IN THE SUPREME COURT OF THE STATE OF NEVADA

SATICOY BAY, LLC SERIES 34 INNISBROOK,

Appellant,

v.

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

Respondents.

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Case No. 80111

APPEAL

From the Eighth Judicial District Court, Department XXVI
The Honorable Gloria Sturman, District Judge
District Court Case No. A-14-710161-C

ANSWERING BRIEF

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DISCLOSURE STATEMENT

The following persons and entities are disclosed pursuant to NRAP 26.1(a):

- U.S. Bank National Association as Indenture Trustee for Thornburg Mortgage Securities Trust 2007-3 Mortgage-Backed Notes, Series 2007-3
- Nationstar Mortgage LLC
- Mr. Cooper Group Inc. (formerly known as WMIH Corp.)
- Nationstar Sub1 LLC
- Nationstar Sub2 LLC
- Nationstar Mortgage Holdings Inc.
- KKR Wand Investors Corporation
- Akerman LLP

DATED this 15th day of April, 2021.

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JURISDICTIONAL STATEMENT

The district court entered summary judgment for Thornburg on December 5, 2018, finding the deed of trust survived the HOA foreclosure sale based on pre-sale tender, and resolving all remaining claims. 10 JA 1729-1742. The district court reopened the case and resolved the remaining interpleader claim on September 11, 2019, and November 19, 2019. 12 JA 2158-68, 2228-32. Saticoy Bay, LLC Series 34 Innisbrook appealed on November 19, 2019. 12 JA 2233-35. There appears to be jurisdiction under NRAP 3A(b)(1).

ROUTING STATEMENT

The Nevada Supreme Court should retain this appeal because the primary issue—excess proceeds following HOA foreclosure sales—is an issue of significant importance that has not fully been addressed. *See* NRAP 17(a)(12). This court should also retain this appeal because the amount in controversy exceeds $1 million and the parties are likely to seek review under NRAP 40B.

PREFACE

Thornburg and Saticoy stipulated the deed of trust survived the HOA's foreclosure sale as a result of pre-sale tender. *See Stipulation* (filed Aug. 3, 2020). Saticoy does not challenge that issue on appeal. *Id.* This court approved the stipulation. *See Order* (filed August 12, 2020).

ISSUES

Tender: Whether superpriority tender by Thornburg's servicer preserved the deed of trust in advance of the HOA foreclosure sale.

Amicus Brief: Whether this court should consider an argument made for the first time in SFR's amicus brief and when the argument contravenes a stipulation between Thornburg and Saticoy that the deed of trust survived the sale.

Excess Proceeds: Which entity—Thornburg or the Timpa Trust—is entitled to excess proceeds following the sale under NRS 116.31164(3)(c) (now codified as NRS 116.31164(7)(b))?

Enlarge Remittitur: Whether this court should delay issuance of the remittitur if affirmed to provide sufficient time for Thornburg to enjoin the proceeds prior to filing a deficiency judgment/breach of contract suit.

Saticoy's Remaining Claims: Whether this court should remand so Saticoy can pursue claims against the HOA and its foreclosing agent.

Untimely Amendment: Whether the district court abused its discretion in not permitting amendment five years into litigation and after dispositive quiet title and excess proceeds judgments so Saticoy could assert an equitable argument that the sale should be set aside.

RELEVANT STATUTE

NRS 116.31164(3)(c) provides, in pertinent part: "After the sale, the person conducting the sale shall . . . [a]pply the proceeds of the sale for the following purposes in the following order . . . (4) Satisfaction in the order of priority of any subordinate claim of record; and (5) Remittance of any excess to the unit's owner."

STATEMENT OF THE CASE

This is an NRS 116 quiet title appeal with more than $1 million in excess proceeds at stake. During the pendency of the appeal, Saticoy stipulated to the district court's finding that the deed of trust survived the HOA's foreclosure sale based on pre-sale tender. This court approved that stipulation, but SFR seeks to disturb it via its amicus brief. This court should affirm the district court's quiet title judgment that the deed of trust survived the sale.

The sale rendered more than $1 million in excess proceeds. Saticoy argues Thornburg is entitled to excess proceeds and that such proceeds should to be applied to the loan. The Timpa Trust, the borrower who defaulted on its loan obligations and has been residing in or renting the property without making a mortgage payment for more a decade, argues it is entitled to excess proceeds. Thornburg has not taken a position as to whom excess proceeds should be awarded due to the potential of violating the one-action rule.

If this court affirms the excess proceeds judgment in Timpa's favor, then Thornburg can pursue the deficiency balance—which could be paid from the excess proceeds—from Timpa after Thornburg forecloses. The result would be the same in this scenario: Thornburg will obtain the excess proceeds.

This court should further affirm the district court's dismissal of all remaining claims brought by Saticoy against the HOA and its foreclosing agent, including misrepresentation and unjust enrichment, and not permit Saticoy to amend its complaint to assert the sale should be set aside after the district court already adjudicated quiet title and excess proceeds.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. THE HOA'S LIEN WAS CREATED

Spanish Trail Master Association recorded its CC&Rs in May 1984. 4 JA 579-611. The Legislature thereafter codified NRS 116 *et. seq.* in 1991, setting into place the HOA lien's priority but granting a limited exception for home mortgages. Thornburg agrees with Saticoy that the recording of the CC&Rs created and perfected the HOA's lien. The lien has a component that is senior to the deed of trust, to the extent of the amount specified in NRS 116.3116(2)(c). The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust. NRS 116.3116(2); *see Prop. Plus Invs., LLC v. Mortg. Elec.*

Registration Sys., Inc, 133 Nev. 462, 465, 401 P.3d 728, 730 (2017); *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 745, 334 P.3d 408, 411 (2014).

B. TIMPA PURCHASED A MULTI-MILLION DOLLAR HOME IN SPANISH TRAIL

In June 2006, Frank Timpa (who is now deceased) obtained a $3,780,000 loan to purchase a golf-course property within Spanish Trail. 4 JA 522.[1] A deed of trust securing the loan was recorded against the property. 4 JA 496-518. The deed of trust identified Countrywide Home Loans, Inc. as the lender and Mortgage Electronic Registration Systems, Inc. (**MERS**) as the deed beneficiary. 4 JA 497. In June 2010, MERS assigned the deed of trust to the Thornburg Mortgage Securities Trust 2007-3. 4 JA 522, 544.[2]

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[1] In July 2006, Timpa conveyed the property via a grant, bargain, sale deed to the Timpa Trust for no consideration. 11 JA 1769. For simplicity, all references to Timpa refer to either Frank Timpa or the Timpa Trust.

[2] A corrective assignment was recorded August 2018, whereby MERS assigned the deed of trust to U.S. Bank National Association as Indenture Trustee for Thornburg Mortgage Securities Trust 2007-3 Mortgage-Backed Notes, Series 2007-3. *See* Clark County Instrument Number 2019-0821-0000410. This assignment has no effect on Thornburg's claims. *See* NRCP 25(c) ("If an interest is transferred, the action may be continued by or against the original party" unless the court grants a motion to substitute the transferee.); *see Triple Quest, Inc. v. Cleveland Gear Co.*, 627 N.W.2d 379, 383 (N.D. 2001) ("The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on his successor in interest even though he is not named." (quoting 7C Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 1958)).

The loan required Timpa to make minimum monthly payments to Thornburg or its predecessors. *See* 1 JA 43-69. In February 2008, Timpa stopped making payments and failed to abide by the terms of the loan. 2 JA 177. As of September 2019, the amount owned on the loan was in excess of $6,600,000. 12 JA 2089. That amount is proportionally greater today and continues to increase.

Timpa allegedly remains in possession of the property, despite not making any mortgage payments for more than a decade and despite Saticoy's eviction efforts. 12 JA 2184. Upon information, Timpa has been either residing in or renting the property for between $6,500-$8,000 per month. 12 JA 2106.

C. TIMPA DEFAULTED ON BOTH HIS HOME LOAN AND HOA OBLIGATIONS

Not only did Timpa stop making mortgage payments, it also stopped paying monthly assessments to Spanish Trail. 7 JA 1159. In August 2011, Spanish Trial, through Red Rock Financial Services, recorded a notice of delinquent assessment lien. 4 JA 613. Spanish Trail, through Red Rock, subsequently recorded a notice of default and notice of sale. 4 JA 656, 678-79.

D. BANK OF AMERICA TENDERED THE SUPERPRIORITY AMOUNT OF THE LIEN

In February 2012, Bank of America, N.A. (**BANA**), the servicer of the loan, tendered the superpriority portion of Spanish Trail's lien. 5 JA 649-51; 8 JA 1280-1304. The monthly assessment rate was $225 and BANA tendered nine times that

amount, $2,025. *Id.* Red Rock rejected the tender check pursuant to its custom and practice at this time. 8 JA 1283-84. Timpa also tendered in excess of the superpriority portion of the lien before the sale. 4 JA 637-44; 7 JA 1154-55.

E. SATICOY PURCHASED THE PROPERTY FOR $1.2 MILLION

In November 2014, Saticoy purchased the property at Spanish Trail's foreclosure sale "without warranty expressed or implied" for $1,201,000 right after the seminal *SFR Investments* decision. 4 JA 681-83; 4 JA 726. The property's fair market value at the time of the sale was $2,000,000. 4 JA 688.[3]

II. PROCEDURAL POSTURE

A. QUIET TITLE LITIGATION

In November 2014, Saticoy filed a quiet title action against Thornburg. 1 JA 1-4. It subsequently filed an amended complaint, a second amended complaint, and a third amended complaint. 1 JA 5-12; 1 JA 139-44.[4] Thornburg answered and asserted claims against Saticoy, Spanish Trail, and Red Rock. 2 JA 167-95. Thornburg requested, among other things, a declaration its deed of trust survived Spanish Trail's foreclosure sale. 2 JA 191.

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[3] The property's fair market value today is approximately $5,150,000. https://www.zillow.com/homedetails/34-Innisbrook-Ave-Las-Vegas-NV-89113/7147860_zpid/ (last assessed, March 15, 2021).

[4] In its third amended complaint Saticoy also asserted misrepresentation and unjust enrichment claims against Spanish Trail and Red Rock premised on their failure to notify Saticoy about BANA's tender. 1 JA 141-42; AOB 58.

In May 2018, Thornburg moved for summary judgment again on the basis of BANA's tender, among other reasons. 4 JA 478-94 (citing *Bank of Am., v. Ferrell Street Tr.*, No. 70299, 2018 WL 2021560 (Nev. April 27, 2018) (unpublished)). Thornburg also filed an errata. 8 JA 1276.[5] In July 2018, the court orally denied Thornburg's motion. 13 JA 2236-2316 (hearing transcript). Thornburg moved to reconsideration immediately after this court published *Diamond Spur*. 9 JA 1384-92 (citing *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) (***Diamond Spur***)).

In December 2018, the district court entered summary judgment for Thornburg. 10 JA 1729-1742; 13 JA 2317-37 (hearing transcript). Saticoy reviewed the order prior to entry. 10 JA 1728. The court found both BANA and Timpa made payments to Spanish Trail via Red Rock in excess of the superpriority portion of Spanish Trail's lien. 10 JA 1735. Specifically, the court found Spanish Trail, through Red Rock, applied Timpa's payments to the superpriority amount. *Id.* The court concluded BANA's tender satisfied the superpriority portion of the lien such that the deed of trust survived Spanish Trail's foreclosure sale. 10 JA 1737-38. The court further concluded Saticoy purchased the property subject to

[5] Saticoy also sought summary judgment, which was orally denied. 3 JA 278-304; 13 JA 2236-2316. Saticoy did not assert Spanish Trail's foreclosure sale should be set aside in its summary judgment opposition. 3 JA 302-03. The same can be said for Saticoy's reconsideration opposition. 10 JA 1651-55. Thus, Saticoy did not specify in its moving papers whether it preferred a finding that it took its interest subject to the deed of trust or a finding that the HOA's foreclosure was void.

the deed of trust. 10 JA 1738. The court dismissed all remaining claims with prejudice—including all claims brought by Thornburg and Saticoy—but later reopened the case to address excess proceeds. *Id.*

B. INTERPLEADER LITIGATION

In May 2015, Red Rock asserted an asserted an interpleader counterclaim. 1 JA 94-108; 2 JA 247-49. After paying Spanish Trail and itself, Red Rock deposited the remaining $1,168,865.06 in the district court. 1 JA 106; 4 JA 619. Thornburg answered, requesting the court make a judicial determination regarding the priority in payment of the excess proceeds. 2 JA 266.

In June 2019, six months after the December 2018 quiet title judgment, Timpa filed a summary judgment motion seeking entitlement to the proceeds. 10 JA 1753-66. In opposition, Saticoy argued the excess proceeds should be distributed to Thornburg and applied to outstanding loan balance. 11 JA 1886-1905. Thornburg did not oppose or otherwise respond to the motion due to concerns over the one-action rule. 12 JA 2063. Red Rock sought additional fees and costs totaling $29,161.69, including fees and costs related to defending Thornburg's claims. 11 JA 1850-55.

In September 2019, the district court granted Timpa's motion, ordering the clerk to distribute $1,139,703.36 to Timpa, and $29,161.69 to Red Rock. 12 JA 2158-68. The district court found when "Thornburg foreclosures on the Thornburg

Deed of Trust, Thornburg will establish a substantial deficiency between what is owed to Thornburg and how much Thornburg will receive from the sale." 12 JA 2063. Because Thornburg did not oppose Timpa's motion, the court found Thornburg waived its claim to recover excess proceeds. 12 JA 2064. However, the court also concluded "Thornburg has not waived any claim to a deficiency balance after it foreclosures on the Thornburg Deed of Trust [and that] Thornburg has not waived a claim that the HOA Excess Proceeds could potentially satisfy such deficiency." *Id.*

In September 2019, Saticoy moved for reconsideration and an emergency stay of the clerk's distribution of the proceeds. 12 JA 2069-85, 2091-99. In October 2019, Saticoy filed a motion to amend its complaint for the fourth time to argue Spanish Trail's sale should be declared void, thereby entitling Saticoy to a refund of the amount it paid at the HOA's foreclosure. 21 JA 2167-80. Thornburg opposed Saticoy's motions to the extent they sought to relitigate the finding that the HOA's foreclosure did not extinguish the deed of trust. 12 JA 2117-20, 2195-98. Saticoy replied, asserting it did not intend to impair, alter, change, or modify Thornburg's lien rights under the deed of trust. 12 JA 2191.

In November 2019, the district court entered an order denying Saticoy's motion to amend its complaint and denying reconsideration in relevant part. 12 JA 2228-32; 13 JA 2344-64 (hearing transcript). Saticoy appealed. 12 JA 2233-35.

In February 2020, the district court awarded $7,563.16 to Republic Services from the excess proceeds. SA 1-3. In total, there remains approximately $1,132,140.20 in excess proceeds, plus interest, to be distributed after the appeal.

III. STIPULATION THAT THE DEED OF TRUST SURVIVED THE SALE

Thornburg and Saticoy stipulated the deed of trust survived Spanish Trail's foreclosure sale as a result of BANA's tender. *See Stipulation* (filed Aug. 3, 2020). This court approved the stipulation. *See Order* (filed August 12, 2020).[6]

ARGUMENT

As a preliminary matter, this court should affirm the district court's summary judgment for Thornburg based on pre-sale tender and conclude Thornburg's deed of trust survived Spanish Trail's foreclosure sale. This is consistent with the stipulation between Thornburg and Saticoy. This court should also affirm the district court's dismissal of all remaining claims brought by Saticoy against Spanish Trail and Red Rock and not permit Saticoy to amend its complaint as doing so may delay foreclosure, cause the loan balance to dramatically increase, and ultimately prejudice Thornburg.

[6] In Saticoy's conclusion, it requests reversal of the quiet title judgment. AOB 59. Thornburg believes Saticoy is not retracting its stipulation that Thornburg's deed of trust survived Spanish Trail's foreclosure sale. Thornburg requests Saticoy clarify its intention in its reply brief.

I. STANDARD OF REVIEW

This court reviews *de novo* district court's summary judgment orders. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A summary judgment motion should be granted under NRCP 56 when the pleadings and other evidence demonstrate no genuine issue as to any material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

This court also reviews the district court's legal conclusions *de novo*, including issues involving statutory interpretation. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). When interpreting a statute, this court first determines whether the language of a statute is ambiguous. *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001). When the language of a statute is clear and unambiguous, this court do not look beyond its plain meaning, and it gives effect to its apparent intent unless that meaning was clearly not intended. *Id.* Rules of statutory interpretation should avoid absurd or unreasonable results whenever possible. *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999).

II. THE HOA LIEN'S PRIORITY

Saticoy argues Spanish Trail's lien has priority over the deed of trust at all times, even after a tender, for purposes of excess proceeds distribution. Thornburg has remained neutral on this due to Nevada's one-action rule. Saticoy's argument

notwithstanding, Thornburg and Saticoy agree BANA's tender preserved the lien of the deed of trust; Saticoy's priority argument only affects the post-sale distribution of excess proceeds.

Thornburg does agree with Saticoy on some of its priority arguments. Thornburg agrees an HOA's lien is created by the recordation of CC&Rs. NRS Chapter 116 creates a comprehensive statutory scheme for creating and managing HOAs. Recognizing that assessments are vital for HOAs to function, the statute grants HOAs a singular lien for assessments. An HOA is formed by recording CC&Rs. NRS 116.2101. The lien is created and perfected when an HOA is formed (or 1991 if an HOA was formed prior to codification of NRS 116 *et seq*.). "Recording of the [CC&Rs] constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required." NRS 116.3116(5). Under Nevada's "first in time, first in right" rule, the HOA's lien would be completely senior to mortgages recorded after the CC&Rs. As a race-notice jurisdiction, when a lien is perfected by recordation prior in time, it has seniority to any subsequently recorded lien. NRS 111.320. NRS 116.3116(2)(a) codifies the race-notice first-in-time rule by making liens recorded prior to the CC&Rs subordinate to the HOA's lien.

NRS 116.3116(2)(b) grants an exception from the first-in-time rule for first mortgages—the statute gives a deed of trust recorded after the CC&Rs priority as

long as it was recorded before the date when the assessment being enforced became delinquent. After granting this exception, the statute limits the exception in NRS 116.3116(2)(c) as this court found in *SFR Investments*. The HOA's lien is senior to a first deed of trust only to the extent of assessments adopted under the periodic budget "which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116(2)(c).

Essentially, NRS 116.3116(2)(c) creates an exception to the exception. *SFR Invs.*, 130 Nev. at 745, 334 P.3d at 410. The statute gives HOAs a lien with a superpriority component against all first mortgage holders from the date the HOA is created, in an amount set at 75% of the annual budget at the time the HOA commences enforcement proceedings. This is why the statute comes with two exceptions. The first, codified at NRS 116.3116(2)(b), creates an exception from the first-in-time rule (which was codified at NRS 116.3116(2)(a)) for deeds of trust. The second, codified at NRS 116.3116(2)(c), makes the exception in NRS 116.3116(2)(b) inapplicable to a component of the HOA's lien. The HOA's lien has a superpriority component from the time it is created by the recordation of CC&Rs—Saticoy and Thornburg agree on that.

Critically, the parties agree the sale did not discharge the deed of trust due to BANA's tender. Saticoy argues the HOA's lien remains prior even though there is

no obligation owed on the superpriority component after tender—and therefore no ability to discharge the deed of trust. In Saticoy's view, the remaining priority entitles Thornburg to the excess proceeds. It is on this latter point that Thornburg takes no position given its concerns over violating the one-action rule.

III. TENDER PRESERVED THE DEED OF TRUST

A. SATICOY STIPULATED THORNBURG'S DEED OF TRUST SURVIVED

BANA tendered the superpriority portion of Spanish Trail's lien before the foreclosure sale. 5 JA 649-51; 8 JA 1280-1304. Timpa tendered too. 4 JA 637-44; 7 JA 1154-55. The district court concluded BANA's tender preserved Thornburg's deed of trust as a matter of law. 10 JA 1729-1742. Saticoy does not challenge the district court's conclusion on appeal and has stipulated Thornburg's deed of trust survived Spanish Trail's sale. *See Stipulation* (filed Aug. 3, 2020). This court approved the stipulation. *See Order* (filed August 12, 2020).

This court should affirm the district court's quiet title judgment in Thornburg's favor as a result of BANA's pre-sale tender. *See Diamond Spur*, 134 Nev. 604, 427 P.3d 113 (2018); *see also Anthony S. Noonan IRA, LLC v. U.S. Bank, N.A.*, 137 Nev. Adv. Op. 15, at *3 n.4 (Nev. April 15, 2021). Alternatively, or in addition to BANA's tender, this court should affirm judgment based on Timpa's tender. *See 9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 459 P.3d 227 (2020). Either way, Thornburg's deed of trust survived.

B. SFR CANNOT ALTER THE STIPULATION BY FILING AN AMICUS BRIEF

In its amicus brief, SFR Investments Pool 1, LLC attempts to challenge the stipulation between Saticoy and Thornburg by raising arguments never contemplated by Saticoy. This court should not consider SFR's arguments, nor should it permit Saticoy to raise them in reply. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (an issue raised for the first time in a reply brief was waived).

1. Stare Decisis Protects *Diamond Spur*

This is not the first time an HOA-sale investor tries to deny the consequence of a pre-sale tender. SFR attempted to do so through similar arguments in *Diamond Spur*. Yet, this court, when reviewing the tender facts, reversed and remanded for entry of judgment for Bank of America. *Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121. Saticoy and SFR both raised the same arguments after *Diamond Spur*. This court and the court of appeals considered these attacks on tender in dozens of NRS 116 cases and have rejected them ***over and over*** again.

Diamond Spur makes clear that if the mortgage lender satisfied the superpriority component prior to the sale, the buyer cannot use some other means to retroactively reinstate the superpriority piece. SFR tried to use the doctrine of *bona fide* purchaser to accomplish this in *Diamond Spur*, but the court correctly rejected its argument. The court recently rejected Saticoy's attempt to dismantle

Diamond Spur by using deed recitals. *Saticoy Bay LLC Series 133 McLaren v. Green Tree Servicing LLC*, 136 Nev. Adv. Op. 85, 478 P.3d 376 (2020). SFR now wants to use NRS 111.180(1) to accomplish the same objective, but the court should reject this argument as well.

Stare decisis protects *Diamond Spur*. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) ("[U]nder the doctrine of stare decisis, we will not overturn [precedent] absent compelling reasons for so doing. Mere disagreement does not suffice."). This doctrine plays a critical role in our jurisprudence, especially when property rights are at stake. *Payne v. Tenn.*, 501 U.S. 808, 828 (1991) ("[c]onsiderations of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"); *Or. ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977). "The reason for this is the special reliance that these decisions command-they become rules of property, and many titles may be injuriously affected by their change." *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 960 (9th Cir. 1982) (quotations omitted); *see U.S. v. Milner*, 583 F.3d 1174, 1184 (9th Cir. 2009); *Barstow v. Union Consol. Silver-Min. Co.*, 10 Nev. 386, 387 (1875) ("It is essential that there should be some stability in the decisions under which rights of property have been acquired."). SFR fails to provide any compelling reason for this court to depart from *Diamond Spur* and dozens of cases that followed.

There is no reason to retreat from *Diamond Spur*. *See Badger v. Eighth Judicial Dist. Court*, 132 Nev. 396, 402, 373 P.3d 89, 93 (2016) (this court is loath to depart from the doctrine of *stare decisis*); *Child v. Lomax*, 124 Nev. 600, 607, 188 P.3d 1103, 1108 (2008) (this court will not overturn precedent unless it is clearly erroneous). Under *Diamond Spur*, a valid tender cures the superpriority delinquency and the *bona fide* purchaser doctrine cannot revive the superpriority piece. 124 Nev. at 612, 427 P.3d at 121. While *Diamond Spur* did not address explicitly address NRS 111.180, it made clear that a buyer cannot deny the consequence of tender through a collateral challenge. The *bona fide* purchaser doctrine cannot turn a non-superpriority sale into a superpriority sale.

2. Saticoy Never Raised NRS 111.180 as a Defense to Tender

Saticoy did not raise NRS 111.180 below or on appeal. SFR now raises this statute for the first time—and after the deed the trust stipulation—in a last-minute attempt to convert the a non-superpriority sale into a superpriority sale. SFR is prohibited from raising NRS 111.180.

An amicus curiae cannot raise new arguments on appeal. *See Ormsbee v. Allstate Ins. Co.*, 865 P.2d 807, 808 (Ariz. 1993) ("An amicus cannot raise issues which have not been raised by the parties."); *State v. Lasorte*, 596 P.2d 477, 482 (Mont. 1979) ("An Amicus curiae cannot raise separate issues not raised by the parties."); *Endress v. Brookdale Comm. College*, 364 A.2d 1080, 1087 n.6 (N.J.

1976) ("an Amicus curiae must accept the case before the court with the issues made by the parties); *Russell v. Board of Plumbing Examiners*, 74 F.Supp.2d 349, 351 (S.D.N.Y. 1999) ("The *amicus* cannot raise or implicate new issues that have not been presented by the parties."); *Temple Univ. Hosp, Inc. v. Healthcare Management Alternatives, Inc., Inc.*, 832 A.2d 501, 506 n.2 (Pa. 2003) ("An amicus curiae is not a party and cannot raise issues that have not been raised or preserved by the parties.")

SFR was not involved below. Nor was NRS 111.180 addressed below. SFR has no right to argue against the judgment on NRS 111.180 grounds, especially where Saticoy and Thornburg stipulated Thornburg's deed of trust survived the sale. NRS 111.180 is not before this court.

3. Superpriority Tender Trumps BFP Status

Even if this court expressly considers NRS 111.180 as to post-July 2013 sales, it should not make any difference in circumstances where there was a pre-sale superpriority tender. This is because superpriority tenders extinguish the superpriority lien, transforming superpriority sales into non-superpriority sales ***prior to*** the sale. As this court broadly recognized in *Diamond Spur*:

> A party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void. *See Henke v. First S. Props., Inc.*, 586 S.W.2d 617, 620 (Tex. App. 1979) ("[T]he doctrine of good faith purchaser for value without notice does not apply to a purchaser at the void foreclosure sale."); *see also* Baxter Dunaway, *Trustee's Deed: Generally*, 2 L. of Distressed Real Est. § 17:16 (2018) ("Avoid deed

> carries no title on which a bona fide purchaser may rely...."). Because a trustee has no power to convey an interest in land securing a note or other obligation that is not in default, a purchaser at a foreclosure sale of that lien does not acquire title to that property interest. *See id.*; *cf. Deep v. Rose*, 234 Va. 631, 364 S.E.2d 228 (1988) (when defect renders a sale wholly void, "[n]o title, legal or equitable, passes to the purchaser").
>
> A foreclosure sale on a mortgage lien after valid tender satisfies that lien is void, as the lien is no longer in default. See 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, Real Estate Finance Law § 7:21 (6th ed. 2014) ("The most common defect that renders a sale void is that the mortgagee had no right to foreclose...."); *see also Henke*, 586 S.W.2d at 620 (concluding the payment of past-due installments cured loan's default such that subsequent foreclosure on the property was void). It follows that after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property.

134 Nev. at 612, 427 P.3d at 121.

In support of its continued attack on *Diamond Spur*, SFR cites legislative testimony from a senate hearing on April 1, 2013 relating to Assembly Bill 300, which amended NRS 107.080. SFR fails to cite any testimony from Senate Bill 493, which later became NRS 111.180. The only substantive testimony on Senate Bill 493 clarifies this statute simply codified the common law bona fide purchaser doctrine. Hearing on SB 493 before Assemb. Comm. on the Comm. & Labor, 77th Legislature, p. 10 (Nev. May 3, 2009) (Statement of Rocky Finseth of the Nevada Land Title Association). In other words, this court's bona fide purchaser holding in

Diamond Spur applies equally to HOA foreclosure sales before and after NRS 111.180's passage.

SFR's namesake case even contemplates that financial institutions would pay off the HOA's NRS 116.3116 superpriority lien before the sale. *SFR Invs.*, 130 Nev. at 748, 334 P.3d at 412-13 ("secured lenders will most likely pay the [9] months' assessments demanded by the association rather than having the association foreclose on the unit. (citing 1982 UCIOA § 3–116 cmt. 1; 1994 & 2008 UCIOA § 3–116 cmt. 2)); *id.* at 750, 334 P.3d at 414 ("But as a junior lienholder, U.S. Bank could have paid off the HOA lien to avert loss of its security."). Saticoy had notice of the seminal *SFR Investments* decision before the sale and could have inquired about whether the superpriority portion of Spanish Trail's lien was satisfied before the sale. Saticoy choose not to, and cannot now be throned with BFP status to subvert Bank of America's tender.

Post-tender sales do not mutate back to superpriority status just because an HOA-sale purchaser purports to be a statutory BFP (as opposed to a common law BFP). HOA-sale purchasers purchased what they purchased—title subject to a financial institution's deed of trust. The attacks on *Diamond Spur* must stop.[7]

[7] Even if there was a statutory conflict between NRS 116.3116 and NRS 111.180, the first would win. *See Sierra Ins. Co. v. Rottman*, 95 Nev. 654, 601 P.2d 56 (1979) ("it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally."). The first is specific to HOA foreclosure sales where the second

4. The Federal Court Has Addressed *Diamond Spur* and NRS 111

While this court has yet to expressly address the interplay between *Diamond Spur* and NRS 111.180, the federal district court has. That court rightly chose *Diamond Spur* (or the tender cases preceding *Diamond Spur*). *See Bank of N.Y. Mellon v. Spring Mountain Ranch Master Ass'n*, 2020 WL 6435749, at *3-4 (D Nev. Nov. 2, 2020); *U.S. Bank, N.A. v. Eagles, LLC*, 2017 WL 2259768, *3-6 (D. Nev. May 23, 2017); *Nationstar Mortg., LLC v. Hometown West II Homeowners Ass'n*, 2016 WL 3660112, at *2-8 (D. Nev. July 8, 2016).

In *Spring Mountain*, the HOA-sale purchaser argued it held free and clear title since it was a bona fide purchaser under NRS 111.180(1). *Id.* at *3. The court rejected the argument, recognizing "'a party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void.'" *Id.* (citing *Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121). This holding is correct as to all HOA foreclosure sales, not just those occurring before July 1, 2013.

Even if BFP were relevant, the record demonstrates, as set forth below, that Saticoy is not a bona fide purchaser. *See Huntington v. Mila, Inc.*, 119 Nev. 355, 75 P.3d 354, 356 (2003) ("A subsequent purchaser with notice, actual or constructive, of an interest in property superior to that which he is purchasing is

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applies to real property sales generally. Like this court has proclaimed, BFP yields to superpriority tender. *See Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121.

not a purchaser in good faith, and is not entitled to the protection of [Nevada's] recording act."); *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86 Nev. 494, 471 P.2d 666, 668 (1970) (a purchaser has "duty of inquiry ... when the circumstances are such that [he] is in possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights" (internal quotation marks omitted)). And even if it were a BFP, it was a BFP at a non-superpriority sale, obtaining title subject to the deed of trust. Of course, the entire issue is moot since Saticoy stipulated that the deed of trust survived the HOA's foreclosure.

5. SFR Re-Argues the Tender Should Have Been Recorded

SFR argued in *Diamond Spur* that Bank of America was required to record its tender. 134 Nev. at 609, 427 P.3d at 119. This court rejected that argument. *Id.* at 609-10, 427 P.3d at 119-20; *see Renfroe v. Carrington Mortg. Servs., LLC*, No. 76450, 2020 WL 762638, at *2 (Nev. Feb. 14, 2020) ("we have already held that a deed of trust holder need not record notice of its tender") (unpublished). SFR continues to make the argument. It should be disregarded under stare decisis.

SFR puts the onus on Bank of America to record the tender, but takes no responsibility for purchasers to investigate the kind of title they were purchasing. Any diligent buyer would perform due diligence before spending over a million dollars on an encumbered property. HOA-sale purchasers, like SFR and Saticoy

Bay, are hardly innocent. *Nationstar Mortg., LLC v. Springs at Spanish Trail Ass'n*, 2019 WL 2250264, at *6 (D. Nev. May 24, 2019) (Saticoy Bay is not "an innocent, third-party bona fide purchaser"); *U.S. Bank, N.A. v. SFR Invs. Pool 1*, LLC, 2016 WL 4473427, at *10 (D. Nev. Aug. 24, 2016) ("SFR was not an innocent purchaser").

Most HOA-sale purchasers are sophisticated real estate speculators. For several years, they capitalized on the uncertainty regarding the interpretation of NRS 116.3116 as to whether a HOA foreclosure could operate to extinguish a first deed of trust on the subject property by scooping up properties for pennies on the dollar. The only reason this sale fetched $1.2 million is because Saticoy purchased it two months after this court published *SFR Investments*. 4 JA 681-83. And the only reason Saticoy seeks to void this sale, as opposed to the hundreds of cases that came before, is because it has been unable to rent it out and recoup its purchase money. Saticoy, like other investors, took a calculated investment risk.by purchasing properties at HOA foreclosure sales.

6. Tender is by Operation of Law, Not Equity

SFR also invites the court to err by considering tender to be a matter for equity rather than an issue of law. This court rejected this argument in *Diamond Spur*. 134 Nev. at 610, 427 P.3d at 116 (delivery of a check sufficient to pay the

superpriority portion "cure[s] the default and prevent[s] foreclosure as to the superpriority portion of the HOA's lien ***by operation of law***." (emphasis added)).

This court has also rejected the argument in post-*Diamond Spur* decisions. *McLaren*, 478 P.3d at 379 ("we reject Saticoy Bay's argument that the district court was required to weigh the equities before finding a valid tender"); *Premier One Holdings, Inc. v. Nationstar Mortg., LLC*, No. 76591, 2020 WL 2527392, at *1 (Nev. May 15, 2020) (unpublished) ("the district court in essence concluded that the tender had no bearing on the equities, which was consistent with our subsequent decision in [*Diamond Spur*]"); *SFR Invs. Pool 1, LLC v. Bank of Am., N.A.*, No. 77898, 2020 WL 1670746, at *1 n.1 (Nev. March 27, 2020) (unpublished) ("***We clarify that the district court did not grant respondent equitable relief.*** Rather, it correctly determined that appellant took title to the property subject to the first deed of trust because the superpriority tender cured the default as to that portion of the HOA's lien ***by operation of law***" (emphasis added)); *Cogburn Street Tr. v. U.S. Bank N.A.*, No. 74516, 2019 WL 2339538, at *1 (Nev. May 31, 2019) (unpublished) (calling BANA's tender, "legal tender").

Like this court, the Ninth Circuit recently rejected SFR's argument that tender should be applied as a matter of equity in *Nationstar Mortgage LLC v. Springs at Spanish Trail Association*, 812 Fed.Appx. 526 (9th Cir. July 13, 2020):

> Saticoy Bay presses only one issue not addressed specifically in [*Diamond Spur* and *Bank of Am., N.A. v. Arlington W. Twilight*

> *Homeowners Ass'n*, 920 F.3d 620 (9th Cir. 2019)]. The district court, it says, "was still required to weigh the equities" even though it "found that Miles Bauer made a valid tender." Yet, apart from all else, *Shadow Wood* . . . did not concern a valid tender of the superpriority portion of an HOA lien to preserve a first deed of trust, and the Court in *Diamond Spur* exercised no such discretion.

SFR's continued reliance on *Shadow Wood Homeowners Assoc., Inc. v. N.Y. Cmty. Bancorp., Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016) is misplaced. In that case, the former owner had been foreclosed by the association and sought a declaration setting aside the sale. *Shadow Wood*, 132 Nev. at 51-54, 366 P.3d 1107-08. The former owner did not attempt to pay, so it could not make a tender argument. Instead, it challenged the sale on the basis of "fraud, unfairness, or oppression" and inadequacy of price. 132 Nev. at 59-60, 366 P.3d at 1112-13. The former owner did not invoke the tender doctrine, and instead made "an equitably based post-sale challenge." 132 Nev. at 65, 366 P.3d at 1116. *Shadow Wood* was factually different from this case and from *Diamond Spur*, where the obligor paid the amount owed and sought a ruling on that basis.[8]

[8] SFR's "tender as equity" approach would weaken the effect of Bank of America's valid tender to the benefit of HOA-sale investors. District courts, under this approach, would lose their bright-line, *Diamond Spur* tender test and be forced to look at the equities in every case. This would prolong litigation and increase the burgeoning caseload in NRS 116 actions stemming from the last economic downturn.

SFR should stop "overread[ing] *Shadow Wood,"* and cease any "argu[ment] that *Diamond Spur* was wrongly decided or is inapposite" *Stone Hollow Ave. Tr. v. Bank of Am., N.A.*, No. 64955, 2016 WL 8613879, at *2 (Nev. Dec. 21, 2016) (unpublished) (Pickering, J., dissenting); *Springs at Spanish Trail*, 2019 WL 2250264, at *2.

IV. DISTRIBUTION OF EXCESS PROCEEDS

Thornburg concedes it took no position while Saticoy and Timpa disputed entitlement to excess proceeds. Thornburg was concerned a claim to the excess proceeds could jeopardize a future deficiency judgment/breach of contract action against Timpa.[9]

The district court appreciated Thornburg's dilemma. 12 JA 2064. The district court understood that when Thornburg forecloses, there will be a substantial deficiency between what is owed to Thornburg and how much Thornburg will receive from the sale. 12 JA 2063. That deficiency is in the millions of dollars and is increasing daily. *See* 4 JA 540; 12 JA 2089.

Thornburg raised the excess proceeds issue below by acknowledging it and explaining why it did not want to weigh in on the merits of distribution. 12 JA 2063-64. Thornburg likewise abstains from taking a position on it.

[9] Thornburg was also concerned Saticoy could challenge the quiet title judgment if Thornburg received excess proceeds. *See SFR Invs. Pool 1, LLC v. Fed. Nat'l Mortg. Ass'n*, No. 76913 (AOB 9-11).

Thornburg cannot be said to have waived entitlement to excess proceeds in this action over concerns arguing about excess proceeds would violate the one-action rule. Holding as such puts deed beneficiaries in a catch-22 and ultimately could result in two lawsuits involving the same proceeds.[10]

V. THIS COURT'S REMITTITUR SHOULD BE ENLARGED

NRAP 41(a)(1) states "remittitur shall issue 25 days after the entry of judgment unless the time is shortened or enlarged by order." This court should enlarge the time should judgment be affirmed due to serious concerns over waste by Timpa. Thornburg requires sufficient time to file a deficiency judgment/breach of contract action and seek an injunction before distribution of the excess proceeds. It also requires sufficient time to foreclose under NRS 107. If this court does not enlarge the remittitur, it should at the very least provide instruction to the district court regarding distribution of excess proceeds.

VI. A VOID SALE WILL DELAY FORECLOSURE

At the time, Saticoy was thrilled to have obtained a $2,000,000 property in Spanish Trail for just $1,201,000. Since it has been unable to rent the property and has been incurring years of legal fees, it now admits to making a poor investment decision. This court should not feel sorry for Saticoy as it, along with its sister entities, have made ***millions of dollars*** at the hands of financial institutions

[10] Thornburg did not authorize Saticoy to speak for it nor should this case's posture be taken as agreement or a concession that Saticoy can speak for Thornburg.

purchasing properties at HOA foreclosure sales for pennies on the dollar. *See, e.g, Resources Group, LLC v. Nevada Ass'n Servs.*, 135 Nev. 48, 437 P.3d 154 (2019) (awarding free and clear property worth a couple million dollars to Saticoy's parent entity based on the belief that it took a full week to mail a check from the main U.S. Post Office to a collection agent); *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 388 P.3d 226 (2017) (purchasing two lots in Canyon Gate Country Club for $81,000 and the combined lot today is worth $4 million). This court should not void the sale based on equity as Saticoy knew the risks associated with its post-*SFR* "without warranty" purchase. Voiding the sale will complicate foreclosure and prejudice Thornburg.

A. SATICOY IS NOT A BONA FIDE PURCHASER

This court should not void Spanish Trail's foreclosure sale because Saticoy is not a bona fide purchaser. It knew exactly what it was getting into when it purchased the property "without warranty" after the *SFR Investments* decision. 4 JA 681. It had actual, or at the very least, constructive knowledge of Thornburg's deed of trust, and therefore BANA's payment, before bidding on the property for what it described as fair market value. 4 JA 725-26.[11]

[11] To the extent Saticoy argues its purported bona fide status impact's BANA's tender, this court rejected that argument in *Diamond Spur*. 134 Nev. at 612, 427 P.3d at 121.

"The bona fide purchaser doctrine protects a subsequent purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of conveyance." *25 Corp., Inc. v. Eisenman Chemical Co*., 101 Nev. 664, 675, 709 P.2d 164, 172 (1985). However, a purchaser with notice, actual or constructive, of an interest in the land superior to that which he is purchasing is not a purchaser in good faith, and not entitled to the protection of the recording act." *Allison Steel*, 86 Nev. at 499, 471 P.2d at 669.

A party has constructive notice of any recorded interest in the real property records—regardless of whether the party searched the real property records. *Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077, 1086-88 (D. Nev. 2012) (noting the purpose of Nevada's recording statute is to provide constructive notice of all recorded instruments to any subsequent purchaser or mortgagee); *see Fed. Nat'l Mortg. Ass'n v. SFR Invs. Pool 1, LLC*, 2015 WL 5723647, at *3 (D. Nev. Sept. 28, 2015) ("The 2011 recording of Fannie Mae's assignment of the deed of trust put the purchaser on constructive notice of Fannie Mae's interest and prevents the purchaser from claiming BFP status in this case.").

Saticoy did not just have constructive notice; it had actual notice having reviewed the publicly recorded documents prior to the sale. 5 JA 725. The recorded deed of trust, specifically section 9 and the PUD Rider, put Saticoy on inquiry notice of BANA's tender. Section 9 states "Protection of Lender's Interest

in the Property and Right Under this Security Instrument" permits the lender to "pay[] any sum secured by a lien which has priority over" the deed of trust. 4 JA 503. The PUD Rider provides "[i]f Borrower does not pay [HOA] dues and assessment, the Lender may pay them." 4 JA 515.

These provisions in the deed of trust put Saticoy on notice that the first lien holder could pay off a lien which had a portion of priority over the deed of trust and that it was purchasing the property subject to the deed of trust. Indeed, "Saticoy was aware of the [*SFR Investments*] decision, and knew of the implications and possible issues regarding a lender's actions prior to the a sale." AOB 23; *see SFR Invs*., 130 Nev. at 748, 334 P.3d at 413 ("secured lenders will most likely pay the [superpriority amount] demanded by the association rather than having the association foreclose on the unit." (italics omitted)).

Saticoy does not present any evidence it inquired with Red Rock whether BANA tendered in advance of Spanish Trail's foreclosure sale—something it easily could have done as part of its pre-sale due diligence when spending over a $1,000,000. *See* AOB 50 ("After the *SFR Investments* decision two months prior, Saticoy would know to inquire as to the facts regarding a property."). Even if some evidence existed, any inquiry to Red Rock alone was insufficient as a matter of law. *NV Eagles*, 2017 WL 2259768, at *6 ("reliance upon a vendor, or similar person with reason to conceal a prior grantee's interest, does not constitute

adequate inquiry" (citing the Thomas treatise)). Saticoy had the burden of proving bona fide status, and it cannot meet that burden. *Berge v. Fredericks*, 95 Nev. 183, 87, 591 P.2d 246, 248 (1979).

The bona fide purchaser doctrine is "shield to protect, and not a sword to attack." *Oliver v. Piatt*, 44 U.S. 333, 333 n.1 (1845). Saticoy cannot use the bona fide purchaser doctrine as a sword to rescind the sale just because it is unhappy with its purchase years later.[12] Because Saticoy is not a bona fide purchaser, it is not entitled to the protection of the recording statutes, and cannot invoke equitable arguments for the first time ***on the eve of the appeal***. *See* 3 JA 283 (Saticoy's summary judgment motion: "equitable relief is not available to a party that was on notice but failed to act").

B. EQUITY WAS UNTIMELY INVOKED

Saticoy had always sought to keep the property. 1 JA 143. That is until it sought to file a fourth amended complaint in October 2019, ***after*** the district court declared Saticoy purchased the property subject to the deed of trust and after the district court awarded the exceeds process to Timpa. 12 JA 2167-89. Had Saticoy wanted to equitably set aside the sale, it should have presented as such in its

[12] Saticoy remarked during the motion to amend hearing that it "would have not spent a million two without making an inquiry as to when that tender was made in this particular case." There is no evidence that any inquiry was made. The necessarily implication is that Saticoy made no such inquiry and now wishes to back out in hindsight.

original, first, second, or third amended complaints. Presentation at the NRCP 60(b) stage, ten months after the district court granted Thornburg's summary judgment, is untimely.

Saticoy attempts to show its equitable argument was timely by tying it to this court's now-vacated *Jessup* decision. *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. 42, 435 P.3d 1217 (2019). But this court published *Jessup* in March 2019, meaning Saticoy could have asserted its *Jessup* equity argument in opposition to Timpa's summary judgment motion in July 2019. And it certainly could have set forth an equity argument in February 2017, when it filed its third amended complaint, or when it sought summary judgment in December 2018. By that time, this court published *Shadow Wood*, which manifested that district courts could look to equity to seek aside foreclosures sales. 132 Nev. at 51, 366 P.3d at 1106. Saticoy was aware of *Shadow Wood* and even cited it throughout its summary judgment motion. 3 JA 283-92.

Asserting equity under *Jessup* five years into litigation after dispositive rulings is untimely and unreasonable, especially where Saticoy did not previously assert equity in its moving papers. 3 JA 302-03; 10 JA 1654. The district court did not abuse its discretion in not permitting amendment. *See Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) ("a motion for leave to amend pursuant to NRCP 15(a) is addressed to the sound discretion of the trial court, and its action in

denying such a motion will not be held to be error in the absence of a showing of abuse of discretion." (internal quotations omitted)).

C. SATICOY'S CLAIMS AGAINST SPANISH TRAIL AND RED ROCK SHOULD BE LIMITED TO MONETARY DAMAGES ONLY

This court should not allow Saticoy to re-assert claims against Spanish Trail and Red Rock on remand because doing so would significantly prejudice Thornburg and would unnecessarily prolong this quiet title litigation. This litigation has already lasted seven years and resulted in a summary judgment ruling favoring Thornburg that Saticoy has stipulated to. 10 JA 1729-1742; *Stipulation* (filed Aug. 3, 2020). All that remains is an appellate adjudication of excess proceeds. Nationstar has no objection to Thunder asserting damages claims against Spanish Trail and Red Rock, but if damages are awarded, such damages should not include voiding the sale. Voiding the sale has severe monetary implications and impacts Thornburg's forthcoming foreclosure sale.

If the sale is voided, Timpa is automatically reinstated to title. A foreclosure under this circumstance would take ***a lot longer*** since Thornburg will be required to comply with the Homeowners' Bill of Rights, NRS 107.400 *et seq.*, and the foreclosure mediation program. Any delay in foreclosure riches the pocketbooks of Timpa who has been living in or renting the property for between $6,500-$8,000 per month, 12 JA 2106, and increases the loan balance by hundreds of thousands of dollars. As of April 2018, the amount owned on the loan was in excess of

$6,200,000. 4 JA 540. As of September 2019, the amount owned on the loan was in excess of $6,600,000. 12 JA 2089. By time this quiet title case turned void sale case reaches final resolution after an evitable second appeal, the loan balance could easily reach $10,000,000.

D. CLAIMS AGAINST SPANISH TRAIL AND RED ROCK ARE LIKELY FUTILE

While Thornburg takes no position on the viability any action by Saticoy against the Spanish Trail or Red Rock for damages, this court recently held these misrepresentation lawsuits by Saticoy Bay against HOAs lack merit. *See Saticoy Bay, LLC Series 1330 Crystal Hill*, No. 79778, 2021 WL 1192532, at *1 (Nev. March 26, 2021) (unpublished) ("Appellant's complaint alleged misrepresentation, breach of the duty of good faith, conspiracy, and violation of NRS 113.130. Each of these claims fail."); *Saticoy Bay, LLC Series 9157 Desirable v. Tapestry at Town Center Homeowners Ass'n*, No. 80969, 2021 WL 620427, at *1 (Nev. Feb. 16, 2021) (unpublished) ("appellant's claims for misrepresentation and breach of NRS 116.1113 fail because respondents had no statutory duty to disclose whether a superpriority tender had been made"); S*aticoy Bay LLC Series 3237 Perching Bird v. Aliante Master Ass'n*, No. 80760, 2021 WL 620978, at *1 (Nev. Feb. 16, 2021) (unpublished); *Saticoy Bay, LLC, Series 3984 Meadow Foxtail Drive v. Sunrise Ridge Master Ass'n*, No. 80204, 2021 WL 150737, at *1 (Nev. Jan. 15, 2021) (unpublished); *Saticoy Bay LLC Series 5413 Bristol Bend Ct. v. Nevada Ass'n*

Servs., No. 78433, 2020 WL 6882781, at *1 (Nev. Nov. 23, 2020) (unpublished); *Saticoy Bay, LLC Series 8320 Bermuda Beach v. South Shores Community Ass'n*, No. 80165, 2020 WL 6130913, at *1 (Nev. Oct. 16, 2020) (unpublished); *Saticoy Bay, LLC, Series 11339 Colinward v. Travata and Montage at Summerlin Centre Homeowners' Ass'n*, No. 80162, 2020 WL 6129987, at *1 (Nev. Oct. 16, 2020) (unpublished); *Saticoy Bay, LLC, Series 8920 El Diablo v. Silverstone Ranch Community Ass'n*, No. 80039, 2020 WL 6129887, at *1 (Nev. Oct. 16, 2020) (unpublished); *Saticoy Bay, LLC, Series 6408 Hillside Brook v. Mountain Gate Homeowners' Ass'n*, No. 80134, 2020 WL 6129970, at *1 (Nev. Oct. 16, 2020) (unpublished); *Saticoy Bay, LLC, Series 3123 Inlet Bay v. Genevieve Court Homeowners Ass'n*, No. 80135, 2020 WL 6130912, at *1 (Nev. Oct. 16, 2020) (unpublished).

While this court has yet to address Saticoy's unjust enrichment claim[13], it is so-related to its misrepresentation claim, that it would likely fail too. In its third amended complaint, Saticoy alleged that "[i]f [Spanish Trail] or [Red Rock] had disclosed in the documents recorded with the County Recorder, or at the public auction held on November 7, 2013, that the assessment lien being foreclosed did not have a super priority component, [Saticoy] would not have bid and paid

[13] The federal district court rejected Saticoy's unjust enrichment claim. *JPMorgan Chase Bank, N.A. v. Saticoy Bay LLC Series 741 Heritage Vista*, 2020 WL 759885, at *2-3 (D. Nev. Feb. 14, 2020).

$1,201,000 for the Property." 1 JA 143. It further alleged that "[i]f the Court finds the HOA assessment did not contain a super-priority portion, then [Spanish Trail] and [Red Rock] will have been unjustly enriched by the amount of Plaintiff's bid that would not have been made by [Saticoy] if [Spanish Trail] and [Red Rock] had disclosed that [BANA] claimed to have tendered the superpriority amount of the assessment lien. . . ." Saticoy raised the same allegation in its opening brief. AOB 58. ("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").

If HOAs and their agents have ***no duty*** to proactively disclose whether a superpriority tender had been made, *compar*e NRS 116.31162(1)(b)(3)(II) (2017), *with* NRS 116.31162 (2013), then the unjust enrichment claim necessarily fails. Even if the unjust enrichment claim is revived on remand[14], there is no basis to involve Thornburg or void the sale. Damages against Spanish Trail and/or Red Rock should be Saticoy's only remedy in this case.

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[14] Saticoy may also have a judicial admission or estoppel problem if the unjust enrichment claim is remanded since it previously stated in its 2017 discovery responses that Spanish Trail's auction was conducted pursuant to NRS 116 and was commercially reasonable as a matter of law, 5 JA 729. *See Hamilton v. State Farm Fire & Cas. Co*., 270 F.3d 778, 782 (9th Cir. 2001); *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. C*o., 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) (. Saticoy may further have a statute of limitations problem. *In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011) ("The statute of limitation for an unjust enrichment claim is four years.").

Saticoy also cannot complain that the district court did not expressly rule on misrepresentation and unjust enrichment claims since it reviewed the quiet title order and did not make any changes. 10 JA 1728. Claiming on appeal that the district court "inexplicably dismissed" the claims, AOB 22, while Saticoy and Timpa argued in the district court about excess proceeds for nearly a year is revealing of Saticoy's long-standing scheme to delay quiet title litigation. Saticoy could have easily reopened these claims when the excess proceeds portion of the litigation was reopened after the quiet title judgment. It choose not to.

CONCLUSION

This court should affirm the district court's quiet title judgment and conclude Thornburg's deed of trust survived Spanish Trail's foreclosure sale. Should this court affirm the excess proceeds judgment then it should enlarge the remittitur so Thornburg has sufficient time to foreclose and obtain an injunction prior to seeking the excess proceeds through a deficiency judgment/breach of contract action. The end result will be same.

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This court should further affirm the district court's dismissal of all remaining claims brought by Saticoy against Spanish Trail and Red Rock, and not permit the untimely amendment.

DATED this 15th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 9,415 words.

FINALLY, I CERTIFY 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 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 of the transcript or appendix where the matter relied on is to be found.

I understand I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of April, 2021.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on April 15, 2021, the foregoing **RESPONDENT THORNBURG MORTGAGE SECURITIES TRUST 2007-3'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of AKERMAN LLP