When we do a notice of lien, when we send out

a notice of default and election to sell and we send out a notice to sell we're referencing the HOA's entire lien. That includes a super priority amount and the sub priority amount. So if in – throughout that process, if the super priority amount is satisfied, there's nothing in the statute that says we have to go start over if we just want to continue the process with the second portion of our lien.

THE COURT: Is there a requirement for notice? Because by that point, as we all knew, there was this two-part lien. And like I said, "From these records it's really clear that the homeowner had cured the super priority portion." And I think at that point in time, what do you do? Do you use – when you start your sale, do you stand up and say, you know, we originally noticed this for 2000 whatever; we've got that much in payments from the homeowner's association. We're foreclosing on the sub priority portion, which it says right in the beginning amounts are going to continue to accrue, and they'll be added to this lien.

It's absolutely clear and noticed to everybody that you're still going to be accruing fees and fines and future unpaid dues. I mean, it's clear there's that notice, but is there – at that point in time, you know, if you follow *Golden Hill*. If these three judges as was pointed out are, everybody concurs with them.

And the reason why I say this is because they specifically say – and they cite to NRS 116.31162, the version that passed in 2012. So it's a tiny window. It's 2012 to 2015, 2016 that this version was in place. And so that's – I'm just, it's a statutory analysis. They don't lay it all out, but they cite us to where they think that obligation comes from.

MR. WIGHT: Right. And I think the question there –

THE COURT: I'll beg your pardon –

MR. WIGHT: -- Mr. Bohn's –

THE COURT: -- it's not an obligation –

MR. WIGHT: Yeah.

THE COURT: -- where that option.

MR. WIGHT: Right. I think Mr. Bohn's -- their claims against us would address the issues --

THE COURT: Uh-huh.

MR. WIGHT: -- you're asking about here. What duty do we have to, to send out notice that a super priority lien has been satisfied? We have responses to all those --

THE COURT: Uh-huh. Okay.

MR. WIGHT: -- which would need to be addressed in the claims between us and the purchaser. But I think what Counsel for the HOA is asking is that we don't address those claims if the Court intends to hold that the super priority amount –

THE COURT: Uh-huh.

MR. WIGHT: -- was satisfied and that the deed of trust survives. And before we get to all those secondary questions that we allow that portion to be appealed, 54(b) certification.

THE COURT: Well, before Ms. Morgan and we'll finish with Mr. Bohn, there's a couple of questions. One is this commercial reasonableness. I know it's briefed in here and everything. Is there really any question? I mean he paid. Well, okay, it's maybe not quite 60

–

MS. MORGAN: 60 percent.

THE COURT: -- 60 percent of what it's worth at the time of the sale. I know that it was, you know, they had a much higher lien on this property, because it was originally sold to this homeowner for twice that. But I mean, he paid a huge portion. He was serious about this. If you've ever – I don't know if you've ever taken Mr. Haddad's deposition, you guys know what he does to prepare. He's a professional. He does his research. I'll tell you one thing, he would never bid on this if – I don't even have to hear him testify. He would never bid on this if he knew.

And so that's – my question about commercial reasonableness is, I don't – he – I don't see he – he's not an insider, I mean, he had no inside knowledge about this.

MR. HASTINGS: Right. And real quickly with commercial reasonableness, Your Honor. I think that's a – that – and we know that, that term gets used and it's easy for us to use that term talking back and forth. We do have to remember the Supreme Court said, "Commercial reasonability has no hookability HOA sales." We have to remember that first and foremost.

THE COURT: Right. Uh-huh.

MR. HASTINGS: But, but I think what you're referring to when you – and you can correct me if I'm wrong, Your Honor, when you're referring to commercial reasonableness, you're talking about the Shadow Canyon analysis; right?

THE COURT: Right.

MR. HASTINGS: You're talking about whether or not a sale can be set aside. Again, we're talking about quiet title claims, so --

THE COURT: Right.

MR. HASTINGS: – because the Court's using its equitable authority in a quiet title claim between these two parties, whether a sale can be set aside because there was a low, low amount that -- and the reason it was low. So there has to be this causal connection; right? The reason it was low was because fraud, oppression and unfairness.

And we just haven't had any, any argument in the motions before you today that would demonstrate any kind of fraud, oppression or unfairness that would demonstrate a low sales price. We don't even have a slow sales price, number one. That's usually kind of the first factor –

THE COURT: Sales to argue it.

MR. HASTINGS: -- that you get into before you even get into whether there's fraud, oppression or unfairness? So, so that, you know, so my response to the commercial reasonability and whether that's something we need to even worry about. Today, I would say no because it wasn't briefed. But even if it were briefed –

THE COURT: It's briefed. There's a --

MR. HASTINGS: -- we would – we would say –

THE COURT: There's a lot of brief in our commercial reasonableness.

MR. HASTINGS: Oh sorry, I guess I just mean –

THE COURT: Yeah.

MR. HASTINGS: -- within –

MS. MORGAN: It's okay.

MR. HASTINGS: -- the bank's motion's not asking for the sale to be set aside.

THE COURT: Right. Yeah.

MR. HASTINGS: So I don't think that there was briefing on that – on the motions before you today.

THE COURT: There's – yeah, there's a lot –

MR. HASTINGS: There might be some allegations in the complaint about that, but they're not asking Your Honor for summary judgment as to that today.

THE COURT: Okay. All right.

MR. HASTINGS: They're asking Your Honor to enter a declaration that their tender satisfied the super priority amount and that their deed brought the sale; that's it.

THE COURT: I just want to make sure we've got all these done before Ms. Morgan –

MR. HASTINGS: Right.

THE COURT: -- and Mr. Bohn can –

MR. HASTINGS: So.

THE COURT: -- One more thing, Republic. I – he's not here today, but really all he says is: Look, I have a statutory lien, it's prior to everything else. It goes with the land. It's, it's not, you know, it's not about who, who owns the homeowner or anything like that. It's just, it's an address they provide services to. Their lien goes with the land.

MR. BOHN: To the extent my client may have asserted a claim against Republic Services, I readily concede that their lien survives all of foreclosures, and it's equal to a property tax lien.

THE COURT: Okay. All right. When –

MR. BOHN: So I have no problem having Republic dismissed from any claims my client may have asserted.

THE COURT: Okay. Finally, so I know that this is ultimately getting to the bank's claims against you and Mr. Bohn's clients claim against you. What happens? And this is why I looked for the million and 166 thousand dollars. I'm like, "What happens to that?" What is the effect of – what did Mr. Haddad pay a million one hundred and –

MR. BOHN: 1.2.

THE COURT: -- 16 thousand.

MR. HASTINGS: 1, 1.2.

THE COURT: What's – yeah, what – we – the amount that's left. He paid 1.2 but after it's all – all that's left, unless you clawback, is 1 million 116 thousand, because they paid themselves. They paid the HOA, so they've had a little deduction.

MR. HASTINGS: Yeah, so –

THE COURT: Little compared to a million, but it's still $100,000.

MR. HASTINGS: Yeah, so, so I think what would happen is, ideally Red Rock would, would interplead those funds with the Court and the Court would follow the law, would follow 116.31164 –

THE COURT: Uh-huh.

MR. HASTINGS: -- which describes exactly what should happen with proceeds from a sale, and that's pretty typical.

MR. BOHN: Yeah.

MR. HASTINGS: I mean, you see that happening quite often.

THE COURT: Uh-huh.

MR. HASTINGS: And a lot of times that – that's part of these cases. A lot of times it is just kind of sitting off in the background, for whatever reason that, you know, an interpleader was never really done and made a part of this litigation, but I don't think there's any question that that would be how that would proceed.

MR. WIGHT: Yeah, so, I mean, what would happen is if the Court were to hold that the deed of trust survived, those excess proceeds would likely – they would go to junior lienholders if they were not and if – or if there were any, and if there were not, they would go to the home – the homeowners. And if the deed of trust was extinguished, the excess proceeds would likely go to the bank.

MR. HASTINGS: And by the way, Your Honor, at that point, you know, the bank has claims – sorry, was your – I was thinking of other things. Was your situation or example, if the deed of trust was extinguished?

MR. WIGHT: I try to say both.

MR. HASTINGS: No.

MR. WIGHT: So if the deed of trust was extinguished --

THE COURT: Right.

MR. WIGHT: -- then the excess proceeds would go to the

bank.

THE COURT: To the bank.

MR. HASTINGS: Okay.

MR. WIGHT: And if it survived, then it would probably go to the homeowner.

THE COURT: Whichever way this goes – if the Court grants summary judgment, then that's something you – I think you have to address in order to have something. You can get a 54(b) on and go one way or the other to get – try and make that determination before we come back and say, "What about these third party claims?" I think you've got to have it all laid out because otherwise if you just say, "Well, it's set aside or it's not set aside, if we really do have funds on deposit in the court, we have to say what to do with them.

So I, that's why I, it is – it does matter if the funds were deposited with the Court –

MR. HASTINGS: Uh-huh.

THE COURT: -- versus they're being held in a trust account somewhere. That would just be a – that would just be a – you've got a claim to that money; whereas, if we've got it held in the court, we have to say it goes to Mr. Bohn, it goes to the bank.

MR. HASTINGS: Okay.

MR. WIGHT: And I –

THE COURT: It goes to junior lienholders, whoever it goes to.

MR. WIGHT: And I honestly, depending on how the Court wishes, although I do not think that would end up being a problem. I

don't think the parties disagree with where the funds should go depending on whether the deed of trust survives or not. I think all the parties would agree that if the deed of trust survived, that those excess proceeds would go to the homeowner or any other junior lienholders, which I don't think there are any.

I don't think we'd have much argument about that and we'd be able to settle it. And if the Court were to hold that the deed of trust were extinguished, I think we'd all agree that those excess proceeds would go to the bank.

THE COURT: Uh-huh.

MR. WIGHT: So I don't think that's a real issue in this case where those funds would go.

THE COURT: Okay. All right. Great. So Ms. Morgan, Mr. Bohn does raise objections –

MR. HASTINGS: Well --

THE COURT: -- to the – to the whole tender and homeowner, *Golden Hill* [indiscernible].

MR. BOHN: Before you proceed any, Your Honor –

THE COURT: Uh-huh.

MR. BOHN: -- we've been arguing for about an hour. I worked out this morning. I had a lot to drink.

THE COURT: Okay.

MR. BOHN: Can I take a two minute break?

THE COURT: Sure. No problem.

MR. BOHN: I apologize to the Court.

THE COURT: In the meantime, I'm going to – I'm going to see if I can find another case. Go –

MR. BOHN: All right.

THE COURT: -- you can head out now.

MR. BOHN: All right.

THE COURT: I'm going to see if I can find something where we had an interpleader.

[Hearing recessed at 10:34 a.m.]

[Hearing resumed at 10:38 a.m.]

THE COURT: Red Rock Financial Services I find 55 cases, so –

MR. WIGHT: Yeah.

THE COURT: -- and, you know, you'd have to narrow that to anything filed after 2014.

MR. WIGHT: I would almost guarantee those funds are in our client trust account.

THE COURT: Right. And that this -- and that this – that would mean this check to them was voided.

MR. WIGHT: Yes.

THE COURT: It would have had to have been voided.

MR. WIGHT: I believe it was voided and it's in our -- I, I can't say for sure, but in almost all these cases we're holding the excess proceeds in our client trust account until the litigation has concluded --

THE COURT: All right.

MR. WIGHT: -- and then we either interplead them or just

disburse the proceeds.

THE COURT: All right. Okay. So Ms. Morgan, [indiscernible] did address the defenses to tender and to the *Golden Hill* theory, so. I just want to make sure that as to the other things we've talked about like commercial reasonableness, Republic Services should just be dismissed. Those kinds of –

MS. MORGAN: Uh-huh.

THE COURT: -- additional things to clean up. And I think everybody's in agreement that whichever way this comes up, I can see this portion of it being appealed because --

MS. MORGAN: Yes.

THE COURT: -- it's looking premature. I think you're right to go forward whichever way it happens.

MS. MORGAN: We're fine with Republic Services –

THE COURT: Uh-huh.

MS. MORGAN: -- being dismissed. As to the claims against the HOA, we didn't move for summary judgment on those, but I understand they filed a counter motion –

THE COURT: Uh-huh.

MS. MORGAN: -- for summary judgment. Those claims are in the alternative. And what we have in this case is not only just rejecting the tender, but we have, seven days later, the letter from Red Rock telling us, "You're junior bank, you're junior to our – I'm sorry, the Association's lien is junior.

So they tell us that we're completely senior seven day – within

seven days of rejecting our check. And so, I think we, we do have enough –

THE COURT: And that was February of 2012?

MS. MORGAN: Correct, February 17, 2012 is the date of that letter. So to the extent that our deed of trust was extinguished, that's a misrepresentation; and we did plead a claim for misrepresentation. But, you know, at this point, because they're in the alternative, we would be, you know, 54(b) certification and see what happens above.

Or if the HOA's motion for summary judgment is granted, we would request that it be granted without prejudice. Because if we are extinguished, then we will have a money damages claim against Red Rock and the HOA for rejecting our payment and for telling us that, that we are senior. And then, obviously that wasn't the case if our deed of trust is completely extinguished.

THE COURT: Okay. Thanks. All right. And then on – with respect to anything with respect to the *Golden Hill* – because Mr. Bohn did oppose that, and so, we talked about the tender argument, but we also have this other which is, apparently they're basing it on statutory language so, and it's – and this, this problem we have this two year debt between -- the bank tendered right away.

And just assuming that that's a valid tender and it works and, you know, that's going to be what they allow to be a valid tender. You know, because sometimes there were no checks enclosed. Sometimes it was just – we think is a dollar amount and we're ready to pay it.

But this time there was an actual check enclosed and, so

that's two years before the homeowner comes in and tries to – starts trying to bring his account current, so –

MS. MORGAN: Either –

THE COURT: -- what does that do?

MS. MORGAN: -- either way it was satisfied. So it doesn't, you know, I don't think *Golden Hill* speaks as to when the homeowner payment has to be made. The point in time that matters is: To what time period were the payments allotted? Did they make enough payments to cover that nine months that preceded the lien? And we know in this case that they did. And so, I don't think it matters when.

Is Your Honor asking, does it matter when the homeowners payments were – came in relation to when the tender was?

THE COURT: Well, and one of the – well that. I think we did talk about that. But I think also one of the arguments that – that's made is that, you know, how do you know that that's what the – what the homeowner was paying. Well, you know, the super priority amount is a static amount based on the date of the – of the notice. What are the – you go back to the nine months before that and that's your lien, your super priority lien.

So I guess yeah, that's, that's my question is that – and I guess why it makes sense in this analysis that if you get that money deposited and properly accounting for it, they, they knew how much it was. We were two months post *SFR*. What if anything – because I know the argument's always: Well, the bank needs to do something to put us on notice about their tender. So even if, if that were true and their

– because I never saw the bank started a foreclosure or did anything.

MS. MORGAN: Right.

THE COURT: So, and that they have notice to put us on notice, and they need to go into court and try to prove that up. All those obligations that – and they haven't yet told us, for sure, what if anything the bank has to do once they have tendered, and they believe there's a wrongful rejection. I mean, should they have done something to perfect that?

So even if we don't have to get into those issues, we then have the issues with the two years later the homeowner saves the day and comes in and starts making payments, and is that going to protect the bank? Is the bank entitled to the protection of those payments when they haven't done anything to try to perfect their own tender or even their own lien? Didn't start the foreclosure or anything, so.

MS. MORGAN: Well, the lien was, under *Ferrell Street*, the lien was discharged –

THE COURT: Uh-huh.

MS. MORGAN: -- at the time that the check was sent over to Red Rock.

THE COURT: Uh-huh.

MS. MORGAN: *Ferrell Street* says: You don't have to do anything else after that. You don't have to initiate any kind of action. You don't have to record anything.

THE COURT: Uh-huh.

MS. MORGAN: You don't have to keep the tender good. And

that's because it negates the very purpose of 116, which is the efficient payment of HOA assessments under this non-judicial foreclosure scheme. So, you know, I acknowledge this is an unpublished decision, but the Supreme Court has given us guidance on what more, if anything the bank should have done. And the answer is: Nothing, because the lien was extinguished, as a matter of law, at the time that the tender was made.

And whether Saticoy Bay knew that or not is irrelevant, because as a matter of law, it was – the super priority lien was discharged. Now, Saticoy Bay took title without warranty. It knew that it was not getting any kind of warranty with regard to the quality of title. And while the *SFR* opinion was out there, there was nothing that, you know, could have prevented a sub priority sale.

On each particular sale it could either be sub priority or super priority. And purchasers like Saticoy took that risk and knowingly took that risk. Their unilateral hope that it was a super priority foreclosure doesn't defeat the tender.

THE COURT: And so that's – because I – it was discussed in the pleadings. It wasn't the whole commercial reasonableness analysis, although I did see that we do have our, our appraisals from the usual suspects.

MS. MORGAN: Uh-huh.

THE COURT: The bona fide purchaser statute, status being irrelevant to –

MS. MORGAN: To tender.

THE COURT: -- to tender, and also, I'm assuming to the subsequent actual purchase by Saticoy Bay at the foreclosure sale. Like I said, I think pretty clearly he – it was commercially reasonable. This particular purchaser is a real estate professional not a management, HOA management specialist. And certainly with respect to real property, understands how to – how to do the research. Where there is nothing recorded, and like I said: The one case where I thought, well, this is going to be it, the bank did their foreclosure beforehand. The bank didn't record, so they lost.

So just a race to the courthouse, essentially. So, well, actually not courthouse, recorder's.

MS. MORGAN: Recorder's office, yeah.

THE COURT: So yeah. What's – what is the effect of that analysis, because we've got the commercially reasonable element which doesn't apply, but just in case we've got a cite. But BFP status, you said he's not entitled to rely on his BFP status –

MS. MORGAN: Correct.

THE COURT: -- because?

MS. MORGAN: We have put in the BFP analysis in conjunction with the equitable balancing analysis, which is not our strongest defense to extinguishment. I'm not even trying to say this. That's why we included that for purposes of the tender and whether the tender discharged the super priority lien.

As a matter of law, you can be the most innocent purchaser in the world, but you can't buy more than the HOA had to sell. And the

HOA only had a sub priority lien. And, you know, when you take that together with the fact that the trustee's deed and the sale is without warranty, you know, it's not – you don't even need to get to unfairness because it was discharged, the super priority lien discharged in the matter of law. And equity can't come in and save the day in that scenario.

So, you know, to the extent that Saticoy Bay felt that it has been damaged because there wasn't an announcement that needed – that they felt should have been made even though they were buying without warranty, then, you know, their claims would be against the HOA or Red Rock; they wouldn't be against the bank.

THE COURT: Okay. And then, so summary judgment is granted and, again, depending on where this money is, the bank retains their deeds of trust and they own a property, so the funds are either distributed to junior creditors or to the –

MS. MORGAN: The borrowers.

THE COURT: -- to the borrowers.

MS. MORGAN: Right. And then while the matter is on appeal, the funds wouldn't go anywhere.

THE COURT: Correct.

MS. MORGAN: Yeah. So –

THE COURT: Right.

MS. MORGAN: -- I agree with the analysis on how the funds would be distributed in either of the two scenarios.

THE COURT: Okay. Thanks. Okay. Mr. Bohn.

MR. BOHN: Your Honor, I intended to be brief.

THE COURT: Uh-huh. And you will.

MR. BOHN: So, you just send us to trial. I heard you say: Yay, you're right, let's go home and start 4th of July early. What do I know? I tried.

THE COURT: Yeah.

MR. BOHN: There's a lot here.

Let's start with *Golden Hill*, and I say very respectfully, Your Honor, I disagree with *Golden Hill*. You were the District Court Judge on *Golden Hill*. I still disagree with it. I was attorney on that. *Golden Hill* says specifically:

> The record contains undisputed evidence the former homeowner made payments to satisfy the super priority component of the HOA lien, and that the HOA applied those payments to the super priority component, the former homeowner's outstanding balance.

We don't have that evidence here. We don't have an affidavit from the homeowner's saying, "I want to pay off the super priority lien." We don't have an affidavit or deposition testimony from someone at Red Rock or the HOA saying, "These payments were applied to the super priority lien." So you can't say the super priority lien has been extinguished. The bank wants to stand here and say more than $2,025 was submitted; that's enough to call it a super priority, we're done. They're not done.

Super priority is defined as an amount equal to nine months.

It's not just a flat nine months where the first nine months goes to pay it off. Mind you, there are still collection costs, late fees and other matters, normally which are paid off prior to any of the monies going to the principal balance that is due on any account.

We don't have that evidence. That's an issue of intent. That's an issue of fact, that's why we got to go to trial on this. The *Golden Hill* case I will point out, we applied for rehearing. They politely said, "No, thank you." We applied to the Supreme Court for hearing. They said, "No, thank you." But in the rehearing, the Supreme Court noted that we raised new issues in the rehearing that weren't raised before the District Court of the law. *Golden Hill* was the first case that kind of hit us in the face with this issue, and we have since been raising these new issues.

The biggest one with my point is that the UCIOA envisions the bank being active to do something to protect its interests. And they have to do more than just send a letter that no one in the world knows about except for the bank employee who sent the letter and the guy at the HOA who got the letter. And it goes to notice and the recording statutes and BFP.

Another thing about *Golden Hill*, they put in the footnote of *Golden Hill*: What does BFP have to do with this? How can you resurrect a lien that's been satisfied? Well, that was one panel of the Supreme Court, and this is why you have to be careful when you're choosing which reported or unreported decision you're taking.

Because there are actually – there's a lot of Saticoy cases, a lot of SFR cases. There's an unpublished *Ferrell Street* case that came

out like two months after the *Ferrell Street* case that Counsel's referring to. This is *Bank of America* and *Recon Trust Company*, whereas *Ferrell Street* issued April 27th, 2018. And I wanted to make a supplement to the briefing here and this is going to be part of it. This is a different panel from the Supreme Court and this is, of course, my case and I'm pretty sure it's the Akerman law firm also.

Yes, these guys over here again. But in that case that panel of the Supreme Court said:

> Although *Ferrell* claims it is protected as a bona fide purchaser, it offered no evidence either District Court or an appeal to support this assertion, and the District Court did not rule on this issue.

The Court goes onto say:

> We decline to address these issues on appeal, but note, they may warrant the District Court's consideration and light of whether Bank of America sufficiently tendered the super priority portion of the HOA's lien.

So you have one panel saying super or bona fide purchaser doesn't matter. You have another panel saying, "Super priority does matter." You have the *Shadow Wood* case, which is a recorded case. When in the discussion of bona fide purchaser says specifically and NYCB offered no evidence that the purchaser at the sale knew about their pre-foreclosure dispute regarding the attempt to tender. That's the reported case that talks about bona fide purchaser. Bona fide purchaser is an issue.

The Supreme Court came up with a case a couple months ago. It was kind of bland, but it did note on their, in dicta, that the purpose of the recording statute is to give subsequent purchasers notice. 116.1108 – and this is all in my briefs. Stop me if you've heard this before and you read it. The principles of law and equity including real property apply to Chapter 116, all the components thereof. A portion of the real property is the concept of notice and the recording statutes.

If the lien is discharged by mere tender. If the lien is discharged by the payments of the former owner, both of which my client hotly disputes. It's a conveyance and a conveyance must be recorded. And a conveyance that is not recorded is void as to subsequent bona fide purchasers, i.e., if you didn't know about it it doesn't affect your title.

My client has an affidavit here that says, "I didn't know about it." In fact, if you do take us to go to trial he'll tell you, "We never heard of the concept of tender until after *SFR* was decided," because the banks were always just counting on the Supreme Court saying: It's not a true lien, it's not a true priority, it's a payment priority. You have to do a judicial foreclosure.

It was only after *SFR* came out that we got they're not constitutional, commercial unreasonableness. Oh yeah, and by the way, a couple instances: We sent some checks and checks got sent back. And one of the things the banks like to argue about and they still do. They still like to say commercial reasonableness even though the Supreme Court said: You don't say it in HOA cases.

It's unfair. Well, it's not fair for my client to pay 1.2 million dollars for a property and have zero of it go to pay off part of the bank's deed of trust. In cases were substantial amount was made, if Your Honor rules that the bank's deed of trust is extinguished, this isn't one of those cases where the excess proceeds are a couple hundred bucks, this is 1.16 million dollars.

Even though their deed of trust may have been a lot more than that, this is still substantial amounts of excess proceeds, which should go to the bank. It would be unequitable to give the husband and wife who haven't paid anything in years, get this windfall where my client pays 1.2 million dollars for property where he's stuck with this gigantic deed of trust. That's just not equitable. The factor in *Shadow Wood* I point out very often, and it's very important in these tender cases. Before I get to that, you know, Counsel also stood up and said, "We got the letter from Red Rock that said, 'You're prior to us, our lien will not extinguish your lien.'"

Once *SFR* was decided, anyone and everyone in the State of Nevada, even nationwide, heard about this case. And the banks at that point knew: Yes, you can be extinguished if you let this go to sale. *Shadow Wood* says you have to take some action. You are not entitled to equitable relief. If you know there's an event that's going to happen, you allow it to happen and third parties get involved. And that's what happened here.

My client showed up after *SFR* saying: I can buy these things free and clear. I'm going to spend 1.2. I'm going to get this property;

there's over a million in equity; I'll take it, and I'll spend the big money to get it. That was his thought in doing so. But when they say that it was misrepresented to us that our lien is not effected.

Once *SFR* came out, that's off the table, because frankly, before *SFR* came out, there was a split. You know there were 32 judges here. I think there were 32 different opinions as to what happened, never mind the people across the street at Federal Court. Nobody knew it was going to happen until *SFR* was decided. Once *SFR* decided, everyone knew what happened.

And under *Shadow Wood*, you have to take steps to protect your own interests. You cannot let third parties get involved, and if you do, you are not entitled to equitable relief. So when they come here to court asking for equitable relief, they're not entitled to it because – because they didn't do anything to protect the property or put people on notice. And that goes back to the recording statutes.

THE COURT: And you can bring out equitable relief because it's – quiet title is an equitable remedy as against everybody else, not against the homeowners, but against --

MR. BOHN: Well, my client is asking for quiet title as to all claimants against the property, the former owner and against the bank. The bank is not really asking for quiet title. They're asking for declaratory relief simply to state that the deed of trust was not affected by the foreclosure sale and Counsel has said so much. They don't want the sale set aside. They don't care who has title; they just want their deed of trust to stay on the property so that they can realize their

security.

You know the other issue, Your Honor, you will have seen. I mean, this property went to default with the HOA in 2010. What happens very frequently is that the owner can't pay the couple hundred dollars a month it takes for the HOA. They're certainly not paying the couple thousand dollars a month that it takes for the mortgage. The bank has sat on this property for years and years and years and years. Lord knows how much in interest, in late fees and everything else was built up on this, because they haven't done anything to satisfy or to recoup their security.

Mind you, the UCIOA said specifically it was always intended that once the bank got a lien, they would pay it off in full, because their deed of trust says: We can pay other liens which may affect our security. We can add it to the note that you owe us, and we can add that as additional debt to the deed of trust.

The UCIOA specifically, it was always assumed the bank would pay these small minimal nominal liens, in full, turn around and start their own foreclosure, put the property back in the hands of responsible homeowner that will go out and pay the HOA liens. Here the bank has just sat on their hands and the amounts, I think it was like $2,600 is the amount of the original – it was a nominal sum.

And I make this point every time I argue the tender issue. You know, the Supreme Court said: You could pay the whole thing and ask for the money back later. How much are they spending in attorneys' fees and all these thousands of cases arguing over a couple hundred

dollars on a lien, when it would have been so much simpler just to pay the whole amount, charge it to their client for a close and get the money back, back that way. Or if they feel that the HOA charged them too much, take them to Small Claims Court and give the district court judges more time to do other important things, but they don't do that.

And that goes back to the claim for equitable relief. I'll also point out, we did survey interrogatories in this case. And we asked: What proof do you have we're not a bona fide purchaser? They said: You didn't pay too much. You don't got a deed of trust. We know those don't work. We asked about fraud, oppression or unfairness. It was a commercial reasonableness argument. They never mentioned tender in their answers to interrogatories. They are bound by their discovery answers, and they should be allowed to raise it here.

If you look at Counsel's supplement that she talked about the Miles Bauer letter, the statement that they got in that case mentions both the master and the sub association. So, from the account ledger that was provided, we don't know if it's from the Master Association, the sub association or both. Did the sub association have a lien? Did it have a super priority lien? Did the Master Association have a lien? Did it have a super priority lien? How much was it? What was the intent of the party's in accepting the payments? Where did it go to a lien? What was the intent of the owner in making those?

We have – these are all issues here.

THE COURT: Why is the owner's intent important; it's accounting. For – last in first out. You get your payment today, you

apply it against the very first efficiency. It's accounting. It's gap.

MR. BOHN: Right, but there's nothing in the statute. The concept of the super priority lien, it's not the first nine months senior lien; it's an amount equal to nine months. And there's nothing that says this is the, the stated purpose in the UCIOA and noticed by the Supreme Court is to keep the money flowing to the HOAs because these are not profit entities, they have to provide services.

They talk about the equitable balance between the needs for the bank to have their security, but the HOA to get their money. It was always intended – it's clear that it was intended for the bank to be active to do something and not sit on their laurels and let the property go to sale. So when they said: We're not going to take your $2,000 check, they should have said: Well, here's a $6,000 check. They should have paid the thing off and in full. They should've gotten an injunction. They should have recorded something. At the time it cost $17 to record something.

Had they recorded something that says: We believe that we have paid the super priority portion of the lien, after *SFR*, you can't extinguish us; we wouldn't be here today. Eddie Haddad would not have paid 1.2 million for this property had he known he was buying it to – subject to.

We have his affidavit in here that says: I didn't know about the super priority lien. And under *Shadow Wood*, not *Golden Hill*, not under *Ferrell Street* but under *Shadow Wood*, the knowledge of the purchaser regarding pre-foreclosure issues is an issue that weighs on his status as

a bona fide purchaser.

THE COURT: Well, and –

MR. BOHN: There is –

THE COURT: -- [indiscernible] argument is that even a BFP, you know, you get the title that your seller had.

MR. BOHN: Not necessarily. The *Shadow Wood* case. I cited the *Ferrell – Firato v. Tuttle*, case out of the State of California.

THE COURT: Uh-huh.

MR. BOHN: That is based in part on statutory language that says bona fide purchaser at foreclosure sale takes free and clear of any claims. In that particular case, the homeowner came in –

THE COURT: Uh-huh.

MR. BOHN: -- paid the lien. The check never got to the trustee. They went to sale and away we go. There's a whole string cite in the *Firato v. Tuttle* case, including a *Lennartz v. Quilty,* which is specifically cited by the *Shadow Wood* court, the very last paragraph of *Shadow Wood* that says you buy a property free and clear of any infirmity you have no knowledge of.

So there is case law that says: Yes, if you're a BFP, if there's an infirmity, like you said before about the race to the Recorder's Office. If it's not recorded, how are we supposed to know about it? A payment of the super priority lien is a – they're saying a discharge of the lien. A discharge is a conveyance that needs to be recorded.

In actuality, because they are a junior lienholder, their payment isn't a discharge it's an assignment because this – that portion

of the super priority lien gets assigned and applied to their deed of trust, and their deed of trust so says so. An assignment is also a conveyance that must be recorded.

A discharge or an assignment, both of which are conveyances which are not recorded, are void as to bona fide purchasers. And that is just general real estate law. And I -- I've said this many times before, the entire purpose of the recording statutes is to provide notice. Our statutes were adopted in 1861, we borrowed them from California. California got them from New York. New York got them from England. That's how old these are. They've been rooted – this is just basic real estate first year law school 101.

And I'll go back to what I started out saying. They're not entitled to summary judgment. If anyone, my client is, but because of the number of issues, the parties involved and there are issues which are still outstanding, I respectfully submit: I haven't had a trial with you yet, it's about time, Your Honor.

THE COURT: So we – if we have a trial, then what do we do? Do we try the whole thing? Or do you bifurcate and just decide this issue of whether the sale was effective to transfer title to Saticoy Bay, or that the tender or the payments by the homeowner were sufficient to satisfy the HOA liens, so Mr. Haddad paid a million two to be in second position. What?

MR. BOHN: Well, you know, what –

THE COURT: What are we trying?

MR. BOHN: Well, we'll go to trial on everything. There's no

reason to bifurcate. I do know that I filed claims against the former owners but that's strictly for quiet title. Having that read their counterclaims against the TIMPAS; I presume they want some money from the TIMPAS one way or another whether or not the deed of trust is extinguished. And that money, again, would be inequitable for the TIMPAS to get it and my client to get saddled with a gigantic – they should at least get the benefit of the amount with his payment subtracted from the amount due on the deed of trust. Provide, you know, so, yeah, we should go to trial. We should go to trial on everything.

This case was not filed until actually we filed it relatively quickly after the foreclosure sale.

THE COURT: Right. Yeah.

MR. BOHN: My client was very excited when he bought a property for 1.2 million after *SFR*. We filed this November 20th. I think the sale –

THE COURT: A week later.

MR. BOHN: -- was November 6th.

THE COURT: Uh-huh.

MR. BOHN: He's like: Let me get quiet title so I can realize my money on this now. So we have more than a year before we have to get the matter to trial. So – and I would schedule a trial in mid-August.

THE COURT: Uh-huh.

MR. BOHN: But we got lots of time before the five year rule runs out. I have – unless you have any further questions or issues, I'm happy to submit it on what I've spoken to for a long time.

THE COURT: Okay. Thank you.

MR. HASTINGS: Your Honor, I hate to, to even stand up, and to the extent that Your Honor was inclined to grant my motion as it relates to the bank -- just claims against me, I'll sit back down. But if you're not inclined to do so, I do need to make a record on a couple of things that were brought up in opposition by Ms. Morgan today.

THE COURT: No. Uh-uh, no.

MR. HASTINGS: No, you're not going to let me make a record –

THE COURT: I don't need to hear anything else.

MR. HASTINGS: -- or you don't need to hear it?

THE COURT: I don't need – I'm -- hear anything else.

MR. HASTINGS: Okay.

THE COURT: The – one thing that I agree with Mr. Bohn on is that this record's kind of incomplete. As I've said, "Obviously it's accounting; it doesn't have anything to do with the homeowner thought they were doing. It's accounting." How do you account for – and we don't have a complete record from Red Rock to tell what they did.

I mean, because to me the most significant thing – the thing that, you know, I think I have to follow, because it was my case and I was affirmed on it, is that this is a, a defense for the bank -- is that anybody, the homeowner, the bank, anybody can pay off a super -- a volunteer could pay off to submit payments; and if it's sufficient to cover the super priority lien that's where you account for it first.

Because, as I said, you've got your, your last, your last in.

He's paying this in 2014. It goes all the way back to the beginning and applies to what? Well, it applies to the super priority first, obviously because that's your dues, and that's what you owe every month for this privilege of living here and having streets and somebody keeping track of the lighting and the plantings of – that's what you're paying for, and that's the very first thing.

All this other stuff, if you violate the rules and you get fines and things, that's additional. But the super priority takes priority and obviously you'd be paying for that. My problem is here, we don't have a really good record. We have excerpts from the Red Rock Financial's accounting records. And so when I say, "Well, obviously it's a gap." That's obvious to me that there's nothing in the record that tells us that's how they do their accounting.

So to the extent that it is correctly cited that in the other case we did have proof that they had made these payments which were applied to the super priority portions, maybe these weren't. So I do think that we do have to have a trial on certain issues. We don't have to have trial on Republic Services, they're out. So I would grant their request. Take a look at it and file a motion for some summary judgment. But I think everybody here agrees, that's statutory.

So to the extent there's any claims against them, I think everybody realizes they get paid no matter what, because it has nothing to do with the position of with an HOA or with a bank or a homeowner. It is a statutory right that the company has. So Red Rock's out.

With respect to tender --

MR. WIGHT: Republic.

MR. BOHN: Republic's out.

THE COURT: -- Republic, beg your pardon. Thank you. It all starts with r's. Republic's out.

MR. WIGHT: If you want to take Red Rock out too.

THE COURT: Yeah. Republic's out. With respect to the tender defense, I really didn't hear any – other than these equitable arguments, which I think are just arguments. With respect to the facts, I think the facts of the tender are pretty well established. And the legal opinions that were cited by Red Rock when they responded to Miles Bauer. turned out mostly to be wrong. So I don't really know that there's any we need to know, why they rejected the tender. It's – the payment was made, they wrote back saying, "We're not taking this." So that's tender.

So I don't know that we need to have a trial on tender –

MR. WIGHT: Your Honor –

THE COURT: -- if you think it's finished though.

MR. WIGHT: -- Just to address that little – real quickly. It – if -- I would respectfully disagree with that. The history of why we rejected these payments goes back quite a bit. We had communications with Miles Bauer going back to 2010 about why we were rejecting these payments. And it goes to the question of wrong --

THE COURT: I think the --

MR. WIGHT: -- the wrongfulness of the rejection.

THE COURT: And I think this one was early 2010 they – that

was their first -- at least that's the first correspondence I was given. I don't have a [indiscernible].

MR. WIGHT: Right. So at that time we had a lot of correspondence between Counsel for Red Rock and Counsel for Bank of – Miles Bauer. There was a lot of communication going on back and forth between them about why they were rejecting these letters. That was kind of behind the scenes and is not a part of the record here. And it does go to the question of the wrongfulness of the rejection and whether Red Rock acted wrongfully in rejecting the tender.

So that I do think is a question of fact.

THE COURT: Uh-huh.

MR. WIGHT: If the Court, especially were inclined to state that the HOA, Red Rock could possibly be liable for damages on behalf of the rejection.

THE COURT: Okay.

MR. BOHN: I mean, I think Counsel's talking about the stone hollow trilogy where the Supreme Court did say, you know: It's not a discharge if it was rejected in good faith. And so I think good faith on the rejection is always an issue in these cases.

THE COURT: Okay. Well, as Ms. Morgan's indicated, she would like to narrow the issues. So you're telling me, you believe there are questions of fact with respect to good faith rejection? So since I – I'm just trying to figure out what it is we can avoid, because dragging all these people in here for what?

MS. MORGAN: Well and --

THE COURT: I mean –

MS. MORGAN: -- I think we can look to *Ferrell Street* and that gives guidance, because we're talking about the same letter that Miles Bauer sent and that -- at least in *Ferrell Street* they considered that to be perfect tender. So there isn't a question of fact because we're talking about the same letter.

THE COURT: Uh-huh.

MS. MORGAN: And we do have guidance, so you know, the reason for the rejection doesn't really matter because the payment itself, it discharges the lien.

THE COURT: Okay.

MR. WIGHT: And where Red Rock is coming from is, it has to be a different analysis if you're – if you're looking towards –

MS. MORGAN: Damages.

MR. WIGHT: -- whether the, the tender extinguished the deed of trust; it's one analysis. If you're looking to damages against Red Rock or the HOA, I think it's a different analysis where you have to really look into the HOA and Red Rock's intentions, which we haven't done yet.

THE COURT: Okay. Well, we're going to try the whole thing at one time. We have to try the whole thing at one time and I – it's sounding like, really, the only thing anybody agrees on is that, you know, Republic's going to get paid, so they don't really need to be in the case, so –

MS. MORGAN: Well, if –

MR. HASTINGS: Wait, wait.

THE COURT: It's, it's unfortunate that we've just spent an hour – an hour and a half and we're not able to really eliminate any questions.

MS. MORGAN: Well, the tender discharged the lien, which it sounds like that's where maybe Your Honor was going then – then the – then the deed of trust survives, because the super priority lien was discharged. And then that portion can be taken up on appeal.

THE COURT: Uh-huh.

MS. MORGAN: So.

MR. BOHN: If I may.

THE COURT: But it wouldn't if, necessarily, if as you pointed out the – there a couple of other issues. And the one that's odd here and I – it is a legal issue, is if – what is the effect of the bank two years before the homeowner pays tendering. Then what is the legal effect of that? Should the HOA having then attempted to enter into a payment agreement with the homeowner, because their – they didn't have a super priority lien to extinguish at that time; what were they extinguishing?

And so I, I guess my question is: Which is it that the bank can recover under? Is it really just tender, or is it also the fact that in any event the homeowner is the one who really made the proper tender, because their tender was accepted and applied.

MS. MORGAN: Uh-huh.

THE COURT: And –

MS. MORGAN: I think it can be either way. You know, the

bank's deed of trust survived because the super priority lien was discharged by virtue of the bank's tender.

THE COURT: Uh-huh.

MS. MORGAN: But even if that wasn't the case, the super priority lien was discharged because of the homeowner tender.

THE COURT: Uh-huh. But that's – but my point being, what is it that we can eliminate or because we can't at this point in time –

MS. MORGAN: But I didn't want to --

THE COURT: -- we still have to address these other issues of whether the – whether it was effective. Because if the Court accepts the tender you're done; there's nothing further to inquire into. But if the Court says: No, we think there's a problem with this tender, but let's look at this actual payment by the homeowner's – homeowner to the homeowner's association: what does that do? You need to have them both decided I think at the –

MS. MORGAN: Well, I –

THE COURT: -- same time.

MS. MORGAN: -- the homeowner tender wouldn't operate to invalidate the bank's tender, certainly. If any --

THE COURT: No, but I'm just saying if, if the Court finds some problem with tender, they – if they decide they're going to tell us: Well, it's not effective if there's no recording of the tender.

MS. MORGAN: Uh-huh.

THE COURT: Then you still have to answer the second question which is: What's the effect of the homeowner –

MS. MORGAN: Of the –

THE COURT: -- actually depositing money and, and this idea that this triggers some sort of choice by the – by the HOA to decide if they're proceeding on sub priority or they're proceeding on their entire lien. If they want to start over and, and make a new super priority they have that option. But if it – since it's the bank's – the homeowner association's option, then don't they have to let people know that?

So that's kind of – I guess that's my concern, is that we have to decide them both, because they're kind of alternative theories for the bank to recover on versus – and then we get into the whole equitable arguments – Mr. Bohn's clients in which –

MS. MORGAN: I think –

MR. BOHN: Can't –

MS. MORGAN: -- if we go with the Bank of America tender and there's – and the Court finds there's no questions of fact as to Bank of America's tender, then we can – we would request 54(b) certification so that then, Your Honor –

THE COURT: No, because over here we've got a request to say: Well, you've got a counterclaim then for damages. If you went on tender you're still going to have, you know, however much left that this guy owes you. I don't think – property may be worth four million dollars.

MS. MORGAN: Oh, if we lose on tender?

THE COURT: No, no, no. If you win on tender you've got a claim against them, these guys.

MR. HASTINGS: No, that –

MR. WIGHT: No.

MR. HASTINGS: -- those claims go away, Your Honor.

THE COURT: The damages.

MR. WIGHT: Yeah. If, if they win on tender then our claims would be moot and there'd be no –

MS. MORGAN: Right.

THE COURT: But there's a – but there might be a deficiency.

MR. BOHN: My claims against my client or my client's claim –

MR. WIGHT: Right.

MR. BOHN: -- against them.

MR. WIGHT: Right.

MS. MORGAN: Right. And so we would – we would put that narrow issue before the Supreme Court --

THE COURT: Okay. It's –

MS. MORGAN: -- and then – yeah.

MR. BOHN: Might I suggest –

THE COURT: These are damages issues.

MR. BOHN: And this just, you know, I've had a couple of trials. I've had a number of trials at the Akerman firm. I've gotten along with – of the firms – we've all done enough of these. They're painful enough for us. We get along well enough. We are able to stipulate to a --

THE COURT: Well, there we go.

MR. BOHN: -- majority of the facts.

MS. MORGAN: Uh-huh.

THE COURT: And so –

MR. BOHN: And we could also stipulate to what the issues are going to be and what they're not going to be.

THE COURT: Right.

MR. BOHN: I will tell you, I still say that the fact of the tender is on the table. The fact of the – whether or not it was wrongfully rejected and good faith is on the table. We don't know how the homeowner's payments were applied or why they should have been applied at the super priority lien as opposed to any other part. As far as I'm concerned, that's on the table. You're the Judge, you're making the decision.

I also wouldn't mind kicking this trial a little bit. The Supreme Court, here aptly will give us the benefit of reported cases. Maybe they'll finally come out with one that talks about tender. I don't know. I'll also say, I'm looking – calendar call's a week from Thursday, bench trial, you know, a stack presumably begins August 6th.

THE COURT: And it's just the first two weeks. The last two weeks are the Sheldon Adelson Educational Campus.

MR. BOHN: And –

THE COURT: Mr. Adelson's available and we're going to do his trial for the two weeks he's available.

MR. BOHN: I was going to ask to move it. I'm going to be out of the country till August 10th and that would give us all more – if it's – if we can move it to another stack, keep our fingers crossed, maybe get some case law from the Supreme Court, we can try to narrow the issues

and the facts for trial.

THE COURT: Okay.

MR. WIGHT: And I would just have one other suggestion. If the Court were inclined to decide this on the *Golden Hill* matter, on the matter of the homeowner payments. And the only question in the Court's mind is accounting questions with Red Rock, we could set it for an evidentiary – a quick evidentiary hearing on that or something if the Court's inclined to resolve it on that.

But I will state, I mean this is not me submitting evidence but –

THE COURT: Uh-huh.

MR. WIGHT: -- Red Rock always submits the payments on a pro rata basis, so they'll submit basically half the payment to satisfy what's due to the HOA and half the payment to satisfy what's due to their own costs --

THE COURT: Right.

MR. WIGHT: -- so that –

THE COURT: The total amount adds up to –

MR. WIGHT: -- so that – so an evidentiary hearing might not be appropriate, but if it is just an accounting question that the Court's –

THE COURT: Well, that's the only question of fact that he's raised so –

MR. WIGHT: Sitting, sitting on – I don't know he --

THE COURT: And I, I don't have a complete thought.

MR. WIGHT: -- an evidentiary hearing or something might be preferable to going through a full trial on the other issues.

THE COURT: All right. At this point, I think you guys need to talk about if you can narrow down these issues, because there are – I don't perceive what issues there are with respect to tender as to what they -- what was sent in. I understand your point that you need to get to the second part, because you don't want to be liable for a million dollars.

So when we get to the damages in this case against – Mr. Haddad's case against your clients, we've got this problem. And with respect to that we solved Mr. Bohn's problems about, you know, I think equity really does apply. So even if there's – because tender's just purely a legal doctrine. It's not part of the statute.

So where we have these recording statutes that are intended to provide notice and where we've got clear cases that say you've got to record your interest otherwise, you know, nobody knows you went on ahead and did your foreclosures; it, it doesn't work.

So if you go ahead and do your tender, does that work if you haven't recorded it? I don't know. So those are the equitable arguments you're still going to have to do with respect to – with respect to tender. I don't – I don't think you can make any determination in this case other than, there are questions of fact as to every single part of it.

If the Court says I find that this was a tender. That they did the following things: As a matter of fact, these are the elements that they did. We can say that as a matter of fact this tender was made, it was rejected, end of that tender analysis.

Second part though is, if so, what happens to your clients? And also, if so, what happens to Mr. Bohn's clients with respect to his

equitable rights for relying on the record as it appeared and not being told, again, oh, by the way we have a tender from, you know, two years ago. We got a stale check here in our file. I don't know.

So I don't know how you can narrow it down, because I appreciate the idea that you – that you would like to narrow it down. It may not be that there's anything you can narrow down or that you're not going to be able to do with just like the affidavits. Do I need to hear Mr. Miles come in again, if you can find him and get him back here from Hawaii? I'm not sure. What's he going to tell me? That that's his business record. So maybe we don't need him.

With respect to your clients, I don't have a complete file from them, but if we do then we don't need the – we don't need the custodian of records. But, you know, we're probably going to need to – have somebody explain the accounting to us. So I'm just trying to, you know, figure out what it is.

If the goal is to streamline this, and we're not going to be able to do it if Counsel's out of – you don't need a long – I mean it's – what is it? It's like two or three days, but the last two weeks are not available. We have a firm trial setting. It's Mr. Adelson is turning, I think 85, so he's entitled to a preferential setting.

And I'd be happy to entertain any suggestions. I don't know if you want to come back on – for calendar calls, and we can discuss it then. If you have had this chance to discuss these issues and you're ready to –

[Colloquy between Counselors]

THE COURT: You have a week. You have one week before Mr. Adelson's trial.

MR. HASTINGS: So what's the only week of availability for the – for the stack we're currently on?

THE COURT: 13th.

MR. HASTINGS: The 13th of August?

THE COURT: Uh-huh. Yeah.

MS. MORGAN: Oh gosh.

MR. BOHN: That's – well, cancel it by – she's going to be out of town for extended period before that.

THE COURT: Uh-huh.

MR. BOHN: I'm coming back on the 10th. The 13th is the first day. We both agreed, with your permission, we'd like to ask to move it to a different stack --

THE COURT: Uh-huh.

MR. BOHN: -- so we have a different set of scheduling –

THE COURT: Okay.

MR. BOHN: -- problems later on.

THE COURT: All right. Well, you know we'll have to look and see where we can put you that you'd be –

MR. BOHN: Want to talk about it at calendar call?

THE COURT: Yeah. I think we're, we're going to have to have it.

MR. BOHN: Okay.

THE COURT: We'll look for a date to move you to and call

you, you know, early. But it's -- in the interim you can think of ways that you can expedite it and narrow it down, and maybe that's going to make it easier to set it.

MR. WIGHT: I mean, the only thing I can think of is, is it seems like what's going on here is, there's the primary claim of what happens to the deed of trust, and then the claims against the HOA and Red Rock could go either way --

THE COURT: Exactly.

MR. WIGHT: -- depending on what happens.

THE COURT: Yeah.

MR. WIGHT: And if there would be some way that we could settle that initial claim first, that way that could be appealed and we wouldn't have to – because where we're sitting now we're going to have to go to trial kind of on the basis of what happens either way. We're going to have to defend ourselves against –

THE COURT: Right, but –

MR. WIGHT: -- the purchaser's claim and the --

THE COURT: So say we –

MR. WIGHT: -- bank's claims.

THE COURT: -- take the position that it's a valid tender; that's the end of story. We don't talk about anything else. Well, we do because we've got defenses that –

MR. WIGHT: Well not –

THE COURT: -- Mr. Bohn has raised which we inquire, you know, Mr. Haddad --

MR. WIGHT: But then – but then we'd go with a 54(b) certification --

MR. HASTINGS: Yeah.

MR. WIGHT: -- and those -- that, that would go up to appeal before we'd have to deal with –

MR. BOHN: We'd do it all at once at one trial. And Counsel and I, we did a case with Judge Mahan. We were done with evidence in one day. When you involve –

THE COURT: Uh-huh.

MR. BOHN: -- the HOA and –

THE COURT: Right.

MR. BOHN: -- it's going to take a little bit more but there's –

THE COURT: Maybe three.

MR. BOHN: A day and a half maybe. I mean, depend – we had full days over there

THE COURT: Right.

MR. BOHN: And then a couple hours for closing arguments, which is pretty much -- we're going to rehash what you heard this morning.

THE COURT: Uh-huh.

MR. BOHN: So we can get and – that's why a number of other judges, you know, are denying summary judgments on these tender issues, because you can get the trials banged out in two maybe three days. Because in every case I've had –

THE COURT: That's the issue of making the record on the –

on the –

MR. BOHN: Yeah.

THE COURT: -- affirmative defense or –

MR. BOHN: I – I've been able to stipulate to a great majority of facts in every single trial I have done with every –

THE COURT: And that's –

MR. BOHN: -- law firm including the Akerman firm.

THE COURT: -- that's the goal. I mean, because I, you know, my thoughts. There's just like a few questions here. The legal – most of the facts are pretty much agreed; the problem is, how do they apply? And so, what's the result going to be, because if I find valid tender we're done. We still have to hear from his client as to, you know, what he did to show that he was, in fact -- he does, in fact, have an equitable defense to the tender. Because tender's not a statutory, you can't decide it that way, it's –

MR. BOHN: I can tell you, you know, I don't get to bent out of shape about what happens at trial or summary judgment, because I know it's ultimately going to be –

THE COURT: Right.

MR. BOHN: -- heard by the Supreme Court, so –

THE COURT: Correct.

MR. BOHN: So I'm just going to be here to make a record and try to convince you –

THE COURT: Right. And –

MR. BOHN: -- to rule in my favor.

THE COURT: -- my, and –

MR. BOHN: Because if you do I'll have one brief with the Supreme Court.

THE COURT: Right. And that's – and that's the thing that –

MR. BOHN: Do it against me you got to do briefs and the appendix; it's a lot more work.

THE COURT: With, yeah, with respect to – so that's just it, I mean, can you narrow down those facts we are going to need to put on. I don't need to hear him again, you know, I know how he kept his record. I know that we're like on a server in his garage or somewhere because he's retired. But you know, I don't really think that I need to, to hear from those guys.

So what can you – what can you agree on that leaves you with just these very narrow issues? I mean, we may be able to agree on everything with respect to tender, but what's the result and what's the defense? We may be able to agree on everything about the homeowner paying unless, you know, we need to address these issues – these accounting issues.

You know, I largely think it doesn't matter which the – what the HOA does. They've got enough money to satisfy the super priority, what they have to do next – what did they do next? I mean, because you've got these alternative theories for, for the bank to recover, and then you've got all these affirmative defenses here that, you know, they're going to try to raise.

And if they – if they lose they want to prove up claims against

your client. So how do we do that – we could probably do that in about the last two hours that we've spent on this. Probably don't need a whole lot more.

MR. BOHN: Thank you.

THE COURT: But there are – there are questions of fact with respect to every single one of these issues. Even if we got a legal defense here to, to tender. I don't want to wait a long time because, you know, there's a decision coming out pretty much every week, usually unpublished. So where do we go?

How can we do this expeditiously, because – like on the next stack there's a 2013 case. So you're not going to be first on that stack. You're pretty close to pretty much any other stack because four years old is pretty old.

So whatever you guys can work out I'd be happy to try to accommodate it, but we'll need to look at a stack where you've got a good chance of going.

MS. MORGAN: Uh-huh.

MR. BOHN: All right.

THE COURT: Because you're not – not the oldest case on the next stack in September.

MR. BOHN: Which is good to know.

MS. MORGAN: I do think, you know, we don't want to delay things, but at the same time if we had a little more time I think we can put together some stipulated facts, some stipulated –

THE COURT: Uh-huh.

MS. MORGAN: -- you know, exhibits and really pare down the evidence presented so.

THE COURT: All right. Well –

MR. BOHN: Do you want findings in the order denying the motion or just a simple --

THE COURT: Just a –

MR. BOHN: There's issues of fact, go to trial, motion's denied --

THE COURT: Yeah. But –

MR. BOHN: -- except for Republic Services.

THE COURT: There. Yeah, there are a lot of – a lot of facts that cannot be disputed but we have – whether they're entitled to judgment is a matter of law on several of these, and we also have questions on the defenses, so. We can't decide whether they're in or out until I know the answer to that.

MR. BOHN: Thank you, Your Honor.

THE COURT: I mean, I don't think there's a claim against him, but yeah. I don't know. I think it's just your claims, so that, that narrows things down, but they may – you may feel differently. You may feel that there is a claim. There are issues that they say they still get out of. I don't know. So we're going to just have to do it. Too bad.

MR. HASTINGS: Thank Your Honor.

THE COURT: I thought it was a lot more clear.

MR. BOHN: See you next Thursday.

THE COURT: That's why we have argument so.

MS. MORGAN: Yeah.

THE COURT: We'll see you. We'll see you.

MR. BOHN: Happy 4th of July.

MS. MORGAN: Yes. Thank you.

THE COURT: Enjoy the holiday, thanks for coming in and --

MR. BOHN: Thank you.

THE COURT: -- spending all this time with us this morning.

MR. WIGHT: Did we settle who's going to draft the order?

MR. BOHN: I'll do it.

THE COURT: Thank you.

MS. MORGAN: Thank you.

MR. BOHN: Oh, and if he's doing that, I can do it quicker.

THE COURT: Oh, can somebody find out where the money is?

MS. MORGAN: Yes.

MR. WIGHT: Yeah, we will find out.

THE COURT: Okay, thank you.

[Hearing concluded at 11:32 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kerry Esparza
Court Recorder/Transcriber

Electronically Filed
10/15/2020 8:59 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34 INNISBROOK, Plaintiff, vs. THORNBURG MORTGAGE SECURITIES TRUST 2007-3 et al., Defendants.	CASE#: A-14-710161-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN

DISTRICT COURT JUDGE

TUESDAY, NOVEMBER 6, 2018

RECORDER'S TRANSCRIPT OF HEARING:
THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S MOTION FOR RECONSIDERATION OF ORDER DENYING SUMMARY JUDGMENT

APPEARANCES:

For Saticoy Bay: MICHAEL F. BOHN, ESQ.

For Spanish Trail and Aspen: RYAN D. HASTINGS, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

APPEARANCES CONTINUED:

For Thornburg Mortgage Securities Trust: MELANIE D. MORGAN, ESQ.

For Red Rock Financial Services: DANIEL G. SCOW, ESQ.

Las Vegas, Nevada, Tuesday, November 6, 2018

[Hearing commenced at 9:20 a.m.]

THE COURT: Is everybody here?

MS. MORGAN: I think we're still waiting on someone from Mr. Bohn's office.

THE COURT: Okay. All right. Let me know as soon as you guys see him.

[Hearing trailed at 9:20 a.m.]

[Hearing resumed at 9:43 a.m.]

THE COURT: We will take that now.

Welcome back. We'll take appearances.

MR. BOHN: Michael Bohn for Plaintiff.

MS. MORGAN: Melanie Morgan for Thornburg.

MR. HASTINGS: Ryan Hastings on behalf of Spanish Trail Master.

MR. SCOW: And Daniel Scow on behalf Red Rock Financial Services.

THE COURT: Okay. This was filed as a Motion for Reconsideration and so, you know, technically under the Rules of Civil Procedure, I don't really think that's what it is. Way too late for a reconsideration. It's just another motion for summary – motion for summary judgment based on the fact that we do have case law now on tender, so.

MS. MORGAN: Okay, yes. We did file this, you know, this case was the first one where we said, "Oh, we need to bring this issue

before the Court."

THE COURT: Right.

MS. MORGAN: And so, just –

THE COURT: Some time ago.

MS. MORGAN: -- just on the issue of tender there's, you know, other things, other defenses in this case. But this motion is really just focusing a very narrow view on the one defense of tender. And in this case, there's really no question of fact, nothing to go to trial about. We have the letter from Miles Bauer.

It's the same letter as in the *Diamond Spur* case. Only difference is the amount and the HOA, the date. But the language is exactly the same. And the Nevada Supreme Court tells us in *Diamond Spur* that that language – it is a condition, but it's condition that –

THE COURT: That they're entitled to reflect.

MS. MORGAN: -- yeah, that the bank had a right to insist upon. And so, in this case there's no – there's no question of fact, was the right amount tendered? We know it was the right amount. Did the HOA trustee receive the check? We know they received a check. It's in their file. Well, was the letter impermissibly conditional? No, *Diamond Spur* tells us it's not. Well, was the HOA, was their rejection reasonably justified?

They didn't tell us why they rejected it at the time. They sent us a letter saying that we are completely junior, but –

THE COURT: Yeah, the wrong letter.

MS. MORGAN: Yeah, same letter we're talking about in the

other case.

THE COURT: Uh-huh.

MS. MORGAN: So this is, on all fours –

THE COURT: Well, one issue that was raised was, you know, wait a minute, we can't do this without a hearing, because you don't really have a proper foundation for all this evidence that they're relying on.

MS. MORGAN: We –

THE COURT: Argue Mr. Bohn's case for him –

MS. MORGAN: Yeah.

THE COURT: -- but with that, so –

MS. MORGAN: We have Miles Bauer –

THE COURT: -- we could have him make his – take his –

MS. MORGAN: Sure.

THE COURT: -- his position, because I don't – I read it as: We can't do this on summary judgment, you still have to have the testimony to support these allegations. The record's insufficient.

MS. MORGAN: You know, we included an affidavit from Miles Bauer.

THE COURT: Uh-huh.

MS. MORGAN: The same type of affidavit we include and they have 100s of other cases.

THE COURT: Uh-huh, yeah.

MS. MORGAN: I don't see what is insufficient –

THE COURT: Yeah.

MS. MORGAN: -- about the evidence that we attached. The letter has been authenticated by that affidavit. I think to take it to trial is just, you know, more admissible evidence. And we don't need cumulative evidence to prevail, we provided –

THE COURT: Okay.

MS. MORGAN: -- sufficient evidence for summary judgment by way of the update.

THE COURT: Thank you. Counsel.

MR. BOHN: My turn?

THE COURT: Yes.

MR. BOHN: Because of the unusual nature of this particular case, I dare to say 95 percent of the cases that come before Your Honor deal with foreclosure sales that happen before the *SFR* case.

THE COURT: Uh-huh.

MR. BOHN: This one happened after the *SFR* case. I dare say 99.9 percent of your cases, the amount paid was less than 20 percent of the value of the property. Here we have a property that was purchased for 1.2 million.

And because the unusual nature of the case. I mean, Your Honor certainly has discretion to grant or not grant summary judgment. We're scheduled to go to trial not long from now. And as pleasant as Melanie is to go to trial with I, I, you know, it's certainly in your discretion what you want to do with this. But because of the unusual nature of the case, my belief is that this should go to trial to, you know, we're this close.

The Supreme Court, on summary judgment, has numerous times reversed because of issues of fact you should do in time of trial.

THE COURT: Uh-huh.

MR. BOHN: If we go to trial that issue on appeal goes away. And I've been in enough cases with the Akerman firm. We haven't had four parties, but I did a trial the other day with Rex Garner in his – we start at 9 in the morning. We're heading home by 5 – by 4 in the afternoon. These are more like glorified evidentiary hearings. We are normally able to submit joint exhibits, stipulate to three quarters of them.

THE COURT: Nobody's arguing that this was inadequate consideration. I mean, this, as you say, this is a different situation. But as was pointed out, this was one of our earliest hearings on tender and I rejected it at the time on the argument that there were questions of fact about the tender.

Now that we have the case, you say the case is distinguishable and that – these are conditional language. I mean, I don't know that, that was one of the questions. But the other thing, as I said: It seemed to me that you were taking issue with the bank's affidavit. That merely somebody who said, I looked at a computer screen and my computer screen tells me this --

MR. BOHN: Yes, that also.

THE COURT: -- is --

MR. BOHN: I – but we do believe the –

THE COURT: -- arguably not enough.

MR. BOHN: -- the *SFR* through the *Diamond Spur* case,

whatever you want to call it these days. We believe there are actually three conditions within the letter. The decision only spoke of one of the conditions. And with all respect to the Supreme Court, and it took them well over two years to finally issue a decision --

THE COURT: Uh-huh.

MR. BOHN: -- en banc. There are petitions for rehearing. My firm did file an amicus.

THE COURT: Uh-huh.

MR. BOHN: I really don't see them saying: Oh gee, you're right, we got it all wrong after waiting two years and all seven of us agreed. But I think that there are some issues that they just plain missed –

THE COURT: So –

MR. BOHN: -- that I –

THE COURT: -- this – because that letter morphed as we all know that – there were so many iterations of the form letter that went with those tenders that, so, your view is, this particular version of the Miles Bauer letter is not exactly the same as the version –

MR. BOHN: Well –

THE COURT: -- addressed in the motion?

MR. BOHN: -- well, my view is that we took Rockulynn's [phonetic] deposition not long ago when he said: The letter that accompanied the check pretty much was unchanged. The statute changed regarding the abatement liens --

THE COURT: Right.

MR. BOHN: -- in 2011. He didn't, he was let --

THE COURT: Uh-huh.

MR. BOHN: And that's one of the things we raised in our motion. He gives the definition of what a super priority lien is, omits the language about the abatement lien --

THE COURT: Uh-huh.

MR. BOHN: -- and how that's part of the super priority. And we're saying, it says: You have to accept these facts as true. Well, no, you're misquoting the law. And then the other part is he said – and that wasn't addressed in the *Diamond Spur* decision.

And the other one is, they say: You've cashed this check. That means our obligation is paid in full and we have the case it says: You get an annual super priority lien. So it's not paid in full, it's a recurring obligation on the part of the bank.

And the bank, because they have a deed of trust could potentially foreclose the property and become the owner of the property, at which point, their obligations toward the HOA regarding that property would be a monthly assessment they'd be obligated to, so.

THE COURT: I can't – is this one of the ones where we have to figure out what happens to excess proceeds?

MR. BOHN: Yes.

THE COURT: So that's why we have the extra parties in this case?

MR. BOHN: Part of it and –

THE COURT: And so, I guess my question is: Is that really

the problem and why – I mean, because that's an extra issue. I mean, I appreciate the fact that you can do one of these in, you know, six hours, but that seems – don't – do we still need the bank and your client in – because that – I don't see how that issue would be resolved on summary judgment. It seems like we still have issues that you still have to try.

MR. BOHN: I will tell you that because of this case, and I have spoken with some other attorneys and, you know, the issue has arisen, you know. We discussed last time, it's inequitable that the former owner walks away with 1.1 6 million in excess proceeds when they didn't lift a finger and my client would – if the bank gets their way –

THE COURT: Uh-huh.

MR. BOHN: -- pay 1 million dollars for a property that's probably upside down at this point. There's the question raised as to, when is the priority of the liens determined? Is it determined at the time of the sale, or is it determined at the time of the notice of default?

THE COURT: So again, are those issues we have to determine at trial? Or is that the matter of another summary judgment if we – if this one were granted?

MR. BOHN: That's, that's something we could do – that's an issue of law, really.

THE COURT: Uh-huh.

MR. BOHN: That's, you know, is the priority determined when the notice of default is recorded which I'm – the bank is junior and the bank would get the excess proceeds which is what my client would

prefer.

THE COURT: Uh-huh.

MR. BOHN: As opposed to saying: Well, the super priority was satisfied at some point, and so the bank is no longer junior. And so the excess proceeds go to the former owner and my clients get saddled with paying 1.2 million dollars for a property he probably only paid a couple 100 thousands dollars for. That's really more of a legal issue, that's not really a factual issue.

And that's something that's going to have to be decided in Carson City.

THE COURT: Okay. So – but the issue for trial. This is why I was trying to figure out, is there anything left for trial? Because is this – is this a partial summary judgment? Just – this would just be on for mortgages issue. But isn't there still some issue with this excess proceeds? It still has to be decided at trial?

I'm just trying to figure out – I don't – this just seems like such an odd case. It doesn't – I'm not saying that it doesn't fit into the tender factor. It's just got all this peripheral issues that sort of – I don't see how you – what a summary judgment would do? But on the other hand it seems like they're all legal issues, so what is there for trial? So –

MR. HASTINGS: Your –

THE COURT: It's just the – it's just an odd situation.

MR. BOHN: No.

MR. HASTINGS: Your Honor.

MR. BOHN: Don't disagree with the other.

MR. HASTINGS: If I may, briefly, and I didn't file anything, so, I mean –

THE COURT: Uh-huh.

MR. HASTINGS: I'm just asking if I could just maybe put my perspective out there because it might clear, clear some things up –

THE COURT: Right.

MR. HASTINGS: -- for Your Honor. In addition to the claims between Saticoy Bay and the bank which are really at issue on this motion for reconsideration. The bank is asking you to reconsider your order and grant them summary judgment and, and enter a declaration that their deed of trust survived the sale.

Well, we still have, potentially, some issues dealing with excess proceeds, but those have never been made a part of this case.

You know, no one has interpled funds with this Court asking this Court to make a determination as to where those funds go. So I don't think that necessarily has to happen. Maybe that's a good idea, but as of right now, that would not be something that we would be addressing at trial.

Second thing is that Mr. Bohn's client has brought claims against the Association and Red Rock, in the alternative, in the event that Your Honor does indeed grant the bank the declaration it seeks. And those claims are based upon allegations that the Association and Red Rock owed them a duty to disclose this tender, which I also think is an issue of law and not a factual issue as – and not one that would be appropriate for trial.

So I was going to wait to make a – to make any of these comments, you know, depending on what you decided to do with the motion today. But since you're asking these questions, I figured maybe now would be a good time to talk about it.

THE COURT: Yeah.

MR. HASTINGS: You know, in the event that you were to grant the bank's motion, it would be my position, and it would make a lot of sense to kick the trial date to allow for some supplemental briefing –

THE COURT: And, and that was –

MR. HASTINGS: -- on the remaining issues.

THE COURT: -- and that's the ultimate goal.

MR. HASTINGS: Yes.

THE COURT: The ultimate issue is: Even if I grant this summary judgment and as to the bank and Mr. Bohn's client, it doesn't resolve the rest of the case. And it wouldn't be final and it couldn't be appealed.

MR. HASTINGS: Right.

THE COURT: I just – this is not your typical case. And I'm not saying it just because it's a million dollar property, his client paid a million dollars for it, and there's a lot of money at stake. That's not the issue. I mean it does do away with any problems about the adequacy of – we don't have to hear a appraiser come in, but everything else it just – it doesn't –

MR. HASTINGS: Yeah.

THE COURT: -- fit the typical mold.

MR. HASTINGS: So it might mean -- I think Your Honor needs to make a decision as to whether or not you believe --

THE COURT: Huh?

MR. HASTINGS: -- there are any genuine issues of fact related to the tender that remain. I know Mr. Bohn made some comments. I know that in *Diamond Spur* they did very much leave open this, this good faith rejection notion.

THE COURT: Uh-huh.

MR. HASTINGS: And I don't think that what a collection company said at the time is the only evidence of what their good faith belief was at the time of what was owed. So that, you know, Your Honor needs to make a decision as to whether you think that those are things –

THE COURT: Uh-huh.

MR. HASTINGS: -- factually that cannot allow you to grant the bank's motion here today. And if that's the case, then we go forward with the trial and we can sort through some of the issues of law at that time, probably, as well. Either way, frankly, I think it might make sense to, to allow some additional briefing on some of the tertiary issues here to see if those can be cleaned up to where they're not wasting trial time. That would be – that would be my suggestion and recommendation.

THE COURT: Okay. Thanks. Final word.

MS. MORGAN: Yes. You know the real issue is: What is – or is there a genuine issue of material fact with respect to the tender. It doesn't matter how long it'll take to try the case. It doesn't matter how close we are to trial. It doesn't matter how much Mr. Bohn's client paid

after the tender. Because at the time of the tender, he hadn't paid anything, because the sale hadn't happened yet.

And the *Diamond Spur* case tells us that bona fide purchaser and all of – everything that comes with bona fide purchaser does not impact the tender analysis. It's either a --

THE COURT: And what the Supreme Court said in whichever version of *SFR* this is, *Bank of America versus SFR*:

> A foreclosure sale on a mortgage lien after valid tender, satisfies that lien, is void, as the lien is no longer in default.

MS. MORGAN: Right. The lien was discharged because of the valid tender. Now as for evidentiary issues, that screenshot, the pro law screenshot – we don't even need it.

THE COURT: Uh-huh.

MS. MORGAN: What we need is the letter which is the same letter as in *Diamond Spur* and the check. We know that they were delivered and it's authenticated because – well first of the affidavit, and the HOA trustee had it in its file. So there are no evidentiary issues. There is nothing to try with respect to the tender.

Now we can seek 54(b) certification, and this can go up and we can see if the Nevada Supreme Court agrees that it was a valid tender that was appropriate for summary judgment, and everything else can wait. That's one way to deal with it. That happens, you know, all the time.

So really there's nothing that unusual about this case. There's nothing unusual, at all, with respect to the tender. This is the same

tender we see over and over, the same one that was presented to the Nevada Supreme Court in *Diamond Spur*.

THE COURT: So the – so the legal argument that yes, it's the same letter, but the law had changed, the letter didn't change. I mean I, I – there were various iterations of the letter, but it didn't change in substance with respect to the position they took on tender. And so, the issues of law that Mr. Bohn pointed out, there were changes. And Mr. Young did not update his letter. His – in 116. So those don't affect the fact of tender, because the tender is really more a fact question. It doesn't have to do with the letter:

> Here's money, we're able to pay it. We've got a check here, the funds are in the bank, go cash this.
>
> That's tender. You don't have to take it.

MS. MORGAN: Right.

THE COURT: And they don't have to accept it. And the only – and the right to ask for – all we ask is that you release our client. That's not an unreasonable request. You're giving them money. You're entitled to ask for that. So with respect to tender, I really don't' see any questions remain. I think now the case law has changed everything. In fact, you know, I -- in subsequent cases this is where I'd ended up. So that – that's not my problem.

The issue here is – this is really just as to Mr. Bohn's client and the bank. And it resolves that question, but as far as – I, I don't see that it resolves the remaining questions in the case. So it really is not a final decision, so if you want to seek 54(b), okay.

I'm going to grant the summary judgment, which it is a summary judgment. It's not a motion for reconsideration --

MS. MORGAN: Okay.

THE COURT: -- which would be a different standard. And I just – I don't think you can go there. This is – this is instead just – it's new case law, and it came down, and it's directly on point. And I think it is directly the tender case. The oddities of this case, I just think mean the case is not over as to the remaining issues.

I think Mr. Bohn's client's got big issues with respect to his [indiscernible] client, so. I don't know what that means with respect to our trial date, but certainly with respect to your client. I don't see any need to go to trial on tender. At – because there is no question in this case. There can be no question of Mr. Bohn's client's BFP status.

MS. MORGAN: And as to the –

THE COURT: 100 percent they're a BFP. The Supreme Court, expressly in this latest September 13th case, rejects that. It says BFP status has nothing to do with tender; it's totally unrelated. So yes, Mr. Bohn's client is a – is a BFP. There is no question; however, the tender was made.

And the only issue is the issue that was raised which is, what then are the claims of a BFP for this – are they entitled to know that? Does that in any way alter his status as a BFP as between his claims against the others? But it doesn't as to the tender, they expressly reject that in this latest case.

So that's why I said this isn't typical, and I think it still

continues. I just don't see how we could do it any other way. But if you guys want to discuss and decide where you want to go with it. We do have, I think, a calendar call.

MR. BOHN: December 13th.

THE COURT: Yeah.

MR. BOHN: Trial January 7th.

MR. HASTINGS: Well, and again –

THE COURT: Yeah. So we can –

MR. HASTINGS: -- Your Honor, I –

THE COURT: -- discuss then if – how – where you – what you think this does because –

MS. MORGAN: Okay.

THE COURT: -- as I – I don't know if you need anything else other than BFP status is, is absolutely established. But it unfortunately does not impact their tender defense, so –

MR. BOHN: Your Honor, you've seen me and Melanie a gazillion times.

THE COURT: Right.

MR. BOHN: And you don't see me jumping up and down again and getting all upset. I – after that –

THE COURT: Yeah.

MR. BOHN: -- if you saw me read the case, I would have been jumping up and down and getting all upset, but it's settled in now so.

THE COURT: Right.

MR. BOHN: I understand what you're doing, we'll deal with it in Carson City.

THE COURT: Right.

MR. BOHN: I'll talk to Ryan about what we want to do at trial or maybe do –

THE COURT: And we'll see you guys.

MR. BOHN: -- supplemental, additional briefing.

THE COURT: Yeah.

MR. HASTINGS: Would Your Honor be amenable to like a stipulation and order to – do we need to ask by way of stipulation in order to file some supplemental briefing? Or you're – with Your Honor recognizing that there's these additional things that need to be, and probably can be resolved by way of motion as –

THE COURT: Yeah.

MR. HASTINGS: -- opposed to actually trying that?

THE COURT: So when you come in at the pretrial you can tell, are you -- at calendar call; are you going to be able to go forward? I, I don't know that – because this is a – what, what remains is an entirely different –

MR. BOHN: Yeah.

THE COURT: -- issue. And as you've pointed out hasn't really been litigated. And – but it's kind of a –

MR. BOHN: There is – yeah.

THE COURT: -- remaining – it's just a loose end that's hanging out there. I just don't think we can –

MR. BOHN: I'll talk to Counsel and we'll try to work something out.

THE COURT: Yeah.

MR. BOHN: Would you – if it's – would you be amenable to a new summary judgment motion for the remaining issues against me.

THE COURT: That might be the way to do it. Yeah. I think one other thing that we need in the order though would be that, with respect to the issues that Mr. Bohn raised about lack of competent evidence. I think evidence is competent.

MS. MORGAN: Okay.

THE COURT: So I, I don't see any issue there.

MR. BOHN: Okay.

THE COURT: Good luck.

MS. MORGAN: All right. I'll circulate.

MR. BOHN: Thank Your Honor.

THE COURT: I'll be interested –

MR. BOHN: I got enough trials with Melanie, Sturman, one less isn't going to --

MS. MORGAN: Have a good afternoon.

THE COURT: -- like.

MR. BOHN: Thank you.

THE COURT: Thanks.

///

///

///

MR. SCOW: Thank you, Your Honor.

[Hearing concluded at 10:05 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kerry Esparza
Court Recorder/Transcriber

Electronically Filed
10/15/2020 9:10 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34 INNISBROOK, Plaintiff, vs. THORNBURG MORTGAGE SECURITIES TRUST 2007-3 et al., Defendants.	CASE#: A-14-710161-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN

DISTRICT COURT JUDGE

TUESDAY, AUGUST 13, 2019

RECORDER'S TRANSCRIPT OF HEARING:
TIMPA TRUST'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

For Saticoy Bay: MICHAEL BOHN, ESQ.

For Spanish Trail Master Association: RYAN D. HASTINGS, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

ALSO APPEARING (CONTINUED)

For Red Rock Financial Services: STEVEN B. SCOW, ESQ.

For Thornburg Mortgage Securities Trust 2007-3 ARIEL STERN, ESQ.

Las Vegas, Nevada, Tuesday, August 13, 2019

[Hearing commenced at 10:33 a.m.]

THE COURT: Saticoy Bay versus Thornburg. This is the Timpa Trust. This is a million dollars that's been interpled.

MR. SCOW: That's right.

THE COURT: A million dollars.

MR. BOHN: I know you granted summary judgment for the bank and we were just looking to unwind, or Croteau was looking to unwind the sale, but again, I've been substituted out of that case.

THE COURT: Right. Yeah. He wants – he wants the billion dollars that's on – interpled with the Court. So your – it was your understanding it was continued?

MR. STERN: Somebody in my office told me that but I don't know if they actually –

MR. HASTINGS: I saw – yeah, I saw Your Honor, communications from your clerk's – someone moving it. I don't remember exactly what date it was continued to, but Mr. Croteau, at the 11th hour, asked for it to be moved.

MR. STERN: Mr. Croteau is here in the building. I saw him so.

THE COURT: Okay.

MR. SCOW: He filed an ex parte motion, I believe, Sunday to continue today's hearing. But I didn't see anything that the hearing was continued, so that's why we're here.

THE COURT: Yeah.

MR. STERN: A million dollars for Mr. Croteau.

THE COURT: Okay. Yeah. All it was, was a – you made an ex parte motion to continue the 8/13 hearing from Roger Croteau, and that's all I've got is that we, we received it yesterday.

MR. SCOW: Right.

THE COURT: Didn't have anything about continuing it. So it's my understanding then that Mr. Croteau's operating assumption that that continues his hearing?

MR. HASTINGS: Yeah, Your Honor, my, my memory of this is that I saw an email and – from I thought someone in your – on your staff moving the hearing. I then remember seeing an email from Mr. Akin who was not pleased about that. That's why it stuck out in my mind. But yeah, I – that's all I can remember.

MR. SCOW: Your Honor, I think you should sanction Mr. Bohn just for fun.

MR. BOHN: It's always fun being sanctioned. How about jail time with hard labor?

THE COURT: Okay. Well, I'm going to assume since – for some reason there seems to be some understanding that we agreed to continue it. I, I didn't – I, I never did. I don't know what anybody's talking about, so –

MR. SCOW: Well, Your Honor, without, without – Mr. Akin's not here and Mr. Croteau's not here.

THE COURT: Right.

MR. SCOW: It's really their – but those are the main –

THE COURT: Right.

MR. SCOW: -- parties that are arguing the issues. I don't see there's anything else in front of you but –

THE COURT: Exactly. So, I guess we'll move it. I don't know what date, 8/20.

THE CLERK: August 20th, 9:30.

THE COURT: 9:30. Uh-huh.

MR. STERN: With the Court's permission, Your Honor, the bank would prefer not to appear at that. We don't have –

THE COURT: Right.

MR. STERN: -- an issue in that – in that motion.

THE COURT: Yeah. And Mr. Bohn –

MR. HASTINGS: Same with this –

THE COURT: -- is not appearing on this matter?

MR. BOHN: Correct.

MR. HASTINGS: Same request from the Association, Your Honor. We're not seeking any of the interpled funds.

THE COURT: Okay. Great.

MR. SCOW: Your Honor, we'll appear.

THE COURT: To the extent that parties who are – have no claim to the interpled funds are asking to be excused from appearing, then that's understood.

MR. HASTINGS: Thank you.

MR. SCOW: Thank you.

THE COURT: Okay.

MR. BOHN: Thank you, Your Honor.

THE COURT: So apparently I signed some sort of a stipulation yesterday or an order. I don't – I don't know why I did it. I think just to get something off calendar.

MR. STERN: Thank you, Judge.

THE COURT: Okay.

MR. SCOW: Thank, Your Honor.

THE COURT: So thank you.

* * * * * *

[Hearing concluded at 10:36 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kerry Esparza
Court Recorder/Transcriber

Electronically Filed
10/15/2020 9:39 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34 INNISBROOK, Plaintiff, vs. THORNBURG MORTGAGE SECURITIES TRUST 2007-3 et al., Defendants.	CASE#: A-14-710161-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN

DISTRICT COURT JUDGE

THURSDAY, OCTOBER 10, 2019

RECORDER'S TRANSCRIPT OF HEARING:

PLAINTIFF'S EMERGENCY MOTION FOR A STAY OF EXECUTION PENDING THE COURT'S ADJUDICATION OF PLAINTIFF'S PENDING MOTION FOR RECONSIDERATION OF THE COURT'S EXCESS PROCEEDS ORDER PURSUANT TO NRCP 62(b)(3) & (4)

APPEARANCES:

For Saticoy Bay: ROGER P. CROTEAU, ESQ.

For Red Rock Financial: STEVEN B. SCOW, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

APPEARANCES CONTINUED:

For Timpa Trust: TRAVIS D. AKIN, ESQ.

For Thornburg Mortgage Securities Trust: MELANIE MORGAN, ESQ.

Las Vegas, Nevada, Thursday, August 10, 2019

[Hearing commenced at 11:02 a.m.]

THE COURT: Good morning.

MR. CROTEAU: Good morning, Your Honor. Roger Croteau, Your Honor, for Saticoy Bay, Series 34 Innisbrook.

MS. MORGAN: Good morning, Melanie Morgan for Thornburg.

MR. AKIN: Travis Akin, Your Honor, 13059 for Timpa Trust.

THE COURT: Okay. Great. All right. Okay. So –

MR. CROTEAU: Do we argue or what are you going to do?

THE COURT: For the record, because my law clerk, her boyfriend is somebody who had at one point in this long and tortured history of this case had worked for this – for one of the people who represented Saticoy Bay, at some point, in this whole tortured history. She didn't brief it, so just for the record. You just – you just have me, so.

MR. CROTEAU: Huh.

THE COURT: All right.

MR. CROTEAU: Okay. How much argument do you want? I mean, obviously it's straightforward in the pleadings, but here's the thing. The Nevada Supreme Court has not addressed this issue on point.

THE COURT: Yeah.

MR. CROTEAU: They've anecdotally made comments, but there is no addressing of the issue. We are obviously, eventually unless something else occurs, we're going to be taking this up. We have a

Motion for Reconsideration that is a substantive motion which should stay the proceedings pending – before appeal under the new rules.

THE COURT: Uh-huh.

MR. CROTEAU: Because we have a motion for Rule 60 and we also have another motion on Rule 59. So that's basically the lay of the land. I have one more motion I'll be filing either today or tomorrow in this case. Too – frankly, Your Honor, package it up and figure out what we're doing. I hope to change your mind but if I don't –

THE COURT: Uh-huh.

MR. CROTEAU: -- I'm, you know, trying to make this appropriately packaged. Secondly, the almost million two is sitting in the account with the Court. The stay requested under NRCP 62(a) on the facts of this case and *Nelson*, I think beg to be stayed at this point. It is a short term stay under Rule 62 pending the further rulings of this Court with regard to whether or not the excess proceeds are distributed. Whether or not – based on my subsequent motion, whether or not the Court will revisit those issues.

I think there's been a law changed in the summary, since the summary judgment motion in this case that gives rise to the Court's consideration. I'll be filing that motion. So what we're requesting is this. There is no danger of loss of a million two from the standpoint of the Timpa Trust, it's with the Court.

I understand what the State parameters are. I understand that – and I'm not sure if the Court has the ability to have it in an interest bearing account or not.

THE COURT: I believe they are interest bearing, yeah, uh-huh.

MR. CROTEAU: Okay. So if the Court is – if they're receiving interest onto this then the, the bond for the stay should be basically, I guess the cost of, of – maybe some attorney's fees and so forth –

THE COURT: Okay.

MR. CROTEAU: -- in responding to the various motions without being compensated.

THE COURT: Yeah, and –

MR. CROTEAU: I think at, at the most.

THE COURT: Right. And for the record, the actual number that was deposited was 1 million 168 thousand $805 dollars and 5 – $865 –

MR. CROTEAU: Right.

THE COURT: -- and five cents.

MR. CROTEAU: Right. And, Your Honor –

THE COURT: Not quite a million two. So I just want to make it clear.

MR. CROTEAU: Yeah. Your Honor awarded fees to the HOA trustee that were redacted from that as well as the, the—

THE COURT: Uh-huh.

MR. CROTEAU: -- payments to – for the HOA. So the real inequity and the problem here is that – I mean, using round numbers. And I know you're probably looking at that. I'm sure you looked at it because you prepped it. But the lender is currently due 6.6 million on

this property.

THE COURT: Uh-huh.

MR. CROTEAU: The value of the property is currently 2.7 million. The borrower is dead. There is no borrower for the – for the bank to chase on a deficiency action.

THE COURT: Uh-huh.

MR. CROTEAU: The Timpa Trust is a trust – is, is basically – we are fearful and concerned, in all likelihood, will immediately distribute these funds from the Timpa Trust before any action can be done on a deficiency action, before the foreclosure will ever occur, before my appeal's ever decided as to whether or not it goes to lender or not. So there's a whole lot of issues here.

And given the expense and serious inequities in all of this, because at this point in time, the way the ruling goes is, the beneficiaries of the Timpa Trust pick up the million six or the million $168,000. And they have no liability on the – on the loan.

THE COURT: Uh-huh.

MR. CROTEAU: They have no liability on the property. They have nothing. They're just getting a windfall. And, and everybody at this table is taking a substantial enormous loss. So I think under those facts, the short term status quo maintenance that we're requesting is a reasonable request, under the case law, and I think before Your Honor.

And Your Honor certainly understands that this is – this case is probably going to be one of the seminal cases that decides the issue. Because though we have some going out, this one's going to, you know,

demands for immediate merit.

THE COURT: Okay. And I know there was a joinder.

MS. MORGAN: Yes.

MR. CROTEAU: Yes.

MS. MORGAN: Just very briefly. We agree wholeheartedly that the status quo should be maintained in order to preserve those funds. We don't necessarily agree that we don't have any recourse on the deficiency --

THE COURT: Understood.

MS. MORGAN: -- just for the record, but everything else, we agree that it's in the best interest just, I think, at least all parties on this side of the table to have everything just stay the way it is for now.

THE COURT: Okay. And then what – what's your position on Mr. Croteau's position, you – they're secure. There – the million two is, the Court's got it? Again, a million – a million one something. So the Court's got it, so they're secure.

MS. MORGAN: Exactly.

THE COURT: And as I said, I believe that these are – and I'll check on that, but they do – these in interest bearing account I believe.

MS. MORGAN: I, I believe they do also.

THE COURT: Yeah. Because we've had some problems in the past where we failed to disburse a specific dollar amount that was deposited and they're like: What about the interest?

MS. MORGAN: Uh-huh.

THE COURT: So I'm pretty sure it's interest bearing.

MS. MORGAN: Right. So there's no harm or prejudice, and it really just maintains everyone's, you know, just the status quo and it keeps it safe.

THE COURT: Okay. Great. Thanks. Okay, so Counsel I know you didn't have much time to respond so.

MR. AKIN: Yeah, Your Honor, I didn't want a whole lot of time, just a couple things. Finally, Mr. Croteau and I do agree on something. [Laughter heard].

MS. MORGAN: Yay.

THE COURT: Okay, make a note of that.

MR. AKIN: The bank doesn't have a shot at the deficiency for a number of reasons, statute of limitations, the borrowers are dead.

THE COURT: Uh-huh.

MR. AKIN: A whole litany of reasons.

MR. CROTEAU: Right.

MR. AKIN: I just have to say that, you know, to – for Saticoy to say that they're going to somehow use their just 1.2 million dollars as a credit to buy 6.6 million dollars worth of property that's only worth 3.7 is kind of like saying, you know, Saticoy already made the stupidest purchase in the history of residential real estate in Nevada, and now they're going to double down on it. It just doesn't make any economic sense whatsoever. It's not rational, it's not logical.

The whole reason we're here is to stall and Mr. Croteau's done a great job of that. We got our five year rule running on November 20th. So we're going to squeeze the – everything that we can out of this,

get every last day out of this. Then it's going to be stuck in appeal for two years, because as we've seen we're going to, you know, we're going to have three motions for extensions on opening brief. Three motions for extensions on the reply brief.

And then as soon as we do win before the Nevada Supreme Court, he's going to file Chapter 11, and we're going to be stuck in that for a year. So sometime in the, you know, in three and a half years my clients', you know, my dead clients' children will actually, you know, be made whole.

And Mr. Croteau asks or acts as if Saticoy hasn't had a chance to rent this property out for five years. Like there's just been no money coming in. And I mean that's, that's just not realistic. All that being said, Your Honor, I know you're going to grant a stay. I would just [laughs] --

THE COURT: Well, I guess because we're not fighting over like – it's not a concern that the property's going to be wasted, and so we need to make sure somebody's paying homeowner association dues. And it's, it's the money.

MR. AKIN: Yes.

THE COURT: We're just talking here about money.

MR. AKIN: And I -- my only suggestion would be, I mean, I'm not sure exactly what interest rate we're drawing here. But I think we're entitled to, to the legal interest rate, to the post judgment interest rate. And that's at 7.5 currently, I believe, from July 1st 2019 to December 31st, 2019.

So we would ask that the – this is going to delay things two months. When I do the math I get 7250 a month, so for a total of 14,005 for the bond. If –

MR. CROTEAU: Well, and deduct what you're getting from. You gotta get the – I mean, you have to net out what the bank's going to provide so.

MR. AKIN: Yeah, well, yeah, I understand. And so if, if we could, you know, if we could determine what interest rate we're getting and then have Saticoy make up the difference for the 14-5, then I think we're protected. And then we could come back in here again for – in a couple months when they do the appeal, and we'd ask for the same rate for a couple years, seeing how this is going to, you know, just go down the road.

THE COURT: Uh-huh. Right. Thanks.

MR. CROTEAU: A quick comment. More editorial than anything else. I don't think there's a five year rule issue here, anymore.

MR. AKIN: On November 20th, I mean, that's ab initio. I'm not screwing with the five year rule, sorry. [Laughs].

THE COURT: No, no, I understand.

MR. CROTEAU: No, no, no -- no.

THE COURT: No the – it's, it's closed. I mean, you've got everything –

MR. CROTEAU: What's closed? You've adjudicated --

THE COURT: The case.

MR. CROTEAU: -- the case.

THE COURT: Yeah, that's what I'm saying: The case is closed. Everything's been adjudicated.

MR. CROTEAU: Well, I mean I'm giving you a –

THE COURT: We don't have an appeal but –

MR. CROTEAU: -- post judgment motion, but –

THE COURT: -- yeah.

MR. CROTEAU: -- basically you adjudicated the case with a five year rule –

THE COURT: Right.

MR. CROTEAU: -- on that basis has already –

THE COURT: Stop.

MR. CROTEAU: -- been done.

THE COURT: Uh-huh, right --

MR. CROTEAU: -- so, oh, okay.

THE COURT: -- as of –

MR. CROTEAU: So okay, I just want to make sure we're clear so.

THE COURT: Yeah, no. I'm in agreement with you Mr. Croteau. I don't think that we have a five year rule problem --

MR. CROTEAU: No.

THE COURT: -- I just looked. He is correct –

MR. AKIN: But if we're still dealing with motions on November 21st.

THE COURT: He's absolutely correct.

MR. AKIN: I'm filing something to protect. I have to protect

my client.

MR. CROTEAU: But you can –

THE COURT: Right.

MR. CROTEAU: -- you can hear – well, won't have to put anything on OST.

THE COURT: We have a –

MR. CROTEAU: So that's what I'm saying –

THE COURT: -- we have a summary judgment.

MR. CROTEAU: Summary judgment was December of '18, Your Honor.

THE COURT: Motion stayed. So yeah, so I think we've got – I think we've got a – there is a actual judgment that was entered because –

MR. CROTEAU: That's correct.

THE COURT: -- all we are doing here is post judgment –

MR. CROTEAU: Motions.

THE COURT: -- issues.

MR. CROTEAU: The only other thing we did was –

THE COURT: Well, we did have – we did actually have a – no, that was order setting a bench trial was the, the – yeah, September of 2018, so it was set for trial and then we see if we can find this. Okay. December 7th, I think you're correct. December 7th was when we granted summary judgment and I guess, you know, if the concern is that we have a – we need a 54(b) determination if that's appealable, I mean, I guess we could do that.

MR. CROTEAU: No. No.

MR. AKIN: My issue is, Your Honor, on November 21st if we're still in this courtroom –

THE COURT: Uh-huh, right.

MR. AKIN: I'm wondering if, you know, I have to protect my clients.

THE COURT: Yeah.

MR. AKIN: Like if there's any –

THE COURT: Because we, we did send out, in January of 2019, a request that parties come in and discuss a trial date. So at that point we, you know, I was concerned that there were still parties in the case who did not have – oh, because, yeah, because –

MR. CROTEAU: The interpleader.

THE COURT: -- yeah because Timpa Trust didn't enter its appearance until January 2019. Yeah, so there, there is a concern, but I do think that we just need an order that says: This is a final appealable order and –

MR. CROTEAU: Wouldn't that be a 54(b) certification?

THE COURT: Right. That's what I'm saying.

MR. CROTEAU: And why don't we just do this if it's okay with the Court. I am making a motion that figured before the court dealing with that December 2018 order. So if I – if need be, would the Court entertain an OST on that? It really doesn't even need to be much of an OST because I'll have the motion filed this week --

THE COURT: Sure. Uh-huh.

MR. CROTEAU: -- so.

THE COURT: Understood.

MR. CROTEAU: Okay.

THE COURT: But yeah, I think that the – we – again, these are not dispositive, but we did statistically close the case based on summary judgment. That was filed on April 15th. I think after we had a hearing – that status hearing in which we discussed, yeah, there really does not need to be a trial, it's just the disposition of the funds.

MR. CROTEAU: Well, under 41 basically –

THE COURT: So.

MR. CROTEAU: -- it is the ruling that is dispositive of the case. It ultimately decides whether or not the five year rule runs.

THE COURT: Right.

MR. CROTEAU: And in this particular case it was dispositive as to what was decided in the summary judgment motion in December of '18. So these are post judgment motions except for the interpleader of funds –

THE COURT: Uh-huh.

MR. CROTEAU: -- that frankly starts a new date because they interpleaded the funds just recently.

MR. AKIN: Well, I mean, the – Red Rock originally interpled the funds in their answer going back five years. Like –

MR. CROTEAU: But they never put them on here.

MR. AKIN: -- I – I'm not –

MS. MORGAN: Uh-huh.

MR. AKIN: What?

THE COURT: Take a – yeah, take a look at the minutes that were on February 5th of 2019. We had a whole discussion about what was left and was it really over? And –

MR. AKIN: And we did status memos in April. Everybody agreed, the Court agreed that --

MR. CROTEAU: I didn't.

MR. AKIN: -- November 20th is our, our drop dead date.

MR. CROTEAU: I never agreed to –

MR. AKIN: Well, I mean, you wrote it.

MR. CROTEAU: I did the motions. I did the status check. I never – I never wrote that it was November 20th was the date for the five year rule.

MR. AKIN: It's in the status memo from April.

MR. CROTEAU: I didn't do it.

MR. SCOW: And, Your Honor, Steven Scow on behalf of the Red Rock. I'm sorry I'm slow, I just came from across the street. I figured I'd pop in. If there's a question for me go ahead and ask.

[Colloquy between Counselor Morgan and Counselor Croteau]

THE COURT: I appreciate. What we are just discussing now is, do we really have the five year rule problem and Counsel's concerned that we have a five year rule problem if we don't have a final appealable judgment on the record by November 20th, when our five year rule would run.

MR. CROTEAU: Months.

THE COURT: So.

MR. AKIN: And, you know, if he's planning on filing a new motion that it doesn't, which you just said that that he is, then –

MR. CROTEAU: I'll have it on file this week.

MR. AKIN: -- we're not going to have a final appealable [laughs].

MR. CROTEAU: I'll have it on file this week, Your Honor –

THE COURT: Uh-huh.

MR. CROTEAU: -- and I'll provide you with an OST so it can be heard and decided well before the 21st date.

MS. MORGAN: Right.

MR. AKIN: My concern is this, you know, Saticoy is, is the Plaintiff in this case, so --

THE COURT: Right.

MR. AKIN: -- you know, if the five year rule runs, then everything that we've been – there's still issues open. I think the whole thing goes away.

MS. MORGAN: Well, we can stipulate to – and we're not going to – I can represent right now –

MR. AKIN: Yeah.

MS. MORGAN: -- we're not going to say on November 21st: Oh, too late if there's anything else. I mean I think we can work together and –

MR. AKIN: But my, my – I mean, this whole thing is just a stall at some point.

THE COURT: Well, yeah, so I understand that your, your point being that --

MR. CROTEAU: Actually it's not a stall. There's no reason to stall. There's a reason to posture the case in –

MR. AKIN: The reason to stall is to --

THE COURT: Okay, Counsel please.

MR. AKIN: -- continue to collect rent.

THE COURT: So the question is whether there's adequate security, because you're right, I'm going to grant a stay.

MR. AKIN: Yeah.

THE COURT: The question there is adequate security with just the funds that are on deposit with the Court, the million one hundred and whatever thousand. So I'm, I'm not sure that I agree that your client is entitled to post judgment interest in order to get the stay. If your client's entitled to post judgment interest, that's determined at another time. So typically you do secure a stay with something.

And usually it's the cost of, you know, it's to cover your cost of going in and, you know, represent counsel to represent you to get the stay lifted or something. So you need to have some sort of a security, something put down, but I don't think it's 7,000 or even $14,000. It would be some amount that would be significantly less than that.

MR. CROTEAU: I'll offer 5,000, Your Honor.

THE COURT: Okay. So we got a $5,000 bond? That should cover the cost, because there's also a bond for the – assuming he finally gets the appeal to –

MR. AKIN: Yeah, we'll have to come back, yeah.

THE COURT: There's a – there's a bond for that as well, so –

MR. CROTEAU: Yeah, exactly.

THE COURT: -- I think $5,000 is adequate security for the – for the pendency of having to come back and litigate over this in the future. Whether or not your client's entitled to interest and what that would be would be something determined at a later date. I'm not saying your client's not entitled to it. I'm just saying, "I'm not going to do that as a bond."

But I do think that $5,000 is more than generous for the – for the time of the appeal.

MR. AKIN: And I guess my issue would be, you know, it – I'm sure that this is a single asset LLC. If they lost the house there would be no way to secure any kind of post judgment interest –

MR. CROTEAU: I'm putting a bond out.

THE COURT: Uh-huh. Correct.

MR. AKIN: Above and beyond –

THE COURT: Right.

MR. CROTEAU: And you're getting a windfall.

MR. AKIN: -- see what I'm saying?

THE COURT: Okay.

MR. CROTEAU: They never put out the money to begin with.

THE COURT: All right. Great. So all right. Thank, thank you, Counsel. So at this point in time, I just would ask that the parties take a look at the five year rule and let me know whether you think you're,

you're satisfied that we're protected. Or if you need to put something on the record because I, I understand the concern that we make sure that we have –

MR. CROTEAU: Post judgment motions aren't covered by 41, so .

THE COURT: Yeah. So I – so I think, yeah, I think that we're – I think we're okay. I think that, that we have a final appealable judgment from a certain date. I think that was the outcome of what we did last Spring --

MR. CROTEAU: Right, right.

THE COURT: -- was that no, it's final. All we have to do is deal with distribution of the proceeds. That's post judgment so --

MR. CROTEAU: Right.

THE COURT: -- wouldn't – we would have our, our five year rule would have been protected as of the date we had summary judgment. Okay, so.

MR. CROTEAU: The automatic stay lifts tomorrow, Your Honor, so if I –

THE COURT: Uh-huh.

MR. CROTEAU: I'll get an order to the Court. I don't know if I'll have time to circulate.

THE COURT: Yeah. So we'll extend the, the stay – when do you think you can have the bond posted, yeah. What's today? It is --

MR. CROTEAU: I can get it posted today or tomorrow morning, so that's fine.

THE COURT: So we'll extend it through –

MR. CROTEAU: Further order of the Court?

THE COURT: Monday?

MR. CROTEAU: Well –

THE COURT: Until, until the order – until the order is entered? So upon entry of order? Yeah.

MR. AKIN: I won't – I won't get – I won't get crazy, Your Honor.

THE COURT: Until the –

[Laughter heard]

THE COURT: -- until the order's entered and the bond deposited?

MR. CROTEAU: That's fine.

THE COURT: Then the stay will remain in, in place.

MR. CROTEAU: Well, the stay's in effect currently --

THE COURT: Currently.

MR. CROTEAU: -- and then upon –

THE COURT: And we're going to extend it.

MR. CROTEAU: -- issuance of the order --

THE COURT: Uh-huh.

MR. CROTEAU: -- stay's in effect until further order of the Court.

THE COURT: Correct.

MR. AKIN: I won't get cute, Your Honor, if you're going to --

THE COURT: Yeah. And so then yeah, and it – so a $5,000

bond. Okay, great. Okay. We'll see everybody, I'm sure, a future date.

MR. AKIN: Thank --

MR. CROTEAU: Thank Your Honor.

THE COURT: Best of luck.

MS. MORGAN: Thank you.

MR. SCOW: Sorry, again, I was late.

THE COURT: Thanks. Oh, no problem, appreciate you coming in.

[Hearing concluded at 11:20 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Kerry Esparza
Court Recorder/Transcriber

Electronically Filed
10/15/2020 9:43 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 34 INNISBROOK, Plaintiff, vs. THORNBURG MORTGAGE SECURITIES TRUST 2007-3 et al., Defendants.	CASE#: A-14-710161-C DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN

DISTRICT COURT JUDGE

TUESDAY, OCTOBER 29, 2019

RECORDER'S TRANSCRIPT OF HEARING:
ALL PENDING MOTIONS

APPEARANCES:

For Saticoy Bay:	ROGER P. CROTEAU, ESQ.
For Timpa Trust:	TRAVIS D. AKIN, ESQ. BRYAN NADDAFI, ESQ. ELENA NUTENKO, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

APPEARANCES CONTINUED:

For Thornburg Mortgage: DONNA WITTIG, ESQ.

For Red Rock Financial: BRODY R. WIGHT, ESQ.

Las Vegas, Nevada, Tuesday, August 10, 2019

[Hearing commenced at 9:31 a.m.]

MR. CROTEAU: Roger Croteau for Saticoy Bay.

MR. AKIN: Travis Akin for the Timpa Trust, Your Honor.

MS. WITTIG: Donna Wittig for Thornburg Mortgage.

MR. WIGHT: Brody Wight for Red Rock Financial Services.

MR. NADDAFI: You can sit here.

MR. CROTEAU: You're supposed to be over here.

MS. WITTIG: I'll come over here.

MR. CROTEAU: Melanie always sits with me.

MR. NADDAFI: Bryan Naddafi on behalf of Timpa Trust, Your Honor.

MS. NUTENKO: And Elena Nutenko on behalf of Timpa Trust.

THE COURT: Okay.

MR. CROTEAU: Good morning, Your Honor.

THE COURT: All right. So we have several motions on. The first of these motions is the Plaintiff's Motion for Reconsideration. We then have a Motion to Amend the Complaint and the Ex-Parte Motion for Order Shortening Time, which I think basically is just the Motion to Amend the Complaint. I think that's, that's not a separate motion. I think it's just related to the Motion to Amend the Complaint. So I see no reason not to just address them as one, because they're kind of related.

MR. CROTEAU: I think they're all my motions. Well, at least I think I'm the moving party. I'm not in the motion so --

THE COURT: Right, yeah, yeah. But I, I – as I said I – there, technically it's listed on here as three separate motions. Technically, I think it's really only two. And I see no reason not to just discuss the whole thing at one time.

MR. CROTEAU: No, that's fine, Your Honor, I appreciate that. Couple things, Your Honor, when we start. We have a Motion to Amend. We also have a Motion for Reconsideration. We also have a Motion to Amend on NRCP 50 15(b)(2) and 60(b). Now the motions really address a certain issue in this case, and let's talk procedurally, if we may, for a few minutes.

The Timpa Trust and its current beneficiaries didn't really enter this case or at least make an appearance in this case until March of '19. Okay. If you'll recall we did status memos. The only parties that were signatories to any of the orders or anything else was the bank, my client, Red Rock, and the HOA.

What we're seeking to do at this point is remedy what I would perceive to be a gross inequity of what's gone on in this case. And we're looking – not any fault of the Court. I don't mean it in that sense, but from the respective part of how this order ends up affecting the major parties.

Couple of things that I think are relevant. One of the reasons we asked to relook at your December 3rd, 2018 order is because it says that we're dismissing all the bank's claims in the Summary Judgment Motion. What the Court never addressed in those claims, which Saticoy Bay's claims against the HOA and the HOA trustee – I've outlined that a

little bit more in detail in the 15(b)(2) motion. However, what's relevant there is this: Claims 4 and 5 specifically ask if the Court were to deem the tender to be effective, we seek to unwind the sale.

The bank sought to unwind the sale throughout all of its pleadings, and I've gone through that in detail. I'm not going to belabor the arguments. But the bank, in its various pleadings, and I cited those in our motion. We're requesting that if the, you know, if this – the sale was improper it should be unwound. The sale should be void if the tender was not treated correctly it should be void.

The respectful request, if you will, to amend the complaint after order, is simply to add a claim that would say:

Under equity grounds, we seek to have it set aside.

In addition to claims 4 and 5: If you're looking for 4 and 5, Your Honor, they're in the Third Amended Complaint filed by the Plaintiff. They speak directly to unwinding the sale in a conjunction. Basically, if the Court were to find that the proceeds somehow were deemed to not be a super priority payment, I mean –

THE COURT: I have a procedural question about that. Once a judgment's been entered --

MR. CROTEAU: Uh-huh.

THE COURT: -- and the appeal filed, doesn't that divest this Court of –

MR. CROTEAU: Appeal's not filed.

THE COURT: -- jurisdiction?

MR. CROTEAU: There's no appeal filed yet, Your Honor.

THE COURT: Thought they'd file – that there's an appeal filed.

MR. CROTEAU: Not yet.

THE COURT: Because you went and got the, the bond, the amount of the bond.

MR. CROTEAU: No. No, not yet. What happens is this, procedurally speaking –

THE COURT: Okay, so but – there's -- there is a judgment, so, I mean, procedurally how could – I just – I have a procedural question. I mean, how, how is it possible -- it doesn't make more sense to request leave under *Huneycutt* to like take your appeal to the Supreme Court and say, you know:

> If there's – if the Court sees this as an issue, we'll go back to the District Court and ask the District Court if they would consider doing this, and then you get the order from the District Court saying –

MR. CROTEAU: Well –

THE COURT: Yes I would or no, I wouldn't. And then it goes – then it goes forward one way or the other. I mean –

MR. CROTEAU: Your, Your Honor's –

THE COURT: -- isn't that the way you do it? Because I mean once you've got a judgment, I just don't see how you can go back in and amend a complaint after a judgment's been entered.

MR. CROTEAU: Under 15(b)(2) it says specifically:

> When an issue not raised by the pleadings is tried by

the parties, express or implied.

THE COURT: Uh-huh.

MR. CROTEAU: And in this particular case, we alleged it in the Complaint.

THE COURT: Uh-huh.

MR. CROTEAU: Now did it get alleged as equity? That's a different issue. Counsel for the bank alleged it in equity saying that the – it's unfair and it should not go forward, and it should be voided and the sale set aside. We didn't specifically have an equity complaint at the time Your Honor made the order in December.

However, our Motion for Reconsideration is a substantive motion which makes the, the order, in December, under our new rules, a wide open order, so to speak. When your ruling comes down today or whenever it comes down that'll finalize that order for appeal. However, there was no certification done in this case. And as we pointed out, there were matters that were unresolved in this case –

THE COURT: Uh-huh.

MR. CROTEAU: -- that weren't per se, post judgment matters. I mean, we had the entire issue with Red Rock Financial Services, and candidly, the HOA. The only claims that Your Honor adjudicated –

THE COURT: Uh-huh.

Ro -- just so we're clear. If we look at the Motion for Summary Judgment, my client was not involved in the claims between the bank and the HOA and the HOA trustee. Those are separate claims. That's

what Your Honor ruled upon.

Your Honor ruled upon, in the order, that all the bank's counterclaims were moot. Well, the Court never ruled upon my client's fourth and fifth causes of action, which was in the Third Amended Complaint stating that they had claims against the HOA and the HOA trustee for failure to inform, failure to disclose the tender, so forth.

THE COURT: Uh-huh.

MR. CROTEAU: And there is no ruling that I know of that I could find in any of the record that says that. So that would leave another substantive issue open. Whether Your Honor closes it today is another issue. But I'm really making mention of that because that prevents a finality of appeal. Parties are still in the case.

THE COURT: So, then, right. So your position being that it – the bank would, would require a 54(b) certification with respect to the summary judgment as to the bank?

MR. CROTEAU: Well, subject to the order, period.

THE COURT: Uh-huh.

MR. CROTEAU: And the only other order that ever came out of this Court that provided any finality was the one that is dated in September, I think –

MR. NADAFFI: 11th.

MR. CROTEAU: 11th, yeah. And that's while this – these motions are pending. That's not a final order either. I mean it's, it's an order, obviously, but we filed a timely Motion for Reconsideration and that's before the Court. So the time for appeal has not started yet. So,

but in any event. Again, we're back to the aspects of this case that are relevant. Timpa Trust and the bank and everybody in this – in this arrangement if we will –

THE COURT: Uh-huh,

MR. CROTEAU: -- has been misrepresented to, good or bad. The only reason Timpa Trust is even playing in the case currently is, they think they're going to get a windfall of a million 1.64. And that's really the only reason. We're not looking to, at this point, so we're clear with the Court. We are not looking to upset the issue as to whether or not tender was made or not made. I think that's been decided.

I think the, the progeny of the cases that have come out of the Supreme Court at this point kind of dictate where that's going to go, so that's not the issue. The issue is the outcome. It's the outcome as to how the sale gets handled –

THE COURT: Uh-huh.

MR. CROTEAU: -- or doesn't get handled. I submit to you that if the Court were to exercise jurisdiction and provide equity in this case, and I think that that is a new ruling under an opportunity for this Court to –

THE COURT: So –

MR. CROTEAU: -- refute the –

THE COURT: -- I'm not understanding, procedurally, where we are then. So if summary judgment was granted as to the bank, they – the claims that remain were Saticoy's claims against the HOA and Red Rock. Then wouldn't we need to address those claims separately so

you're just asking at this point in time to amend your Complaint to proceed against the HOA and Red Rock?

MR. CROTEAU: I'm amending it – I'd like to amend the Complaint --

THE COURT: Uh-huh.

MR. CROTEAU: -- okay, to provide a claim of equity. In other words, the bank is – and in their opposition were willing and have no opposition to the sale being unwound from the perspective that it doesn't affect their first deed of trust, which we are not seeking to do. If, in fact, this Court were to unwind the sale –

THE COURT: Uh-huh.

MR. CROTEAU: -- the bank would be in exactly the same position they are today. The only thing that would occur, and frankly the Timpa Trust would go back into ownership of the property and the bank would foreclose their property and proceed. The only thing that would get fixed by this is that the excess proceeds would then revert back to the Plaintiff, and the inequities would be soft, if you will.

THE COURT: Uh-huh.

MR. CROTEAU: It leaves Timpa Trust who really had no involvement in the case until March – well, at least in, in the substantive pleadings when they substitute in the parties, because the borrower is deceased. And remember we went through all this and I, I don't –

THE COURT: Uh-huh, yeah.

MR. CROTEAU: -- mean to be redundant but, you know, the bank is sitting in a precarious position. I'm not sitting here necessarily

advocating for the bank; however, I do have position in respect to the fact that I am taking, as the borrower or as the buyer, some –

THE COURT: Uh-huh.

MR. CROTEAU: -- the first deed of trust.

Your Honor already decided that under both NRCP 30 and 40, we're entitled to make these claims –

THE COURT: I –

MR. CROTEAU: -- because we're going to be in a position of having to pay off the loan if we keep the property --

THE COURT: Right.

MR. CROTEAU: -- but –

THE COURT: So subsequent to the hearing on the motion – the Motion for Summary Judgment with respect to the bank, the tender motion.

MR. CROTEAU: Yes, Your Honor.

THE COURT: Then the Court decided *Jessup* –

MR. CROTEAU: In March.

THE COURT: -- in March. So how does –

MR. CROTEAU: In –

THE COURT: -- *Jessup* change anything that – the posture of the case?

MR. CROTEAU: Substantially. I mean, if you look at – the *Jessup* ruling in note 5 is the first time where they've actually laid down a section of the statute there -- a section that says: Had we been asked to consider this –

THE COURT: Uh-huh.

MR. CROTEAU: -- we would have. And it's the first time that the Court ever said – and at least it's certainly in a footnote, and it's relevant that at least it contained it in a footnote --

THE COURT: Uh-huh.

MR. CROTEAU: -- that they would consider arguments of unwinding the sale as opposed to simply affirming the sale and having the first deed of trust be non-extinguished from the bank taking as a result of the tender payment. So that was the first [cough heard], if you will, from the Supreme Court when they thought enough to put it in the note, because it was raised by the bank and the – and the Court responded to that in *Jessup* –

THE COURT: Uh-huh.

MR. CROTEAU: -- saying that: Hey, had you made this allegation in your Complaint, we would address the issue. And I submit to you, if there's a case that cries out for it it's this one. Because, you know, we're, we're left in a position where the 6.8 million dollars roughly owed on the property – it's worth 2.8.

THE COURT: So we don't know what they would do with it because the footnote reads:

> As the bank's deed of trust was not extinguished,

MR. CROTEAU: Uh-huh.

THE COURT: We need not address the viability of the bank's claims against ACS and Foxfield.

> Similarly, we do not address the bank's remaining

arguments in support of its deed of trust remaining intact as neither the bank nor the purchaser have expressed whether they would prefer to have the sale set aside or have the purchaser take title to the property subject to the first deed of trust.

MR. CROTEAU: We are making that assertion.

THE COURT: So what you're asking to do, because they don't say what the effect --

MR. CROTEAU: They don't say what they're going to do – no, I'm not – I'm not suggesting that.

THE COURT: Okay.

MR. CROTEAU: I'm merely suggesting that in the absence of making a statement for it or a demand for it, they're not considering it. Based upon the facts of this case, there is no case that cries higher for an equitable resolution than this case.

THE COURT: And so, so I guess my question about reconsideration is, because I, I – so --

MR. CROTEAU: Well, it's a Motion to Amend as well under 15(b)(2).

THE COURT: I thought that with respect to the vote, to the reconsideration, your position was that *Jessup* would change the outcome of a December 3rd order, findings of fact, conclusions of law. I didn't really see that it does affect that.

MR. CROTEAU: I don't think it changes the – I don't think it changes the outcome related to the bank.

THE COURT: So you're not looking to unwind that, that summary judgment that was granted with respect to the bank?

MR. CROTEAU: I'm look – well, if we would amend -- it would get amended to the extent, if this Court granted equity. Because the order goes on to say –

THE COURT: Yeah.

MR. CROTEAU: -- that the bank takes the property and the Plaintiff is subordinate to the first deed of trust. What I'd rather have it say is that the bank, you know, it's time remains unextinguished and the sale is rescinded which moots your excess proceeds order, because it, then there is no excess proceeds.

THE COURT: Uh-huh.

MR. CROTEAU: So that would be the substantive change in that order. The effective change from the bank's perspective is a nullity. The bank would remain in first position, it remains unchanged. And the other thing that might change is if there's any subsequent liens [cough heard] on the property, but I don't believe there were at that particular point in time.

THE COURT: So with respect to the Motion for Reconsideration, the portion that is at issue is this question of: What happens to the sale? Is the sale unwound? Does the buyer take subject to the deed of trust?

MR. CROTEAU: Correct. Correct. Well, does that – let me outline it clearly.

THE COURT: Okay.

MR. CROTEAU: The way the new order's drafted –

THE COURT: Uh-huh.

MR. CROTEAU: -- all right, and it, it appears to be a dispositive motion, but it's not a dispositive motion of the entire case.

THE COURT: Uh-huh.

MR. CROTEAU: What remains is the claim 4 and 5 in the Third Amended Complaint filed by Saticoy. The remaining issues; however, if we address the subsequent change in the law, and I call it a change in the law, only because, it's the first time that the Nevada Supreme Court has spoken to the issue of unwinding, so to speak and and put it out there.

The bank has requested unwinding in its – in its answer to the counterclaims and requested that throughout the pleading process. It was requested in our third and our fourth and fifth claim as of 2017, all right. Now we did that and fashioned it on the basis of a misrepresentation by the HOA and the HOA trustee as to the acceptance of tender and not acceptance of tender. Because in this particular case, the testimony would be – my client would have not spent a million two without making an inquiry as to when that tender was made in this particular case.

So that would be the testimony if we're at time of trial. Now the other side to this is, and putting it substantively. If I don't make a motion to amend the pleadings to conform with an equity ground for setting aside the sale, I don't – I'm concerned whether or not I've actually triggered the request at the Supreme Court to say:

Look, this sale should have been unwound as a practical matter.

I mean the, the results are abhorrent to –

THE COURT: Well –

MR. CROTEAU: -- any kind of equitable outcome.

THE COURT: -- I guess the question that I have – the way it was presented in the – in the motion for reconsideration, I guess maybe I – what I took from that and particularly the, the cite to *Jessup*, was some sort of a suggestion that the bank's lien was subordinate to the HOA lien, but in fact, the HOA has one lien with two parts. One part that's superior to the bank and one part that's subordinate to the bank.

So I'm trying to understand what it is about *Jessup* because I'm still not following –

MR. CROTEAU: Okay. Let me – let me do --

THE COURT: -- what we need to – why – what we need to reconsider.

MR. CROTEAU: Let me –

THE COURT: Is it simply a question of you want certain language in that order stricken or altered? Because I'm still trying to understand if you're not affecting the outcome as to the bank.

MR. CROTEAU: Okay. Let's do it differently if I may.

THE COURT: Yeah.

MR. CROTEAU: And I'll try – I'll try and do this so it makes sense, okay?

We have two orders before the Court. You have the 12/8/18

order which is your Motion of Summary Judgment that was dispositive of the HOA's claims and counterclaims against -- HOA trustee claims against the bank, and the bank's claims against the HOA trustee. And also the bank's claims against my client, Saticoy, for quiet title. That's what you disposed of in that order.

You did not dispose of the Third Amended Complaint, allegations four and five, Complaint – claim four and five, against the HOA and the HOA trustee by Saticoy. That's still an open – as far as I see it, unresolved issue in any of the cases or any of the orders.

The second thing we discussed on the reconsideration aspect was the excess proceeds. And I think that's where you're heading with that. What we're saying on the excess proceeds is and I'm putting it bluntly, is this: The application of excess proceeds is different under 116 than it is under 107.

And it's different because you have this confusing – and I call it confusing, NRS 116.3116 section that talks about prior interests. It doesn't use the word priority. And I don't want to replow the ground. We've done this and I know what your Court's ruling is; however, I point you to a couple of aspects of this:

> 3116 is not part of the foreclosure statute. 31162 is where it begins. The foreclosure section 311 – 116, 31162, 31168. And that's the section that deals with excess proceeds, notices and so forth on how to do a sale.

And it also provides that the excess proceeds goes to the subordinate lienholder of record. The record lienholder never changes,

ever, ever. There's no recording of a notice of delinquent assessment lien, okay. That's not required by the statute in this timeframe. So of record, the bank, the first position deed of trust is always junior to the CC&R's, always.

So the only thing that 116.3116 does is provide the bank the ability to keep the lien on the property as opposed to letting and extinguishing and just taking the action unto the excess proceeds. That's all it does. Because, otherwise, if they don't and they pay the super priority payment, they stay as a lienholder on the property and are allowed to conduct their own foreclosure.

But that doesn't mean they are the, the party to receive excess proceeds as a subordinate lien of record. The statute uses that terminology nowhere else. Subordinate lien of record is in the priority section, and it's there for a reason. You know, Counsel for the Defendants here say that we have to interpret this statute by the strict meaning in the statute. I have no problem with that. Read it. Not you Your Honor, but read it in their arguments. It says, "Subordinate lien of record." There is only one record that never changes.

The statute is clear under NRS 116 that the lien is perfected at the time of recording the CC&R's. That means, anything that comes after the CC&R's is subordinate.

THE COURT: Okay, so –

MR. CROTEAU: I – you -- we've already had that argument.

THE COURT: -- but I'm trying to understand what it is you're seeking? Because as I said, two different motions, so I want to talk

about them at the same time --

MR. CROTEAU: Yup.

THE COURT: -- because they seem sort of related.

MR. CROTEAU: Uh-huh.

THE COURT: What you're specifically asking – I just want to make sure I got this procedurally right that, because this is not a final judgment, it – procedurally under Rule 60, you can move to – because I mean, it would look to be late because notice of entry was given on this, you know, back in –

MR. CROTEAU: But I'm allowed to bring it because –

THE COURT: -- in December.

MR. CROTEAU: -- what I perceive to be a change in law.

THE COURT: And so, because of the change of law and again it – I – that's where I was concerned, because I really didn't see the *Jessup* changed the law as to the outcome. But what I'm understanding you saying is that the significant thing about the *Jessup* case from March is the footnote.

MR. CROTEAU: It is.

THE COURT: What seems to indicate that the Court believes that that issue of unwinding a sale is one that can be alleged.

MR. CROTEAU: Correct.

THE COURT: It is a remedy that can be alleged –

MR. CROTEAU: Correct.

THE COURT: And -- but since it wasn't, then they felt like they couldn't address it. So it's not addressed, and they don't tell us

what they do about it. They don't tell us –

MR. CROTEAU: No doubt.

THE COURT: -- if they – if they would agree that you can unwind one of these sales or not. They don't tell us that.

MR. CROTEAU: That's correct.

THE COURT: So what you're saying is that, because of *Jessup* now, again, some months ago, but because of that change in the law that the fact that the causes of action between the Saticoy, the Plaintiff, and the HOA and trustee were – had not been resolved.

Also as to the bank even though the bank prevailed over Saticoy with respect to quiet title, there -- they're either should be or you should be allowed to amend to allege that if as an alternative, if you don't prevail on your quiet title, then unwind the sale.

MR. CROTEAU: Correct.

THE COURT: Okay. Got it.

MR. CROTEAU: And, and we, we allege that with – that's the fourth and the fifth complaint allegations --

THE COURT: Causes of action and a third one.

MR. CROTEAU: -- against – in the Third Amended Complaint against the HOA and the HOA trustee.

THE COURT: Right.

MR. CROTEAU: We don't allege that against the bank.

THE COURT: And so what you're seeking to do in your Amended Complaint would be to make it more clear that that's –

MR. CROTEAU: A requested relief we are requesting.

THE COURT: And in the alternative too if they prevail –

MR. CROTEAU: If the proceeds – if it's not – if the super priority payment was in fact paid by tender, then we seek to unwind the sale on equity grounds.

THE COURT: Because tender itself being an equitable remedy?

MR. CROTEAU: Correct.

THE COURT: That the banks are able to prevail in these cases --

MR. CROTEAU: Correct.

THE COURT: -- based on that equitable remedy of tender similarly. Okay, because I just wanted to make clear what you thought had changed with *Jessup*. Okay, great.

MR. CROTEAU: Well, and again, what we think would change with *Jessup* and unlike and, look, no offense, Your Honor, I've been doing these since 2010 and '11 timeframe.

THE COURT: Uh-huh.

MR. CROTEAU: And this is the – believe the first time where the – I mean, I've seen court decisions come out of the Supreme Court and you go like: How did that sale even get done? Or you know there'd be a failed notice, for example, and they'd still uphold the sale to make the, the sale subject to it and you go like, it makes no sense. It – the sale should be set aside, clearly, if a notice was failed.

So this is the first time, at least we've seen, where the Court makes actual notice of a situation where the bank had raised it, said

look, this is unfair, let's unwind the sale. Well, it should be immediately available to the plaintiffs as well. And that was the notation in note five.

THE COURT: Okay.

MR. CROTEAU: So given, again, the significant inequities in this case, and obviously the litigation practice is going to proceed. I think it was inappropriate not to bring this motion, and I think mandatory for me to bring this motion to at least clear the record at the lower level.

And let's face it, we both know the case is going up whether it's I or them [laughs] --

THE COURT: Uh-huh. Uh-huh. Yeah.

MR. CROTEAU: -- so you know, but it's, it's – I think it's mandatory from that perspective.

THE COURT: And so looking at the proposed – the fourth, Proposed Fourth Amended Complaint that's attached. The fourth and fifth claims for relief are simply taking into consideration the current status of the case.

MR. CROTEAU: Correct. Based upon – essentially, conforming –

THE COURT: Well –

MR. CROTEAU: -- to the complaint to the rulings of this case.

THE COURT: Okay.

MR. CROTEAU: And then making sure we have an argument in there for equitable relief.

THE COURT: Okay. And then incorporates in this sixth cause of action, this new issue of specifically citing to the footnote –

MR. CROTEAU: Yes.

THE COURT: -- that –

MR. CROTEAU: Yes.

THE COURT: -- you want to – you want to put that issue –

MR. CROTEAU: -- before the Court.

THE COURT: -- before the Court as it -- okay. Got it.

MR. CROTEAU: Yeah. I mean, that's essentially, I mean, I'd love to see you set aside the order and call it in –

THE COURT: Uh-huh.

MR. CROTEAU: -- call the sale from an equity perspective --

THE COURT: Okay.

MR. CROTEAU: -- and I would request -- my relief actually is requesting.

THE COURT: Right.

MR. CROTEAU: Just under the record, my actual relief is requesting to maintain the integrity of your December order; however, change the outcome to that, you know, the sale's confirmed as to the extent that the HOA's foreclosure deed does not wipe out the bank's.

However --

THE COURT: But you're not looking for that ruling today --

MR. CROTEAU: -- would grant – but the --

THE COURT: You realize he alleges in your Proposed Amended Complaint.

MR. CROTEAU: And then file a motion for that.

THE COURT: And then proceed on that issue, okay, got it.

MR. CROTEAU: On an order shortening time, because if we give any credence to Counsel's arguments at 11:20 is the operative five year rule. Though I disagree with that, you know, allowing that to stand. There at least is an opportunity to file a motion on that issue --

THE COURT: Uh-huh.

MR. CROTEAU: -- and have it heard before that timeframe.

THE COURT: Okay. Got it, thanks.

MR. CROTEAU: Anything else you'd like to –

THE COURT: No, thanks.

MR. CROTEAU: Thank Your Honor.

MS WITTIG: Your Honor.

THE COURT: Yes.

MS. WITTIG: Just – I just would like to go second just because I think we don't have much of a dog in the fight --

THE COURT: Right.

MS. WITTIG: -- from the bank's perspective, but I just want to clarify a couple things. I do agree with Plaintiff's Counsel that whether the sale is unwound or whether the Court finds that, as it already did, that's subject to the deed of trust. And we don't really care as long as our deed of trust remains a lien on the property. So with that, we are in agreement with Plaintiff's Counsel.

What I do have, I guess an objection to is the amending of the Complaint. To the extent that it seeks to relitigate issues against a bank, for example. If you take a look at the proposed second thing for relief. It says: Plaintiff seeks a declaration from this Court pursuant to NRS

40.010. That title of property is vested in the Plaintiff free and clear of all liens and encumbrances.

So again, these are reasserting allegations against some things that have already been decided. What I would propose or recommend or what I don't have an objection to is amending the Third Amended Complaint just to add a remedy or amend the prayer for relief to have this alternative relief that they're seeking as opposed to making us relitigate these issues.

THE COURT: And so you're –

MR. CROTEAU: I'd, I'd be happy with that.

THE COURT: -- your position with respect to the order that is on file with respect to the bank's claims, doesn't need to be amended at all?

MS. WITTIG: I don't have a position either way.

THE COURT: Okay.

MS. WITTIG: I understand the relief and the reasons behind the modifications that Plaintiff is seeking. Whether the Court keeps the Motion for Summary Judgment as is or modifies the language just to say that the sale is unwound, either way, the deed of trust is still a lien on the property, and that's all the bank cares about. And so, we don't take a position either way on that issue.

It's just that the Amended Complaint –

THE COURT: And, again, procedurally, it seemed to me the only way you could do it is the reconsideration – I was thinking maybe it was premature, but maybe it's not. The real issue is allowing the Third

Amended Complaint – a Fourth Amended Complaint to be filed which alleges this alternative relief. If they're aren't granted quiet title, and the bank prevails on its counterclaim, then in the alternative, here's the relief we're seeking --

MR. CROTEAU: Which has already happened –

THE COURT: -- and –

MR. CROTEAU: -- so we're seeking this new relief.

THE COURT: Yeah, and so this is the – this is what we're seeking now, then –

MR. CROTEAU: We just fashioned it before.

THE COURT: I'm just trying to understand what we would do with respect to the findings of fact conclusions of law, on file, if they need to be altered or amended at all, or if they have to wait to have that done until after a determination of: Should we allow this Motion to Amend, amend the Complaint to go forward. And if we amend the Complaint, then we have to have the hearing on the theory that's alleged in the Amended Complaint.

MR. CROTEAU: Well, I don't want to be wrong but I would think –

THE COURT: Yeah.

MR. CROTEAU: -- that if we put down – based upon the bank's understanding and position, we don't seek to adjust the bank's findings. The only thing that frankly, and to put it – to put it succinctly as client, Counsel said. The only parties to that order, other than the bank, are the HOA and the HOA trustee and ourselves. So with that regard,

we're seeking amongst those two other parties, Plaintiff and those two other parties, to suggest that the sale should be unwound.

If the sale is unwound, the excess proceeds order becomes a moot point and that's, I think the classic, if you will, reconsideration of that order, but –

THE COURT: Thank you.

MR. CROTEAU: -- and I think.

THE COURT: Thank you.

MR. CROTEAU: Okay. I mean, that make sense?

THE COURT: Thank you.

MR. CROTEAU: And then I think that the Amended Complaint –

THE COURT: And –

MR. CROTEAU: -- was seeking to add simply to put that in play to make sure that it's properly before the Court.

THE COURT: And that addresses the concern the bank has that –

MR. CROTEAU: Right. Right. We seek, we seek to --

THE COURT: I'm, I'm talking to her.

MR. CROTEAU: Oh, I'm sorry.

THE COURT: So, Counsel addresses the concern that the bank has.

MS. WITTIG: I think I got lost in this conversation.

THE COURT: Okay.

MS. WITTIG: I'm sorry.

MR. CROTEAU: Not going to change it.

THE COURT: So all, all you want – all you want [cough heard]. All you want when this – at the – at the end of the day is a determination that as to the quiet title action, the affirmative defense of – equitable defense of tender is, is granted. Your client tendered, therefore, you – your client retains their first priority as a deed of trust. You – your client's taking no position on the appropriate –

MS. WITTIG: Outcome?

THE COURT: with respect to –

MR. CROTEAU: Her or me?

THE COURT: -- the unwinding of the sale or --

MS. WITTIG: Correct.

THE COURT: -- or not?

MS. WITTIG: I think that – I think that the determination as to the equitable relief that Plaintiff is claiming needs to be resolved before it's determined whether the Motion for Summary Judgment can or should be amended.

THE COURT: That's what I was asking, yeah, it seems to me that –

MS. WITTIG: But, yeah, as far as whether the bank wants to get involved in that, we don't. Because whether the Court amends the order or keeps it as is, either way the deed of trust still remains a lien –

THE COURT: Right.

MS. WITTIG: -- on the property.

THE COURT: Okay.

MS. WITTIG: If the sale is unwound, then we still have a deed of trust. And so –

THE COURT: All right. Thanks.

MS. WITTIG: -- it doesn't affect us in that respect.

THE COURT: Just wanted to clarify that. Yeah, thanks. So I don't know who is going to go first over here.

MR. AKIN: Your Honor, I'm just – I think, mix it, start with the motion for reconsideration part of it.

THE COURT: And you're speaking on behalf of?

MR. AKIN: I'm speaking on behalf of Timpa Trust, Your Honor.

THE COURT: Of TImpa Trust.

MR. AKIN: On page 6 of the December 3rd order, it says:

> It is further ordered adjude [sic] adjudged, and decreed that all remaining claims not specifically mentioned, including all claims and Thornburg's counterclaim and crossclaims, and Saticoy's Complaint are dismissed with prejudice.

So the representation that there's still claims out there hanging around, is erroneous. The – all the attorneys signed the order, Your Honor signed the order. So if it took care of all the claims it took care of all the claims.

Saying now that there's a fourth and fifth claim on a Third Amended Complaint, there's a problem with that. Should have heard about it before now. And going into the merits. A Motion for Reconsideration may only be brought in circumstances where there's

substantially different evidence is subsequently introduced, which hasn't happened. Or the Court's decision is clearly erroneous, which it's not.

We still have the same excess proceeds statute, okay. The statute is what it is, it was what it was. When Saticoy went and purchased this property, the statute's been on the book since 1992 with that same excess proceeds order. It knew it was taking a risk. As far as the equitable subrogation, it wasn't raised in the MSJ, so for them to bring it up on a Motion for Reconsideration is not proper.

> Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing. That's *Achrem versus Expressway Plaza Ltd.*

And third of all, this notion that *Jessup* is intervening law is crazy. *Jessup* came out on March 7th, 2019, okay. It's been over seven months. The time periods for, you know, Rule 60 says: Seven months is too long, six months is the limit.

When we did this original MSJ briefing in June and July, *Jessup* was on the books and it was never brought up. You know, they're just looking for, basically, a second shot at the apple. And the equitable subrogation claim is, is -- it's really not in good faith. Saticoy is in the windfall business, that's what Saticoy does, is get windfalls. We've had enough cases in this courtroom. We've had enough cases at the Supreme Court.

Saticoy is a sophisticated purchaser, okay. They went to an HOA foreclosure option. They knew what the excess proceeds statute was. They paid 1.2 million dollars for a house that appraised at 2

million. They were seeking an $800,000 windfall. Now they've come into this Court with unclean hands, with no title insurance, buying an as is deed asking to have that money back.

And Saticoy conveniently fails to mention how much money that they've made off of this house in the last five years. That's not part of this at all. And so, basically Saticoy walks in looking for a windfall and Saticoy's trying to get out the door with a windfall. Get their money back and then get all the money in rents that they've made. For a true equitable determination of this case to be made, we would have to know, was it reasonable for the bank to charge my client's interest and fees after they had lost the possession of the house?

Even up to today, my client's don't have possession of the house. All the interest and fees that the banks are claiming, is it reasonable to charge my client that? How much money has Saticoy made or should it have reasonably made in the last 5 years? Saticoy actively market the property for rent?

Who's living there? Were there, you know, I'm – I don't think I'm speaking out of turn here, but some of these companies, you know, have the usual practice of allowing their lawyers to live in there, allowing other staff members to live in these houses.

How much value did Timpa Trust lose from essentially being illegally evicted from their home? The way the foreclosure mediation program went and the rate of the, the default rate and how fast these things were going. My clients might have been able to sit in the house for six, seven years. They might have been able to die in their own

home rather than being illegally evicted.

How much has the house increased in the value from the time of the foreclosure sale till now? I don't know if you've looked at the markets but, real estate market's up. It's doing good. You know, the bank's probably didn't do too bad on this as far as the taking five years. They did nothing but make money.

And how much will the house sell for auction? We don't know how the house – how much the house is going to sell for auction? It's completely speculative. And, you know, for all those reasons I'm, I'm as confused as you are in the procedural aspect. We have this order from December 3rd, it says it takes care of all the claims. And it seems like we're coming back in here and trying to take care of new claims.

When I look at Rule 59, under 59.1 they list seven reasons why a new trial – amendment of judgment can be – can be taken. None of them apply here. And under 60, the only really [sic] reason under 60b that I can guess that Saticoy's trying to bring this under, is any other relief that's justified as *Jessup* is intervening. *Jessup* is not intervening. It – if he wanted to bring a *Jessup* argument, it should have been brought, you know, six months --

THE COURT: Okay, well –

MR. AKIN: -- after *Jessup* –

THE COURT: -- with respect to the conclusions of law, the Court at number nine.

MR. AKIN: Uh-huh.

THE COURT: The Court finds Saticoy is a bona fide

purchaser and that status is irrelevant when a defect in the foreclosure proceedings renders the sale void. After a valid tender, the super priority portion of an HOA lien, a foreclosure sale of the entire lien is void as to the super priority portion, because it cannot extinguish the first deed of trust.

Then the judgment is that the HOA foreclosed only on its sub priority portion of the lien, and Saticoy purchased at interest in the property located at this location of – which remains a first position encumbrance against the property. And that the deed of trust recorded on June 12th is in the first position, superior to the interest conveyed by the foreclosure deed. All remaining claims not specifically mentioned including claims in Thornburg's counterclaims and crossclaims in Saticoy's complaint, are dismissed with prejudice.

So this is what I'm trying to figure out, procedurally, what's the appropriate thing to do? Because I understand the point raised in the *Jessup* footnote which is this idea that the Court's never been, it's never been properly before the Court to ask what happens? Do we just operate, when this – when this process happens this isn't your typical HOA foreclosure sale where there's like a couple hundred dollars left.

This is one of these HOA foreclosure sales on a super priority lien. There's a tender so the lien is not extinguished. So what happens then to these excess proceeds? Do we follow this or does – or should in these situations where there's been a tender that the purchaser doesn't know about, is – does equity – because that's an equitable remedy.

MR. AKIN: Uh-huh.

THE COURT: If we're following – strictly following the statute they're out of luck --

MR. AKIN: Uh-huh.

THE COURT: -- which, you know, I was one of the first people out there on that limb saying: You got to go really read the statute, they're out of luck. But the court, the Supreme Court then found:

> Well, there's equity, and equity holds that if the bank tenders, equitably, they're entitled to recover.
>
> Well now what they seem to be saying in this footnote is:
>
> We've never been asked to look at this as to, what does that mean? Do we just follow strictly the statute? Or are we supposed to look at this idea of unwinding the sale?

So I'm trying to figure out if we really need to actually litigate that whole issue, or if it is simply a question of -- because I think that Mr. Croteau seems to take a position that the Third Amended Complaint adequately states equitable claims to simply clarify with an amendment to the findings of fact, conclusions of law that, you know, the Court has not addressed this question of whether or not we should unwind this sale.

And so, therefore, as between these two parties, the Court's never addressed that and so that, that question remains live because as between these two. The Court didn't address that question in -- as between those two parties. So how does that then effect claims, again, that was as to those two parties. These other claims that are out here with respect to these other parties.

When you unwind the sale, who do you unwind the sale as to? So I'm just trying to figure out if we – if we really need to amend the Complaint, or do we just simply have to state here in these findings of fact, conclusions of law saying that was not before the Court, subsequently this *Jessup* case has implied that this may be a potential alternative remedy. It was not pled at the time because, you know, nobody knew about it, so the Court has not addressed it.

MR. AKIN: And I understand we're –

MR. CROTEAU: And, and we've requested – we requested it –

THE COURT: Thank you.

MR. CROTEAU: -- in this motion.

MR. AKIN: But I guess my issue is, once they amend the Complaint, I mean, don't we have a duty to answer, and then, don't we have to have a --

THE COURT: No –

MR. AKIN: -- hearing on it?

THE COURT: -- what I'm saying is: Do we have to do that? If you listen to me I started with – I'm trying to understand if we really need to amend this Complaint and litigate this. Don't we simply just have to state in these findings of fact, conclusions of law that a subsequent decision has come down, which seems to indicate that there is a potential alternative – are you ready?

MR. NADDAFI: My apologies, Your Honor.

THE COURT: Sorry. A potential alternative relief that was not

pled, because I think Mr. Croteau's position is, if it was pled, but that was not addressed in this motion, the Court did not rule on it, therefore, you know that's a -- that's my *Huneycutt* question. That goes up to the Supreme Court and then you ask the Supreme Court: Do you want the judge to consider the unwinding of the sale? And it comes back down to the Court on a *Huneycutt* procedure.

MR. AKIN: Well, Your Honor, I'm not interested in having to go up to the Supreme Court twice, you know, on this issue, and it sounds like that's the way it, it would go.

THE COURT: Okay. Thanks. Anything else?

MR. AKIN: I just have one thing. Procedurally, I think the simplest way to decide this is -- *Jessup* came out March 7th and we didn't hear about it till October.

THE COURT: Uh-huh.

MR. AKIN: It was past the six month date on the Rule 60.

THE COURT: Okay.

MR. AKIN: That, that makes it nice and easy. And I think –

THE COURT: Okay.

MR. AKIN: -- Counsel for Red Rock would like to address some things.

MR. WIGHT: Your Honor, we filed an opposition to the motion to amend yesterday. I don't know if you saw it. I'm sure you –

THE COURT: Uh-huh.

MR. WIGHT: -- probably haven't had a chance to read it.

THE COURT: I have it here.

MR. WIGHT: But I would ask that the Court at least read through our motion before making a final decision as to it. But sum it up, I mean, it's interesting that Counsel for Saticoy Bay – it's ironic that he says he doesn't want to replow ground here, because all the Motion to Amend is really a motion to resurrect the dead. It – the Motion to Amend would force this Court to relitigate everything that's already been litigated.

When the bank brought their countermotion back in April 2015, they brought a countermotion to set aside the sale. This equitable relief that we're talking about was already brought before this Court. When the Court granted Thornburg's Motion for Summary Judgment in December 2018, the Court disposed of that equitable remedy, completely. The Court dismissed it with prejudice.

Saticoy Bay said nothing then. Saticoy Bay said nothing for months after then. Then when the Court decided the Motion for Summary Judgment filed by Timpa Trust and disposed of the excess proceeds, the Court further enforced that the sale was not set aside, and then distributed the excess proceeds.

Now this Motion to Amend asks the Court to undo all of that. Not only would the Court have to overturn its previous decision where it allocated the excess proceeds, but it'll have to resurrect the equitable claim that it already disposed of in – with Thornburg. That's, that's not – there's no red – there's no power. There's no procedural power for them to do that with a Motion to Amend.

Final judgment on this issue has – had – has come and gone

before the Court in at least two instances.

THE COURT: Uh-huh.

MR. WIGHT: And now there's no – there's nothing under the rules that say they can amend their Complaint to bring this one. It's precluded. All this reference to *Jessup*, it's a red herring. *Jessup* --

THE COURT: And I do have another thing about *Jessup* I forgot to ask Counsel. Attached as a – as an exhibit is an order granting en banc reconsideration.

MR. CROTEAU: Correct.

THE COURT: This is my – this is my *Huneycutt* question: Is don't we need to know what happens and then depending on that outcome you ask the Supreme Court: Do we need to go back down to the District Court –

MR. WIGHT: In order to figure out what happens they'd have to bring a claim for it and they didn't bring a claim. They didn't enforce their rights when they had a chance to --

THE COURT: Okay.

MR. WIGHT: -- enforce their rights. We were -- we were a party to the bank's counterclaim asking for that equitable relief. When the Court granted Summary Judgment and dismissed that claim against us, that was the final judgment on that issue. To now bring it, they're precluded under the Doctrine of Issue Preclusion. They're precluded from bringing an issue up before this Court that has already been decided by the Court while all these parties were parties to the case.

You can't resurrect and issue just because the Supreme Court

says: Hey, -- I mean, let's, let's grant for a moment that *Jessup* says – it doesn't say this, but let's grant that it says: Hey, look, there might be this equitable issue. That does not mean that they just suddenly get a second chance to bring the issue when it was already decided by the Court. It doesn't say: Oh, well, the Supreme Court thinks there might be something here. I want another bite of this apple. I want another shot at this.

I didn't – I didn't move to set aside to settle when I had a chance. I didn't move to set aside the sale. I didn't bring anything up about it when, when it was before the Court, when the Court dismissed it with prejudice. But now this decision comes out and I suddenly want to bring this.

And I want to bring it just because everything in my – if everything in this case hasn't gone my way. Everything that's been litigated has been litigated fully and it hasn't gone my way, so now I want to amend the Complaint and I want to bring this that is, that's already been disposed of completely. It's just trying to tack on *Jessup t*o say something that it doesn't.

Jessup, in reality, it doesn't even say that. *Jessup* doesn't say anything. All *Jessup* says in a footnote is: This wasn't before us so we're not going to consider it. It doesn't create any new standing that didn't exist beforehand. It doesn't do anything. And if there is a question: Well, what do we do? It, you know, it is a good question.

Like, If they bring an equitable claim here to set aside the sale, what do we do? Do we set it aside or do we not? That's a question to

ask when they actually plead that in the proper course. But they didn't plead it in the proper course, so it's not before the Court. It's just – there's no procedural back drop for them to do this. And there's a reason for that. When there's finality in decisions, the law doesn't allow parties to just come up and say: That didn't work, let me try this. That didn't work, let me try this. Because it extends litigation forever, and there's no finality to it and we see that here.

We're bumping –

THE COURT: But –

MR. WIGHT: -- right up against the five year rule.

THE COURT: I, I understand your, your point that it's not addressed in any of these pleadings, but as Mr. Croteau pointed out, the Third Amended Complaint in the Fourth Cause of Action, paragraph 27:

> If the Court finds that the HOA assessment lien did not contain a super priority portion, then Plaintiff's high bid for the property should be rescinded due to the misrepresentations made by the HOA and RRFS in the foreclosure documents. And all monies paid by Plaintiff should be refunded to Plaintiff.

MR. WIGHT: But --

THE COURT: It's in there so.

MR. WIGHT: -- well, then, first of all that would – that would make it –

THE COURT: That – that's my question.

MR. WIGHT: -- so you wouldn't have to amend the Complaint

THE COURT: That's my question.

MR. WIGHT: -- because it make it so you wouldn't have to amend their complaint --

THE COURT: That's my question.

MR. WIGHT: -- because it would already be in the Complaint.

THE COURT: That's my question is, because they've asked for two different things: Amending the Complaint or reconsidering the findings of fact conclusions of law that were in December. I'm understanding that they're not looking to change the outcome, that all the cases now seem to indicate that tender's viable.

Jessup is something that happened subsequent. We don't know what's going to happen. I don't know why it's being reconsidered en banc. So it may or may not have an effect. That's why I'm saying is –

MR. WIGHT: But I will say –

THE COURT: -- there is this allegation in the underlying Complaint, a Third Amended Complaint that we did not address.

MR. WIGHT: But it was –

THE COURT: And just to put in, in the findings of fact, conclusions of law; we didn't address it.

MR. WIGHT: But it was completely litigated in the Motion for Summary Judgment. By distributing the excess proceeds the Court impliedly ruled on that issue. By distributing –

THE COURT: No.

MR. WIGHT: -- the excess proceeds, the Court can't --

THE COURT: I was never asked to specifically make a

determination on that. I just – we just went with the assumption. We just never addressed this issue of reconsidering.

MR. WIGHT: But that's because they chose not to enforce those rights.

THE COURT: Right.

MR. WIGHT: They chose not to bring that up. When Timpa Trust brought the Motion for Summary Judgment to distribute those excess proceeds, they didn't bring that up. They didn't ask the Court to consider that equitable action – issue. And that's –

THE COURT: Think they did.

MR. WIGHT: -- that was their choice.

THE COURT: Okay.

MR. WIGHT: They chose instead to fight it on different grounds.

THE COURT: Okay.

MR. WIGHT: And so when the Court distributed the excess proceeds, they made their decision and the Court made its decision; that was finality. Now to come back and say: Hey, we should've done this. We wanted to do this --

THE COURT: Uh-huh.

MR. WIGHT: -- instead, you know, it's just not a proper – it – they chose their strategy, and their strategy was to fight the distribution of the excess proceeds –

THE COURT: Uh-huh.

MR. WIGHT: -- on different grounds. Now there's no going

back and saying: You know what, we wanted – we shouldn't have done that, we should have done this instead.

THE COURT: Okay.

MR. WIGHT: We should've – we should've fought to unwind the sale.

THE COURT: All right. Okay.

MR. WIGHT: That, that goes against what, what the finality of the decision is. And in a Motion for Reconsideration, this isn't anything new. Like you said, it was in their Complaint in the – in their Fourth Cause of Action. Even if they go off *Jessup, Jessup* was heard well before the, the September 11th order. There's nothing new for reconsideration here. The only thing is – the fact of the matter is they decided not to litigate this issue.

THE COURT: Okay. Thanks. All right. So does – I think only Mr. Croteau's involved in *Jessup*, so he may be the only one who could answer this. But you did provide the notice of reconsideration?

MR. AKIN: No.

THE COURT: The -- *Jessup's*?

MR. CROTEAU: The en banc hearing, Your Honor?

MR. NADDAFI: The en banc hearing?

THE COURT: To be reconsidered, yeah.

MR. AKIN: Yeah.

THE CROTEAU: Yeah.

THE COURT: I don't – so I don't know that was provided. I just didn't know – it's here. I just didn't know what the issue with respect

--

MR. AKIN: I think – I think the issue there is *Jessup* says even less than, than, than what it says, which is nothing. Which is – the Court may take it up, but now because it's under reconsideration, you know, that, that part of it could change.

MR. CROTEAU: That – that's really not an issue, but --

THE COURT: Okay. All right. Okay. So, again, in looking at this reconsideration, three of the judges agreed to reconsideration. It's going to be – looks like it's next week. Three of the judges – there's a dissent by Justice Hardesty with three judges concurring with him, so four of them dissented in the en banc saying:

> While I recognize the role provides two justices may compel the grant of a petition for en banc reconsideration. Appellant has not demonstrated an en banc or consideration is warranted; therefore, I dissent.

So that's why I'm –

MR. CROTEAU: If Your Honor –

THE COURT: -- not understanding what the – what the issue to be reconsidered in *Jessup* was, because I didn't really see that it directly affected or would change the outcome in this case unless they change the outcome in *Jessup*.

But as I said: I do recognize the footnote, the significance of the footnote, and that somewhere in there I have no problem with acknowledging was not addressed in, in our pleadings so.

MR. CROTEAU: So the, the issue from my perspective, Your

Honor, for the record is: First off Counsel for Red Rock, I'm not sure why they're stumping for Timpa Trust, but God bless. I mean, I know they, they don't want to spend their money or get their money taken from them. That's not – that wasn't the issue.

But I mean our allegations against Red Rock are numerous as you, as you know in terms of whether or not they, they were in good faith and so forth. So there's a whole bunch of allegations there if they want to restart this litigation, I guess that's okay.

But the reality is, they're way off on claim preclusion. You only get that if you're in a different case. I don't think he understood that so.

THE COURT: Well, okay, so when this was originally done we closed the case and then we were told: Please reopen it because it doesn't resolve all the claims.

MR. CROTEAU: Correct.

THE COURT: So this is why – so then we set a hearing to have further proceedings.

MR. CROTEAU: Okay.

THE COURT: So this is why I'm trying to understand --

MR. CROTEAU: No, no, I'm okay, and –

THE COURT: -- you know --

MR. CROTEAU: -- maybe I can help a little bit.

THE COURT: -- what – where at some point as Counsel's indicated, shouldn't we have addressed this sooner? And didn't we resolve everything when –

MR. CROTEAU: Well, I went back through all your orders –

THE COURT: Uh-huh.

MR. CROTEAU: -- and your judgments and what ended up happening – here's where Counsel's a little off. All right. The Motions for Summary Judgment were between the bank and Saticoy.

THE COURT: Uh-huh.

MR. CROTEAU: There was never a Motion for Summary Judgment between Saticoy and the HOA or the HOA trustee. So for it to be before the Court there would need to be an order unless the Court did it sua sponte and somehow disposed of claims four and five on its own without any motion pending really is the issue; right? So that's the issue with the Third Amended Complaint.

I'm not sure Counsel can actually say that Red Rock addressed those issues in their motions, because if you read them it doesn't say that. So I think that that's an open issue. I think, however, the allegations raised in four and five are against the appropriate party to set it aside. Okay, because it's the HOA and the HOA trustee that conducted the sale.

The bank is the wagging of the tail, so to speak. And I don't mean any disrespect to the bank, but they weren't the active party. There's – the party doesn't want to get wiped out. The people that did the doing that we're alleging was the wrong doing is the HOA and the HOA trustee. So our allegations are directed towards them in a tortious manner.

The amendment of the Complaint speaks to footnote number five only from the perspective of:

You did equity by giving them tender, give us equity by giving us an unwind of the sale to put parties in a more equitable position. And instead of providing the beneficiaries of the trust that have absolutely nothing to do with this transaction at all, or anything to do with this property at all, other than receive proceeds.

THE COURT: Okay, well, again, it's just, again, just looking at the procedural posture of this thing. I don't – and this issue on this five year rule issue. I don't see that this was ever stayed, but we closed it more than once.

MR. CROTEAU: Statistically only, Your Honor.

THE COURT: Right.

MR. CROTEAU: It didn't get closed, per se, as a closed case.

THE COURT: And so that's my question. I don't believe that extends your five year rule. The period of time –

MR. CROTEAU: No, I didn't say it did.

THE COURT: -- it's statistically closed. So I just think that, you know, your five year rule runs on November 20th. So here's my – here's my --

MR. CROTEAU: Now the HOA and the HOA trustee were in substantially later, but that's a different issue.

THE COURT: Right. And so that's – so that's my question. As to these other claims, because Thorn – Timpa didn't enter the case until earlier in 2019. They were not in this case.

MR. CROTEAU: The Timpa Trust; that's correct.

THE COURT: Timpa Trust, right. So they were not in this case until –

MR. CROTEAU: Until they decided to enter when they smelled the excess proceeds.

THE COURT: Correct, yeah.

MR. CROTEAU: Okay.

THE COURT: So they didn't get involved here. So this, this is my question is: What is the five year rule effect? If there are still portions of this case that are based on pleadings that aren't – weren't filed on November 20th but were filed on some other date, then is there still time to litigate these questions? I'm just trying to understand our procedural –

MR. CROTEAU: No, and Your Honor –

THE COURT: -- posture.

MR. CROTEAU: -- I as well. And frankly, I want to get a more learned response to that. I've done the research but I want –

THE COURT: Right.

MR. CROTEAU: -- to get a more learned response to it before I pontificate to the Court on direct. I don't know.

THE COURT: Right. Okay. Well, so then but here then going back to my, my question that I – all along. This seems to me – and, and because there are two different kinds of relief that were requested here: One was to amend the Complaint and state this cause of action. As you say, in the Third Amended Complaint, that paragraph is in there.

MR. CROTEAU: It is.

THE COURT: So I'm not understanding why we would need to amend it there. So –

MR. CROTEAU: Just to turn it from a tortious to an equitable. To add the equitable allegations, not simply tortious.

THE COURT: Okay. All right. Understood.

MR. CROTEAU: That's why.

THE COURT: Okay. So then, oh, okay. So then the request with respect to reconsideration of the summary judgment, again, I didn't see that anything in *Jessup* would have changed the outcome here putting aside the arguments of Counsel that it's untimely. But I do appreciate the point that that footnote does reference this whole problem of, you know, what do you do? Do you just go right back to the statutes and strictly enforce the statute, which is what I've always said: You have to strictly follow the statute.

But this is equity. And this whole concept of tender is an equitable remedy that the banks are able to salvage some of these properties through this equitable remedy. So in the – in the counter then should, in fact, a purchaser at one of these who's a purchaser, you know, signs in good faith, purchased with no knowledge of a tender – should they be entitled with some sort of equitable remedy too?

So that gets us to this point of the argument of counsel saying: You didn't litigate that. And so we – you shouldn't be entitled to this relief at this point, because it was not litigated as, as with respect to the bank. It was not an issue that the Court considered at the time this other summary judgment was raised.

So that's why, in looking at this, on the one hand I could see putting something in the – specifically in the findings of fact, conclusions of law that says, you know, we did not raise this. And to the extent that *Jessup* creates anything new, I mean assuming it survives this en banc rehearing –

MR. CROTEAU: Oh, can I help you with that --

THE COURT: -- you --

MR. CROTEAU: -- a little bit?

THE COURT: -- then you follow the *Huneycutt* procedure and say: Can we go back down to the District Court with that and, and litigate it there? That's –

MR. CROTEAU: Just a comment.

THE COURT: -- not uncommon, we do that all the time with *Huneycutt* issues.

MR. CROTEAU: No, that's fine, but, but let me – let me do this comment if I may with respect to the *Jessup* decision.

THE COURT: Uh-huh.

MR. CROTEAU: The reason *Jessup* is on for en banc review, is that, *Jessup* was only a first lighter case, Your Honor. And what they did in *Jessup* is, they provided a course of conduct defense to the bank for not submitting a check or tender, actual tender.

THE COURT: Uh-huh.

MR. CROTEAU: That's the whole *Jessup* argument. And whether or not if, if I deal with you on an ongoing basis and you return my checks because of conditional language and that was the, the

repartee, if you will. Does that get to go on forever, or are there things that change in that relationship? And the Court in that case imputed their own – and I'm talking about the appellate court.

THE COURT: Okay. Well, again, none of that matters; I don't care --

MR. CROTEAU: Yeah. But that's what's going on.

THE COURT: -- because I don't think – I don't think *Jessup* changes –

MR. CROTEAU: The note doesn't change.

THE COURT: -- the outcome. That doesn't change the outcome of the motion that was granted in December, but here's my question is: If the request is to amend the findings of fact to simply say:

> As between the bank and Saticoy, this was an allegation against these other parties, but the Court did not consider it. So to the extent that this footnote in *Jessup* means anything, it would have to be, you know, the Court did not – it was not properly before the Court. And then you ask for a *Huneycutt*.

MR. CROTEAU: Well, it was properly before the Court is what he addressed.

THE COURT: Then you ask for *Huneycutt* relief.

MR. CROTEAU: The only other thing – the only other way to handle this is to authorize the Amended Complaint. We get it filed and we do a Motion for Summary Judgment on the two causes of action remaining and the equity aspect. The Court can rule on it and move it

along. And you can do that on an OST. We have over 20 days. Then I could have that on file in a day or two.

THE COURT: Uh-huh. Okay. So Counsel want to be heard so we'll let – you can have the last word, it's your motions; we'll let – we'll hear from you.

MR. AKIN: Your Honor, I would just say that your – the original order was December 3rd.

THE COURT: Uh-huh.

MR. AKIN: On March 7th, *Jessup* came out. They had three months – six months, liberally, from when *Jessup* come out to make these arguments. We litigated these issues again in the excess proceeds order, nothing from them. This is a third shot at the apple, okay. In the original underlying MSJ, the original one from December, they could have made all these equity arguments that they wanted to but they chose not to.

Your order came down. It said all of the claims have been decided. They could have filed a Motion for Reconsideration in between March 7th and in between June 7. They probably could have even filed one up till – or up till September 7th did – we even litigated these issues again and then they didn't.

Now we're hearing – now we're hearing that there's going to be a fourth – there's going to be a fourth -- after they filed the Amended Complaint they want to relitigate these issues for a fourth time. It's – sometime finality's got to happen at some point. If they would have made these arguments an underlying MSJ from December or from the

one from September, they would have made these arguments, they would have them ripe for appeal, but they didn't.

Now we're hearing we're going to go for number four. It's going to be 2050 before we finish this case unless, unless the Court just makes a determination and sends it up. This is – procedurally they're barred. They haven't litigated these issues. They could have brought it up numerous times. The time limits are past and now we're hearing about a new one. It's, it's crazy.

THE COURT: Thank you.

MR. WIGHT: Yeah. And just going off the – I would focus on the September 11th decision, right. Because what happened was Timpa Trust brought their Motion for Summary Judgment asking for the excess proceeds. We're a part of that and we're involved because some of those excess proceeds went to us to pay for our fees and costs, 29,000 specifically.

When Timpa Trust files their Motion for Summary Judgment, Saticoy Bay has a responsibility. And that responsibility is to bring all arguments that they have in opposition to that Motion for Summary Judgment. One of those arguments is this equitable argument that the sales should have been set aside. So even if we set aside the December of 2018 motion, completely, when they filed their September 11th motion, Saticoy Bay had that responsibility to bring that equitable claim.

When they were silent on it, and the Court ruled that the excess proceeds should be distributed, 29,000 to my client and the rest

to TImpa Trust, that's it. That was full litigation of this issue. There is like – there is a curious question about: Well, is – should the sale be set aside or not? But that's a question that was not before the Court and that's because Saticoy Bay chose not to bring that before the Court.

And because they chose not to bring it before the Court, they set that right aside, forever. In a Motion for Reconsideration, if something new came up, which nothing new came up in between now and then, that might be proper, but that didn't happen.

And that what we are saying is the Motion to Amend cannot – they cannot bring their new equitable claim without setting completely aside, this Court's previous decision on September 11th. There's no way. There's no way to set to set aside the sale without overturning your, Your Honor's previous decision.

And so what it is – it is just another bite at the apple. And what if you allowed them to amend and we go through that and we litigate that completely and they say: Oh, but then there was this other issue that we never disposed of. And then there was this other issue. The litigation keeps going and going.

That's why in Motions for Summary Judgment, Counsel has responsibility to bring all their arguments to bear. You lay everything out when a Motion for Summary Judgment is filed. And when they don't they – they don't have those rights anymore. And that's all we're saying.

Is that, they disposed of all their – all their rights to litigate this.

THE COURT: Thank you. Mr. Croteau, in conclusion.

MR. CROTEAU: Yeah, a couple things, Your Honor. First off,

you know, and a question frankly I don't have the answer to. I did some research trying to figure it out. But we would have our claims against Red Rock and the HOA until 2022 if that's the case. We didn't bring them in till '17, at least from our perspective. But that's a different program.

THE COURT: Uh-huh.

MR. CROTEAU: Again, Your Honor understands the road map here, and I understand you understand. So I, frankly really don't care about his $28,000. We're not seeking to even set that aside currently, actually. Though I'm going to – for the record, I'm going to keep – I'm going say we want it set aside, but that really wasn't our focus here. So our focus is to unwind the transaction. The excess proceeds being defined as the money being held by the Court is the issue. So, again, if that's what their focus is.

THE COURT: Okay. But again, this – I just – this has been – this to me really is a procedural issue, and this is why I've been asking from the very beginning. The Summary Judgment, I appreciate the fact that was a reconsideration. I had denied that Summary Judgment, then all these cases came out that said: Yeah, you can look at tender, so we took another look at tender and then I granted their Summary Judgment.

MR. CROTEAU: I know you – like I said.

THE COURT: Okay. And so then, now we're going forward and so we – the findings of facts, conclusions of law as between the bank and Saticoy are what they are.

MR. CROTEAU: A quiet title.

THE COURT: I appreciate – I appreciate the fact that *Jessup* subsequently [coughing heard] came out. And there is a reference in that footnote to a possible equitable issue here. And as I said: The only thing I can consider doing is to say: I would amend the findings of fact, conclusions of law to say that at the time the motion was argued to the Court, that issue that's in the footnote from *Jessup* was not raised. and was not litigated with the Court. Period, end of story. I would – I would be happy to amend that and put that in –

MR. CROTEAU: Well, and maybe –

THE COURT: -- so that, because to me as I said, "I think this is a *Huneycutt* problem."

MR. CROTEAU: Well, maybe, maybe Your Honor a little more elaboration might – would be appropriate from the standpoint that you considered our motion under 50b – 15(b)(2) and something to that effect. And, you know, equity is, at least in our – there is an argument in the Third Amended Complaint that relates to cause of action Court – the Court find.

THE COURT: I have no problem with –

MR. CROTEAU: And, and –

THE COURT: -- if you want more – if you want more detail that –

MR. CROTEAU: More detail.

THE COURT: -- in the Third Amended Complaint at – there is a – there is this reference in paragraph, I think causes of action four and five.

MR. CROTEAU: Right.

THE COURT: But that was not addressed by the Court, subsequently this *Jessup* case is decided which references in a footnote this equitable – as an equitable remedy.

MR. CROTEAU: And –

THE COURT: That issue, since the Summary Judgment was decided before *Jessup*. That issue was not considered by this Court. And that would be all I would consider amending the findings of fact and conclusions of law to say. I would amend it to say that.

MR. CROTEAU: Certainly I would accept that as a offer of the Court, but –

THE COURT: Now – so with respect to the amended – of the findings of fact, conclusions of law I will do that. That's -- I will grant that in part as to making that reference to the fact that *Jessup* came out after the fact. That there were allegations in the Third Amended Complaint that referenced unwinding the sale. We did not discuss it in the Summary Judgment; it just did not come up.

So to the – to the extent that *Jessup* has any bearing, it was not considered. But that issue was not considered at the time because it was prior to *Jessup*. Fine, that's all I'm going to say on the findings of fact, conclusions of law. I'm going to deny the Motion to Amend the Complaint at this point in time, because I do not, again, see that as the appropriate procedural approach.

Because that's the findings of fact, conclusions of law as to the bank. And so, we've done the other issue as to the excess

proceeds. So it seems to me that that's also its own separate order that should be final. And it does now appear to me that everything's final and the case is ripe for an appeal. That's why I said: This is a *Huneycutt* issue. If anything that is referenced here in this footnote from *Jessup* indicates that the Court – the Supreme Court should be asked: Should this – should the trial court take another look at this? There's a process to do that.

But it's – once a judgment has been sent to the Supreme Court or is final and goes to the Supreme Court, but then you can ask the Supreme Court: Should this be remanded down to the District Court for a determination? You file a motion with the Court saying: Would you reconsider – would you take another look at this, and the Court says yes or no.

And the Court – and the Supreme Court can say: Well, then, okay, yeah, we'll let – we'll let the trial court hear it again. I mean, it – I believe that's – I don't under – that's a process that I think is more appropriate than going in after the fact and amending a complaint after summary judgment's been granted.

MR. CROTEAU: Just for the record.

THE COURT: Yeah.

MR. CROTEAU: I object.

THE COURT: Okay.

MR. CROTEAU: Because I have to [laughs].

THE COURT: Uh-huh. Yeah.

MR. CROTEAU: So I appreciate that, Your Honor.

THE COURT: Uh-huh.

MR. CROTEAU: But I understand.

THE COURT: So are you going to – are you going to write the orders and show them to Counsel?

MR. CROTEAU: Sure.

THE COURT: Because whatever you want to put in there is, you know –

MR. CROTEAU: Yes.

THE COURT: -- you can discuss with them. But I think it's more appropriate if you write them, because you know what you're looking for. I'm not granting it in its entirety; I'm granting part of your remedy –

MR. CROTEAU: I understand.

THE COURT: -- your relief on the – on the Motion for Reconsideration. I'm going to deny the Motion to Amend, because I think that it – it's a procedural problem for me. Procedurally, I think it is untimely, because this judgment's already been entered with respect to the other six proceeds. So procedurally, I don't think I can amend the complaint. I did – I think it's, I – to me this – I look at this as it's just a procedural problem.

MR. CROTEAU: Well –

THE COURT: I appreciate everybody arguing all these issues but it's procedure.

MR. CROTEAU: I think – I think the only thing I bring umbridge with is the 15(b)(2) language that says you can amend

pleadings even after --

THE COURT: Uh-huh.

MR. CROTEAU: -- a judgment's entered. So arguably that would deal with your timeliness issue.

THE COURT: Right. And so, to the extent that, but again, that at the time that – the excess proceeds motion was considered, I didn't address this. I – that footnote, *Jessup,* had not been brought to my attention. I didn't even consider unwinding the sale. That – and whether that is or is not a possibility, it's not clear from *Jessup* that they are saying – endorsing it. They're simply saying, you know, it is –

MR. CROTEAU: It's simply –

THE COURT: -- something there.

MR. CROTEAU: -- it's simply saying that equity really resides with both parties.

THE COURT: Right. And so that may be. And if the Court says:

> Yeah, we think that you need to go back to the trial court and take a look at this whole equitable issue. Fine. There is a process to do it short of having the Supreme Court actually finish its ruling otherwise, you know, just plays itself out in the Supreme Court.

MR. AKIN: And obviously, Your Honor, I object as well. But can we – can we be just crystal clear about – it sounds like we're adding a sentence to the findings of fact and conclusions of law. And –

MR. CROTEAU: Here we go.

MR. AKIN: -- I'd really like to have this in by November 20th.

THE COURT: Uh-huh.

MR. CROTEAU: No, no. It'll be in your – I'll have it in your inbox this week.

MR. AKIN: But can we – can we make it crystal clear what, what it is that you're changing so –

MR. CROTEAU: I thought she just did.

MR. AKIN: -- that we're not – we're not going back and forth on it?

MR. CROTEAU: Well, I --

THE COURT: I thought I was clear.

MR. CROTEAU: -- I, I think you are Your Honor.

THE COURT: Are, are you clear?

MS. WITTIG: I – Your Honor, I am, yes.

THE COURT: Mr. Croteau, you understand?

MR. CROTEAU: I got it.

THE COURT: Okay. Good.

MR. AKIN: And Your Honor, the bond issue?

MR. CROTEAU: Still there.

MR. AKIN: Can – once the new judgment is entered, do you want us to file a motion or –

MR. CROTEAU: There's new – there's no –

THE COURT: The bond – at this point, the bond isn't because we're just talking about the December.

MR. AKIN: Yes, but we – you entered a stay based upon this

Motion for Reconsideration of the final judgment, and then so –

THE COURT: But I thought that was as to – as to the excess proceeds.

MR. CROTEAU: It is.

MR. AKIN: It is.

MR. CROTEAU: Nothing's changed. They – I think he's trying to get something that's not even before the Court, but that's a different issue.

THE COURT: Right. Yes, I didn't consider this to be related to – in making –

MR. CROTEAU: It's not.

THE COURT: -- any changes with respect to the excess proceeds motion.

MR. AKIN: Okay.

MR. CROTEAU: It's not.

THE COURT: So are we just waiting for that to be final?

MR. CROTEAU: Yeah.

THE COURT: Okay.

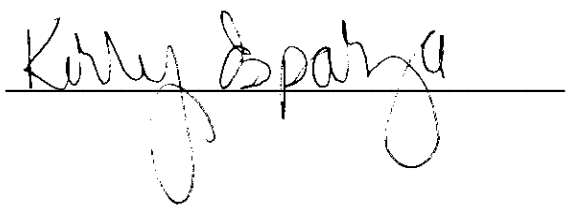
MR. CROTEAU: Thank you.

THE COURT: Thank you.

[Hearing concluded at 10:43 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Kerry Esparza
Court Recorder/Transcriber