IN THE SUPREME COURT OF NEVADA

SATICOY BAY LLC, SERIES 34 INNISBROOK, Appellant, vs. THORNBURG MORTGAGE SECURITIES TRUST 2007-3; FRANK TIMPA; MADELAINE TIMPA; TIMPA TRUST; RED ROCK FINANCIAL SERVICES, LLC; SPANISH TRAIL MASTER ASSOCIATION; REPUBLIC SERVICES; AND LAS VEGAS VALLEY WATER DISTRICT Respondents.	Supreme Court Case No. 80111 Electronically Filed Jan 29 2021 06:39 p.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S OPENING BRIEF**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Law firms that have appeared for Saticoy Bay LLC Series 34 Innisbrook ("Saticoy"): Law Offices of Michael F. Bohn, Esq., Ltd., from inception through March 5, 2019; Roger P. Croteau & Associates, Ltd., represented after March 5, 2019.

2. Parent corporations/entities: Saticoy is a Nevada series limited liability company. Saticoy's Manager is Bay Harbor Trust, the trustee of Bay Harbor Trust is Resources Group, LLC; Iyad Haddad is the manager of Resources Group, LLC. No publicly held corporation owns 10% or more of the beneficial interest in the Appellant and/or the Bay Harbor Trust.

Dated January 29, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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(B) Saticoy sought reconsideration of the September 11, 2019 Order by way 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 submitted on September 24, 2019. JA2069.

(C)The filing dates establish the timeliness of the appeal: The Order granting in part and denying in part Saticoy's Motion for Reconsideration was entered on November 18, 2019, with the Notice of Entry of Order being entered on November 19, 2019. JA2225-2232. The Notice of Appeal was filed on November 19, 2019. JA2233.

(D) The appeal is from a final judgment.

III. NRAP 17 ROUTING STATEMENT

The instant matter should be retained by the Supreme Court of Nevada, because this appeal raises two principal issues as questions of first impression involving the common law and statutory interpretation of NRS Chapter 116 pertaining to (1) the distribution of proceeds from a homeowner association's sale and (2) the exercise of equity in unwinding homeowner association foreclosure sales based upon the inequitable distribution of excess proceeds premised upon an improper distribution scheme as compared to the correct scheme of static interests regarding priority, especially in light of the failure to respond to inquiries by prospective purchases at homeowner association lien foreclosure sales prior to the 2015 amendment of NRS 116. NRAP 17(a)(11). The issue presented in this appeal represent present two cases of first impression in the State of Nevada regarding (1) the distribution of excess proceeds following and (2) the exercise of equity in unwinding a homeowner association's sale where either an inequitable distribution of excess proceeds or the failure to address inquiries by buyers lead to an inequitable outcome.

IV. STATEMENT OF ISSUES PRESENTED

Whether the district court erred by granting Timpa Trust's Motion for Summary Judgment ("Timpa MSJ"), Thornburg's Motion for Summary Judgment ("Thornburg MSJ"), in part, and denying Saticoy's Motion for Reconsideration and Motion to Amend Complaint in light of the following:

1. Did the district court err in denying Saticoy's Motion for Reconsideration and Motion to Amend the Complaint to comport to the evidence in light of the then-recent decision in of *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII,* 135 Nev. Adv. Op. 7, 435 P.3d 1217 (2019) ("*Jessup*") leaving the question open as to whether an interested party, including the third party buyer such as Saticoy, could have an homeowner association's sale set aside on equity grounds on a case-by-case basis?

2. Does NRS 116.3116 dictate the priority of interest holders to be paid under NRS 116.31164 in such a way that the strict reading of the two provisions in conjunction necessarily results in a lien, which is subordinate to an association lien perfected by the recordation of a homeowner association's declaration of covenants, conditions and restrictions of record, remaining a subordinate lien since such a determination is made at the "institution of an action" by the service of a notice of delinquent assessment lien?

3. Did the district court abuse its discretion by failing to allow Saticoy to amend its Third Amended Complaint to address the facts in evidence, and thus address arguments against the homeowner association and the collection agent while seeking to unwind the sale if the interest sold was misrepresented, and thus facilitated an inequitable outcome while sitting as a court in equity?

4. Did the district court abuse its discretion and also commit errors of law by dismissing Saticoy's claims against Red Rock Financial Services ("Red Rock") and the Spanish Trail Master Association (the "Association"), without any motion practice or opportunity to address Saticoy's claims by any party to the case?

5. Did the district court abuse its discretion by granting Red Rock's Motion for its attorney fees from the excess proceeds based upon its claim of interpleader, rather than limiting its fees to the costs of the interpleader action to deposit the amount of $1.16 million dollars of excess proceeds?

V. STATEMENT OF THE CASE

On November 20, 2014 Saticoy filed its initial Complaint. JA0001. Saticoy's Initial Complaint asserted two (2) claims for relief against Respondent Thornburg Mortgage Securities Trust 2007-3 ("Thornburg") and then-defendant Recontrust Company, N.A., a division of Bank of America, for declaratory relief and quiet title. *Id*. On November 25, 2014, Saticoy filed an Amended Complaint which again set forth claims for declaratory relief and quiet title, adding Respondents Frank Timpa ("Frank") and Madelaine Timpa ("Madelaine"), individually and as trustees for the Timpa Trust (collectively as the "Trustee"), as defendants. JA0005.

Thornburg answered the Amended Complaint on April 10, 2015, and set forth counterclaims against 1) Saticoy for quiet title, declaratory relief, permanent and preliminary injunction, and unjust enrichment, 2) the Association for quiet title, declaratory relief, wrongful foreclosure, negligence, negligence per se, breach of contract, misrepresentation, unjust enrichment, and breach of the covenant of good faith and fair dealing, and 3) Red Rock, as the Association's foreclosing agent for wrongful foreclosure, negligence, negligence per se, breach of contract, unjust enrichment, and breach of the covenant of good faith and fair dealing.

JA0014. Thornburg likewise sought to have the Association Sale held invalid and set aside by way of its counterclaims. JA00038.

On May 21, 2015, Red Rock answered Thornburg's claims against it, and Red Rock itself counterclaimed with an Interpleader of proceeds from the Association Sale as to all defendants. JA0094.

On June 11, 2015, Saticoy filed the Second Amended Complaint against Thornburg, Frank, Madeline, and the Timpa Trust seeking quiet title and declaratory relief against all defendants, and a writ of restitution against Frank, Madeline, and the Timpa Trust for the possession of the Property. JA0109.

Republic Services Answered Red Rock's Interpleader on June 23,2015. JA0113. Thornburg Answered Red Rock's Interpleader on June 24,2015. JA0116.

On February 10, 2017, Saticoy filed the Third Amended Complaint, again seeking quiet title and declaratory relief against all defendants, and a writ of restitution against Frank, Madeline, and the Timpa Trust for the possession of the Property, and adding claims against the Association and Red Rock for misrepresentation and unjust enrichment. JA0139. Saticoy requested the underlying sale be set aside. JA0142-143.

Republic Services submitted an Answer to the Third Amended Complaint on February 24, 2017. JA0145. On March 3, 2017, Red Rock answered the Third Amended Complaint. JA0149.

Thornburg answered the Third Amended Complaint on May 30, 2017, and again asserted claims against 1) Saticoy for quiet title, declaratory relief, permanent and preliminary injunction, and unjust enrichment, 2) the Association for quiet title, declaratory relief, wrongful foreclosure, negligence, negligence per se, breach of contract, misrepresentation, unjust enrichment, and breach of the covenant of good faith and fair dealing, and 3) Red Rock, as the Association's foreclosing agent for wrongful foreclosure, negligence, negligence per se, breach of contract, unjust enrichment, and breach of the covenant of good faith and fair dealing. JA0167. Thornburg likewise sought to have the Association Sale held invalid and set aside by way of its counterclaims. JA0192-3

Red Rock answered Thornburg's counterclaim and again sought to interplead the funds on June 12, 2017. JA0247. Thornburg answered Red Rock's counterclaim on July 5, 2017, and requested that:

> [I]f the Court determines that Thornburg's Deed of Trust was in fact a "subordinate lien" under NRS 116.3116 and NRS 116.31164, that the Court make a judicial determination regarding the priority in payment of the excess proceeds that Thornburg's Deed of Trust has priority over all other interests and encumbrances and is entitled to all the excess proceeds up

> to the unpaid balance of the Deed of Trust and the Note it secures.

JA0266. Saticoy Answered Thornburg's Counterclaims on September 7, 2017. JA0271.

Dispositive motion commenced when both Saticoy and Thornburg moved for Summary Judgment against one another and all other parties on May 4, 2018. JA0278 and JA0478. Republic Services opposed Saticoy's Motion for Summary Judgment on May 14, 2018. JA0732. Thornburg opposed Saticoy's Motion for Summary Judgment on May 21, 2018. JA0736. Saticoy opposed Thornburg's MSJ on May 22, 2018. JA0997. The Association opposed Thornburg's MSJ and countermotion for Summary Judgment on May 22, 2018. JA1156. The Association consistently referred to the claims of Thornburg, i.e., the "Bank" throughout its briefing, and did not address the claims of Saticoy. *Id*.

Thornburg filed a Reply supporting its Motion for Summary Judgment and Opposition to the Association's countermotion for Summary Judgment. JA1197. Red Rock joined the Association's countermotion for Summary Judgment on May 30, 2018. JA1210. Republic Services' partial opposition to the Countermotion for Summary Judgment was filed on May 30, 2018. JA1213. The Association filed its Reply in support of its countermotion for Summary Judgment on June 26, 2018. JA1249. Saticoy supplemented its Opposition to Thornburg's MSJ on June 27,

2018. JA1271. Thornburg filed an Errata to its Motion for Summary Judgment on June 28, 2018. JA1276. Thornburg filed a Sur-reply supporting its Motion for Summary Judgment on June 29, 2018. JA1305. Thornburg filed an Errata, alternatively a Sur-reply, supporting its Motion for Summary Judgment on July 2, 2018. JA1351. The motions were denied at the hearing of July 3, 2018.

After the briefing and decision on Saticoy's Motion for Summary Judgment, Thornburg's Motion for Summary Judgment, and the Association's Motion for Summary Judgment, the Association answered Saticoy's Third Amended Complaint on July 19, 2018. Saticoy's Third Amended Complaint contained the claims against the Association for misrepresentation and unjust enrichment, and Thornburg's counterclaim. JA1359 and JA1367.

Thornburg moved for reconsideration of the denial of its Motion for Summary Judgment, before a written order was entered, on September 17, 2018. JA1384. Saticoy opposed Thornburg's Motion for Reconsideration on October 2, 2018. JA1651. Thornburg replied in support of its Motion for Reconsideration on October 26, 2018. JA1691. The matter was heard on November 6, 2018, and the Findings of Fact, Conclusions of Law, and Order Granting Thornburg's MSJ ("MSJ Order") was filed on December 3, 2018. JA1719. In the MSJ Order the district court found that Saticoy's interest in the Property was subject to

Thornburg's deed of trust, and more importantly that "all remaining claims not specifically mentioned, including all claims in Thornburg's counterclaim and crossclaims and Saticoy's complaint, are dismissed with prejudice." *Id.* Neither the Association nor Red Rock moved to have Saticoy's claims against them dismissed, or filed any such request. A Notice of the MSJ Order was filed on December 5, 2018. JA1729.

Madelaine and Timpa Trust answered Red Rock's Counterclaim for interpleader (as filed on May 21, 2015) and made claim to the surplus funds on January 31, 2019. JA1743. Timpa Trust moved for summary judgment on June 25, 2019. JA1752. Red Rock responded to Timpa's MSJ on July 9, 2019. JA1850. Timpa Trust replied in response to Red Rock's opposition to the Motion for Summary Judgment on July 9, 2019. JA1867. Saticoy opposed Timpa's MSJ and Red Rock's limited response to Timpa's MSJ on July 26, 2019. JA1886. Timpa Trust replied to Saticoy's Opposition to Timpa's MSJ on August 6, 2019. JA2039. On September 11, 2019, an Order granting Timpa's MSJ ("Excess Proceeds Order") was entered, awarding Timpa Trust the excess proceeds in the amount of $1.2 million dollars, which was noticed on the same date. JA2050 and JA2058.

Saticoy moved for Reconsideration of the MSJ Order and the Excess Proceeds Order on September 24, 2019. JA2069. Thornburg submitted a limited opposition to Saticoy's Motion for Reconsideration on October 4, 2019. JA2117. Timpa Trust opposed Saticoy's Motion for Reconsideration on October 8, 2019. JA2145. Saticoy submitted a Motion to Amend the Complaint on October 16, 2019 in light of the *Jessup* decision and its guidance regarding an equitable unwind as requested by Thornburg and Saticoy in its pleadings. JA2167. Saticoy also responded to Thornburg's limited opposition to Saticoy's Motion for Reconsideration on October 18, 2019. JA2190. Thornburg opposed Saticoy's Motion to Amend the Complaint on October 25, 2019. JA2195. Saticoy replied in support of the Motion for Reconsideration on October 25, 2019. JA2199. Timpa Trust opposed Saticoy's Motion to Amend on October 27, 2019. JA2212. Red Rock likewise Opposed on October 28, 2019. JA2218. The district court denied the Motion to Amend the Complaint its Order of November 18, 2019, finding the request for amendment to be procedurally improper as "there is a separate final order and the case is final." JA2225-6. The district court then went forward with refusing to grant reconsideration, acknowledging that the clarification of the law set forth in *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. Adv. Op. 7, 435 P.3d 1217 (2019) was not considered. *Id*. The notice of entry of order,

and the notice of appeal, were both timely filed on November 19, 2019. JA2228 and JA2233.

VI. STATEMENT OF RELEVANT FACTS

This matter concerns the real property commonly known as 34 Innisbrook Avenue, Las Vegas, Nevada (the "Property"). On June 6, 2006, Frank entered into a loan secured by the Property. JA1720. Frank obtained the loan from Countrywide Home Loans, Inc., (*"*Lender*"*) in the original amount of $3,780,000.00 (the *"*Loan*"*), on June 12, 2006. JA 1720. The Loan was secured by a Deed of Trust against the Property that was recorded in the Clark County, Nevada Recorder's Office ("First Deed of Trust"). JA1720. On June 4, 2010, MERS, on behalf of Recontrust executed a Corporation Assignment of Deed of Trust Nevada to Thornburg as Lender, which was recorded on June 9, 2010. JA1892. The borrowers on the Loan, Frank and Madeline, are deceased, and the Property was and is held by the Timpa Trust, whose successor trustees are Todd Timpa and Stuart Timpa. JA2053.

The Property is located within a common interest community governed by the Association. JA1720. On February 25, 1984, the Master Declaration of Restrictions for Spanish Trail, which runs with the land and governs the Property, was recorded in the Clark County, State of Nevada Recorder's Office. ("CC&R").

JA1720. On or about August 17, 1988, the Declaration of Restrictions for Estates West at Spanish Trial, which runs with the land and governs the Property, was recorded in Clark County, State of Nevada Recorder's Office. ("Estates CC&R"). JA1890.

The Timpa Trust failed to pay the Association the assessments on the Property, such that on August 4, 2011, Red Rock, on behalf of the Association, recorded a lien for delinquent assessments indicating the Timpa Trust owed $5,543.92 (the "Association Lien"). JA1526 and JA1721. The Association Lien indicated it was recorded "in accordance with" the CC&Rs. *Id.* At the time the Association Lien was recorded, the Association's assessments were $225.00 per month. *Id.* There were no nuisance abatement charges. *Id.* The superpriority lien amount of the Association's Lien was $2,025.00 ($225.00 x 9) for the assessments coming due December 1, 2010 through August 1, 2011. *Id.* From July 9, 2013 through December 13, 2013, the Trust made payments totaling $2,350.00. *Id.* Red Rock accepted the payments and applied the payments to the delinquent assessments coming due December 1, 2010 through August 1, 2011. *Id.* On December 6, 2011, Red Rock recorded a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments asserting the Association was owed $8,312.52. *Id.* On December 23, 2011, BAC Home Loan Servicing

("BANA"), then the loan servicer, through its counsel Miles, Bauer, Bergstrom & Winters ("Miles Bauer") sent a correspondence to Red Rock seeking to determine the superpriority lien amount, and offered to "pay that sum upon adequate proof." *Id.* Red Rock received the letter on December 27, 2011, and on January 26, 2012, Red Rock responded with a ledger indicating the total amount due was $9,255.44. *Id.* On February 10, 2012, Miles Bauer, sent Red Rock a $2,025.00 check ("HOA Payment"). *Id.* Red Rock received the check on February 10, 2012. *Id.* Red Rock rejected the HOA Payment. *Id.* On September 15, 2014, Red Rock (on behalf of the Association) recorded a Notice of Foreclosure Sale setting forth a sale date of October 8, 2014, with $20,309.95 being due as of September 15, 2014. JA1722. On November 7, 2014, in light of the decision in *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), Saticoy purchased the Property at the Association's sale ("Association Sale") conducted by Red Rock for $1,201,000.00. *Id.* After deducting all sums due to the Association and Red Rock, there remained $1,168,865.05, ("Excess Proceeds") which was deposited with the district court in accordance with the interpleader action on June 20, 2019. JA2052.

Following the Association Sale on November 7, 2014, Saticoy commenced this litigation on November 20, 2014. JA0001. During the course of the litigation,

Thornburg disclosed that the Timpa Trust's Loan had an unpaid balance of $6,279.233.20 as of April 30, 2018. JA1386 and JA1453. As of November 7, 2014, the Property was worth approximately $2,000,000.00. JA1722. Red Rock has been awarded $29,161.69 of the Excess Proceeds as attorney fees. JA2053. Due to the death of Frank and Madeline, the excess proceeds are currently set to be distributed to the Timpa Trust, such that the remaining $1,139,703.36 can be distributed to the beneficiaries of the Timpa Trust, who are strangers to the First Deed of Trust. JA2055. Likewise, Saticoy is now the title owner of the Property, which is over encumbered by approximately $4 million dollars, and Thornburg is likewise facing a deficiency of $4 million dollars upon the eventual foreclosure of the First Deed of Trust. JA2055.

VII. STANDARD OF REVIEW

An order granting summary judgment is reviewed de novo. *Physicians Ins. Co. of Wis., Inc. v. Williams*, 279 P.3d 174, 175 (Nev. 2012); *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005). "Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and 8 affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood,* 121 P.3d at 1031.

This Court reviews a district court's findings of fact to see if they are supported by substantial evidence. *Cty. of Clark v. Sun State Props., Ltd.*, 72 P.3d 954, 957 (Nev. 2003); *see In re Estate of Bethurem*, 313 P.3d 237, 242 (Nev. 2013) (explaining findings of fact reviewed for substantial evidence). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Jones v. SunTrust Mortg., Inc.*, 274 P.3d 762, 764 (Nev. 2012). A district court's conclusions of law are not entitled to any deference, and are reviewed de novo. *Cty. of Clark*, 72 P.3d at 957; *Paige v. State*, 995 P.2d 1020, 1021 (Nev. 2000) ("Questions of law are subject to de novo review.").

VIII. SUMMARY OF ARGUMENT

The district court erred when it granted Thornburg's MSJ and Timpa's MSJ, resulting in the MSJ Order and Excess Proceed Order and denied Saticoy's Motion for Reconsideration and Motion to Amend Complaint for the following reasons:

1. The district court erred in denying Saticoy's Motion for Reconsideration and Motion to Amend the Complaint in light of the then-recent decision in *Jessup* leaving the question open as to whether an interested party, including the third party buyer such as Saticoy, could have a homeowner association's sale set aside on equity grounds on a case-by-case basis when requested by Thornburg and Saticoy in its pleadings.

2. NRS 116.3116 dictates the priority of interest holders to be paid under NRS 116.31164 in such a way that the strict reading of the two provisions in conjunction necessarily results in a lien, which is subordinate to an association lien perfected by the recordation of a homeowner association's declaration of covenants, conditions and restrictions of record, remaining a subordinate lien since such a determination is made at the "institution of an action" by the service of a notice of delinquent assessment lien.

3. The district court abused its discretion by failing to allow Saticoy to amend its Third Amended Complaint to address the facts in evidence, and thus address arguments against the Association and Red Rock while seeking to unwind the sale if the interest sold was misrepresented, and thus facilitated an inequitable outcome while sitting as a court in equity.

4. The district court abused its discretion and also committed errors of law by dismissing Saticoy's claims against Red Rock and the Association, when Saticoy relied upon the information of Red Rock and the Association when it bid $1.2 million dollars for the Property, without any motion practice addressing Saticoy's claims by any party to the case.

5. The district court abused its discretion by granting Red Rock Financial Services' ("Red Rock") Motion for its attorney fees from the excess

proceeds based upon its claim of interpleader, rather than limiting its fees to the costs of the interpleader action to deposit the amount of $1.16 million dollars of excess proceeds.

IX. LEGAL ARGUMENT

A. INTRODUCTION

The current posture of this case makes Saticoy the loser of $1.2 million dollars, and the unrelated and non-responsible beneficiaries of the Timpa Trust the recipients of a nearly $1.16 million dollar windfall as the Timpa Trust has no legal relationship with the Loan and/or Thornburg (the borrowers are deceased). After the ruling in *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), Saticoy, armed with this Court's findings, performed the requisite due diligence and was the successful bidder (from a pool of four bidders) at the HOA Foreclosure Sale. If the district court's orders are left undisturbed, the Association, Red Rock, and Republic Services have been made whole and fully paid, yet Saticoy has no recompense for its $1.2 million dollar payment for the Property at the Association's sale, and Thornburg can only seek to recover on its $6 million dollar First Deed of Trust against the Property, which is currently valued at approximately $2 million dollars.

This matter is currently postured to allow relative strangers to the Property to obtain a **1.16 million dollar windfall**, while award Thornburg, as the holder of the First Deed of Trust, with a multi-million-dollar, uncollectable, deficiency and deprive Saticoy of any interest in the Property. There is no equity to be found in this outcome, only an injustice based upon an unreasonable reading of an otherwise clear statute.

The original borrowers, Frank and Madeline are dead, their Trust's beneficiaries are currently seeking to collect a 1.16 million-dollar windfall and will not be responsible for the multi-million-dollar deficiency that Thornburg is certain to realize upon its foreclosure. Saticoy will ultimately be deprived of the Property and lack any recourse for obtaining a return of the purchase price. While the district court sought to pursue equity and read the plain language of the statute, it ultimately reached the exact opposite outcome. Thus, Saticoy seeks to have the matter remanded with either directions to set aside the sale, as Thornburg and Saticoy have already sought and both had agreed upon, or to have the 1.16 million dollars credited to the Thornburg First Deed of Trust, in an effort to mitigate the incredible inequity that this matter presents. Setting aside the Sale does not affect the HOA or Red Rock as Thornburg may pursue its own foreclosure.

B. THE DISTRICT COURT ERRED IN DENYING SATICOY RECONSIDERATION UNDER NRCP(59)(e) AND 60(b) OF THE MSJ ORDER AND EXCESS PROCEEDS ORDER AFTER THE *JESSUP* DECISION ISSUED

The threshold issue in this matter is whether the underlying sale should be set aside pursuant to the request of Saticoy in Third Amended Complaint. JA0142-143. Thornburg likewise sought to have the Association Sale held invalid and set aside by way of its counterclaims. JA00038 and JA0192-3. Both Thornburg and Saticoy sought to have the Association Sale set aside. Indeed, there was even an agreement between Thornburg and Saticoy to this effect as set forth before the district court when the parties sought to reinstate the statistically closed case and when Saticoy sought to amend its complaint in 2019. JA2173-2174. However, when Saticoy sought the district court's reconsideration of the MSJ Order based upon the then-recently issued decision in *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII,* 135 Nev. Adv. Op. 7, 435 P.3d 1217 (2019)("*Jessup*"), the district court agreed to amend the MSJ Order to note that *Jessup* had "not been published and any such references regarding the unwinding of the foreclosure sale were not discussed or considered in the [MSJ Order] of this case and to the extent that the determination[s] in *Jessup* have any bearing to this case, it was not considered by the Court." JA2226. Thus, when made aware of the *Jessup* matter, the district

court acknowledged that it made no finding in relation to the arguments and law therein, and refused to reconsider the prior decisions based on same.

In *Jessup* the Nevada Supreme Court held that a bank's offer to pay the superpriority lien amount of an homeowner association's lien, combined with the HOA foreclosure agent's rejection of that offer, "operated to cure the default as to that portion of the lien such that the ensuing foreclosure sale did not extinguish the first deed of trust." Thus, in *Jessup*, the Court found the HOA purchaser took title subject to the bank's first deed of trust. *Id*.

However, at Footnote 5 of *Jessup* the Court stated as follows:

> As the Bank's deed of trust was not extinguished, we need not address the viability of the Bank's claims against ACS and Foxfield. Similarly, we need 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**. (Emphasis added).

Thus, although in *Jessup* the Court found definitively that the bank's deed of trust survived the HOA foreclosure sale, the Court also recognized that either the bank or the third party purchaser could have requested the court set the sale aside as an alternative to the purchaser taking title subject to the first deed of trust. In this case, Thornburg and Saticoy had pled this very issue in an alternative theory. Given the underlying facts of this case, any evaluation of the equities would dictate

an unwinding, or setting aside, of the sale. The equities should be balanced on Saticoy's attempted to ascertain if a superpriority payment was enumerated prior to the Association Sale.

1. VOIDING OF SALES FOR EQUITY DUE TO FAILURE TO NOTICE AND LOW PRICE IS ALREADY ESTABLISHED LAW.

This Court has established precedent of allowing for the voiding of sales in matters where there was a failure to properly notice the sale, or where the sale resulted in an unconscionably low sale price due to an element of inequity. Failure to "substantially comply with NRS 116.31168 and NRS 107.090(3)," coupled with an analysis of prejudice, can be sufficient to declare a sale void. *U.S. Bank v. Res. Grp., LLC*, 444 P.3d 442, 448 (Nev. 2019). Prejudice is a necessary element of the evaluation, such that a simple failure to properly notice, alone, is insufficient. *W. Sunset 2050 Tr. v. Nationstar Mortg., Ltd. Liab. Co.*, 420 P.3d 1032 (Nev. 2018) . Likewise, sales are set aside when low price, coupled with "some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price" is set forth." *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc.*, 132 Nev. 49, 56, 366 P.3d 1105, 1110 (Nev. 2016) *citing Golden v. Tomiyasu*, 79 Nev. 503, 515, 387 P.2d 989, 995 (Nev. 1963). "History and basic rules of statutory interpretation confirm our view that courts retain the power to grant equitable relief

from a defective foreclosure sale when appropriate." *Id*. The district court retained the ability to review the sale, including the outcome regarding the excess proceeds, on equitable grounds. Thornburg and Saticoy merely asked that it consider the *Jessup* analysis, and the proposed distribution of the excess proceeds, in the equitable analysis. Likewise, had Saticoy had the opportunity to address the underlying Association Sale, Saticoy could have placed issues of unfairness before the district court for inclusion in the equitable analysis. The district elected, specifically, to avoid this analysis.

2. VOIDING OF SALES FOR EQUITY IN SIMILAR CIRCUMSTANCES IS ACCEPTABLE IN OTHER COURTS.

In *In re Cross*, the United States Bankruptcy Court for the District of Nevada discussed how it would resolve a matter, similar to this, where a third party was harmed based on a wrongful foreclosure. 290 B.R. 157 (Bankr. D. Nev. 2001). There, the court held a foreclosure sale was void because it was in violation of the automatic bankruptcy stay. *Id*. As a result, the court rescinded the foreclosure sale and returned the property to its former owner. *Id*. at 159. After the property is returned to its former owner, the next question for the court to determine "is whether the third-party purchaser... can recover expectation damages... as a result of [the] wrongful foreclosure. *Id*. The *In re Cross* court decided that:

> [W]hen a foreclosure sale is rescinded, the parties will be put, as nearly as possible, into the positions they held prior to the violation. The Third–Party Purchaser... is entitled only to return of the funds expended at the sale plus interest and fees. *Id*. at 159.

Furthermore:

> [A] court should attempt to put the parties as close to their original positions as is "reasonably possible and demanded by the equities of the case." *Id*. at 160.

The court's analysis is based in large part on concepts related to rescission of a contract, but the court notes that "[a]s general cannons [sic], [contract rescission concepts] are applicable to this Court's rescission of the wrongful foreclosure sale of Cross' property." *Id*.

> Further, this Court will attempt to place the parties in positions as near as reasonably possible to that occupied prior to the foreclosure sale. … **The proper measure of damages suggested by both law and reason is the return of funds expended by Woolman to purchase Cross' property at the foreclosure sale plus interest and attorney's fees**. See *Walker v. California Mortgage Service*, 67 B.R. 811 (Bankr.C.D.Cal.1986).

Id. at 161 (emphasis added). Although *In re Cross*, is a bankruptcy matter, Saticoy requests this Court find that the proper remedy here, "suggested by both law and reason," is the return of Saticoy's purchase money incident to an unwinding of the sale. Saticoy and Thornburg already discussed this position, and agreed that an unwinding of the sale would be the most equitable outcome. JA2173-2174. Indeed, this is the only outcome which avoids a million-dollar

windfall to the unfunded trust, and a multi-million-dollar deficiency to Thornburg and Saticoy. In fairness, Saticoy should be reimbursed the full amount of its purchase price of $1,201,000.00. See also *In re Walker*, 67 B.R. 811, 816 (Bankr. C.D. Cal. 1986), *subsequently aff'd,* 861 F.2d 597 (9th Cir. 1988), where the court held a third-party purchaser at a void sale was "entitled to the benefits of the rescission of the foreclosure sale," which amounted to a refund of the third-party purchaser's purchase money.

Saticoy sought the district court's decision as it related to the *Jessup* mandate by timely bringing a Motion for Reconsideration, and a Motion to Amend, in an effort to have the analysis conducted and avoid the inequitable windfall which Timpa Trust was awarded. However, the district court incorrectly declined to address Saticoy claims under *Jessup*, declaring that the Motion to Amend was not the "appropriate approach … [as] there is a separate final order and the case is final" in the same Order that the district court denied Saticoy's Motion for Reconsideration acknowledging that *Jessup* had "not been published and any such references regarding the unwinding of the foreclosure sale were not discussed or considered in the [MSJ Order] of this case and to the extent that the determination[s] in *Jessup* have any bearing to this case, it was not considered by the Court." JA2226. The district court was properly and timely informed of the

Jessup holding pursuant to NRCP 60(b), Saticoy and Thornburg had sought to have the Association Sale set aside in their pleadings, and was made aware of the inequality of the MSJ Order paired with the Excess Proceed Order would effectuate. The district court declined to address the issue, specifically stating that the very issue was not addressed while denying Saticoy reconsideration or amendment. Thus, the district court erred, and should be reversed.

3. SATICOY'S CLAIMS AGAINST THE ASSOCIATION IN THE THIRD AMENDED COMPLAINT WERE IMPROPERLY DISMISSED

Saticoy presented two allegations against the Association and Red Rock in the Third Amended Complaint, claiming misrepresentations and unjust enrichment. JA0142-143. While neither the Association nor Red Rock sought to dismiss these claims in their dispositive motion, instead focusing solely on the claims of Thornburg (JA1156-1164 and JA1249-1255), Saticoy's claims against the Association and Red Rock relating to the misrepresentations made at the sale were inexplicably dismissed by the district court in the MSJ Order. JA1724. If Saticoy had the opportunity to present and litigate its claims against the Association and Red Rock, Saticoy could have asserted a basis for unwinding the sale on unfairness and equity grounds. The claims were posed in the alternative, as Saticoy stated that 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 misrepresentation made by the HOA and RRFS." JA0142. Thus, as required by the *Jessup* analysis *supra, the* alternative relief of an unwinding of the sale was requested. JA0142. The district court dismissed Saticoy's claims without argument, evidence, or even the request of the relevant parties. Saticoy had no opportunity to oppose this dismissal, as it appears to have only been added to the MSJ Order as an afterthought. This sudden dismissal, without evidence and in contravention to the requested relief, further calls into question the district court's refusal to reconsider the MSJ Order in light of *Jessup*.

Furthermore, the timing of the foreclosure is important in light of Saticoy's misrepresentation claim, which Saticoy would have addressed if it had known of the challenge to the claim. The Association Sale occurred on November 7, 2014. JA1722. The Association Sale was **seven weeks after** the *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014) issued from the Nevada Supreme Court. It is only reasonable that Saticoy was aware of the decision, and knew of the implications and possible issues regarding a lender's actions prior to a sale. As set forth by Saticoy's counsel at the time of the hearing for the Motion to Amend on October 29, 2019:

> Now we ... fashioned [the claim] 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.

JA2379.

Saticoy clearly sought to set forth to renew the request to set aside the sale, as contemplated in *Jessup,* and sought to do so under the basis that the claim had not been disposed of by the MSJ Order. The district court erred both in dismissing the claims from the Third Amended Complaint, and in prohibiting Saticoy from properly conforming the pleadings to the facts as set forth by denying the Motion to Amend.

4. SATICOY'S CLAIMS AGAINST THE ASSOCIATION AND RED ROCK FOR MISREPRESENTATION SHOULD BE DECIDED ON THEIR MERITS

NRS 116.1108 provides for the application of general principles of law to homeowner association liens as stated below:

> **NRS 116.1108** Supplemental general principles of law applicable. The principles of law and equity, including the law of corporations, the law of unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.

Likewise, NRS 116.1113 provides, "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement."

Focusing on the claim of misrepresentation in *Nelson v. Heer* the Court defined intentional misrepresentation as being established by demonstrating:

> (1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance.
>
> With respect to the false representation element, the suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist." And, with respect to the damage element, this court has concluded that the damages alleged must be proximately caused by reliance on the original misrepresentation or omission. Proximate cause limits liability to foreseeable consequences that are reasonably connected to both the defendant's misrepresentation or omission and the harm that the misrepresentation or omission created.

123 Nev. 217, 225, 163 P.3d 420, 426 (Nev. 2007). The *Heer* Court provided that the omission of a material fact, such as Thornburg's tender of the superpriority amount, is deemed to be a false representation which the Association and Red Rock are bound by the mandates of NRS 116.1113 and NRS 113.130 to disclose to potential bidders, and this duty is a good faith obligation to disclose upon reasonable inquiry from potential bidders at the Association Sale, and such intentional omission is equivalent to a false representation under the facts of this case.

Saticoy did not have the opportunity to address the misrepresentation claim as set forth in the pleadings due to the district court's entry of the MSJ, Order, and

latter, the denial of the Motion to Amend Complaint. Were Saticoy allowed the opportunity to set forth any arguments or support, Saticoy would have supported Saticoy's counsel's arguments at the time of the hearing for the Motion to Amend on October 29, 2019:

> Now we ... fashioned [the claim] 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.

JA2379.

Saticoy should be allowed to pursue their misrepresentation claims. As such the Motion to Amend was improperly denied.

C. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ITS APPLICATION OF NRS 116.31164 TO DETERMINE THE PRIORITY OF THE INTEREST HOLDERS

The Excess Proceeds Order demonstrates a fundamental lack of understanding of various aspects of NRS 116 *et seq*., and its interplay with the date that creates the lien priority determination of the subordinate lien status related to the payment of Excess Proceeds. The priority of the interests in excess proceeds matters is not a game of musical chairs, where the interests of the parties change as time passes and the person in the last chair when an interpleader matter is brought obtains a windfall. The priority of interests is set when the CC&Rs are recorded at

the Clark County Recorder's Office, and only varies as obligations are accrued and old interest are paid in full. The First Deed of Trust, and thus Thornburg's interest in the Excess Proceeds, cannot leap-frog over the Association's lien interest by payment of the superpriority lien amount of the Association's lien. Thus, in any sale pursuant to an assessment lien, whether or not the superpriority payment is made, any excess proceeds must always go to the holder of a first deed of trust before they can go to junior lien holders or a borrower obligated under the deed of trust. This is only reasonable, as it avoids the exact situation presented in this matter; a million-dollar windfall for the Timpa Trust and an uncollectable four-million-dollar deficiency for Thornburg.

1. THE PRIORITY FOR EXCESS PROCEEDS DISTRIBUTION IS DETERMINED BY THE RECORD TITLE AT THE TIME OF THE NOTICE OF DELINQUENT ASSESSMENT LIEN, NOT AT THE HOA FORECLOSURE SALE.

NRS 116. *et. seq*. was in force and effect at the time of the commencement of an action in this case and as of the Association Sale, NRS 116.31164(3)(c),[1] and

[1] The statute has not been amended at any time from the Association Sale to current, such that revisions to the timing and content of other notices under NRS 116 play no role. At the time of the Association Sale, the operative statute was numbered as NRS 116.31164(3)(c). The statute has since been renumbered as NRS 116.31164(7)(b) but reads the same. For purposes of this brief, Saticoy will refer to the statute by its current numbering, NRS 116.31164(3)(c).

governed the distribution of the proceeds generated from the Association Sale. NRS 116.31164(3)(c) provided that after conducting the Association Sale and complying with the prior provisions of NRS 116.31164, the Association or Red Rock shall:

> (c) Apply the proceeds of the sale for the following purposes in the following order:
>
> (1) The reasonable expenses of sale;
> (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;
> (3) Satisfaction of the association's lien;
> (4) **Satisfaction in the order of priority of any subordinate claim of record**; and
> (5) Remittance of any excess to the unit's owner.

(Emphasis added).

As clearly stated by the statute, NRS 116.31164 requires that, after satisfying the expenses of sale; attorney's fees and other legal expenses; and the association's lien, all as enumerated in subsections (1), (2) and (3) of NRS 116.31164, any remaining funds must be paid first to the Lender, the holder of any First Deed of Trust recorded against the Property, then to any junior lien holders in priority of recording as of the filing of the Notice of Delinquent Assessment (NRS 116.31164(3)(c)(4), in order to partially or wholly satisfy any such previously

recorded security interest, and if any funds remain thereafter, then to the Timpa Trust.

The priority status of "any subordinate claim of record" as set forth in NRS 116.31164(3)(c)(4), is determined when the Notice of Delinquent Assessment was mailed by certified or registered mail to the Timpa Trust by Red Rock. NRS 116.31162(1)(a). The payment of the superpriority lien amount by Miles Bauer merely operated to protect Thornburg's First Deed of Trust in maintaining its attachment to the Property and not being extinguished. The outcome of this analysis is that the First Deed of Trust was and always remains junior to the Association's lien, which came about from the recording of the CC&Rs in this case in 1984. JA1720. The impact of Miles Bauer's tender of the superpriority lien amount of the Association's lien was simply, but importantly, the preservation of the First Deed of Trust, and thus retained the Property as security for the underlying debt. Clearly the payment by Thornburg of the superpriority portion of the Association's lien was not with the anticipation that the Excess Proceeds would be delivered to strangers to the Loan, to Thornburg's detriment.

Pursuant to NRS 116.3116(5), "recording of the declaration [CC&Rs] constitutes record notice and perfection of the lien, no further recordation of any claim of lien for assessment under this section [NRA 116.3116] is required."

Pursuant to NRS 116.037, the "Declaration" is defined as "any instruments, however denominated, that create a common-interest community, including any amendment to these instruments." In other words, the Association lien was perfected upon the recording of the CC&Rs which all predate the Loan and the First Deed of Trust.

SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A., 130 Nev. 742, 334 P.3d 408 (2014) held that:

> To initiate foreclosure under NRS 116.31162 through NRS 116.31168, a Nevada HOA must notify the owner of the delinquent assessments. NRS 116.31162(1)(a). if the owner does not pay within 30 days, the HOA may record a notice of default and election to sell. NRS 116.31162(1)(b). Where the UCIOA states general third-party notice requirements, see 1982 UCIOA § 3-l16(j)(4) ("In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected."), *NRS 116.31168* imposes specific timing and notice requirements.

If Nevada homeowner associations are to foreclose their assessment liens as if it were a deed of trust under NRS 107.090, and the CC&Rs determine the priority of the Association lien, then the First Deed of Trust is junior to the Association lien, and that never changes once the action is instituted, unless a reconveyance were to occur.

Pursuant to NRS 116.3116, the Association's lien arose when assessments

became due. NRS 116.3116(2) determines the Association's lien from the service of a Notice of Delinquent Assessment as the 9 months immediately preceding an action to enforce a lien.

> "The provisions of NRS 107.090," governing notice to junior lienholders and others in deed-of-trust foreclosure sales, "apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." NRS 116.31168(1).

SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A., 130 Nev. 742, 746, 334 P.3d 408, 411 (2014). Thornburg was noticed pursuant to the Association's sale documentation, and as evidenced by the tender of the superpriority amount prior to the sale.

When determining "priority" of lien holders, based upon the CC&Rs recordation date, all liens and deed of trust holders shall be junior to the Association's lien.

In *SFR Investments*, the Nevada Supreme Court specifically addressed the language specific to NRS 116.3116(2) as not being applicable to payment priorities or proceeds.

> NRS 116.3116(2) does not speak in terms of payment priorities. It states that the HOA "lien ... is prior to" other liens and encumbrances "except ... [a] first security interest," then adds that, "The lien is also prior to [first] security interests" to the extent of nine months of unpaid HOA dues and maintenance and nuisance-abatement charges. Id. (emphases added). "Prior" refers to the lien, not payment or proceeds, and is used the same

> way in both sentences, a point the phrase "[**11] also prior to" drives home. And "priority lien" and "prior lien" mean the same thing, according to Black's law Dictionary 1008 (9th ed. 2009): "A lien that is superior to one or more other liens on the same property, usu. because it was perfected first."

130 Nev. 742, 747, 334 P.3d 408, 412 (2014).

The sale in this matter occurred two months after the foregoing decision was issued by the Court.A careful reading of NRS 116.3116(2) specifically limits the analysis of NRS 116.3116(2) to that specific section and to all provisions of NRS 116 et. seq. by providing "lien under this section is prior to all other liens and encumbrances on a unit except..."

The use of the word "prior" does not mean "priority" that is delineated in NRS 116.31164(c). If the drafters of the Uniform Common Interest Ownership Act of 1982 ("UCIOA") wanted to make the priority of a homeowner's assessment lien an interest which can change position and priority, the UCIOA would not have chosen two distinct words with different meanings. The use of different descriptions of interests was intentional and logical.

2. NRS 116.3116 PROPERLY BALANCES THE EQUITIES ONLY IF THE LENDER RECEIVES THE EXCESS PROCEEDS

A review of NRS 116 *et. seq.* is consistent with black letter lien law, payment priority, but it was intended to create a unique balancing of equities

between lenders, HOAs and unit owners.

> "As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two [**6] pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all HOA fees or assessments, is subordinate to a first deed of trust."

SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A., 130 Nev. 742, 745, 334 P.3d 408, 411 (2014).

> NRS 116.3116 Liens against units for assessments.
>
> 1. **The association has a lien on a unit** for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, **any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due**. ….
>
> **2. A lien under this section is prior to all other liens and encumbrances on a unit except:**
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> The lien is also **prior** to all security interests described in paragraph (b)

***

This **subsection does not affect the priority of mechanics or materialmen's liens, or the priority of liens for other assessments made by the association**.

***

5. Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(Emphasis added).

NRS 116.31166 - Foreclosure of liens: Effect of recitals in deed; purchaser not responsible for proper application of purchase money; title vested in purchaser without equity or right of redemption.

1. The recitals in a deed made pursuant to NRS 116.31164 of:

(a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;

(b) The elapsing of the 90 days; and

(c) The giving of notice of sale, are conclusive proof of the matters recited.

2. Such a deed containing those recitals is conclusive against the unit s former owner, his or her heirs and assigns, and all other persons. **The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money**.

3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit s owner without equity or right of redemption. (Added to NRS by 1991, 570; A 1993, 2373)

(Emphasis added).

Timpa Trust seeks to rewrite centuries old lien law, common law, and codifications of such concepts. Timpa Trust interprets NRS 116.3116(2) to mandate that if the first deed of trust holder, here Thornburg, pays the superpriority lien amount, the first deed of trust holder is no longer a junior, subordinate, lienholder of the homeowner's association, and as such, it is not entitled to any excess proceeds from an assessment lien sale (hereinafter, the "Flipping Interest" theory, as the first deed of trust "flips" from a junior to a senior interest, relative to the association assessment lien). In using Timpa Trust's Flipping Interest analysis, when Thornburg paid the superpriority lien amount it ensured, but limited, its recovery under the Frist Deed of Trust. The district court interpreted NRS 116.31164 to mean that Thornburg may only look to 1) the Property for the NRS 116 *et seq*. foreclosure proceeds and 2) to Timpa Trust in a deficiency action to collect its Loan balance if any portion of its Loan is unsecured. Unsurprisingly this has the inequitable result that Timpa Trust, which defaulted on the obligation to the Association and Thornburg, is to receive the million-dollar windfall of the Excess Proceeds.

Pursuant to the MSJ Order, the district court determined that Saticoy purchased its interest in the Property subject to the First Deed of Trust held by Thornburg. Therefore, Saticoy contends that the Excess Proceeds in this matter

should go to Thornburg to be applied towards paying off the First Deed of Trust that secures the Property, if the Association Sale is not set aside (*see supra*). In this case, the Loan is under-secured, with a likely deficiency of 4 million dollars.

In order for NRS 116 *et seq.* to operate as a homeowner association foreclosure statute, it must not produce absurd results and follow the general tenets of lien law foreclosure. To infer such a departure from hundreds of years of jurisprudence, and to infer that it was the intent of the UCOIA drafters that such an absurd result would occur when paying the superpriority lien amount would cause a first deed of trust holder to make a conscious decision to either pay that superpriority lien amount and maintain its first deed of trust as secured by real property (that may be over encumbered) or allow an assessment line sale to proceed without paying the superpriority lien amount and hope that the resulting sale would yield a greater net return to the first deed of trust holder. Essentially, the Flipping Interest theory requires first deed of trust holder's to gamble.

NRS 116.3116(2) merely provides a mechanism for the first deed of trust holder to elect to maintain its security on real property and obtain the excess proceeds from an assessment sale (if any), as a credit to the borrower against all sums due under the first deed of trust's obligation. Effectively, in each case the result is the same using that analysis with the UCOIA producing the same net

results. If the first deed of trust does not choose to pay the superpriority lien amount, its first deed of trust converts to a claim for the excess proceeds. If the first deed of trust holder pays the superpriority lien amount, it preserves its collateral, the encumbered real property, and it could then reduce its unpaid balances on the Loan by the net excess proceeds following the assessment lien sale. In either scenario the first deed of trust holder will always receive the excess proceeds and function as expected consistent with real property lien law.

Timpa Trust is ultimately responsible for the same amount under either analysis, whether a Flipping Interest or not. If Timpa Trust solely distributes the Excess Proceeds to the beneficiaries, but does not apportion the deficiency, only then will Timpa Trust obtain a better interest. However, in regards to Thornburg, there is a very clear difference between the two schemes, namely, the difference of the Excess Proceeds.

As Saticoy has consistently set out in this matter, it is the Association and Red Rock's responsibility to pay Thornburg the Excess Proceeds so Thornburg can apply them to the Loan secured by the First Deed of Trust. As it relates to Excess Proceeds, the same process and priority applicable to an NRS 107 sale dealing with priority and excess proceeds of the sale should be followed when dealing with an NRS 116 sale. An NRS 107 sale forecloses on a particular deed of trust, be it first,

second, third, etc., wherein the priority is clearly established by the recordation date. In this matter, the recordation date of the CC&Rs in 1984 clearly established the priority of the Association Lien. Based upon the foregoing, it is clear that the Court should reverse the district court's Excess Proceeds Order with directions that that the Excess Proceeds be paid to Thornburg.

3. NRS 116.3116 ALLOWS THE BANK THREE OPTIONS IN RELATION TO ASSOCIATION FORECLOSURE SALES.

Based upon NRS 116.3116, a lender under a deed of trust should have 3 options to choose from regarding a homeowner association sale, even in light of a superpriority lien interest being paid or not. First, a lender could do nothing. This would result in the lender losing their security interest, and only obtaining excess proceeds from a sale. This would be a reasonable outcome in some circumstances, since the lender would save the costs and time of a foreclosure, and if the property sold for market value and was not over encumbered, the lender would mostly, or completely, be paid in full. The second option would be for the lender to do nothing against, lose their security interest and obtain the excess proceeds from the sale, and if the excess proceeds were insufficient because the property was over encumbered, seek the remainder from a breach of contract action against the borrower. This option can be reasonable if the borrower has the means to pay, but the property has issues that would make a foreclosure problematic. Finally, the

third option is for a lender to appear at a homeowner association sale, and bid on the property up to the amount of their lien. In this scenario, the lender either obtains the property and receives most of the amount bid is returned as excess proceeds by being the winning bid, or ensures that the excess proceeds from the sale will be sufficient to pay the lender's interest in full.

The lender obtains the excess proceeds in all of these scenarios. The difference is that the lenders election either guarantees that the amount of excess proceeds is sufficient to make the lender whole (or nearly whole) and/or obtains the property or can seek recompense from the borrower.

NRS 116.3116, as interpreted by Saticoy, makes each of these approaches reasonable, as the lender obtains the excess proceeds. Under the "Flipping Interest" theory the lender will not obtain the excess proceeds if the superpriority portion is paid, so is forced to determine if the property value obtained through their own foreclosure would be sufficient to make the lender whole. Thus, the lender is forced to take a gamble on whether the excess proceeds, or their own foreclosure, will ultimately net them satisfaction. Saticoy's set interest, wherein the lender can always acquire the excess proceeds, eliminates this uncertainty, and conversely, ensures that borrowers do not obtain windfalls.

4. STANDARD STATUTORY INTEPRETATION DOES NOT ALLOW FOR INTERESTS TO CHANGE BASED UPON LATTER ACTS.

Another issue with the "Flipping Interest" approach is that it revises NRS 116.3116 in a way that is not contemplated by the statute, or any other statute. Essentially, the "Flipping Interest" theory sets for an implicit "if/or" reading of the statute, where the statute does not set forth such a scenario.

By way of example, the following charges are specifically not subordinated to the first deed of trust as the superpriority lien amount includes: (1) any charges incurred by the association on a unit for maintenance and nuisance abatement pursuant to NRS 116.310312; (2) that portion of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding the date on which the notice of default and election to sell is recorded pursuant to NRS 116.31162(1)(b); and (3) the costs incurred by the association to enforce the lien, subject to certain statutory limitations, including limits on the amounts that may be charged and certain superseding regulations that may be adopted by Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

Any "if/or nature is tied to specific amounts and acts, and or other statutes.

This allows a person to determine if there are any alternative scheme. The "Flipping Interest" theory does not allow for such clarity. Despite the clear list set forth in NRS 116.3116, the "Flipping Interest" theory would change the list based on the payment of the superpriority amount, without any statutory language setting forth the "if/or" change contemplated by Timpa Trust. Saticoy's approach does not suffer from this ambiguity, as the interested parties can clearly determine their interest from the recordation date of their interest.

5. EXCESS PROCEED DISTRIBUTION TO LENDERS IS A PREMISE FOR HOMEOWNER ASSOCIATION FORECLOSURES.

In all cases, a homeowner association assessment lien sale extinguishes all security interests that are subordinate to the first deed of trust, but these liens receive any available excess proceeds after satisfaction of the first deed of trust. NRS 116.31164 requires that the excess proceeds be distributed to lenders to satisfy or partially satisfy the debt secured by the deeds of trust recorded against the Property.

As the *SFR Investments* court stated:

> The HOA lien statute, NRS 116.3116, is a creature of the Uniform Common Interest Ownership Act of 1982, § 3-116, 7 U.L.A., part II 121-24 (2009) (amended 1994, 2008) (UCIOA).

130 Nev. 742, 744, 334 P.3d 408, 410 (2014)

In interpreting the UCIOA, the *SFR Investments* court stated that:

> The Uniform Law Commission (ULC) has established a Joint Editorial Board for Uniform Real Property Acts (JEB), made up of members from the ULC; the ABA Section of Real Property, Probate and Trust Law; and the American College of Real Estate Lawyers, which "is responsible for monitoring all uniform real property acts," of which the UCIOA is one, *http://www.uniformlawcommission.com/Committee.aspx?title=Joint* Editorial Board for Uniform Real Property Acts. The JEB's 2013 report entitled. *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act*, also supports that § 3-l16(b) establishes a true priority lien. *Id at 334 P.3d at 314, 2014 LEXIS 88, *13*.

130 Nev. 742, 749, 334 P.3d 408, 413 (2014)

By way of clarification, the Joint Editorial Board for Uniform Real Property Acts 2013 Report author reviews various scenarios regarding the prior lien language of what is NRS 116.3116(2), but this example is instructive because it presumes that a homeowner association's assessment lien sale does not generate enough proceeds to pay off the first deed of trust after the Lender paying the superpriority lien amount.

> **Example Three. Because of a dispute over PPOA's enactment of parking rules and imposition of parking fines, Homeowner withheld payment of the monthly installment of assessments. After six months, PPOA brings an action to enforce its lien for the six preceding months of unpaid assessments and to collect fines (joining Bank as party). Homeowner continues to withhold assessments. Six months later, while the first action is pending, PPOA bring second action to enforce another lien for the most recent six months**

> **of unpaid assessments and fines. Again, PPOA joins Bank as party and seeks to establish its lien priority over Bank for the additional six months of unpaid assessments. Bank objects that PPOA is entitled to only one six-month limited priority lien and cannot extend its lien priority through successive actions.**
>
> Thus, in Example Three, Bank can redeem its first mortgage lien from the burden of PPOA's limited priority lien by payment of $1,500 (reflecting the immediately preceding six months of unpaid assessments) plus the costs (including reasonable attorney's fees) incurred by PPOA in bringing the action to enforce its lien).11 Once Bank has paid this amount to PPOA, PPOA's foreclosure sale to enforce the balance of unpaid assessments would transfer title to the unit/parcel subject to the remaining balance of Bank's first mortgage. PPOA's lien for the unpaid assessment balance would transfer to the proceeds of the sale (if there are any proceeds).
>
> ***
>
> If the value of the unit/parcel is less than the remaining balance due to Bank, of course, PPOA will have no substantial incentive to proceed with the foreclosure sale. No third party will agree to purchase the unit/parcel without an agreement by Bank to reduce the mortgage loan balance.

Saticoy is directly affected by the failure of the Association, by and through its agent, Red Rock, for failure to make the payment of the Excess Proceeds to Thornburg consistent with this analysis, and Saticoy has a significant interest in assuring that the Excess Proceeds will be properly distributed.

Non-judicial foreclosure sales commonly enforce substantially identical statutory schemes for the distribution of foreclosure sale proceeds such as set forth in NRS 116.31164, but in all cases the proceeds are paid to secured interest holders

in order of priority as limited by the availability, and extent. Again, since the homeowner association's assessment lien is foreclosed as if it were a deed of trust, the homeowner association's assessment lien priority dated from the recording of the CC&Rs and liens would be junior to the homeowner association's assessment lien.

6. NRS 116.3116 PRECEDES THE FORECLOSURE REQUIREMENTS OF NRS 116.31162

Further confirmation that the priority of the various interests in the Property, and thus the interests in the Excess Proceeds, was established at the time of the Notice of Delinquent Assessment Lien was served is found in the ordering of the relevant statutes. NRS 116.3116 established the Association's lien, the priority of the Association's lien, and the relative position to the other interests, including Thornburg's First Deed of Trust. *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 745, 334 P.3d 408, 411 (2014). NRS 116.3116 is thus foundational, and set the priority of the liens before the procedure for a foreclosure, or the distribution of excess proceeds, can even be considered. Thornburg's tender prior to the foreclosure, and thus the "Flipping Interest" asserted by Timpa Trust can play no role in determining the order of the interests in the Property, as this order is dictated by statute at the time of the filing of the Notice of Delinquent Assessment Lien. While Saticoy acknowledges that whether Thornburg's First

Deed of Trust can be extinguished or not based on actions taken after the filing of the Notice of Delinquent Assessment Lien, this does not change the priority of the First Deed of Trust.

NRS 116.3116 comports with, and does not change, Nevada's approach to rights and recordation. "At common law, lien priority depends upon the time that liens attach or become perfected: 'first in time, first in right.'" *State Dep't of Taxation v. Kawahara*, 131 Nev. 425, 428, 351 P.3d 746, 748 (Nev. 2015). NRS 116.3116 requirements the attachment of the lien prior to a foreclosure occurring. While NRS 116.3116(3)(b) does set forth a modification of the general "first in time, first in right," it simply sets forth a logical extension whereby a portion of a lien incident to a homeowner association's governing documents takes priority over a first deed of trust. Indeed, the amount of the superpriority portion, and the specific months incorporated therein, are determined at the time of the recordation of the notice of delinquent assessment lien. *Anthony S. Noonan IRA, LLC v. U.S. Bank Nat'l Ass'n EE,* 466 P.3d 1276, 1278 (Nev. 2020). While tender, or lack thereof, may impact the ongoing existence of the first deed of trust being secured by the property, it does not change the priority of the interests. The priority of the interests is set at the outset, in this way the entire foreclosure process mirrors the arrangement of NRS 116.3116 *et seq.* The order of the interests is set from the

commencement, payments after the notice of delinquent assessment lien merely determine whether a party *keeps* their interest and its claim to excess proceeds.

7. FLIPPING INTERESTS CONTRAVENE THE PURPOSE OF THE PUBLIC RECORD.

A "Flipping Interest" theory also clearly contravenes the public recording of documents. Allowing a previously undisclosed act, i.e. the payment of the superpriority lien amount, to change the priority of a deed of trust violates the "first in time, first in right" upon which the priority of liens is generally established. *State Dep't of Taxation v. Kawahara*, 131 Nev. 425, 428, 351 P.3d 746, 748 (Nev. 2015). The "first in time" portion of the priority is determined by review of the publicly recorded statutes. "Generally, the purpose of recording statutes is to provide subsequent purchasers with knowledge concerning the state of title for real property." *State Dep't of Taxation v. Kawahara*, 131 Nev. 425, 131 Nev. Adv. Rep. 42, 351 P.3d 746 (2015).

To that end, NRS 247.190 provides in pertinent part as follows:

> 1. A document acknowledged or proved and certified and recorded in the manner prescribed in this chapter from the time of depositing the document with the county recorder of the proper county for record, provides notice to all persons of the contents thereof, and all third parties shall be deemed to purchase and take with notice.

Similarly, NRS. 111.315 provides that:

> Every conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved, acknowledged and certified in the manner prescribed in this chapter, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which the real property is situated or to the extent permitted by NRS 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record.

Likewise, NRS 111.320 states:

> Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the Secretary of State or recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.

The CC&Rs, which memorialize the Association's inchoate lien upon the Property, were recorded in 1984. Under the "first in time, first in right" standard by which Nevada operates, this necessarily places the Association's lien prior to all latter recorded liens.[2] The "Flipping Interest" theory, herein based upon the payment of the superpriority lien in 2014 (prior to the revisions to the statutes), does not take account of the recordation date of the CC&Rs. The recordation of the CC&Rs remains prior to all other interest, both in time and in right.

[2] Tax liens and other superpriority liens are clear, statutorily

8. SATICOY IS A PROPER PARTY DUE TO ITS INTEREST SUBJECT TO THE DEED OF TRUST.

Saticoy is a proper party and has rights in the determination of the application of the Excess Proceeds. Pursuant to NRS 30.040, Saticoy's rights, status and legal relations are and will be greatly affected by the manner in which the Excess Proceeds are distributed, because all Excess Proceeds paid to Thornburg as holder of the First Deed of Trust encumbering the Property will directly reduce the encumbrance, which is senior to Saticoy's interest in the Property. Any funds paid to subordinate lien holders or the unit owner in lieu of the holder of the First Deed of Trust would constitute a windfall to which the subordinate lien holder and/or Timpa Trust should not be entitled. Junior lienholders would be prejudiced by the payment of any Excess Proceeds to Timpa Trust of prior to the satisfaction of all security interests recorded against the applicable real property in order of priority. Saticoy has standing because Saticoy is responsible for the remainder of the First Deed of Trust secured by Saticoy's property.

9. RED ROCK WAS NOT ENTITLED TO ADDITIONAL COSTS FROM THE EXCESS PROCEEDS.

Red Rock was awarded additional fees and costs from the Excess Proceeds, despite already having obtained costs from the initial Association Sale. In effect,

the district court awarded Red Rock attorney fees without basis. JA1857-1866. While Red Rock couches the request in light of its' seeking to interplead the funds, an essentially unchallenged action which should have taken no more then a few hours of attorney time and minimal costs, it seeks to collect nearly $30,000.00 for participating in the underlying litigation of this matter. JA1853. Red Rock presents no offer of judgment which the parties rejected, nor a successful motion or dismissal of a claim against it. Essentially, Red Rock seeks to be compensated for taking an action it should have taken years prior (the interpleader) and for successfully accomplishing a task which no party challenged (the same interpleader). The Association Sale occurred on November 7, 2014; Red Rock sought to interplead the funds on May 21, 2015. JA0094 and JA1722. Thus, to the extent that the Association Sale is unwound as requested above, or the Excess Proceeds are awarded to Thornburg to apply to the First Deed of Trust, Saticoy requests that Red Rock be similarly directed to provide the additional fees that it acquired, above and beyond a reasonable $2,500 for the interpleader, to Thornburg.

10. SATICOY IS A BONA FIDE PURCHASER.

Finally, if the Association Sale is not unwound, Saticoy is a bona fide purchaser of the Property. It is undisputed at the district court that Saticoy had no notice of the tender of the superpriority lien amount, and Timpa Trust did not offer

any evidence to the contrary. *See* JA1105-1107. In *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, this Court held, "Nationstar has the burden to show that the sale should be set aside in light of Saticoy Bay's status as the record title holder." 405 P.3d 641, 646 (Nev. 2017); see also *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc*., 132 Nev. 49, 64 (Nev. 2016) ("A subsequent purchaser is bona fide under common-law principles if it takes the property 'for a valuable consideration[3] and without notice of the prior equity, and without notice of facts which upon diligent inquiry[4] would be indicated and from which notice would be imputed to him, if he failed to make such inquiry.'") (citations omitted). The district court concluded that Saticoy is a bona fide purchaser, "100 percent they're a BFP. …. So yes, Mr. Bohn's client [Saticoy] is a – is a BFP." JA2333.

This is completely reasonable, as Saticoy could not know of any competing interest in the Property, or a notice of interest, except by the recorded documents, or responses to inquiries made at the time of the sale. There is no ability to conduct further due diligence in this manner of sale, as opposed to sale pursuant to NRS

[3] In this matter, Saticoy was the highest bidder with a bid of 1.2 million dollars.
[4] After the *SFR Investments* decision two months prior, Saticoy would know to inquire as to the facts regarding a property.

107 et seq. where all information is clearly set forth at the county recorder's office. Saticoy would be unable to obtain any additional information prior to the sale,

D. THE DISTRICT COURT ERRED IN BESTOWING A MANIFESTLY UNJUST WINDFALL UPON TIMPA TRUST, TO THE DETRIMENT OF THORNBURG AND SATICOY

The district court sat as a court of equity and impaired Saticoy's title to the Property based on Thornburg's tender of the superpriority lien amount of the Association's superpriority lien amount prior to the NRS 116 foreclosure sale of the Property by the Association to Saticoy. For its part, the Timpa Trust would apparently have the district court believe that its exercise of equitable jurisdiction ceases with that result. It does not. Saticoy respectfully submits that what equity starts, equity must finish, as well. Saticoy now requests this Court remand the matter directing the district court to do just that: complete the adjudication of this matter as a court of equity, including its determination regarding the appropriate disposition of the Excess Proceeds by permitting Saticoy to file the amended complaint. NRS 116.1108 supplements the entirety of NRS 116 with equitable principles of Nevada law, including the distribution statute set forth in NRS 116.3116(4)(7)(b).

The district court's proper application of equitable principles here would have resulted in the proposed Fourth Amended complaint, which comported to the

evidence in this case, being filed with the district court. The entry of the amended complaint would allow the district court to address the inequity of the Excess Proceeds Order upon remand. The Excess Proceeds Order achieves two results that are abhorrent to, and shock the conscience of, a court of equity. First, the Excess Proceeds Order effectuates a forfeiture upon Saticoy because its high bid on the Association Lien at the Association Sale does not result in any corresponding reduction in debt owed against the Property. Second, the Excess Proceeds Order bestows an unwarranted and, indeed, unconscionable windfall upon the Timpa Trust.

The Timpa Trust never stood to receive any money—let alone the Excess Proceeds—from the Property. By mere happenstance of the tender at issue here, the Timpa Trust now seeks to benefit from an unconscionable windfall at Saticoy's expense. This district sitting as a court of equity cannot, and should not, allow this to happen. Fortunately, there are established principles of equity in Nevada that the district court should employ here to avoid such an unconscionable result: namely, the law of equitable subrogation. Under established principles of equitable subrogation, the Excess Proceeds should be awarded to Thornburg to avoid a million-dollar windfall upon the Timpa Trust. By allowing entry of the amended complaint to be filed with the district court, the district court will then be

placed in a position to see this matter through to fruition as a court of equity, consistent with NRS 116.1108, and avoid the unjust and, indeed, unconscionable windfall-forfeiture scenario discussed above.

Unfortunately, as matters presently stand, the inequitable results flowing from the district court's Excess Proceeds Order do not stop there; indeed, they adversely affect Thornburg's interests, as well. The Excess Proceeds Order effectively works a kind of de facto forfeiture with respect to Thornburg by leaving Thornburg without a meaningful remedy. The district court's Excess Proceeds Order states, with respect to the one-action rule and its purported—albeit incorrect—application to Thornburg that, "Thornburgh has not attempted to interfere with the deposit of the Excess Proceeds in recognition of Nevada's one-action rule and its relation to the pursuit of a deficiency judgment. Accordingly, Thornburg has waived its claim to receive the Excess Proceeds." JA2052-3, ¶15. If Thornburg pursues the Excess Proceeds, it runs the risk of running afoul of the one-action rule. On the other hand, if Thornburg does nothing, then it runs the risk of having the Excess Proceeds distributed to the Timpa Trust pursuant to the Excess Proceeds Order. It is only reasonable that the Timpa Trust would disburse the Excess Proceeds to the beneficiaries. The near-certain dissipation of the Excess Proceeds will leave Thornburg without any meaningful recourse as neither

the Timpa Trust nor its beneficiaries are counterparties with respect to the to the Timpa Trust's asserted indebtedness with respect to the Property, and the original borrowers are deceased. The reservation of to the Timpa Trust's rights in the Excess Proceeds Order to pursue those proceeds at a later date to satisfy any foreclosure deficiency is of little solace as the Excess Proceeds will be unreachable.

1. SATICOY'S FOURTH AMENDED COMPLAINT WOULD ADDRESS THE INEQUITABLE OUTCOME.

If the Court is not inclined to award the Excess Proceeds to the Timpa Trust, as argued by Saticoy, then the district court should apply principles of equitable subrogation and award the Excess Proceeds to Saticoy. That result can be reached, however, if the Fourth Amended Complaint is entered. Nevada law on equitable subrogation is designed for just such a circumstance as is presented in this case with respect to the Excess Proceeds: namely, preventing a purported junior-interest holder in the Property from receiving an unwarranted windfall at the expense of Saticoy and Thornburg.

When Saticoy tendered the Association Sale bid for the Property, it did so with the legitimate expectation set in place by the publicly recorded documents that the Excess Proceeds would be distributed in accordance with identified subordinate claims against the Property that were of record, not to bestow a

windfall upon the Timpa Trust. Saticoy had no knowledge of the tender, nor did any of the other bidders at the Association sale. Saticoy would not intentionally seek to be saddled with the Property (only worth approximately $2,000,000.00, JA1722) sill encumbered by the First Deed of Trust for several million dollars, without any corresponding reduction in the outstanding indebtedness claimed by Thornburg. Any indebtedness that would otherwise be reduced through the application of the Excess Proceeds. Additionally, Timpa Trust is not a party to the First Deed of Trust, and the borrowers are now deceased. This is unjust. But this unconscionable result can be avoided through the application of principles of equitable subrogation. That result can be achieved only by permitting Saticoy to file the proposed amended complaint.

2. SATICOY'S FOURTH AMENDED COMPLAINT WAS NOT UNTIMELY OR PROCEDURALLY IMPROPER.

By its terms, NRCP 15(b)(2) provides in relevant part as follows:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

See NRCP 15(b)(2) (emphasis added).

Nevada's policy of over a half century that leave to amend a complaint should be granted freely under NRCP 15 applies with even greater force in the context of amendments made post-judgment pursuant to NRCP 15(b). *See, e.g.*, *Marschall v. City of Carson*, 464 P.2d 494, 498 (Nev. 1970); *see also Good v. District Court*, 279 P.2d 467, 469 (Nev. 1955). Saticoy's request to amend the complaint to comport with the facts in evidence comes post-judgment under NRCP 15(b)(2). Thus, Saticoy's request benefits from a series of directions from the Supreme Court of Nevada that such requests benefit from, and must be reviewed under, the heightened liberality standard discussed above.

By its terms, NRCP 60(b)(6) also provides that relief may be granted from a final order or judgment for "any other reason that justifies relief." NRCP 60(b)(6).

In addition, the *Jessup* Court expressly recognized that a purchaser, like Saticoy here, has standing to request that a foreclosure sale be set aside based upon claims, causes of action, and/or legal theories previously advanced by the bank in that litigation. This possibility was in the event that the purchaser's title to property was impaired as a result of a bank's deed of trust surviving an NRS 116 foreclosure sale by way of judicial determination after the fact as a result of a previously undisclosed tender. *See id*. 435 P.3d at 1221 n.5 ("Similarly, we need 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.") (Emphasis added).

Jessup expressly confers upon Saticoy the right to seek the relief it seeks through the Amended Complaint should have been granted by the district court on this basis alone.

3. ACCEPTANCE OF THE EXCESS PROCEEDS BY THORNBURG WOULD NOT EXTINGUISH THE FIRST DEED OF TRUST.

Additionally in *SFR Invs. Pool 1, Ltd. Liab. Co. v. Fannie Mae*, 453 P.3d 398 (Nev. 2019) (unpublished disposition) this Court issued an Order of Affirmance where Fannie Mae received the excess proceeds from a homeowners' association lien foreclosure sale, but Fannie Mae's deed of trust was not extinguished by the sale, despite receipt of such excess proceeds. This decision notes that a lender's decision to accept excess proceeds from a homeowners' association lien foreclosure sale could just as easily have been "consistent with . . . [the lender's] belief that it could recover the remaining balance of its secured loan by foreclosing on its deed of trust." *Id.* This demonstrates that a lender can have its deed of trust protected (through tender or the Federal Foreclosure Bar) but is

still entitled to receive the Excess Proceeds. Thornburg can, and should obtain the Excess Proceeds if the Association Sale is not set aside.

4. THE ASSOCIATION AND RED ROCK HAVE BEEN UNJUSTLY ENRICHED.

Saticoy set forth a claim for unjust enrichment against the Association and Red Rock in the Fourth Amended Complaint as attached to the Motion to Amend Complaint. JA2186. This claim is particularly relevant for two reasons; 1) it shows the motivation behind the misrepresentations set forth in the preceding claim, and thus supports the setting aside of the sale as requested under the *Jessup* analysis *supra*, and 2) it addresses another inequity, that of the Association and Red Rock being made whole at the expense of Saticoy. Saticoy did not have a chance to set forth arguments or factual support in the record, as Saticoy was not allowed to enter the Fourth Amended Complaint. However, the logical basis for the argument is clear. The Association and Red Rock were seeking to collect more than $20,309.95 in unpaid assessments and related costs. JA1722. While the Association and Red Rock undeniably accomplished this outcome, if the bidders at the sale, including Saticoy, were informed of the prior tender by Thornburg, it is unreasonable to expect that they would have bid the matter up to 1.2 million dollars.

X. CONCLUSION

Based upon the foregoing, the district court committed reversible error in multiple ways. Saticoy respectfully requests that this Honorable Court reverse the MSJ Order and Excess Proceeds Order.

Dated this January 29, 2021.

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XI. ATTORNEY'S CERTIFICATE OF COMPLIANCE

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

[a.] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in Times New Roman font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

[a.] Proportionately spaced, has a typeface of 14 points or more, and contains 13,992 words; or

[b.] does not exceed 30 pages.

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3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this January 29, 2021.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on January 29, 2021, I caused a copy of **Appellant's Opening Brief** to be filed and served electronically via the Court's E-Flex System to the following:

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