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 Jun 13 2022 01:41 p.m. Elizabeth A. Brown Clerk of Supreme Court **APPELLANT'S PETITION FOR REHEARING**

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II. PETITION FOR REHEARING

This Court should grant rehearing and reconsider, in part, its May 26, 2022, Affirmance ("Affirmance") of the district court's award of the proceeds exceeding the homeowner association's lien to Respondent Timpa Trust. This Court's reasoning did not address the issues pertaining to the factual issue of the relative priority standing of the involved parties, as set forth in Appellant Saticoy Bay, LLC, Series 34 Innisbrook's ("Saticoy") Opening Brief and Reply. As this Court premised the Affirmance on the finding that Respondent Thornberg Mortgage Securities Trust 2007-3 ("Thornberg") "did not have a 'subordinate' interest in the property for the purposes of subsection (8)(b)(4) in light of its superpriority tender," the relative priority of the positions is not set at the time of the homeowner association sale, but as the relative documents are recorded with the Clark County Recorder, which results in a "set of facts, which, if true, [that] would entitle [the plaintiff] to relief." The factual tenet is that NRS 116.31164(8)(b) provides for the "satisfaction in the order of priority of an subordinate claim of record," which is established at the commencement of an action, or in this context, the Lien for Delinquent Assessments ("LDA") that established its priority as to the recording of the conditions, covenants, and restrictions for the community. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). The

general premise is that all claims of record are junior to the NRS 116 foreclosure sale, as the "record" never changes until a claim is paid off.

Thus, based on the below issues pertaining to the Order of Affirmance, rehearing is appropriate

III. FACTUAL BACKGROUND

This matter concerns the real property commonly known as 34 Innisbrook Avenue, Las Vegas, Nevada (the "Property"). On February 25, 1984, the Master Declaration of Restrictions for Spanish Trail, which runs with the land and governs the Property, was recorded in the Clark County, State of Nevada Recorder's Office. ("CC&R"). JA1720. On or about August 17, 1988, the Declaration of Restrictions for Estates West at Spanish Trial, which runs with the land and governs the Property, was recorded in Clark County, State of Nevada Recorder's Office. ("Estates CC&R"). JA1890.

On June 6, 2006, Frank Timpa entered into a loan secured by the Property. JA1720. Frank Timpa obtained the loan from Countrywide Home Loans, Inc., (*"*Lender*"*) in the original amount of $3,780,000.00 (the *"*Loan*"*), on June 12, 2006. JA 1720. The Loan was secured by a Deed of Trust against the Property that was recorded in the Clark County, Nevada Recorder's Office ("First Deed of Trust"). JA1720. On June 4, 2010, MERS, on behalf of Recontrust executed a

Corporation Assignment of Deed of Trust Nevada to Thornburg as Lender, which was recorded on June 9, 2010. JA1892.

The Timpa Trust failed to pay the Association the assessments on the Property, such that on August 4, 2011, Red Rock Financial Services ("Red Rock"), on behalf of Spanish Trail Master Association (the "Association"), recorded the LDA indicating the Timpa Trust owed $5,543.92 (the "Association Lien"). JA1526 and JA1721. The Association Lien indicated it was recorded "in accordance with" the CC&Rs (of note is that the Association Lien was never paid in full, and therefore remained prior to all other liens). *Id.*

On December 6, 2011, Red Rock recorded a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments asserting the Association was owed $8,312.52. *Id.* On September 15, 2014, Red Rock (on behalf of the Association) recorded a Notice of Foreclosure Sale setting forth a sale date of October 8, 2014, with $20,309.95 being due as of September 15, 2014. JA1722. On November 7, 2014, Saticoy purchased the Property at the Association's sale ("Association Sale") conducted by Red Rock for $1,201,000.00. *Id.* After deducting all sums due to the Association and Red Rock, there remained $1,168,865.05, ("Excess Proceeds") which was deposited with the district court in accordance with the interpleader action on June 20, 2019. JA2052.

IV. LEGAL STANDARD

The Court may consider rehearing a matter pursuant to Nev. R. App. P. 40(c)(2) in the following circumstances:

> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

V. LEGAL ARGUMENT

A. INTRODUCTION

The Court's conclusions in the Affirmance fails to address at what point in time the parties standing under NRS 116.31164(8)(b) is determined, i.e. whether the determination of the standing occurs at the time of the Association Sale, or as the interests are recorded, consistent with "the order of priority of any subordinate claim of record." Applying a strict statutory analysis, NRS 116.3116 is not part of the foreclosure provision, and the provision is utilized to protect a lender's security interest in the property, but in either case the excess proceeds should always be utilized to pay debts subordinate to the CC&Rs. This interpretation serves the interests of justice and common sense, and would be in harmony with the drafters of

the Uniform Act. Saticoy's Petition for Rehearing is premised upon this limited factual question, which is determinative to the application of NRS 116.31164(8)(b).

As the Court set forth in the Affirmance, "Thornberg did not have a 'subordinate' interest in the property for purposes of subsection (8)(b)(4) in light of its superpriority tender." The statement that Thornberg's interest was determined "in light of its superpriority tender" leads Saticoy to conclude that the Affirmance overlooked a material fact in the record, namely the previous recordation of the CC&Rs, prior to the First Deed of Trust. For the "district court's excess proceeds order [to have] strictly followed the letter of the law," the Association Lien, perfected at the time of the recordation of the CC&Rs, is always "first in time, first in right," and thus (always of record) senior to First Deed of Trust.

B. THE PRIORITY OF THE INTEREST ARE NOT DETERMINED AT THE TIME OF THE SALE

As stated in the Affirmance, NRS 116.31164(8)(b) sets forth the order of payment of the interest holders following a homeowners association sale. The analysis set forth in the assumption only looks to the relative position of the interest holders *at the time of the Association Sale,* thus disregarding the absolute position of the interest holders as reflected in the dates of recordation of the interests. Thus, by failing to recognize the recordation date of the CC&Rs, First Deed of Trust, and LDA, and applying NRS 116.31164 to the modified

Association Lien at the time of the Association Sale, the district court, and the Affirmance, overlooked the material facts of the recordation dates of the CC&Rs, First Deed of Trust, and LDA. The adoption of a Flipping Interest analysis is contrary to the plain meaning of NRS 116.3116(8)(b)(4); if the drafters had intended such a result, they could have specified a tender, or lack of tender, distribution scheme, but the did not. A logical reason for such a failure would be that the proceeds are distributed under one theory—to all liens of record junior to the LDA, which was created and perfected by the recordation of the CC&Rs.

As set forth in the Opening Brief, pursuant to NRS 116.3116(5)[1], "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 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." Thus, the Association lien was perfected upon the recording of the CC&Rs, and therefore predate the First Deed of Trust. In turn, the Association's lien arose when assessments became due, *and was perfected at the time it arose*, due to the prior recordation of the CC&Rs. The Association Lien was not fully satisfied until the Association Sale. NRS

[1] Currently NRS 116.3116(9)

116.3116(2) (Currently NRS 116.3116(3)(b)) determines the Association's super-priority portion of a lien as the 9 months immediately preceding an action to enforce a lien; here, the LDA.

> "The provisions of NRS107.090," governing notice to junior lienholders and others in deed-of-trust foreclosure sales, "apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." NRS 116.31168(1).

SFR Invs. Pool 1, Ltd. Liab. Co. v. U.S. Bank, N.A., 130 Nev. 742, 746, 334 P.3d 408, 411 (2014).

If the Association Lien was the equivalent of a deed of trust, then unless the deed of trust was fully satisfied, it would maintain its priority over the First Deed of Trust. The priority status of "any subordinate claim of record" as set forth in NRS 116.31164(8)(b)(4), is determined when the LDA was mailed by certified or registered mail to the Timpa Trust by Red Rock. NRS 116.31162(1)(a). Thus, the proper time to consider the application of NRS 116.31164(8)(b) is not at the time of the Association Sale under a concept of a Flipping Interest not of "record" title; it is at the time of the LDA, i.e. when the Association's lien is commenced, the superpriority portion is set, and the Association's foreclosure process is commenced. While the payment of the superpriority lien amount by Miles Bauer protected Thornburg's First Deed of Trust from extinguishment, it did not change the recordation date or the recorded "priority" of the relevant interest holders.

If the recordation of the CC&Rs, First Deed of Trust, and LDA are not contemplated, then the "Flipping Interest" approach is the consequence producing results not intended by the statute. The Flipping Interest approach results in the first deed of trust "flipping" from a junior to a senior interest, relative to the previously recorded and perfected association assessment lien without notice. The Flipping Interest theory can only be the outcome if no weight is given to the perfection of the LDA at the recordation of the CC&Rs, First Deed of Trust, and LDA, leading to the conclusion that the recordation dates of the CC&Rs, First Deed of Trust, and LDA were not considered in reaching the Affirmance. NRS 116.3116 formed the basis of the Flipping Interest theory, but that provision is not part of the foreclosure provisions of the statute but begins at NRS 116.3116.

C. THE PRIORITY OF THE INTEREST HOLDERS IMPACTS THE APPLICATION OF NRS 116.31164

The misapprehension of the impact of the CC&Rs, First Deed of Trust, and LDA lead to Affirmance 's acceptance of the Flipping Interest theory, which also contravenes other court's interpretation of similar statues.

The Virginia Supreme Court analysed a statue nearly identical to NRS 116.31164(8)(b) in *Colchester Towne Condo. Council of Co-Owners v. Wachovia Bank, N.A.*, 266 Va. 46, 581 S.E.2d 201 (2003)("*Colchester*"). The *Colchester*

court properly analyzed Va. Code Ann. § 55-79.84(I)(5)(c)[2]

> The unit owners' association shall receive and receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, and apply the same in the following order:
> first, to the reasonable expenses of sale, including reasonable attorneys' fees;
> second, to the satisfaction of all taxes, levies, and assessments, with costs and interest;
> third, to the satisfaction of the lien for the unit owners' assessments;
> fourth, **to the satisfaction in the order of priority of any remaining inferior claims of record; and**
> fifth, to pay the residue of the proceeds to the unit owner or his assigns; provided, however, that the association as to such residue shall not be bound by any inheritance, devise, conveyance, assignment or lien of or upon the unit owner's equity, without actual notice thereof prior to distribution. (Emphasis added).

The question posed to the Virginia Supreme Court in *Colchester* mirrored that set forth in this matter: did the distribution statute require that the proceeds from a non-judicial sale by an association first be applied to satisfy a prior first deed of trust on the unit sold? *Colchester*, 266 Va. 46, 48, 581 S.E.2d 201, 202 (2003). In applying Va. Code Ann. § 55-79.84(I)(5)(c) to a non-judicial sale, where the lender under the first deed of trust actively asserted a claim to the funds in excess of the expenses, taxes, and assessments, the *Colchester* court found statutory construction favored disbursal to the lender.

> In short, we conclude that the General Assembly intended to balance the interests of the holder of a first deed of trust and those of a unit

[2] Currently Va. Code Ann. § 55.1-2148.

> owners' association by providing in these subsections that the satisfaction of the institutional lender's first mortgage or first deed of trust be a term of the public sale of an individual condominium unit by the unit owners' association when seeking to satisfy its inferior lien for unpaid assessments
> …
> A contrary result permitting the sale proceeds to be used to satisfy the lien of the unit owners' association, other lesser encumbrances, and potentially disbursing the residue of the sale proceeds to the defaulting former owner, without applying those proceeds to satisfy the first deed of trust, would put the institutional lender holding the first deed of trust at a serious disadvantage with respect to its ability to protect its security interest in the condominium unit. The purchaser and new owner of the condominium unit would have no obligation to pay the lender the sums unpaid on the lender's first deed of trust. The lender would be placed at risk that the new owner might permit damage to the unit before the lender could foreclose. The other detrimental possibilities are numerous and of great potential consequence, such as the prospect of inadequate fire insurance coverage in the event of unexpected fire damage to the unit. Additionally, the original owner would no longer own the unit and, thus, would have less incentive to satisfy the debt secured by the lender's deed of trust. We have no doubt that the General Assembly intended to avoid such possibilities to the detriment of the institutional lender's security interest

Colchester, 266 Va. 46, 51-52, 581 S.E.2d 201, 204 (2003)

Virginia's substitution of the word "inferior" for Nevada's usage of "subordinate" succeeds in avoiding the confusion presented by the Flipping Interest theory accepted by the Affirmance in this matter. As a factual matter and a matter of public policy, the timing of the recordation of documents advances NRS 247.190, which 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.

The recordation of the CC&Rs, First Deed of Trust, and LDA are completely disregarded by the acceptance of the Flipping Interest theory, and additionally provide an equitable outcome as set forth in *Colchester*.

VI. CONCLUSION

Based upon the foregoing, the district court committed reversible error in multiple ways. Saticoy respectfully requests that this Honorable Court grant rehearing, and reverse the decision below.

Dated this June 10, 2022.

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VII. 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 40(b)(3)) because it

[**a.] Proportionately spaced, has a typeface of 14 points or more, and contains 2,570 words**

[b.] does not exceed 10 pages.

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

Dated this June 10, 2022.

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CERTIFICATE OF SERVICE

In accordance with NRAP 25, I hereby certify that on June 10, 2022, I caused a copy of **Appellant's Petition for Rehearing** to be filed and served electronically via the Court's E-Flex System to the following:

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