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 Aug 13 2021 09:37 p.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S REPLY BRIEF**

Counsel for Appellant:

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

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 August 13, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.
/s/ Roger P. Croteau
Roger P. Croteau, Esq.
Nevada Bar No. 4958
2810 W. Charleston Blvd., Ste. 75
Las Vegas, Nevada 89102
Attorneys for Saticoy

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Statutes

Rules

II. LEGAL ARGUMENT

A. INTRODUCTION

Despite the fact that Saticoy's legal arguments are focused on two (2) paramount issues, each of Respondents' Answering Briefs take a different approach to Saticoy's underlying argument. However, the common element is that none of the various arguments directly address the reasoning underlying Saticoy's approach to the analysis of NRS 116.31164(3)(c),[1] and Saticoy's requested equitable relief of rescission based upon the facts of the case, yet the Respondents analysis eschews a direct analysis for various tangential arguments.

Saticoy's commences their challenges to the district court's decision, as to both the MSJ Order and the Excess Proceeds Order, by challenging the Association Sale. Saticoy raised these challenges in the Third Amended Complaint, and included the challenges in the proposed Fourth Amended Complaint. Saticoy's issues are equitable, but also based on the recording statute themselves, as Saticoy seeks to be able to consistently rely upon the recorded documents. This reliance is justified by the recording statutes themselves, the public policy considerations, and equity. These considerations could not be properly raised in the district court below

[1] As stated in the Opening Brief, the statute has since been renumbered as NRS 116.31164(7)(b) but reads the same. For purposes of this brief, Saticoy will continue to refer to the statute as NRS 116.31164(3)(c).

due to the district court's refusal to consider such issues; Saticoy seeks the opportunity to address this deficit by remanding the matter to the district court with direction to allow the Fourth Amended Complaint be entered, or the MSJ Order as to the Third Amended Complaint be set aside, so as to allow Saticoy to explore these issues.

The distribution of the Excess Proceeds in this matter is the secondary issue for this Court to address. While the history of this matter is convoluted with procedural issues raised by Respondents to be addressed below, the underlying issues are not. Saticoy sets forth an analysis where the interests of the various parties follows in an orderly manner from when their interests are recorded, following Nevada's general acceptance of the "first in time, first in right" method of determining priority. Respondents instead propose a "Flipping Interest" where the interests are evaluated on a fluid basis beginning with the Notice of Delinquent Assessment through the completed Association Sale, and shuffle around like playing cards based upon the actions at that moment. Saticoy's approach allows for a consistent distribution of proceeds from a sale which only requires a review of the date the various interests were recorded; Respondents approach requires in-depth factual analysis based on a review of various actions, exceptions, and

relations. Saticoy's approach allows for an equitable distribution which benefits all parties; the Respondents prefer a windfall.

The Spanish Trail Master Association (the "Association") Answering Brief ("Association AB"), mostly ignores Saticoy's approach to NRS 116.31164(3)(c), instead focuses on the duties of the Association, and the standing of Saticoy to set forth any arguments in light of the procedural posture of the matter.

The Red Rock Financial Services ("Red Rock") Answering Brief ("RRAB") addresses NRS 116.31164(3)(c), but does so by creating strawman arguments regarding Saticoy's reference to the *Jessup* matter and equity arguments made by Saticoy, alongside various procedural arguments addressed previously by way of the Opening Brief and the previously briefed Motions to Dismiss in this appeal.

Timpa Trust U/T/D March 3, 1999's (the "Timpa Trust") Answering Brief ("Timpa AB") addresses NRS 116.31164(3)(c) by applying the statutory language at the time of the sale, disregarding the long history of "first in time, first in right" of case law in Nevada. Timpa Trust ignores the language of NRS 116.31164(3)(c) that provides distribution of excess proceeds to all the holders of liens, with the homeowners' association priority assessed and recorded as of the date of the recordation of the CC&Rs. Clearly, the "of record" reference never changes until a deed of trust is reconvened which never occurs under the facts of this case. Timpa

Trust also joins in several of the arguments set forth by both the Association and Red Rock, and will be addressed as part of the Association and Red Rock's arguments.

The Thornburg Mortgage Securities Trust 2007-3 ("Thornburg") Answering Brief ("Thornburg AB") acknowledges that Thornburg did not claim the Excess Proceeds, and avoids addressing NRS 116.31164(3)(c). Thornburg instead focuses on the arguments of the Amicus Curie brief addressing Bona Fide Purchaser arguments set forth therein, seeking only additional time upon remitter to proceed with a foreclosure on the Property.

While the various Respondents have some overlap in regards to the case law set forth and their various defenses, the fragmented nature of the various arguments shows the unwillingness of the Respondents to examine NRS 116.31164(3)(c), since such an examination would set forth the underlying issues with the "Flipping Interest" approach taken by the Timpa Trust and adopted by the district court below. A "Flipping Interest" approach in evaluating any excess proceeds distribution creates absurd results and. would punish a lender and the purchaser for purchasing the Property.

B. SATICOY'S CHALLENGE TO THE UNDERLYING ASSOCIATION SALE IS BASED IN EQUITY AND STATUTORY RELIANCE

As a preliminary issue, Saticoy challenges the validity of the Association Sale; if the Association Sale is found void the sale would be unwound, and there would be no Excess Proceeds to distribute. However, Saticoy was not able to address the Association Sale, as the claims in the Third Amended Complaint were dismissed by the MSJ Order. As set forth below in response to the Association and Red Rock's arguments in their respective Answering Briefs, Saticoy did not have the opportunity to present evidence or argument regarding Saticoy's acts before the Association Sale to the district court. However, since both the Association and Red Rock seek to analyze what arguments Saticoy could or would set forth, Saticoy will present their arguments conceptually to show that the claims would not be futile or irrelevant as claimed by Red Rock and the Association and Red Rock.

To place the matter in context, as of the date of the sale in this matter NRS 116 had not been amended to require the disclosure of a payment (either by a borrower or a lender) of a superpriority portion of a homeowners' association lien. While that issue was addressed by the revisions to the statute in 2015, at the time of the Association Sale, there remained no requirement that the property record disclose any payments. The 2015 revisions to NRS 116 addressed this issue, both as to the statutory and equitable issues Saticoy sets forth below.

As to the statutory challenges Saticoy could pose, Saticoy was entitled to rely upon the public record. The real property recording system is not just for the use of the individuals recording documents, it functions to inform the general public. "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.

A recorded document serves to advise all persons of the contents of the document. *See 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 979 F. Supp. 2d 1142, 1152 (D. Nev. 2013); *see also In re Century Offshore Mgmt. Corp.*, 119 F.3d 409, 413 (6th Cir. 1997) ("The purpose of the recording statutes at issue here is to allow third parties to deal with immovable property without searching beyond the public records.").

Saticoy could, and did, rely on the public records; up until 2015 these records were deficient for not disclosing the payments toward the Association's lien on the Property. Pursuant to the above analysis, the public records had a glaring omission. While it was not the obligation of the Association or Red Rock to correct this omission, the omission existed, nonetheless.

This leads to Saticoy equitable analysis, that the underlying Association Sale was inequitable due to the failure to disclose the payments towards the Association's lien on the Property. While Red Rock and the Association analyze the recent (unpublished) case law on this issue, case law which was not available at the time of the Third or Fourth Amended Complaints, Red Rock and the Association diligently avoid analyzing the equity of the underlying sale. The

Timpa Trust analyzes the issue, but only in the broadest sense. This variation in handling is unsurprising, as a successful challenge to the Association Sale would address the equities. A rescission would eliminate the windfall to the Timpa Trust, such that the Excess Proceeds issue would be irrelevant. Both the Timpa Trust and Saticoy would be returned to their position prior to the sale, where Saticoy would be returned the majority of the bid price, and the Timpa Trust would return to ownership of the Property, and liability under the First Deed of Trust. Thornburg would remain in possession of the First Deed of Trust secured by the Property, and could foreclose on the Property. The equitable issues are addressed by a rescission of the sale, thus, should Saticoy succeed in its claims against Red Rock and the Association, the Excess Proceed issue becomes moot.

C. SATICOY'S EVALUATION OF NRS 116.31164(3)(c) IS THE ONLY COMPREHENSIVELY REASONABLE APPLICATION FOR EQUITABLE DISTRIBUTION OF THE EXCESS PROCEEDS

Before addressing the splintered arguments of the Respondents in the various Answering Briefs, Saticoy asks the Court to reorient on the equitable and statutory issues concerning the Excess Proceeds, and the distribution of 1.16 Million Dollars of Excess Proceeds from the sale of the Property, in relation to equity and NRS 116.31164(3)(c). Saticoy's approach is not to consider NRS 116.31164(3)(c) as functioning in a vacuum, but in relation to the recorded

documents. The priority of each parties interest, i.e. "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, not at the time of the Association Sale to Saticoy. NRS 116.31162(1)(a). While the payment of the superpriority lien amount by Miles Bauer protected Thornburg's First Deed of Trust from being extinguished, it did not change the priority of the First Deed of Trust. Since the First Deed of Trust was recorded prior to the recordation of the CC&Rs, the First Deed of Trust remains junior to the Association's lien. This comports with NRS 116.3116(5), *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), and the general practice of recordation of notices in relation to real property. This is not a convoluted, tortious, or twisted analysis as Respondents contend; it is a simple, consistent approach that does not require detailed analysis dependent on the time the review is conducted, i.e. pre-tender, post-tender, pre-sale, post-sale, etc… With this brief reorientation conducted, Saticoy will address the Respondents various ancillary arguments, and conclude with a comprehensive review of Saticoy's approach in light of the challenges raised by Respondents.

D. THE ASSOCIATION'S STRAWMAN ARGUMENTS ILLUSTRATE WHY THE MSJ ORDER WAS FLAWED

The Association sets forth a series of strawman arguments in an effort to address Saticoy's requests for reconsideration and amendment. The Association mischaracterizes Saticoy's reliance on *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII,* 135 Nev. Adv. Op. 7, 435 P.3d 1217 (2019)("*Jessup*"), construing reliance on Jessup instead of merely showing that Saticoy and Thornburg needed to state a preference as to the handling of the Association Sale, either voiding or retaining the outcome, for the matter to be properly analyzed pursuant to the equities involved. The Association thereafter proceeds to argue the equity of setting aside the Foreclosure Sale, despite Saticoy having been prevented from making substantial arguments regarding the same below by way of the district court refusing either reconsideration or amendment, by way of an equity-based futility argument. Finally, the Association seeks to prevent an equity analysis based on judicial estoppel and voluntary dismissal arguments, arguing that Saticoy challenges to Thornburg's efforts to set aside the Association Sale prevent Saticoy from making its own arguments against the sale, and that Saticoy voluntarily released the claims against the Association and Red Rock by counsel signing a proposed Order as to the "Reviewed by" when paired with an email. Each of these

arguments avoids the underlying equity, or mischaracterizes it, in an effort to avoid addressing the distribution of the Excess Proceeds.

1. SATICOY DID NOT PRESENT *JESSUP* TO THE DISTRICT COURT AS REQUIRING THE ASSOCIATION SALE BE SET ASIDE, ONLY THAT A PREFERENCE REGARDING THE SALE BE STATED

The Association mischaracterizes Saticoy's purpose in setting forth footnote 5 of *Jessup* as Saticoy holding the "incorrect belief that *Jessup 1* somehow could have authorized the district court to set aside the Association's foreclosure sale." Association AB, page 8. As set forth in the Opening Brief, both Thornburg and Saticoy sought to have the Association Sale set aside, such that there was 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. Indeed, 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. Saticoy did not state that *Jessup* required the Association sale be unwound, only that Thornburg and Saticoy could state whether they "prefer to have the sale set aside or have the Purchaser take title to the

property subject to the first deed of trust." *Jessup*, footnote 5. It is because this preference was not put before this Court in *Jessup* that Saticoy sought to set forth the issue, and moved the district court to allow Saticoy to put its request that the Association Sale be set aside.

To address the equity analysis, Saticoy sought to determine if the Association "substantially compl[ied] with NRS 116.31168 and NRS 107.090(3)," which if coupled with an analysis of prejudice, could be sufficient to declare a sale void, pursuant to *U.S. Bank v. Res. Grp., LLC*, 444 P.3d 442, 448 (Nev. 2019). Saticoy acknowledged that 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). If "unfairness" is sufficient to set aside a sale for inadequacy of price, then by the same logic unfairness should also be sufficient to set aside a sale where the failure to inform Saticoy of Thornburg's tender where the resulting sale left Saticoy with essentially no interest in the Property. In this

matter, if the Association Sale is upheld Saticoy would lover over $1,100,000.00 due to the lack of information in the record. Thus, the analysis of this matter must focus on whether the "unfairness" is limited solely to the sale price, or includes the process and its participants.

"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." *Golden v. Tomiyasu*, 79 Nev. 503, 515, 387 P.2d 989, 995 (Nev. 1963). Pursuant to this equity analysis, and the indication in *Jessup* that Thornburg and Saticoy had to set forth a preference of whether the sale should be set aside, or the deed of trust retained, that Saticoy moved the district court. In so doing, Saticoy merely requested the district court consider the *Jessup* analysis requirement of a stated preference, and the proposed distribution of the excess proceeds, in the equitable analysis set forth.

Instead of addressing the equity arguments, the Association notes that Jessup was thereafter vacated, after the appeal in this matter was already commenced, by the decision in *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII,* 462 P.3d 255 (Nev. 2020)("*Jessup 2*"), whereby the *en banc* reconsideration vacated *Jessup.* Since Saticoy only set forth the *Jessup* decision as indicating that Saticoy and Thornburg were required to state a preference for the handling of the Association

Sale in relation to the Deed of Trust for the consideration of the underlying equity analysis, the Association misses the relevance of the Jessup decision as Saticoy presented it to the district court.

Timpa Trust also argues that Saticoy misunderstands *Jessup*, citing to the logic contained with the body of the decision and the vacating of *Jessup* by *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 462 P.2d 255(Nev. 2020). Timpa AB page 45 to 48. First, as stated in response to the Association arguments, Saticoy only relies upon the footnote of Jessup for the requirement that Saticoy and Jessup set forth their preference for the handling of the Association Sale. Saticoy does not rely upon *Jessup* for the evaluation of the distribution of the Excess Proceeds or the validity of the Association Sale, but only a requirement for challenging the Association Sale. Saticoy correctly cited to *Jessup* as an intervening change in the law as it sets forth the requirement for Thornburg and Saticoy setting forth their preference for the handling of the Association Sale.

To be clear, Saticoy did not present that the *Jessup* decision required the Association Sale be set aside, only that for the equity analysis, a preference regarding the Association Sale had to be set forth by Thornburg and Saticoy for the matter to be properly before the court. Saticoy directed the court to this requirement, prior to the *Jessup 2* decision in 2020, in order to allow for the full

equitable analysis by the district court. Saticoy sought to address the equity of the disbursement of the Excess Proceeds as part of the analysis of the equity of the Association Sale; a request the district court acknowledged but denied by way of refusing both reconsideration and amendment.

2. THE ASSOCIATION'S ARGUMENTS AGAINST THE CLAIMS IN THE THIRD AMENDED COMPLAINT ARE PREMATURE

The Association argues that Saticoy could not bring any claims to challenge the Association Sale because recent case law indicates that the claims the Association believes Saticoy would bring have already been addressed. Essentially, after conducting its own review of the matter, the Association concludes that recent case law would have ultimately resulted in Saticoy's claims being dismissed eventually, and thus they could not have been brought previously. Association AB page 9-13. However, Saticoy never had the opportunity to pursue the claims, or to further clarify the claims by entry of the proposed Fourth Amended Complaint. While the Association now claims that it would be "inequitable" to give Saticoy the opportunity, it ignores the possibility of evolution of the claims to date.

Neither the Association nor Red Rock sought to dismiss the two claims brought against them in the Third Amended Complaint in their dispositive motions, instead focusing solely on the claims of Thornburg. JA1156-1164 and

JA1249-1255. The district court dismissed Saticoy's claims without argument, motion or other meritorious legal practice, and certainly without the analysis conducted by the Association in the Association AB, and presented no evidence or support for the dismissal. Essentially, the claims unique to Red Rock and the Association asserted by Saticoy were summarily dismissed without any legal argument, analysis and/or defense and without legal process or opportunity to respond and defend Saticoy's claims. While the Association seeks now to infer the existence of an agreement to dismiss the claims (see below), this agreement is by inference only. Saticoy had no opportunity to argue the issues set forth, and any agreement to dismiss the claims was certainly nullified by the motion to submit the Fourth Amended Complaint, which restated the allegations. JA2185-2187.

While Saticoy did not have the opportunity to address the Association's current arguments below, the arguments have been set forth, and continue to be set forth, in the ongoing cases concerning the Association's obligations under NRS 116.1113 and NRS 113.130 regarding the disclosures to potential bidders, which is coupled with an "unfairness" aspect due to the lack of information, information known to the Association and Red Rock but not made available to Saticoy. However, to address the Association's arguments, two points are relevant. First, the Association relies on *Noonan v. Bayview Loan Serv'g*, 438 P.3d 335 (Nev.

2019) (unpublished disposition). However, the Association's reliance on *Noonan* is misplaced, because it is factually distinguishable. It is true the *Noonan* court stated, "Hampton neither made an affirmative false statement nor omitted a material fact it was bound to disclose," *Noonan,* 438 P.3d at 335, yet it remains an open question whether this lack of duty extends to matters where a party inquired whether a tender/payment had been attempted or made. Common sense would dictate that, after the decision in *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), a purchaser would "inquire" regarding payments made to an association lien, and certainly before spending over $1.1 million to purchase the property.

The *Noonan* decision is based upon a factual determination of whether a material, factual, question had been asked and if it was answered or there was a material omission of fact. The *Noonan* court did not consider the arguments presented in more recent matters about whether NRS 116.1113 and NRS Chapter 113 address the duty following an inquiry, where the Association and its agent refused to respond to the inquiry. The Court in *Nelson v. Heer* provided that the omission of a material fact is deemed to be a false representation. 123 Nev. 217, 225, 163 P.3d 420, 426 (Nev. 2007). It remains an area of dispute whether the Association and Red Rock would be deemed bound by the mandates of NRS

116.1113 and NRS 113.130 to disclose to potential bidders the payment of a portion of the lien upon **reasonable inquiry** by potential bidders.

Another point of evaluation would be that if reasonable inquiry were proven by Saticoy, and Red Rock refused to respond to the inquiry so as to lead Saticoy to believe that no payments or tender had been made, then these actions constitute substantial unfairness in the Association Sale process to warrant rescission of the Association Sale if requested. As Saticoy was the successful bidder, but other bidders had forced the purchase bid to increase to the amount that Saticoy ultimately reached. Thus, Saticoy was not the only bidder mislead by the dearth of information, indicating that the lack of information was not unique to Saticoy, but endemic to the Association Sale, thus illustrating the "unfairness" incident to the Association Sale.

While the Association in this matter would likely contend that an inquiry was not in evidence in this matter, such an absence simply illustrates the early junction at which these claims were summarily disposed. To the degree that none of these arguments have been brought in the record due to the summary disposition, the Association's arguments are premature. Couching the arguments in the supposed equity analysis of *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, fails to remedy this deficiency. 405 P.3d 641, 646 (Nev.

2017). Saticoy's claims were dismissed without argument or analysis, using recent case law to forensically construct a reason why they would have failed is inappropriate.

3. SATICOY DID NOT TAKE CONFLICTING POSITIONS REGARDING THE VALIDITY OF THE SALE, ABANDON THE CLAIMS AGAINST THE ASSOCIATION OR RED ROCK, OR FAIL TO TIMELY APPEAL THE MSJ ORDER

The Association's remaining arguments both seek to create a bar to any claims against the Association or Red Rock by inferring judicial estoppel and an agreement to dismiss the claims by way of the MSJ Order. The judicial estoppel argument rest upon the inference that if Saticoy challenges Thornburg's arguments regarding the invalidity of sale, it is estopped from posting other bases for invalidating the sale. The argument regarding the signing of the "Reviewed By" line, coupled with an email requesting Saticoy's input regarding a dismissal of claims, seeks to create a stipulation to dismiss where none was present. Both arguments are overbroad in their application, and prejudicial to not just Saticoy but any other litigant. The third argument is found in the jurisdictional statement, and is that Saticoy failed to timely appeal the MSJ Order, as it was "final" order, even though significant additional issues, including the distribution of the excess proceeds, were left to be addressed by the September 11, 2019 order. The

Association's efforts to limit the arguments of Saticoy are wholly incorrect, and should be disregarded.

a. Saticoy Can Oppose Thornburg's Arguments to Invalidate the Association Sale While Setting Forth Different Arguments

The Association seeks to prevent Saticoy from challenging the Association Sale by invoking judicial estoppel, based upon Saticoy previously challenging Thornburg efforts to set aside the Association Sale. Association AB at page 13-15. As set forth in *NOLM, LLC v. Cty of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004), judicial estoppel requires the same party to have taken two position in a judicial matter where the party successfully asserted the first position, and thereafter took a second position which was "totally inconsistent," and the first position was not taken as a result of "ignorance, fraud or mistake." In this matter, Saticoy did not take two "totally inconsistent" positions regarding the validity of the Association Sale. Saticoy's first position was that, in order for Thornburg to set aside the Association Sale, it must show "inadequacy of price, and additional proof of some fraud, oppression, or unfairness that accounts for and brings about the inadequacy of price" pursuant to *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 646 (Nev. 2017). JA0292. In the Third Amended Complaint and proposed Fourth Amended Complaint, Saticoy argues

that the sale is invalid due to the Association and Red Rock withholding the information pertaining to the discharge of the super-priority portion of the Association's lien. JA0142-143 and JA2185-2187. These are two separate, and consistent, arguments regarding the Association Sale. The first, as set forth, address the *Shadow Canyon* requirement that the low sale price be brought about, and accounted for, by the existence of fraud, oppression, or unfairness. Thus the inadequate price must have been *caused* by the fraudulent, oppressive, or unfair actions which Thornburg sought to set forth. Saticoy's argument was that Thornburg failed to show a connection between the low price and the conduct, and thus failed to meet its burden under *Shadow Canyon*.

Saticoy's argument against the validity of the Association Sale is premised upon the inequitable outcome where the Association and Red Rock knew of the attempted payment of the super-priority lien, but failed to disclose this information, leading Saticoy to purchase the Property. Saticoy need not argue that the fraudulent, oppressive, or unfair action "accounts for and brings about the inadequacy of price" pursuant to *Shadow Canyon*, but Saticoy may argue that said conduct was unfair to Saticoy because it resulted in Saticoy paying such a significant sum for a Property that was over encumbered by nearly 4 million dollars. Indeed, Saticoy does not need to argue the conjunction of the activity to

the price, only that equity should prevent such an outcome. Thus, Saticoy's second argument is not "totally inconsistent" with that it successfully set forth against Thornburg, and should not be judicially estopped.

b. Saticoy Did Not Stipulate to Dismiss the Claims Against the Association and Red Rock

The Association also contends that Saticoy "agreed" to dismiss the claims against the Association and Red Rock by Saticoy's counsel signing the MSJ Order (which the Association refers to as the "FFCL") under the "Reviewed by" block, without further comment to a prefatory email stating a requested dismissal to allow the appeal. The association sets forth no case law or statutory interpretation supporting this broad interpretation of the signing of a proposed order. Signing a proposed order of the court merely provides that it contains the court's order, not any agreement thereto by the signatories. Undersigned counsel notes that the nearest relevant determination is found in *Mortimer v. Pac. States Sav. & Loan Co.*, 62 Nev. 147, 145 P.2d 733 (1944), stating that a "court is presumed to read and know what it signs[;] The practice of preparing entries for the court to sign and enter of record, is proper." The supposition that the execution of a "Reviewed by" block is tantamount to a stipulation among the parties, and thus Saticoy "voluntarily chose to dismiss its claims by way of the FFCL" as asserted by the Association is without support. Indeed, the Association does not cite to an

argument in opposition to these claims, as it was Thornburg that moved for reconsideration of the district court decision. JA1384-1650. Indeed, even at oral argument, the Association argued against the claims of Thornburg, and was unsure if it could procedurally argue against the claims of Saticoy. JA2250-2263. The Association fails to present support for the dismissal in either the MSJ Order or the record, relying solely upon a one sentence electronic correspondence stating a possible reason to dismiss the claims against the Association and Red Rock. Association AB page 16. The MSJ Order itself offers no other support or basis for the Association claim of voluntary dismissal. Essentially, Red Rock asserts that Saticoy stipulated to the dismissal of the Association and Red Rock by way of the MSJ Order, even though this was not provided for by the district court's directive, and that Saticoy permitted such inclusion.

Additionally, as noted in Saticoy's Opening Brief and as is clear from the record, Saticoy sought to re-allege and articulate the claims against the Association and Red Rock by way of the Fourth Amended Complaint. JA2185-2187. Thus, it is clear there was no agreement or stipulation to dismiss the claims against the Association or Red Rock.

c. Saticoy's Appeal is Timely

The Association argues in the jurisdictional statement that Saticoy's appeal is untimely. Association AB at page 1-2. As the Association does not challenge the jurisdiction to consider Saticoy's appeal of the orders entered on September 11 (which Saticoy labels "the Excess Proceeds Order'), or November 19, 2019, which awarded the Excess Proceeds to Timpa Trust and denied Saticoy's Motion to Amend Complaint and submit the Fourth Amended Complaint, respectively. Association AB at page 2. Instead, the Association contends that Saticoy failed to timely appeal the MSJ Order, and that the Excess Proceeds issue should be the only issue before the Court. This argument is unreasonable on its face, as a significant issue, the Excess Proceeds distribution, was only decided, and then challenged, a year after the MSJ Order was entered. Simply stated, the Association contends that the relevant issue of the Excess Proceeds was not a relevant issue as to the claims between the parties. While the Association contends that the district court improperly re-opened the matter to address the Excess Proceeds, such a contention lacks any statutory authority and is not even set forth in the argument section of the Association's brief. To the extent that the Court deems this argument relevant, Saticoy refers to the arguments already set forth in the fully brief Motion to Dismiss.

E. RED ROCK AND TIMPA TRUST CREATE A VARIETY OF STRAWMAN ARGUMENTS REGARDING THE PROCEDURAL HANDLING BEFORE THE DISTRICT COURT, SATICOY'S REFUTATION OF THE FLIPPING INTEREST THEORY, AND REITERATES THE ASSOCIATION ARGUMENTS REGARDING THE ASSOCIATION SALE

Red Rock poses a series of arguments that reiterate the Association's arguments, adds some limited procedural arguments, and presents an abbreviated opposition to Saticoy's refutation of the Flipping Interest Theory, without addressing the underlying equities in the matter. Saticoy will address these arguments in a sequential fashion, as there is no overarching theme to Red Rock's opposition, except to create basic versions of Saticoy's arguments, and then address those arguments instead of the positions Saticoy actually set forth in the Opening Brief.

1. THE APPEAL IS TIMELY, AND PROPERLY FOLLOWS FROM THE MSJ ORDER, THE EXCESS PROCEEDS ORDER, AND THE MOTION FOR RECONSIDERATION

Red Rock reiterates the Motions to Dismiss previously filed in this matter, in part by arguing that Saticoy failed to timely appeal the MSJ Order (which Red Rock refers to as "the 2018 Order"). Both Red Rock, and the Association as stated *supra*, contend that the MSJ Order was a final order, which was ripe for appeal following its entry on December 5, 2018. Red rock nor any other party to the case ever included a request for certification of the MSJ Order in their briefing. This

disregards the Excess Proceeds Order, the request for reconsideration of same, and the entry of the November 18, 2019 regarding same, which was appealed on November 19, 2019, the day the notice of entry of order was entered. JA2225-2235.

The MSJ Order did not respond to, nor address, the distribution of the excess proceeds, because that issue was **not** before the district court during that motion practice. JA1719-1728. *See Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345 (2013) ("The finality of an order or judgment depends on 'what the order or judgment actually does, not what it is called.' To be final, an order or judgment must 'dispose [ ] of all the issues presented in the case, ***and leave[] nothing for the future consideration of the court***, except for post-judgment issues such as attorney's fees and costs.'") (emphasis added) (citations omitted).

The fact that the MSJ Order did not resolve all issues against all parties is demonstrated beyond any doubt by the district court's reopening the matter after statistically closing the matter, resulting in the Excess Proceeds Order whereby Timpa Trust received ***over $1,100,000 in excess proceeds***. Comparing the Excess Proceeds Order to the MSJ Order, it is clear that the MSJ Order was not a final, appealable order. The distinction lies in the plain wording of NRCP 54(b), which requires specific language to be incorporated into the Order for it to be appealable.

To the extent that either Red Rock or the Association is arguing that the order statistically closing the case made the MSJ Order a final judgment, that argument is inaccurate. *See Brown*, 129 Nev. at 347 n.1 ("Because the order only serves to direct the statistical closure of a case rather than to resolve any claims pending in that case, our conclusion would be the same had the district court checked the box indicating that the basis for the statistical closure was a voluntary, involuntary, or stipulated dismissal or a default or summary judgment."); *Matz v. W. Progressive-Nevada, Inc.*, 445 P.3d 220 (Nev. 2019) (unpublished disposition) ("form orders statistically closing a case are not final and appealable.").

The simple fact that additional motion practice and hearings were held and adjudicated subsequent to the MSJ Order proves without doubt that the MSJ Order was not a final, appealable judgment. To the extent that it could have been deemed to be such, this error was remedied after Saticoy's Motion to Reinstate was granted. Indeed, Timpa Trust did not file its motion for summary judgment until June 25, 2019. JA1752. This Motion was not adjudicated until it was granted pursuant to the Order entered on September 11, 2019. JA2050. Quite simply, it is patently clear that the MSJ Order did not adjudicate all issues between all parties because issues and claims were later adjudicated.

As the Excess Proceeds Order was subject to Saticoy's Motion for Reconsideration, which functioned to toll the appeal deadline pursuant to NRAP 4(A)(4), where the appeal was noticed immediately thereafter, the appeal is timely.

2. SATICOY HAS STANDING TO CHALLENGE THE DISTRIBUTION OF EXCESS PROCEEDS AND THE AWARD OF "ATTORNEY FEES" DERIVED THEREIN

Red Rock seeks to avoid an analysis of the award of attorney fees by way of its arguments that Saticoy failed to either challenge the award, or is not damaged by the award. Both of these approaches ignore that Saticoy set forth its standing, and thus its challenge to the award of attorney, in its opposition to Timpa Trust's Motion for Summary Judgment. JA1886-2038. Saticoy will be impacted by the distribution of Excess Proceeds by way of the First Deed of Trust, as 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. Funds paid to Timpa Trust will function solely for the benefit of Timpa Trust, no other parties, and as set forth above and below, lead to an inequitable outcome.

Timpa Trust echoed Red Rock's standing arguments, asserting that only Thornburg could assert a claim pursuant to an interpleader, and did not. Timpa AB page 41-44. As set forth in Saticoy's opposition to Timpa Trust's Motion for

Summary Judgment wherein Timpa Trust claimed the Excess Proceeds "Plaintiff, as the subsequent purchase of the Property, is a 'successor in interest in the Property which is [the] subject of the deed of trust'" JA1904. Thus, under NRS 107.220, Saticoy is to address the First Deed of Trust with Thornburg on Timpa Trust's account, and therefore sought to have the Excess Proceeds applied to the First Deed of Trust. Thus, Thornburg need not make a claim, and Saticoy was not making a claim to obtain the Excess Proceeds; instead, Saticoy was seeking a distribution to address the First Deed of Trust, as an equitable outcome, which would benefit all parties, as opposed to solely the beneficiaries of the Timpa Trust, who, despite Timpa Trust's claims, are strangers to the First Deed of Trust and are not liable under the First Deed of Trust. As Timpa Trust notes, "Interpleader is an equitable proceeding to determine the rights of rival claimants." *Balish v. Farnham*, 92 Nev. 133, 137, 546 P.2d 1297, 1299 (1976). Thus, Saticoy's equitable arguments regarding the distribution of the Excess Proceeds, as set forth in greater detail below, and Saticoy's interest in the Property, which remains subject to the First Deed of trust, address the standing issues posed by Timpa Trust.

Pursuant to the MSJ Order, Saticoy's interest in the Property was subject to the First Deed of Trust and thus Saticoy had a right pursuant to NRS 40 et seq. and

NRS 30.130 to challenge the distribution of Excess Proceeds, and request that the Excess Proceeds be directed to reduce the balance of the First Deed of Trust.

This standing then leads to the challenge to the distribution of Red Rock's purported "attorney fees" from the Excess Proceeds. First, by challenging the distribution of the Excess Proceeds, Saticoy inherently challenged the supposed "attorney fees" of Red Rock. Every dollar awarded to Red Rock from the Excess Proceeds is a dollar not applied to the First Deed of Trust. Additionally, while Red Rock characterizes the award as "attorney's fees", Red Rock sets forth no offer of judgment which the parties rejected, nor a successful motion or dismissal of a claim against Red Rock as a basis. In reality, 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 funds Red Rock sought were not part of the collection effort, and is only characterized as "attorney fees" in an effort to shoehorn Red Rock's request into the Court's consideration of the Excess Proceeds.

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 <u>subordinate claim of record</u>**; and
> (5) Remittance of any excess to the unit's owner.

(Emphasis added). By Red Rock's own admission, the attorney fees were not expenses of the sale or for maintaining the Property. JA1857-66. The attorney fees were for the interpleader and primarily for this litigation. Id. As such, the fees were taken outside the bounds of NRS 116.31164(c), but were sought as part of the distribution of the Excess Proceeds. By opposing the distribution as requested by Timpa Trust, Saticoy opposed any other costs associated with the Association Sale, including the attorney fees of Red Rock. Thus, Saticoy set forth its arguments against the award of attorney fees on appeal, and this Court should evaluate whether the award of approximately $30,0000 from the Excess Proceeds was proper.

3. THE CLAIMS AGAINST RED ROCK AND THE ASSOCIATION WERE DISMISSED PRIOR TO AN ANALYSIS OF THE MERITS

Red Rock conducted a detailed analysis of the support for the claims of

Saticoy, despite Saticoy having been unable to present evidence. Similar to the arguments made by the Association, Red Rock argues that recent unpublished decisions warrant the district court's prior dismissal of Saticoy's proffered claims without adjudication or briefing. Red Rock then presents a factual analysis of Saticoy's claims, based solely upon the material in Saticoy's allegations, acknowledging that the issues were not raised in the record. RRAB at page 17. Finally, Red Rock contests the possible inquiries of Saticoy, again presenting a factual analysis where Saticoy did not have the opportunity to conduct discovery through the claims brought in the Third Amended, or proposed Fourth Amended Complaint.

a. Red Rock Seeks to Litigate Saticoy's Claims on Appeal

Red Rock eagerly seeks to litigate the claims of Saticoy in its Answering Brief, acknowledging it was addressing issues that neither Red Rock nor Saticoy raised before the district court. RRAB page 17. Saticoy raises certain issues regarding its claims against the Association and Red Rock, but solely in the context of the Third Amended Complaint and proposed Fourth Amended Complaint, as indicators of the merit of the underlying claims. Saticoy was unable to present the claims, or litigate them in any substantive manner, due to the MSJ Order and the denial of the Motion to Amend. Thus, while Saticoy can address Red

Rock's arguments, especially those pertaining to *Noonan* and *A Oro*, Saticoy did not have the opportunity to address these arguments, and the relevant factual analysis, before the district court. *A Oro, LLC v. Ditech Financial LLC,* 434 P.3d 929 (Nev. 2019) and *Noonan v. Bayview Loan Serv'g*, 438 P.3d 335 (Nev. 2019) Both cases are distinguishable. *Noonan* is based upon a factual determination of whether a material, factual, question had been asked and if it was answered or there was a material omission of fact. *Id*. *A Oro,* like *Noonan,* also relies upon there being no affirmative duty to disclose an attempted or accepted tender of the superpriority lien amount. 434 P.3d 929 (Nev. 2019). Both matters, like the cases listed in footnote 1 of the RRAB, only deal with an affirmative duty by the Associaiton; the cases say nothing of a duty in response to an inquiry by Saticoy. This discrepency shows that Saticoy's propsoed Fourth Amended Complaint would not have been futile, as issues of law reamined unaddressed.

b. Red Rock Attempts to Address the Shortcoming of Prior Caselaw By arguing Against Inquiry

Red Rock seeks to address the indefinite state of the law regarding the responsibility of the Association to respond to an inquiry by Saticoy through a factual analysis that was not presented to the district court, which Saticoy could not respond to before the district court due to the denial of the Motion to Amend. Red Rock attempts to infer that Saticoy could not have inquired as to any payments of

the Association's lien by reference to Mr. Haddad's prior declaration in its litigation against Thornburg regarding the title to the Property. RRAB at page 21-23. Red Rock's quoted material fails to address the inquiry likely made by Mr. Haddad on behalf of Saticoy, as none of the responses quoted are directly counter to the possibility of inquiry, set forth by Saticoy's counsel. Opening Brief, page 26. The testimony quoted by Red Rock only shows that Mr. Haddad and Saticoy 1) did not receive information from the Association or Red Rock, 2) was not affiliated with the Association or Red Rock, and 3) would have been removed from the *auction* if they posed a disruption. RRAB at page 22. It is completely reasonable that Mr. Haddad could inquire, and receive no response prior to the auction, and all of these responses be consistent with such an inquiry. Saticoy could not oppose this as a factual contention of record because Saticoy was not permitted to amend its pleadings due to the MSJ Order dismissing the Third Amended Complaint, and Saticoy being denied entry of the Fourth Amended Complaint. However, the district court did not reach this conclusion, as Red Rock notes, since these arguments were not presented to the district court. RRAB at page 17, Section II (C) " […] Even if Red Rock Did Not Raise the Issue in Lower Court […]" Notably, the Association Sale took place after the decision in *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), thus, as set forth by

Saticoy's counsel before the district court 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. Thus, there exists a question of fact as to whether Saticoy inquired with red Rock as to any payments made to the Association's lien, following the clear mandate of the *SFR* decision.

While Red Rock goes to some length to characterize Saticoy's proposed arguments to invalidate the sale as futile, the arguments are raised, necessarily, for the first time on appeal. Though Red Rock referenced unpublished decision and orders of this Court in an effort to refute the claims of Saticoy, though the claims and causes of action could not be explored, Red Rock still fails to present convincing reasoning as to why the proposed Fourth Amended Complaint could not be set before the district court, and thus, Red Rock's arguments as to the futility of Saticoy seeking to set aside the Association Sale is unfounded.

c. Saticoy's Third and Proposed Fourth Amended Complaint Complies with Notice Pleading Requirements

Red Rock's challenges to Saticoy's ability to assert claims against the

Association and Red Rock, necessarily, focus on the allegations set forth in the Third Amended Complaint, which do not present the specific factual allegations addressing the inquiries made by Saticoy. RRAB page 19-21. However, Red Rock seeks to use the current unpublished orders to address the prior pleadings of Saticoy, depriving Saticoy of the ability to address these issues, and asking this Court to infer that Saticoy could not address these issues. As Red Rock's reference to the unpublished Order of Affirmance in *Saticoy Bay, LLC, Series 8320 Bermuda Beach v. S. Shores Community Assn.,* 473 P. 3d 1046 (Nev. 2020) shows, Saticoy has adjusted it's pleadings to address the very issues which Red Rock now sets forth as impossible hurdles to relief. While Saticoy has not addressed all hurdles at this juncture, Red Rock's arguments that remanding the case to allow Saticoy to present its claims would be "futile" is an effort by Red Rock to have this Court to go far beyond any finding of the district court set forth in either the MSJ Order or any document in the record, (of which there were none). The Court made no finding of facts or conclusion of law on Saticoy's claims against the Association and/or Red Rock.

Finally, as Saticoy set forth in both the Opening Brief and its prior arguments to the district court, Saticoy likely did make an inquiry into any payment of the Association's lien. Opening Brief page 22, RRAB page 21. As

stated above, however, Saticoy cannot address this issue further based on the record as the MSJ Order, followed by denial of the Motion for Reconsideration and the Motion to Amend, had the cumulative effect of restricting Saticoy to the pleadings submitted by way of the Third Amended Complaint set forth on February 10, 2017. JA0139-0144. Since the filing of the Third Amended Complaint over 4 years ago, two of which were on appeal, have elapsed. Likewise, with the guidance of the Bermuda Beach and other similar Orders (though not published decisions) Saticoy has refined its pleadings beyond mere notice pleading to address the specificity deficiencies of Saticoy's efforts and to the inquiry of Red Rock which Red Rock now presents. Thus, the Orders cited by Red Rock are not indicators of futility on Saticoy's part, but only an indication of the evolving state of this area of law, and evolution which should have been allowed to continue in this case by allowing Saticoy's Motion to Amend.

4. SATICOY'S MOTION TO AMEND WAS PROPER, AND SHOULD HAVE BEEN GRANTED

Red Rock's arguments are less a reason to affirm the district court decision, and more support for why the policy of Nevada is to freely allow the amendment of complaints. *Marschall v. City of Carson*, 464 P.2d 494, 498 (Nev. 1970) ("…and leave to amend should be freely given when justice requires. NRCP 15(a). We must apply the same rule to NRCP 15(b) where there is even greater liberality

of amendment.") (citations and internal quotation marks omitted) (emphasis added); *see also Good v. District Court*, 279 P.2d 467 (Nev. 1955) ("Otherwise a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Subdivisions [71 Nev. 43] (b), (c), and (d) of this rule evidence even greater liberality of amendment." (internal quotation marks omitted). While leave to amend is not unconditional, it has few restrictions, as it allows matters to be fully addressed on their merits, as is the preference in Nevada.

Red Rock seeks to depict Saticoy as having exceeded those limits by presenting the MSJ Order as a final order, a position echoed by the Association and Timpa Trust. Association AB page 6-7 and Timpa AB 51-However, as addressed above, the MSJ Order clearly was not a final Order, as the Excess Proceeds Order followed thereafter, and only after the Excess Proceeds Order addressed the remaining issues regarding the distribution of the Excess Proceeds was the matter fully resolved. The Motion for Reconsideration and Motion to Amend were submitted in tandem to address the underlying issues regarding the district court's decision as it related to the *Jessup* mandate regarding the Association Sale. Saticoy brought the Motion to Amend with the Motion for Reconsideration 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's claims pursuant to the issue raised in *Jessup*, declaring that the Motion to Amend was not the "appropriate approach … [as] there is a separate final order and the case is final" while 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. Thus, Saticoy properly and timely informed the district court of the *Jessup* holding pursuant to NRCP 60(b), and in the context of setting aside the MSJ Order, also sought to amend with the proposed Fourth Amended Complaint.

Timpa Trust also challenges the Motion for Reconsideration stating that Saticoy failed to set forth new law pursuant to NRCP 60(b), disregarding the reference to the *Jessup* decision. Timpa also challenges Saticoy's Motion for Reconsideration for failing to set forth how the district court's decision was clearly erroneous pursuant to *Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd*., 113 Nev. 737, 941 P. 2d 486, 489 (1997). However, Saticoy did detail the error of the district court by analyzing equitable subrogation issue as the First Deed of Trust, and the failure to comply with equitable principles.

While equitable subrogation was not specifically pled previously, the equitable arguments were presented, and continued to be presented by way of the Motion for Reconsideration. JA2069-2090.

Saticoy was not seeking to "retroactively" disrupt a final judgment by bringing the Motion to Amend, as it was characterized by Red Rock. RRAB page 37. Instead, Saticoy was attempting to address the inequality of the awarding of a windfall to Timpa Trust, and seeking to set the litigation on the right course by submission of the Fourth Amended Complaint.

Red Rock's claim that the MSJ Order was a final Order is belied by its own argument, as Red Rock states "Saticoy Bay is attempting to amend its complaint to unwind two previous final judgments." RRAB page 38. Red Rock contends that there were two final judgments, presumably the MSJ Order and the Excess Proceeds Order. Saticoy agrees that the Excess Proceeds Order of September 11, 2019, entered in response to Timpa Trust's Motion for Summary Judgment, was the only final Order, and that the deadline to appeal was tolled by the Motion for Reconsideration. The Motion to Amend, filed in tandem with, and related to, the Motion for Reconsideration is not an effort to "unwind the two previous final judgments," the Motion for Reconsideration addresses the prior orders and their culmination in awarding the Timpa Trust a windfall. The basis for setting aside the

MSJ Order and Excess Proceeds Order are addressed separately in Saticoy's briefing.

Timpa Trust challenges the jurisdiction of the district court to consider the Motion to Amend in light of a final order having already been entered, and because setting aside the Foreclosure sale was not a new issue. As set forth herein, the Motion to Amend was submitted with the Motion for Reconsideration, and had the Motion for Reconsideration been granted, there would not have its MSJ Order in place. Additionally, as set forth in response to the Red Rock arguments, Saticoy did not seek to submit the Fourth Amended Complaint "for purposes of relitigating the entire matter" as Timpa Trust contends. Timpa AB at page 52. Instead, Saticoy sought to address the underlying issues with the proper context, while addressing the Association Sale, and challenge the Association Sale on a different basis by way of the Fourth Amended Complaint then had previously been set forth. While the concept of setting aside the Association Sale was present "clearly the entire duration of this litigation," the theory under which Saticoy challenged the validity of the Association Sale, due to the lack of disclosures of the prior tender, as new. JA2168. As such, relief pursuant to NRCP 15(b)(2) is proper.

Red Rock also seeks to argue claim preclusion against Saticoy, citing *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 713 (Nev. 2008). RRAB at page 40. Red

Rock's claim preclusion argument is essentially a slight revision to the Association's arguments set forth above. Red Rock's ongoing assertion that no claims may be brought due to the decision of the MSJ Order disregards that A) the MSJ Order was not a final order and subject to review by this Court until the case is closed, and B) that Saticoy was seeking to bring the claims in the Fourth Amended Complaint following a Motion for Reconsideration and Motion to Amend, which if granted would have resulted in there not being a prior order disposing of the claims as alleged.

Red Rock's misunderstanding of the Motion to Amend is based on conflating its arguments against the underlying claims with Saticoy's procedural efforts to address the district court's error, and thus does not support denying Saticoy the opportunity to fully litigate its claims against the Association and Red Rock.

5. RED ROCK CHALLENGES THE DISTRIBUTION OF EXCESS PROCEEDS

Red Rock also argues against the distribution of the Excess Proceeds based on the same premise as Timpa Trust, namely that NRS 116.31164(3)(c) determines not just the distribution of the Excess Proceeds but also the priority of the interest in the Property. Saticoy thus addresses these arguments below in responding to the Timpa AB.

F. TIMPA TRUST AND RED ROCK BOTH CHALLENGE THE DISTRIBUTION OF THE EXCESS PROCEEDS BASED ON THE INCORRECT READING OF NRS 116.3116(3)(C) AS DETERMINING THE PRIORITY OF THE DISTRIBUTION OF THE EXCESS PROCEEDS

Both Timpa Trust and Red Rock contend that the NRS 116.3116(3)(c) is clear, establishing both the priority of the parties and application of the Excess Proceeds along lines of that priority, in one self-contained statute. Timpa AB pages 35-40 and RRAB page 23-33. Saticoy's approach is much more nuanced, but not so nuanced as to be "confused and muddled" as Timpa Trust asserts. Saticoy seeks a strict reading of the statute and the statutory construction NRS 116.31164(3)(c) is not a part of the NRS 116 foreclosure statutes that beings at NRS 116.31162. Timpa Trust page 38. The analysis of Timpa Trust and Red Rock avoids justifying the "Flipping Interest" theory on either equity or logical grounds, and simply revert to a recitation of the statute and the black-letter law regarding interest priority. Timpa AB pages 37-38 and RRAB page 25-26.

Summarizing both arguments; Timpa Trust characterizes Saticoy as seeking to elevate junior lienholders over senior lienholders, that NRS 116.31164(3)(c) sets forth the priority of the lienholders, and that the Association's lien "jumps" in priority due to the superpriority portion of the Association lien, but that Thornburg prevented this "jumping" by payments of the superpriority lien amount. Timpa AB

pages 35-40. Red Rock contends that Saticoy does not understand the concept of junior and senior lienholders, and sets forth NRS 116.31164(3)(c) as a departure from Nevada's common law rule of "first in time, first in right," and concluding with several hypotheticals involving a second mortgage and a large amount of equity. RRAB page 23-33. Neither Timpa Trust nor Red Rock directly address Saticoy's reasoning, favoring a mechanical repetition of the statute over any substantive analysis.

1. SATICOY'S ANALYSIS OF NRS 116.31164(3)(C) IS THE ONLY ANALYSIS THAT IS TIME AND ACTION INDEPENDENT

Neither Timpa Trust nor Red Rock address when lien priority is established, taking it for granted that the relative positions of the parties would be determined when examined at the commencement of the case, instead of at the time of the Notice of Delinquent, **or** the Notice of Default, **or** after the Notice of Sale, **or** finally at the time of Association Sale. All of the foregoing analysis is fundamentally changed when, and if, the super-priority amount is paid. Thus, it is Red Rock, and not Saticoy, that creates a "Schrödinger cat" where the status of a lienholder cannot be determined until it is examined right up to the Association Sale. As stated in the Opening Brief, the priority status controls the foreclosure provisions of NRS 116 provided that Excess Proceeds are paid to "any subordinate

claim of record" as set forth in NRS 116.31164(3)(c)(4), as 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). On that date the priority of the Association's lien is determined based on the date of the recording of the CC&Rs against the Property.

"Any substantive claim of record" is determined by the recorded liens recorded at the Clark Counter Recorder's Office which has not change at any point in the Association Sale process. Only a satisfaction and/or reconveyance of a line or the Property during the Association Sale process would effectuate a change in the "subordinate claims of record" secured by the Property. There are no provision in NRS 116 *et seq*. that provide for a conditional payment to any party by payment of the superpriority lien amount. NRS 116.3116 merely provides the lender added security that if the Property does not sell for a sum sufficient to satisfy the First Deed of Trust that it may subsequently foreclose on the remaining balance of the First Deed of Trust and after acquisition of the Exceeds Proceeds to satisfy any remaining balance and thereafter any remaining excess proceeds would be distributed pursuant to NRS 107 *et seq*.

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, it did not establish a time at which the priority of liens would be examined pursuant to the statute. The outcome of this analysis is that the First Deed of Trust is always junior to the Association's lien, which came about from the recording of the CC&Rs in this case in 1984. The recordation of the CC&Rs thus remains a senior interest of "record," which comports with NRS 116.3116(5), wherein the "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. This analysis does not run afoul of *SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), as 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, which likewise ties the determining event to the Notice of Delinquent Assessment Lien recordation.

A close reading of NRS 116.31164 illustrates the limitation, as word "prior" does not mean "priority" as it is set forth by Red Rock and Timpa Trust. While both Red Rock and Timpa Trust attempt to equate "prior" with "priority," and quote extensive case law regarding the interaction between junior and senior interests, both Red Rock and Timpa Trust miss the implication of the term "priority." Furthermore, due to the effort to evaluate the relative position of the lienholders at the time of the Association's Sale, instead of the recordation of the Notice of Delinquent Assessment, Red Rock and Timpa Trust create a shifting set of interests, which cannot be determined by simply reviewing the recordation date of the relevant documents. Thus, the "Flipping Interest" propounded by Red Rock and Timpa Trust remains fluid and requires detailed analysis, Saticoy's common-sense approach for a plain reading of NRS 116.31164(3)(c) does not.

2. SATICOY'S ANALYSIS ADDRESSES THE EQUITIES OF ALL OF THE PARTIES

Both Red Rock and Timpa Trust claim that equity is served by the district court's awarding of the 1.16 million dollars to Timpa Trust. Thornburg seeks a stay on remitter in order to foreclose and then, presumably, pursue the Excess Proceeds to address a deficiency. Thornburg AB at page 39. Effectively Thornburg would be seeking a pre-judgment writ of attachment to the Excess Proceeds until it can complete a foreclosure sale and asses the lien deficiency. Since Timpa Trust's

beneficiaries are not parties to the First Deed of Trust, should Timpa Trust obtain and distribute the Excess Proceeds, Thornburg will be unable to obtain the Excess Proceeds, and thus will be left without a recovery for any deficiency.

As set forth in the record and the Opening Brief, 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 which are deficient in this case by an estimated amount of $ million dollars, and 2) to Timpa Trust that is not a party to the loan and First Deed of 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.

In order for NRS 116 *et seq.* to properly function as a homeowner association foreclosure statute, it must not produce absurd results and follow the general tenets of lien law foreclosure. As Red Rock and Timpa Trust espouse the equity of Timpa Trust receiving over a million dollars, as a deprivation of their personal property. Timpa AB at page 53. Timpa Trust, specifically its beneficiaries, are not parties to the First Deed of Trust, and thus their claim to the Excess Proceeds as their property is tenuous at best.

a. Red Rock Hypotheticals are Inapt

Red Rock seeks to pose two hypotheticals to justify the Flipping Interest theory, both of which simply show how Saticoy's interpretation is reasonable and equitable. Applying NRS 116.31164(3)(c) as contemplate by Red Rock's first hypothetical, Red Rock speculates as to the outcome of this matter if a second deed of trust encumbered the Property. RRAB page 31. Pursuant to the Flipping Interest approach, the second deed of trust holder would receive the Excess Proceeds and any Excess Proceeds would be distributed potentially to the Timpa Trust; under Saticoy's approach, Thornburg would receive the Excess Proceeds and any excess proceeds therefrom would be to the record deed of trust holder, and to the Timpa Trust. Red Rock contends that this is unfair as Thornburg could "receive double recovery and leaves subsequent creditor's high and dry." RRAB page 32. First, a foreclosure by the first deed of trust holder customarily extinguishes a second deed of trust, this is a risk a lender assumes with a second deed of trust, however, the second deed of trust would expect to receive any excess proceeds after payment of the first deed of trust. Second, the borrower would remain liable for the balance of any portion thereof of the second deed of trust regardless. The second's loss of the deed of trust simply means the holder of the second note would not be able to seek recovery by way of a foreclosure under the second deed of trust, but would have to

pursue the excess proceeds and then a breach of contract action under the note against the borrower. Receipt of any excess proceeds would reduce the amount sought, but not extinguish the second deed of trust (unless the excess proceeds equaled or exceeded the outstanding balance). Under both the Flipping Interest theory and Saticoy's theory, a second deed of trust holder remains extinguished by a homeowner's association sale but does partake in excess proceeds in priority with its recording, the difference is simply on the amount of liability.

Put another way, if there are two deeds of trust, the difference between the two theories is simply which is reduced; first the borrower remains liable for both. Additionally, under Saticoy's approach, if the excess proceeds from a homeowner association sale are applied to the first deed of trust, and the property is foreclosed upon by the first deed of trust holder, and if that foreclosure results in excess proceeds, then the second deed of trust holder receives those excess proceeds after payment of any sums remaining on the first Deed of trust after application of the Excess Proceeds. Thus, under Saticoy's approach, the second deed of trust holder can still receive payment, albeit only after the first deed of trust is fully satisfied, i.e. exactly how a "first in time, first in right" system contemplates satisfaction.

Red Rock's second hypothetical contemplates a scenario where there is equity in the property. RRAB at page 32. This hypothetical fails for several

reasons. First, if there is equity, then when the excess proceeds are applied to the first deed of trust, there will simply be additional equity following the foreclosure by the first deed of trust holder. In this hypothetical, Red Rock completely ignores NRS 40.462, which states:

> 2. The proceeds of a foreclosure sale must be distributed in the following order of priority:
> (a) Payment of the reasonable expenses of taking possession, maintaining, protecting and leasing the property, the costs and fees of the foreclosure sale, including reasonable trustee's fees, applicable taxes and the cost of title insurance and, to the extent provided in the legally enforceable terms of the mortgage or lien, any advances, reasonable attorney's fees and other legal expenses incurred by the foreclosing creditor and the person conducting the foreclosure sale.
> (b) Satisfaction of the obligation being enforced by the foreclosure sale.
> (c) Satisfaction of obligations secured by any junior mortgages or liens on the property, in their order of priority.
> (d) **Payment of the balance of the proceeds, if any, to the debtor or the debtor's successor in interest**.

(Emphasis added)

Pursuant to NRS 40.462(2), the debtor is entitled to any true equity in the property (i.e. equity remaining after the payment of the first deed of trust and any junior lienholders) following a foreclosure. Any equity in the form of excess proceeds in the property is ultimately received by the debtor, in Saticoy's approach it is simply received after the first deed of trust is fully paid and any subordinate lien holders, as opposed to the Flipping Interest, where it is received after the homeowners' association sale, forcing the first deed of trust holder to shoulder any

uncertainty in the value of the property (i.e., the possibility of having to pursue a deficiency judgment against the borrower).

Additionally, this second hypothetical illustrates an important concept underlying the two statutes: both NRS 40.462(2) and NRS 116.31164(3)(c) place the unit owner/debtor at the very bottom of both distribution schemes. A comparison of both distribution schemes, which are nearly mirror images of one another in their language and process, illustrates that the unit owner/debtor is the final recipient, after all other interested parties are paid. NRS 40.462(2) does not permit any "Flipping Interest" or interests "jumping" as set forth by Timpa Trust, but instead focuses solely on a straightforward analysis that can be determined based on the recordation of the interests. If the distribution of excess proceeds for a homeowners association lien were to follow through the same progression as set forth in NRS 40.462(2), then it would proceed as Saticoy requests. While the split lien nature of the homeowner's association is a recognized departure from the standard approach to liens, it was not meant to radically impact the distribution of proceeds, as it does under the Respondents' Flipping Interest theory.

Thus, both hypotheticals posed by Red Rock fail to show any equitable shortcoming of Saticoy's interpretation of NRS 116.31164(3)(c). The equitable shortcoming of the Flipping Interest theory are very clear. As set forth in

Saticoy's Opening Brief, holders of first deeds of trust are able to protect their interest without gambling on the possible outcomes of an homeowners' association sale outcome. If such a sale results in excess proceeds, as happened in the Association Sale here, then Thornburg can obtain the Excess Proceeds, and foreclose on the First Deed of Trust to recover the rest of their secured interest.

b. Timpa Trust has no equitable claim

Timpa Trust contends that it has an equitable interest in the Excess Proceeds, but fails to provide any background to this claim of equity. Timpa AB at page 53. To be clear, Timpa Trust acknowledges that the borrowers are deceased, and make no claim to an assignment of the First Deed of Trust. Timpa AB at pages 22-25. While Red Rock argues that Timpa Trust will need the Excess Proceeds for a possible deficiency claim, Timpa Trust makes no such argument. RRAB 33. This is telling; Timpa Trust does not volunteer to make Thornburg whole, and Thornburg specifically requests a delay on remitter to pursue such actions so as to be able to claim the Excess Proceeds. Thornburg AB at page 39. Clearly, Timpa Trust, or more correctly the beneficiaries who will receive the money and be free of any liability under the First Deed of Trust, will ensure that Thornburg is deprived of any "equity" it may seek. Thus, both Timpa Trust's and Red Rock's equity arguments ring hollow.

G. THORNBURG'S ARGUMENTS AGAINST SATICOY ARE MERELY REPETITIONS OF RED ROCK, THE ASSOCIATION, AND TIMPA TRUST

Thornburg devotes the majority of its briefing to address the amicus curie briefing regarding bona fide purchaser status. Saticoy already addressed the bona fide purchaser status in this matter, as 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. 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, and Thornburg did not appeal this issue.

Thornburg argues against Saticoy's pursuit for entry of a Fourth Amended Complaint based on the delay it would cause, the case law already set forth in part by the Association, and the timeliness of Saticoy invoking equity. ThornburgAB at pages 39, 43-49. As set forth above, equity was the premise of this litigation, such that it cannot be untimely, indeed Saticoy asserts an equitable now which benefits Thornburg, which Thornburg deliberately takes no position upon. The delay that Thornburg complains of is incident to the developing body of law in this area; seeking to limit Saticoy's rights because Thornburg would rather foreclose sooner rather than latter is a poor justification for an inequitable outcome.

Similarly, Thornburg's efforts to limit Saticoy to monetary damages are similarly short sighted. ThornburgAB at page 45. Thornburg could still foreclose, as it currently states it will, and complete the process timely. As set forth in all of the briefing, Thornburg retains the First Deed of Trust, and the ability to foreclose thereunder.

III. 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 August 13, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Roger P. Croteau
Roger P. Croteau, Esq.
Nevada Bar No. 4958
2810 W. Charleston Blvd., Ste. 75
Las Vegas, Nevada 89102
Attorneys for Saticoy

IV. 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 13,131 words; or

[b.] does not exceed 30 pages.

...

…

…

…

…

…

…

…

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 August 13, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Roger P. Croteau
Roger P. Croteau, Esq.
Nevada Bar No. 4958
2810 W. Charleston Blvd., Ste. 75
Las Vegas, Nevada 89102
Attorneys for Appellant

CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on August 13, 2021, I caused a copy of **Appellant's Reply Brief** to be filed and served electronically via the Court's E-Flex System to the following:

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

/s/ Christopher L. Benner
An employee of ROGER P. CROTEAU & ASSOCIATES, LTD.