IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT L. MENDENHALL, AN INDIVIDUAL; AND SUNRIDGE CORPORATION, A NEVADA CORPORATION, Appellants, vs. RONALD TASSINARI, AN INDIVIDUAL; AND AMERICAN VANTAGE BROWNSTONE, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondents.	Case No.: 68053 Appeal from the Eighth Judicial District Court, the Honorable Rob Bare Presiding

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Appellant Robert L. Mendenhall is an individual.

Appellant Sunridge Corporation is not a publicly traded company, nor is more than 10% of its stock owned by a publicly traded company.

Appellants are represented by Howard & Howard Attorneys PLLC and Marquis Aurbach Coffing.

Dated this 6th day of June, 2016.

MARQUIS AURBACH COFFING

By /s/ Micah S. Echols
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I. JURISDICTIONAL STATEMENT

Appellants, Robert Mendenhall ("Mendenhall") and Sunridge Corporation ("Sunridge") (collectively "Plaintiffs"), appeal from the District Court's order granting Respondents', Ronald Tassinari ("Tassinari") and American Vantage Brownstone, LLC's ("AVB") (collectively "Defendants"), motion to dismiss. Joint Appendix ("JA") 2:239–247. The dismissal order was filed on May 8, 2015. *Id.* Plaintiffs filed the notice of appeal on May 19, 2015. JA 2:248–249. NRAP 3A(b)(1) authorizes an appeal from a final judgment.

II. ROUTING STATEMENT

NRAP 17(b)(2) presumptively assigns appeals to the Court of Appeals involving a judgment in a tort case that is less than $250,000. The amount in controversy in this case is at least $1,200,000. JA 1:1–10, 37–40.

NRAP 17(a)(13) and (14) also allow the Supreme Court to retain an appeal that involves issues of first impression or issues of statewide public importance. Plaintiffs ask this Court to clarify (1) that claim preclusion under *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008) does not automatically apply to different corporate entities in two lawsuits for the privity analysis; and (2) that an accepted offer of judgment cannot shield fraud claims against new parties that did not accept the offer. For these reasons, the Supreme Court should retain this appeal.

III. ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT ERRED BY GRANTING DEFENDANTS' MOTION TO DISMISS BASED ON CLAIM PRECLUSION WHEN THE PARTIES OR THEIR PRIVIES WERE NOT THE SAME IN THE TWO LAWSUITS.

B. WHETHER THE DISTRICT COURT ERRED BY GRANTING DEFENDANTS' MOTION TO DISMISS BASED ON CLAIM PRECLUSION WHEN THE FRAUD CLAIMS MADE IN THE SECOND LAWSUIT COULD NOT HAVE BEEN MADE IN THE FIRST LAWSUIT.

C. WHETHER THE DISTRICT COURT ERRED BY GRANTING DEFENDANTS' MOTION TO DISMISS BASED ON CLAIM PRECLUSION WHEN THE FRAUD CLAIMS MADE IN THE SECOND LAWSUIT WERE NOT COMPULSORY CLAIMS BUT PERMISSIVE CLAIMS.

D. WHETHER THE DISTRICT COURT ERRED BY FAILING TO CONSIDER THAT NRCP 60(b) AUTHORIZES AN INDEPENDENT ACTION BASED UPON FRAUD.

IV. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This appeal challenges the District Court's dismissal order that erroneously applied claim preclusion principles. JA 2:239–247. The underlying facts of this litigation involve a term sheet for the creation of a limited liability company to develop a casino in Carson Valley, Douglas County, Nevada "within a few miles of Carson City and Lake Tahoe, Nevada and forty-five minutes from Reno, Nevada." JA 2:182. After the other parties performed their obligations under the term sheet, Mendenhall had the option to

secure his interest in the LLC by contributing 46 acres of real property owned by Sunridge and valued at $15,000,000. *Id.* While the term sheet calls for the contribution of $7,000,000 by "Other Investor(s)," this contribution was never made, despite affirmative representations, and a signature on the term sheet. JA 2:131–167, 183. After discovery was nearly complete in the first lawsuit, Mendenhall and Sunridge discovered that Tassinari had actually signed the term sheet for the "Other Investor(s)," even though representations were continually made that there were Canadian investors who would contribute the required $7,000,000. JA 2:131–167. Although Mendenhall and Sunridge attempted to bring this information to Judge Israel's attention in the first lawsuit through a motion to amend, Judge Israel did not rule on the pending motion and, instead, enforced an offer of judgment between Mendenhall/Sunridge and the two Brownstone entities that were the plaintiffs in the first lawsuit, Brownstone Gold Town, LLC and Brownstone Gold Town CV, LLC (collectively "the Brownstone entities"). JA 1:30–36, 41–96, 105–110. In dismissing the first lawsuit, Judge Israel commented that Mendenhall and Sunridge would have to seek a remedy for their fraud claims in "another lawsuit." JA 2:206–207. In the second lawsuit, Plaintiffs, Mendenhall and Sunridge, alleged fraud claims against Tassinari and AVB, neither of which were parties to the first lawsuit. JA 1:1–10. However, Judge Bare dismissed the second lawsuit based upon

claim preclusion and erroneously concluded that Plaintiffs could have made the fraud claims against these different parties in the first lawsuit. JA 2:239–247.

Plaintiffs first assign error to the District Court's determination that Tassinari and AVB are privies to the plaintiffs in the first lawsuit, the two Brownstone entities. JA 2:244–245. The Brownstone entities from the first lawsuit were not parties to the second lawsuit. *Id.* Defendants in the second lawsuit, from which this appeal arises, are only Tassinari and AVB. JA 1:1–10. Without any discovery, the District Court found that AVB "managed, led, owned, and acted on behalf of . . ." the two Brownstone entities. JA 2:245, ¶5. Similarly, the District Court found that Tassinari also "managed, led, and acted on behalf of . . ." the two Brownstone entities. JA 2:244, ¶4. Yet, an action involving a subsidiary does not automatically equate to an action against the parent company. *See Hartsel Springs Ranch of Colorado, Inc. v. Bluegreen Corp.*, 296 F.3d 982, 987 (10th Cir. 2002). And, Nevada law provides that "[a]n agent who fraudulently makes representations is liable in tort to the injured person although the fraud occurs in a transaction on behalf of the principal." *Nev-Tex Oil and Gas v. Precision Rolled Products*, 105 Nev. 685, 685, 782 P.2d 1311, 1311 (1989). At a minimum, the District Court should have allowed discovery into these issues before making findings based upon Defendants' unsupported representations. *Cf. Stubbs v. Strickland*, 297 P.3d

326, 328–329 (Nev. 2013) (requiring a district court to accept all factual allegations as true and draw all inferences in favor of the plaintiff). Therefore, due to the District Court's improper preclusion analysis on privity, this Court should reverse the District Court's dismissal order and allow this case to continue on remand against Tassinari and AVB.

Second, the District Court erred by concluding under a claim preclusion analysis that Plaintiffs could have alleged their fraud claims in the first lawsuit, even though Defendants' fraud was not discovered until after an offer of judgment was already served and later accepted by the Brownstone entities. JA 1:37–40; JA 2:131–167. Indeed, in the first lawsuit, Mendenhall and Sunridge attempted to amend their answer to include fraud claims against Tassinari and AVB. JA 1:41–96. However, Judge Israel never reached a decision on the motion to amend and, instead, declared the entire first lawsuit settled and dismissed, despite the proposed fraud claims against Tassinari and AVB. JA 2:206–207. Judge Israel commented that Mendenhall and Sunridge would have to seek a remedy for their fraud claims in "another lawsuit."[1] *Id.*

[1] Some of the pleadings and hearing transcripts from the first lawsuit were not made a part of the record for the second lawsuit. JA 2:189–237. Accordingly, Plaintiffs have not attempted to include items in the record before this Court from the first lawsuit that were not actually filed in the second lawsuit. *See* NRAP 10(a)&(b)(1); *Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We cannot consider matters not properly appearing in the record on appeal.").

Additionally, in dismissing Plaintiffs' lawsuit, the District Court believed Defendants' counsel's argument that Plaintiffs should have discovered the fraud months earlier, before Tassinari made the stunning admission in his deposition that he signed the term sheet not only on behalf of AVB, but also for the non-existent "Other Investor(s)." JA 2:131–167, 239–247. Since Plaintiffs never had an opportunity, they could not have possibly asserted their fraud claims against Tassinari and AVB in the first lawsuit. At a minimum, these were factual issues that the District Court should have reserved for trial. *See Siragusa v. Brown*, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1998) ("When the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact."); *Hidden Wells Ranch, Inc. v. Strip Realty, Inc.*, 83 Nev. 143, 145, 425 P.2d 599, 601 (1967) ("[T]he trial judge may not in granting summary judgment pass upon the credibility or weight of the opposing affidavits or evidence."). Therefore, this Court should reverse the District Court's order dismissing the second lawsuit.

Third, the District Court erred by granting Defendants' motion to dismiss based on claim preclusion when the claims brought in the second lawsuit were not compulsory claims but permissive claims. The District Court's dismissal order essentially treats Plaintiffs' fraud claims in the instant case as though they

were compulsory claims in the first lawsuit. However, "[t]he general rule is that a claim must have matured before it will be subject to the compulsory counterclaim rule." *Bennett v. Fid. & Deposit Co. of Maryland*, 98 Nev. 449, 453, 652 P.2d 1178, 1181 (1982). Additionally, since Mendenhall and Sunridge had no legal basis to file the fraud claims against Tassinari and AVB at the outset of the first lawsuit, the second lawsuit should have continued. *See Allied Fire Prot. v. Diede Constr., Inc.*, 127 Cal.App.4th 150, 155 (2005) ("The general rule that a judgment is conclusive as to matters that could have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated."). On this additional basis, the Court should reverse the District Court's dismissal order and allow Plaintiffs to prosecute their fraud claims in the District Court.

Finally, the District Court erred by failing to consider that NRCP 60(b) authorizes an independent action based upon fraud. NRCP 60(b) specifically states, "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." This Court has recently addressed independent actions under NRCP 60(b) in *Bonnell v. Lawrence*, 282 P.3d 712 (Nev. 2012). However, the record does not reflect that the District Court considered *Bonnell* before dismissing Plaintiffs' complaint. To the extent that

this Court does not reverse the District Court's dismissal order on some other basis, the Court should vacate the dismissal order and remand for the District Court to consider *Bonnell* in light of the facts of this case.

V. STANDARDS OF REVIEW

A. STANDARDS FOR REVIEWING DISMISSAL ORDERS.

"A district court order granting an NRCP 12(b)(5) motion to dismiss is subject to rigorous appellate review." *Sanchez v. Wal-Mart Stores*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). A district court's order granting a motion to dismiss is reviewed de novo. *Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012). A complaint should not be dismissed unless "it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

B. STANDARDS FOR REVIEWING SUMMARY JUDGMENT ORDERS.

This Court reviews a district court's dismissal order based upon preclusion under the summary judgment standard when the district court considers documents attached to either the complaint or the motion to dismiss briefs. *Bonnell*, 282 P.3d at 715–716. This Court reviews a district court's order granting summary judgment de novo, without deference to the findings of

the district court. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.*, 121 Nev. at 729, 121 P.3d at 1029.

VI. FACTUAL AND PROCEDURAL BACKGROUND

A. THE FIRST LAWSUIT (A653822/JUDGE ISRAEL).

1. The Brownstone Entities' Allegations.

On December 27, 2011, the Brownstone entities filed a lawsuit against Sunridge and Mendenhall in Case No. A653822, which was assigned to Judge Ronald Israel. JA 1:30–36. The allegations focused on the Brownstone entities' plan to develop approximately 46 acres of land owned by Sunridge ("the Property") into a hotel and casino. JA 1:31–33. The Brownstone entities alleged that an agreement between the parties was reached in December 2007. JA 1:33. Mendenhall and Sunridge disputed this characterization of the facts, as the term sheet was only an outline of terms. JA 1:54–58, 113. Notably, Tassinari and AVB were not parties to the first lawsuit (JA 1:30–36), were not listed as parties on the term sheet, and did not attempt to enforce the term sheet. JA 2:181–186. In the first lawsuit, the Brownstone entities alleged that Mendenhall agreed to contribute the Property in exchange for a 27% interest in

the new LLC, the developer and operating entity for the proposed hotel and casino. *Id.* In the first lawsuit, the Brownstone entities alleged breach of contract against Mendenhall and Sunridge for failure to transfer the Property in exchange for a 27% interest in the new LLC. JA 1:33–34. The claims that the Brownstone entities alleged in the first lawsuit were (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment; and (4) declaratory relief. JA 1:30–36.

2. Discovery on the Term Sheet.

During discovery in the first lawsuit, Mendenhall and Sunridge sought information on the details of the term sheet by requesting additional information regarding the "Other Investor(s)," who agreed to contribute $7,000,000 for a 12.6% membership interest based on the term sheet. JA 1:55, 58. Mendenhall and Sunridge deposed executives from the Brownstone entities to get information on the "Other Investor(s)" who had signed the term sheet. JA 2:131–167, 181–186.

In July 2014, Mendenhall and Sunridge deposed Anna Morrison ("Morrison") from the Brownstone entities. JA 1:64, 68–69. In this deposition, Morrison responded to questions on the "Other Investor(s)," stating, "I do believe the other investor was the Canadian group. . . I just don't know who the signer was." JA 1:68. Morrison agreed that the term sheet was "binding on all

the parties that signed it," including Mendenhall, the Brownstone entities, and "the other investor." JA 1:68–69. Morrison stated that "American Vantage Companies" did not sign the term sheet, but AVB, a subsidiary, signed the document. JA 1:69:2–8.

On July 10, 2014, as the parties were approaching the close of discovery in the first lawsuit, Mendenhall and Sunridge sent an offer of judgment to the Brownstone entities, offering $1,200,000 to settle the claims between Mendenhall and Sunridge, on the one hand, and the Brownstone entities, on the other hand. JA 1:38–39. The day after the offer of judgment was sent, on July 11, 2014, depositions continued with the deposition of Robert Gross ("Gross"), the NRCP 30(b)(6) witness for the Brownstone entities, who was the CEO of Brownstone Gold Town, LLC in December 2007. JA 1:61, 72. Gross claimed that the "[o]ther investors would be Bob Sim from Canada. Other investors would be—would be entities through Bob Sim whether it's level ten or whatever entity he would come in with who agreed to participate." JA 1:72. Gross testified that he ***did not recall ever seeing a term sheet signed by Bob Sim or his entities***, in reviewing the documents to prepare as a 30(b)(6) witness. JA 1:73:8–13. Gross explained that while he did not know who signed the "investor signature," he believed someone in "corporate," possibly "Mr. Tassinari . . . who was in the corporate office" would have an idea who signed

for the investor. JA 1:73:16–23. Gross further explained that Bob Sim had "committed seven million or more," but Gross was "not sure on the signature." JA 1:75.

On July 14, 2014, four days after the offer of judgment was sent to the Brownstone entities, Tassinari was deposed. JA 1:60–62. In his deposition, Tassinari confessed that he had signed for both AVB and for the "other investor." JA 1:61. Tassinari claimed that he did not remember why he would have been the "other investor in this agreement." JA 1:61. Although the first lawsuit was designed to enforce the term sheet as a binding contract on the signatories, Tassinari said he was not committing himself to put $7,000,000 into the project. JA 1:62. When asked if he thought "signing on behalf of other investors had any legal consequences to [him]," Tassinari stated, "Never really thought about it." JA 1:62:9. In sum, Tassinari did not think signing as another investor would have any legal ramifications or that he would be bound by his own signature. JA 1:62.

3. Mendenhall and Sunridge Seek Leave to File an Amended Pleading to Allege Their Fraud Claims.

Throughout the first lawsuit and when they sent the offer of judgment on July 10, 2014, Mendenhall and Sunridge believed that a Canadian investor or investment group had committed $7,000,000 and had signed the term sheet.

JA 1:128–130; JA 2:131–167. However, Tassinari and AVB's fraud became clear at the time of Tassinari's deposition on July 14, 2014. JA 2:130. After discovering the fraud, and within the 10-day irrevocable period for the offer of judgment, Mendenhall and Sunridge filed a motion for leave to amend on order shortening time. JA 1:41–96. The motion attached a proposed amended answer to complaint, counterclaim, and third-party complaint to the motion. JA 1:81–95. This proposed amended pleading alleged claims for (1) fraud in the inducement; (2) fraud; (3) negligent misrepresentation; and (4) fraudulent omission. JA 1:93–94. The proposed amended pleading added Tassinari and AVB as new parties for the third-party complaint and included counterclaims against the Brownstone entities. JA 1:81–82. The motion for leave to amend was set for hearing on shortened time on August 7, 2014. JA 1:43.

Before the motion for leave to amend was decided, the Brownstone entities accepted the offer of judgment on July 24, 2014. JA 1:98–100. As a result, the motion to amend was never heard or decided. JA 2:206, 229. No opposition to the motion was filed, due to the acceptance of the offer of judgment. *Id.*

Prior to the dismissal of the action, the Brownstone entities filed a motion to clarify and enforce the terms of the offer of judgment. JA 1:109. Judge Israel denied this motion and, instead, dismissed the first lawsuit with prejudice.

JA 1:109:14–22. During the course of the hearing on this motion, Judge Israel commented that Mendenhall and Sunridge would have to seek a remedy for their fraud claims in "another lawsuit." JA 2:206–207.

B. THE SECOND LAWSUIT (A708281/JUDGE BARE).

In October 2014, Mendenhall and Sunridge, as Plaintiffs, filed a lawsuit against Tassinari and AVB. JA 1:1–18. This second lawsuit related specifically to Tassinari's misrepresentations regarding the "other investor" or the "Canadian investor group" and his signing of the term sheet as the "Other Investor(s)." *Id.* The complaint in the second lawsuit alleged claims for (1) fraud in the inducement; (2) fraud; (3) negligent misrepresentation (in the alternative); and (4) fraudulent omission. JA 1:3–10.

Defendants, Tassinari and AVB, filed a motion to dismiss based upon the doctrine of claim preclusion. JA 1:19–110. In their motion to dismiss, Tassinari and AVB argued that the fraud claims in the second lawsuit "could have been brought" in the first lawsuit. JA 1:21. Plaintiffs opposed this motion and argued that these claims were not brought, nor could they have been brought, in the first lawsuit. JA 2:111–167. Plaintiffs explained that the elements for claim preclusion from *Five Star* were not satisfied. JA 2:116–120. Plaintiffs also argued that their fraud claims were not compulsory in nature because the claims had not matured. JA 2:122. In addition, NRCP 11

prevented Plaintiffs from bringing the fraud claims at the outset of the first lawsuit. JA 2:122.

C. THE HEARING ON DEFENDANTS' MOTION TO DISMISS.

In March 2014, Judge Rob Bare heard the arguments of both parties on the motion to dismiss. JA 2:195–237. Judge Bare asked counsel for Plaintiffs whether they attempted to bring the fraud claims in the first lawsuit. JA 2:219–220. Plaintiffs explained that Judge Israel did not give them an opportunity to be heard on the motion for leave to amend, and suggested that their remedy was a new lawsuit. JA 2:200:1–11; JA 2:220:6–8. In discussing the first lawsuit during the hearing on Defendants' motion to dismiss, Judge Bare stated,

> And in his wisdom, Judge Israel, in August of 2014 as I understand it, heard that Motion to Amend, part of a Motion to Amend, I guess, and said ***he wouldn't prohibit them from filing another lawsuit***.

JA 2:220:5–8 (emphasis added); *see also* JA 2:207:4–7 ("You might not know the answer to this because you're not Judge Israel, but ***why did he make this comment or have this allowance to bring another lawsuit***?") (emphasis added); JA 2:207:15–18 ("Why did he basically say: ***Well, you can bring another lawsuit—and he didn't really do anything affirmative to***, as I understand it, ***to actually clarify*** or enforce anything.") (emphases added).

In the hearing on Defendants' motion to dismiss, while Judge Bare focused upon the procedural ambiguities in the first lawsuit, as to whether the

claim "could have been" brought there, he quickly passed over the other elements of the *Five Star* analysis in the hearing. For example:

> MR. YOUNG [Counsel for Plaintiffs]: And I want to touch very briefly on the second element of the *Five Star* case, whether the facts that were essential are the same. The facts that were essential to the breach of contract were whether Mr. Mendenhall submitted the property to the venture as he was required to under the term sheet. That has nothing to do with whether Mr. Tassinari signed a document pledging $7,000,000 knowing full well that he had no intention of actually giving the $7,000,000.
>
> THE COURT: Okay. Fair enough. Let me ask you this question. . . . When Mendenhall serves the Offer of Judgment. . . What am I supposed to do about that with this thought process? I mean, you control whether you sign off on an Offer of Judgment.

JA 2:221–222. In sum, Judge Bare's focus for the preclusion analysis was upon the single element of whether the claims "could have been" brought in the prior action, concluding they could have been, rather than a full analysis of each element of the *Five Star* analysis. Although Plaintiffs attempted to discuss each *Five Star* factor, including privity and whether the facts essential to each claim were the same, these issues were of little import to Judge Bare's analysis in deciding the claim preclusion issue. Near the end of the hearing, Judge Bare asked,

> But if you believe in the fraud so much that you're filing a Motion to Amend and if you see a judge take any action to finalize and dismiss the case, why wouldn't you say: Judge, before you do that, you know, this is what we need to tell you. We know about this

> fraud from July 4th. We have a Motion to Amend. Here it is. Give us our day on this.

JA: 2:230. Plaintiffs responded that this issue was addressed by Judge Israel, when he "was talking about what language was going to go in the Order, was—the language in the Order says: Between these parties. As to this other thing that you want to do, go ahead and file that elsewhere." JA 2:230–231. The District Court took the matter under advisement and issued a minute order on March 30, 2015. JA 2:238.

D. THE WRITTEN ORDER GRANTING DEFENDANTS' MOTION TO DISMISS.

In May 2015, the District Court filed its written order granting Defendants' motion to dismiss. JA 2:239–247. The District Court erroneously found that Defendants satisfied the three-part test for claim preclusion established in *Five Star*. JA 2:244:7–11. The District Court also made the following findings and conclusions:

1. AVB is the owner of Brownstone Gold Town, LLC and Brownstone Gold Town CV, LLC, and AVB signed the term sheet. JA 2:244.

2. Tassinari signed the term sheet in his capacity as the chairman of AVB. *Id.*

3. Tassinari managed, led, and acted on behalf of the Brownstone entities, and the interests and motivations of Tassinari and the Brownstone entities had sufficient commonality and alignment such that privity exists. *Id.*

4. AVB managed, led, and acted on behalf of the Brownstone entities, and the interests and motivations of AVB and the Brownstone entities had sufficient commonality and alignment such that privity exists. JA 2:245.

5. Tassinari and AVB are privies with Brownstone Gold Town, LLC and Brownstone Gold Town CV, LLC. *Id.*

6. The order of dismissal in the first lawsuit was a final, valid judgment under *Five Star*. *Id.*, ¶¶8–9.

7. The motion for leave to amend in the first lawsuit included a counterclaim and third-party complaint against Tassinari and AVB with virtually the same allegations as the complaint in the second lawsuit. *Id.*, ¶10.

8. The claims in the second lawsuit were based on the same claims or any part of them that were or could have been brought in the first lawsuit, meeting the third requirement for the same claim under *Five Star*. JA 2:246.

Following the District Court's written dismissal order, Plaintiffs timely filed their notice of appeal and now seek relief from this Court. JA 2:248–252.

VII. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED BY GRANTING DEFENDANTS' MOTION TO DISMISS BASED ON CLAIM PRECLUSION WHEN THE PARTIES OR THEIR PRIVIES WERE NOT THE SAME IN THE TWO LAWSUITS.

Plaintiffs assign error to the District Court's determination that Tassinari and AVB are privies to the plaintiffs in the first lawsuit, the two Brownstone entities. JA 2:244–245. The Brownstone entities from the first lawsuit were not parties to the second lawsuit. *Id.* Defendants in the second lawsuit, from which this appeal arises, are only Tassinari and AVB. JA 1:1–10. Without any discovery, the District Court found that AVB "managed, led, owned, and acted on behalf of . . ." the two Brownstone entities. JA 2:245, ¶5. The District Court also found that Tassinari also "managed, led, and acted on behalf of . . ." the two Brownstone entities. JA 2:244, ¶4. Yet, an action involving a subsidiary does not automatically equate to an action against the parent company. *See Hartsel Springs Ranch of Colorado, Inc.*, 296 F.3d at 987. And, Nevada law provides that "[a]n agent who fraudulently makes representations is liable in tort to the injured person although the fraud occurs in a transaction on behalf of the principal." *Nev-Tex Oil and Gas*, 105 Nev. at 685, 782 P.2d at 1311. At a minimum, the District Court should have allowed discovery into these issues before making findings based upon Defendants' representations. *Cf. Stubbs*,

297 P.3d at 328–329 (requiring a district court to accept all factual allegations as true and draw all inferences in favor of the plaintiff). Therefore, due to the District Court's improper preclusion analysis on privity, this Court should reverse the District Court's dismissal order and allow this case to continue against Tassinari and AVB.

1. Tassinari and AVB Were Not Privies to the Brownstone Entities.

The first factor under the *Five Star* analysis asks whether the parties or their privies are the same. *Id.*, 124 Nev. at 1054, 194 P.3d at 713. Nevada law recognizes privity generally in two categories. First, parties are in privity with one another if the party had "acquired an interest in the subject matter affected by the judgment through . . . one of the parties, as by inheritance, succession, or purchase." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009). Second, this Court has recently adopted the RESTATEMENT (SECOND) OF JUDGMENTS, § 41, which analyzes privity under an "adequate representation analysis." *See Weddell v. Sharp*, 350 P.3d 80, 83 (Nev. 2015) (citing *Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 917–918 (Nev. 2014)). Under the "adequate representation" analysis of the RESTATEMENT:

> (1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:
>
> (a) The trustee of an estate or interest of which the person is a beneficiary; or
>
> (b) Invested by the person with authority to represent him in an action; or
>
> (c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or
>
> (d) An official or agency invested by law with authority to represent the person's interests; or
>
> (e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.
>
> (2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.

Alcantara, 321 P.3d at 917 (citing RESTATEMENT, § 41). Tassinari and AVB simply do not satisfy any of these privity tests.

a. Tassinari Was Not in Privity With the Brownstone Entities.

In its order granting Defendants' motion to dismiss, the District Court made several findings regarding Tassinari and AVB, as supposedly being "in privity" with the Brownstone entities based upon the assertion that Defendants

managed, led, and acted on behalf of the Brownstone entities in the first lawsuit, such that there was "sufficient commonality and alignment that privity exists." JA 2:244–245. However, Defendants' motion to dismiss did not cite any Nevada case law to establish that commonality and alignment, by virtue of "managing, leading and acting," somehow establishes privity. JA 1:19–29. Moreover, Defendants did not set forth any evidence to support the District Court's findings. JA 1:30–110; JA 2:181–193. Since any such evidence was within Defendants' exclusive control, the District Court should have allowed discovery before dismissing the case. *See Rocker v. KPMG LLP*, 122 Nev. 1185, 1194–1195, 148 P.3d 703, 709–710 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

Generally, "[c]orporations are treated as entities separate from their officers, directors, and shareholders for purposes of preclusion just as for other purposes. Without more, judgments entered in actions against any one of them are not binding on any other." Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 18A FED. PRAC. & PROC. JURIS., § 4460 (1981). If there is litigation with a corporate officer in an ***official*** capacity "that does not entail individual liability, the corporation may be in privity with the officer or director

to the extent of the official capacity." *Id.* In the instant case, Plaintiffs sued Tassinari in his ***individual*** capacity and alleged fraud claims. JA 1:1–10.

As set forth in Plaintiffs' opposition to Defendants' motion to dismiss, corporate agents and individuals are separately liable for their own fraudulent actions. *See Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1098, 901 P.2d 684, 689 (1995) ("An officer of a corporation may be individually liable for any tort which he commits. . . ."); *Nev-Tex Oil and Gas*, 105 Nev. at 685, 782 P.2d at 1311 ("An agent who fraudulently makes representations is liable in tort to the injured person although the fraud occurs in a transaction on behalf of the principal."). Thus, the District Court erred by dismissing Plaintiffs' complaint since the fraud claims against Tassinari based upon the facts and circumstances of this case removed any privity with the Brownstone entities.

b. AVB Also Was Not in Privity With the Brownstone Entities.

AVB also was not in privity with the Brownstone entities from the first lawsuit because a parent-subsidiary relationship does not itself establish privity. *See* 18A FED. PRAC. & PROC. JURIS., § 4460. In *Hartsel Springs Ranch of Colorado, Inc.*, 296 F.3d at 987, the Tenth Circuit concluded that the district court erred by finding that privity existed between a subsidiary, HSR, and its corporate owner, MEC, in two different lawsuits. In the first case, the

subsidiary, HSR, filed a complaint against defendant Bluegreen based on several claims, including breach of contract, promissory estoppel, fraud, and negligent misrepresentation. In the first case, HSR attempted to amend its complaint to add the corporate owner, MEC, and its successor in interest, Outwest, but the district court denied this request as untimely. *Id.* at 984–985. HSR later merged with the successor in interest, and a single entity named HSR represented the interests of HSR, MEC, and Outwest. *Id.* at 985. In a second case, the new HSR entity filed a lawsuit, bringing claims as the successor in interest to MEC and Outwest against Bluegreen for the same alleged wrongs. *Id.* In sum, the second case involved the parent corporation alleging claims based on similar facts against the same defendant, as a case previously brought by the subsidiary.

On appeal, the Tenth Circuit noted that the district court was correct that the claims in both cases arose from a single wrong committed by the same defendant, that HSR and MEC maintained identical boards of directors and officers, and that "the parties in both cases are represented by the same attorneys." *Id.* at 987. However, the Tenth Circuit concluded that there was not privity between the parties in the two cases because the parent corporation's interests were not presented and protected by the subsidiary, HSR, in the first lawsuit. *Id.* at 988.

Other federal courts have similarly concluded that corporate officers "are generally treated as separate from a corporation for purposes of preclusion," but they "may be in privity with a corporation if they are ***named*** as defendants in their capacity ***as officers***." *Friez v. First American Bank & Trust of Minot*, 324 F.3d 580, 582 (8th Cir. 2003) (emphases added). Similarly, in cases involving government parties, a later suit against government officers in their individual capacities may be brought without being subject to a claim preclusion judgment by a prior case against the government entity or government defendants acting in their official capacities. *See Mitchell v. Chapman*, 343 F.3d 811, 823 (3d Cir. 2003) ("[T]he rule of differing capacities provides that '[a] party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity.'") (citing RESTATEMENT (SECOND) OF JUDGMENTS, § 36(2)). Therefore, this Court should reverse the District Court's dismissal order since Tassinari and AVB are not privies to the Brownstone entities.

2. <u>At a Minimum, the District Court Should Have Allowed Discovery on the Privity Analysis Before Dismissing Plaintiffs' Complaint.</u>

Despite the District Court's detailed findings regarding privity, none of these conclusions are supported by evidence in the record. Instead, the District

Court was persuaded by the arguments of Defendants' counsel at the time of the hearing. JA 2:195–237. Yet, as a matter of law, "[a]rguments of counsel are not evidence and do not establish the facts of the case." *Jain v. McFarland*, 109 Nev. 465, 475–476, 851 P.2d 450, 457 (1993). Not only were the District Court's findings on privity unsupported, but the factual issues raised in Plaintiffs' opposition prevented the District Court from dismissing this case. Indeed, the District Court should have accepted Plaintiffs' factual allegations as true. *See Stubbs*, 297 P.3d at 328–329 (requiring a district court to accept all factual allegations as true and draw all inferences in favor of the plaintiff). Even if this Court construes the District Court's dismissal order as granting summary judgment (*Bonnell*, 282 P.3d at 715–716), the affidavits attached to the opposition to motion to dismiss should have defeated summary judgment. JA 2:127–167.

Since Defendants had the burden to demonstrate the application of claim preclusion (*see Schwartz v. Schwartz*, 95 Nev. 202, 204–205, 591 P.2d 1137, 1139 (1979)), they had to present evidence to satisfy this burden. *See Fullerton v. State*, 116 Nev. 906, 909, 8 P.3d 848, 849 (2000) ("[A] defendant claiming an exemption or exception as a defense has the burden of offering evidence to establish that defense."). At a minimum, there were factual issues on privity that precluded the District Court from dismissing this litigation. Notably,

information on the nature of the relationship that Tassinari and AVB had with the Brownstone entities, for purposes of determining privity, was uniquely within Defendants' possession and control. *See Rocker*, 122 Nev. at 1194–1195, 148 P.3d at 709–710. Yet, Defendants did not present any evidence to support the District Court's findings on privity. Thus, at a minimum, the District Court should have allowed discovery into the privity issues before simply dismissing the complaint.

The evidence presented in Plaintiffs' opposition to motion to dismiss was sufficient to defeat Defendants' motion to dismiss on the privity analysis. The limited evidence in the record reflects that the Brownstone entities were ***not*** representing Tassinari individually or AVB in the first lawsuit. The language of the RESTATEMENT, § 41, as adopted in *Alcantara*, clearly refers to the non-party in the subsequent suit being "represented ***by a party***." *Alcantara*, 321 P.3d at 917 (emphasis added). Since the Brownstone entities were plaintiffs in the first lawsuit, they had the burden to demonstrate that they represented the personal interests of Tassinari and AVB throughout the first lawsuit. Tellingly, the depositions of the Brownstone entities' witnesses, Gross and Morrison, reflect that the Brownstone entities were not representing Tassinari, individually, or AVB in the first lawsuit. JA 2:131–167. In fact, both Gross and Morrison specifically disclaimed any knowledge of Tassinari's fraud in executing the

term sheet. JA 1:65, 74. In her deposition in the first lawsuit, Morrison testified:

> Q: Were you involved at all in the negotiations of that agreement [between Mendenhall, the Brownstone entities, and a Canadian investor]?
>
> A: I was not involved in the negotiation.

JA 1:65. When asked about the "other investor," Morrison stated:

> Q: And then it says "Other investor." Do you know who that other investor is?
>
> A: It's hard to read, isn't it. I don't know.

JA 1:67. Gross, as the NRCP 30(b)(6) representative for the Brownstone entities, was also deposed in the first lawsuit. Gross testified that he did not know who had signed the documents for the "other investor":

> Q: With regard to that other investor signature, if you don't recognize who that is, would there be somebody else who would have more knowledge than you as to who that might be?
>
> A: I don't know. I would have to get a better copy than this and—corporate maybe.
>
> Q: When you say corporate, who would that be?
>
> A: Mr. Tassinari or—who was in the corporate office.

JA 1:73. As the NRCP 30(b)(6) witness for the Brownstone entities, Gross did not act in any way to represent Tassinari or AVB in the litigation. Instead, he

distanced himself from the AVB corporate office. When Gross was asked if there was another signed term sheet in existence related to the underlying casino project, he had no knowledge:

> A: As far as Brownstone entity that I was in charge of, no.
>
> Q: Is there a term sheet that you're aware of that relates to a non Brownstone entity that you're in charge of?
>
> A: Not to my recollection.
>
> Q: I just want to be sure because you seemed to make a differentiation?
>
> A: Well, there is a difference, because ***I ran Brownstone. I was not in corporate. So American Vantage, I don't know***.

JA 1:74 (emphasis added). Gross, as the NRCP 30(b)(6) witness, bound the Brownstone entities to the lack of knowledge and lack of "representation" of Tassinari or AVB for purposes of a privity analysis. *See Keepers, Inc. v. City of Milford*, 807 F.3d 24, 34 (2d Cir. 2015). Therefore, due to the existence of genuine factual issues, it was reversible error for the District Court to find that the Brownstone entities were in privity with Tassinari and AVB, and this Court should reverse the District Court's dismissal order.

B. THE DISTRICT COURT ERRED BY GRANTING DEFENDANTS' MOTION TO DISMISS BASED ON CLAIM PRECLUSION WHEN THE FRAUD CLAIMS MADE IN THE SECOND LAWSUIT COULD NOT HAVE BEEN MADE IN THE FIRST LAWSUIT.

The District Court erred by concluding under a claim preclusion analysis that Plaintiffs could have alleged their fraud claims in the first lawsuit, even though Defendants' fraud was not discovered until after an offer of judgment was already served and later accepted by the Brownstone entities. JA 1:37–40; JA 2:131–167. Indeed, in the first lawsuit, Mendenhall and Sunridge attempted to amend their answer to include fraud claims against Tassinari and AVB. JA 1:41–96. However, Judge Israel never reached a decision on the motion to amend and, instead, declared the entire first lawsuit settled and dismissed, despite the fraud claims against Tassinari and AVB. JA 2:206–207. Judge Israel commented that Mendenhall and Sunridge would have to seek a remedy for their fraud claims in "another lawsuit." *Id.* Additionally, in dismissing Plaintiffs' lawsuit, the District Court believed Defendants' counsel's argument that Plaintiffs should have discovered the fraud months earlier, before Tassinari made the stunning admission in his deposition that he signed the term sheet not only on behalf of AVB, but also for the non-existent "Other Investor(s)." JA 2:131–167, 239–247. Since Plaintiffs were never given an opportunity, they could not have possibly asserted their fraud claims against Tassinari and AVB

in the first lawsuit. At a minimum, these were factual issues that the District Court should have reserved for trial. *See Siragusa*, 114 Nev. at 1391, 971 P.2d at 806; *Hidden Wells Ranch, Inc.*, 83 Nev. at 145, 425 P.2d at 601. Therefore, this Court should reverse the District Court's order dismissing the second lawsuit.

1. Plaintiffs' Fraud Claims in the Second Lawsuit Were Not Based on the Same Cause of Action.

In order for claim preclusion to apply under Nevada law, the two sets of claims must be based on the same "cause of action." *Executive Mgmt. Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 835, 963 P.2d 465, 473 (1998). "The Nevada test for identical causes of action is whether the sets of facts essential to maintain the two suits are the same." *Clements v. Airport Auth.*, 69 F.3d 321, 328 n. 4 (9th Cir. 1995) (citing *In re Estate of Firsching*, 94 Nev. 252, 254–255, 578 P.2d 321, 322 (1978)). This Court has provided further clarification on the "same cause of action" test:

> The true test of identity of 'causes of action,' as that term is used in connection with the plea of former adjudication, is the ***identity of the facts essential to their maintenance***. . . . The authorities agree that when the same evidence supports both the present and the former cause of action, the two causes of action are identical. . . ." Thus, if appellant's claim is based upon evidence of new and independent delinquencies, there can be no such identity. Where claims arise at different times out of the same transaction, a

> judgment as to one or more of such claims is no bar to a subsequent action on the claims arising thereafter. . . .

Round Hill Gen. Improvement Dist. v. B-Neva, Inc., 96 Nev. 181, 183–184, 606 P.2d 176, 178 (1980) (emphasis added).

In the instant case, the facts essential to maintain the two suits, and thereby the causes of action, are different. That is, the same evidence does not support the present and former causes of action. The first lawsuit was brought by the Brownstone entities, asserting that Mendenhall and Sunridge breached a contract for failing to transfer land to develop a casino resort property. JA 1:30–36. Under Nevada law, to maintain a cause of action for breach of contract, a party must establish: (1) the existence of a valid contract; (2) a failure to render performance of obligations when due; (3) that the breach, if any, did not excuse performance by the other party; (4) that the alleged breach was not a result of the other party's failure to perform a condition precedent; (5) that damages were sustained; (6) the amount of damages are proved to a reasonable degree of certainty; and (7) the damages were a foreseeable consequence of a particular breach. *See Dachner v. Union Lead Mining and Smelter Co.*, 65 Nev. 313, 314–315, 195 P.2d 208, 208–209 (1948).

In contrast, Mendenhall and Sunridge alleged fraud claims in the second lawsuit against Tassinari and AVB. JA 1:1–10. To maintain a claim for fraud,

a party must establish (1) a false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). The evidence to prove the Brownstone entities' breach of contract claim in the first lawsuit is markedly different than the proof for Plaintiffs to support their fraud claims against Tassinari and AVB.

In a procedurally similar opinion from New York, a fraud case filed after a breach of contract case was not precluded. *See In re Parmalat Securities Litigation*, 493 F.Supp.2d 723, 735–736 (S.D.N.Y. 2007). In that case, the plaintiffs, who were bondholders, brought their first case for claims that were "purely contractual in nature." *Id.* at 733. In the second case, the bondholders brought a claim to recover damages caused by fraud, resulting in a decline in the value of their securities. *Id.* In examining whether these were the same cause of action, the court explained that the specific losses that the plaintiffs were seeking in the second case were never asserted in the first case, nor was there evidence that "the court ever passed on the issue of [defendant's] alleged fraud." *Id.* at 734. The *Parmalat* court explained that the evidence to prove the

fraud claims would have been "irrelevant to prove the claims submitted to the [first] Court." *Id.* at 734. Put another way, the court explained that the same "transaction" can underlay both claims, but a "single transaction of course could give rise to two distinct injuries." *Id.* at 735. The relevant inquiry is "whether the evidence required to prove one differs from the evidence required to prove the other." *Id.* at 735. As a result, the plaintiffs' claims for fraud in the second case were not precluded by the breach of contract claims in the first case. *Id*. at 736.

Examining the relevant terms "estoppel by judgment" and "res judicata" rather than the more contemporary "claim preclusion," the Ninth Circuit elaborated on these issues in a contract and fraud case in *Bankers Trust Co. v. Pac. Employers Ins. Co.*, 282 F.2d 106, 111 (9th Cir. 1960). Applying Nevada law, the Ninth Circuit concluded that a claim for fraudulent inducement to enter a contract was a separate cause of action from the right to sue to have the contract performed, and the subsequent fraud claim was not barred by res judicata or estoppel by judgment. *Id.* "Entirely different facts are essential to maintaining the two suits. The former required proof of the contract, appellant's performance thereof and appellees' failure to perform; the instant suit requires proof of fraud in the inducement of the contract." *Id.*; s*ee also McDonald v. Johnson & Johnson*, 776 F.2d 767, 770 (8th Cir. 1985) ("[C]ourts agree that

fraud in inducing a contract and a later breach of that contract represent two distinct causes of action under Minnesota law.") (emphasis added); *Vutci v. Indianapolis Life Ins. Co.*, 403 N.W.2d 157, 162–163 (Mich. App. 1987) (finding that a second action alleging negligence and implied contract claims was not precluded by a previous action alleging breach of contract).

In the first lawsuit, Mendenhall and Sunridge defended against the Brownstone entities' allegations of breach of contract. In the second lawsuit, Mendenhall and Sunridge, as Plaintiffs, asserted fraud claims against Tassinari and AVB. Thus, according to the prevailing case law, Mendenhall and Sunridge would not be precluded from bringing their fraud claims in the second lawsuit, even if they had been plaintiffs in the first lawsuit. However, since Mendenhall and Sunridge were only defendants in the first lawsuit, this case law provides an even more compelling reason to allow the fraud claims in the second lawsuit to go forward. Therefore, Plaintiffs' fraud claims against Tassinari and AVB could not have been made in the first lawsuit because the claims were not based upon the same cause of action.

2. <u>Plaintiffs' Fraud Claims Were Not "Brought" in the First Lawsuit Because Judge Israel Did Not Consider Them.</u>

Five Star explains that claim preclusion embraces "all grounds of recovery that were asserted in a suit, as well as those that could have been

asserted." *Id.*, 124 Nev. at 1053, 194 P.3d at 712. Under *Five Star*, the third factor is satisfied when "the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Id.*, 124 Nev. at 1054, 194 P.3d at 713. However, Judge Israel did not consider Mendenhall and Sunridge's fraud claims against Tassinari and AVB in the first lawsuit, and these claims were never "brought."

In the first lawsuit, the issues related to Tassinari and AVB's fraud were not litigated nor did Judge Israel consider these issues. Mendenhall and Sunridge attempted to bring these issues when they arose, but the claims were not addressed because the offer of judgment was accepted, and Judge Israel dismissed the case without considering the motion to amend. JA 1:81–95; JA 2:229. Further, the Brownstone entities attempted to resolve whether the judgment in the first lawsuit impacted the fraud allegations in their motion to clarify. JA 1:109. But, Judge Israel denied the motion to clarify and did not address Mendenhall and Sunridge's fraud claims against the non-parties to the case before him. *Id.* The District Court's determination that Mendenhall and Sunridge's fraud claims were somehow "brought" in the first lawsuit such that they should be precluded is far beyond the policy goals or purposes of claim preclusion.

There is no Nevada case law on claim preclusion applying *Five Star* under circumstances where a claim has been "raised" in an initial case, but the court declines to address the claim. However, other jurisdictions have dealt with similar cases and determined that when a court declines to address a claim, the claim is ***not*** precluded from a subsequent lawsuit by claim preclusion. In *Township of Chestonia v. Township of Star*, 702 N.W.2d 631, 635 (Mich. App. 2005), a claim was "specifically placed before the court," but the trial court declined to rule on it. "Therefore, this claim was neither litigated, nor could it have been litigated in the first action between the parties." *Id.* at 636. The law in Michigan for "res judicata" is similar to that of "claim preclusion" in Nevada under *Five Star*, in that res judicata under Michigan law "bars litigation in the subsequent action of not only those claims ***actually litigated*** in the first action, but those claims arising out of the same transaction that the parties, by exercising reasonable diligence, ***could have litigated but did not***." *Id.* (emphases added). In *Township of Chestonia*, the court concluded that the doctrine of res judicata did not apply because "Star Township ***did bring the claim*** challenged here by plaintiff. However, the trial court then ***elected not to rule*** on the issue." *Id.* (emphases added); *see also American Home Assur. Co. v. Pacific Indem. Co., Inc.*, 672 F.Supp. 495, 499 (D. Kan. 1987) (finding that res judicata did not apply where a plaintiff raised a claim in a second case that

the court in the first case refused to determine as a cross-claim). Similar to *Township of Chestonia*, Mendenhall and Sunridge proposed fraud claims in the first lawsuit, but Judge Israel elected not to rule on the claims. It was error for Judge Bare to apply claim preclusion in the second lawsuit to bar the fraud claims under these circumstances.

3. Plaintiffs' Fraud Claims Could Not Have Been Brought in the First Lawsuit.

a. There Was No Opportunity to Litigate the Fraud Claims in the First Lawsuit.

The application of claim preclusion in Nevada looks not only to whether the claims were actually brought, but whether the claims could have been brought in the first case. *See Five Star*, 124 Nev. at 1054, 194 P.3d at 713. The facts in this case demonstrate that Mendenhall and Sunridge's fraud claims could not have been brought since the fraud claims did not mature until after the irrevocable offer of judgment was served. In *Cogan v. City of Beaverton*, 203 P.3d 303 (Or. App. 2009), the court held that claim preclusion did not apply where a party did not have a "full and fair opportunity to litigate" an issue, where there was "no opportunity for [the plaintiff] to submit evidence and no opportunity to litigate before [in the prior case] the question" at issue. *Id.* at 309.

In the first lawsuit, Mendenhall and Sunridge did not know of the factual basis for their fraud claims until Tassinari's deposition in the first lawsuit. JA 1:128–130; JA 1:130, ¶14; JA 2:131–167. In response to the affidavits filed with Plaintiffs' opposition to motion to dismiss in the second lawsuit, Tassinari and AVB did not submit their own opposing affidavits. JA 2:168–180. Instead, Defendants relied wholly upon their counsel's argument for the meaning of two versions of the term sheet. JA 2:181–193. Defendants' counsel, without offering any independent evidence, claimed that Plaintiffs should have known of Tassinari and AVB's fraud once Plaintiffs had the term sheet. JA 2:203–204, 212. But, "[a]rguments of counsel are not evidence and do not establish the facts of the case." *Jain*, 109 Nev. at 475–476, 851 P.2d at 457. And, Plaintiffs' discovery of Tassinari and AVB's fraud is a factual question. *See Siragusa*, 114 Nev. at 1391, 971 P.2d at 806. The mere fact that Plaintiffs were in possession of the fully-executed term sheet does not mean that they were also aware of Defendants' fraud. In fact, Gross and Morrison testified that they were not even aware of the fraud. JA 1:65, 74. At a minimum, these were factual issues that should have been reserved for trial. *See Hidden Wells Ranch, Inc.*, 83 Nev. at 145, 425 P.2d at 601.

In summary, Plaintiffs, like the plaintiff in the *Cogan* case, did not have a "full and fair opportunity to litigate" their fraud claims since there was no

opportunity to submit evidence and litigate the questions. *Id.*, 203 P.3d at 309. Therefore, the Court should reverse the dismissal order and conclude either that Plaintiffs did not have an opportunity to litigate their fraud claims against Tassinari and AVB in the first lawsuit or that there were genuine factual issues.

b. Formal Barriers of the Irrevocable Offer of Judgment and Later Acceptance Prevented Plaintiffs From Bringing Their Fraud Claims in the First Lawsuit.

Nevada's three-part claim preclusion test is rooted in the RESTATEMENT (SECOND) OF JUDGMENTS. *See G.C. Wallace, Inc. v. Dist. Ct.*, 262 P.3d 1135, 1139 (Nev. 2011) (citing *Five Star*, 124 Nev. at 1054 n. 27, 194 P.3d at 713 n. 27). In *Five Star*, this Court did not discuss each of the "numerous exceptions" to the doctrine of claim preclusion, but acknowledged that exceptions to the doctrine exist. *G.C. Wallace, Inc.*, 262 P.3d at 1139 (citing *Five Star*, 124 Nev. at 1058, 194 P.3d at 716). The RESTATEMENT has set forth exceptions to claim preclusion, including when formal barriers such as jurisdiction or statutory barriers prevent a party from bringing a claim in a first case. RESTATEMENT (SECOND) OF JUDGMENTS, § 26(1)(c). Comment c to § 26(1)(c) explains that formal barriers may exist against the full presentation of a claim in a first case, and when this occurs, claim preclusion in a second case is not appropriate:

> The general rule of § 24 [prohibiting claim splitting] is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

The RESTATEMENT explains that exceptions to the general rule concerning claim splitting include jurisdiction, older modes of procedure (such as the historical division between law and equity which may prevent presentation of a claim in a single action), and implementation of a statutory or constitutional scheme. RESTATEMENT (SECOND) OF JUDGMENTS, § 26(1).

With respect to a "statutory or constitutional scheme," the RESTATEMENT explains, "The adjudication of a particular action may in retrospect appear to create such inequities in the context of a statutory scheme as a whole that a second action to correct the inequity may be called for even though it would normally be precluded as arising upon the same claim." *Id.* The irrevocable offer of judgment scheme under Nevada statutes and case law provides an exception to claim preclusion either as a formal barrier preventing litigation of claims or as a statutory scheme requiring the consideration of a claim in a later case. Plaintiffs' fraud claims could not have been brought in the first lawsuit

due to the priority of maintaining the status of the offer of judgment as irrevocable during the time of acceptance. Under NRCP 68, NRS 17.115, and *Nava v. Dist. Ct.*, 118 Nev. 396, 46 P.3d 60 (2002), an offer of judgment is irrevocable during the 10-day acceptance period. While some jurisdictions permit revocation of an offer of judgment under certain circumstances, such as fraud or serious mistake, Nevada has made an offer of judgment irrevocable. *See id.*; *cf. McGinnis v. Cox*, 465 S.W.3d 157, 164 (Tenn. App. 2014) (holding that an offer of judgment is not revocable during the acceptance period in Tennessee but collecting cases from state and federal courts with differing results).

Under Nevada law, since the offer of judgment is irrevocable during the 10-day acceptance period, Judge Israel was prohibited in the first lawsuit from considering the fraud claims that Mendenhall and Sunridge proposed in their motion for leave to amend. JA 1:41–96. As such, the District Court should have considered these fraud claims in the second lawsuit, as an exception to general principles for claim preclusion, particularly in light of the irrevocable nature of the offer of judgment.

4. Judge Israel Declined to Decide the Proposed Fraud Claims in the First Lawsuit.

When a court will not consider a particular claim as part of an action, this refusal implies that the court in the first action specifically intended the claim to be reserved. In *Dodd v. Hood River County*, 59 F.3d 852, 862 (9th Cir. 1995), the Ninth Circuit explained that a court "may be able to reserve part of a plaintiff's claim for subsequent litigation by expressly omitting any decision with regard to it in the first judgment." *Id.* A court in a first case may reserve an issue, where it acknowledges that certain claims are not before it but may be pending in another court or another case. *Id.* In the instant case, Judge Israel recognized Mendenhall and Sunridge's proposed fraud claims, but indicated that these claims would need to be prosecuted in another lawsuit. JA 2:206–207. In deciding Defendants' motion to dismiss in the second lawsuit, Judge Bare acknowledged Judge Israel's reservation of the fraud claims for another court. *Id.*; JA 2:220:5–8.

Notably, the order dismissing the first lawsuit does not speak to Mendenhall and Sunridge's proposed fraud claims against non-parties Tassinari and AVB. The order dismissing the case was

> with respect to any and all claims as alleged, or that ***could have been alleged*** in this action ***by ROBERT L. MENDENHALL, SUNRIDGE CORPORATION, BROWNSTONE GOLD TOWN, LLC and BROWNSTONE GOLD TOWN CV, LLC***, including,

> but not limited to, those asserted in the Complaint as well as any related or potential claims that could be asserted ***in this action against one another***, with each party to bear their own attorneys' fees and costs.

JA 1:109:14–22 (emphases added). The phrase "in this action against one another" does not reach Tassinari or AVB because they were not parties to the first lawsuit. *Id.* Thus, given Judge Israel's express reservation of the proposed fraud claims in the first lawsuit, and Judge Bare's acknowledgement of this reservation, it was reversible error for the District Court to dismiss Plaintiffs' complaint under these circumstances.

5. Claim Preclusion Does Not Apply Where Under NRCP 11, the Claims Could Not Have Been Brought Earlier.

To allege a cause of action, a party must have a good faith basis for doing so. Specifically, NRCP 11(b) provides, in pertinent part:

> **(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the

> extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

As previously outlined, Mendenhall and Sunridge were not aware of Tassinari and AVB's fraudulent acts until Tassinari's deposition on July 14, 2014—after the offer of judgment had been served. JA 1:37–40; JA 2:130, ¶14. Upon learning of the fraud, Mendenhall and Sunridge promptly moved to add Tassinari and AVB as parties to the first lawsuit. JA 1:41–96. However, before Judge Israel could hear the motion to amend, the Brownstone entities accepted the pending offer of judgment, which prevented Judge Israel from ever ruling on the fraud claims. JA 2:206. As a result, the fraud claims never became part of the first action. Since Mendenhall and Sunridge could not have asserted any fraud claims before having a factual basis to assert such claims, the fraud claims were proposed in accordance with NRCP 11(b). Defendants' bare suggestion that the fraud claims could have been made earlier would have violated NRCP 11(b).

Nevada case law states that a cause of action is not barred by claim preclusion in a subsequent suit if the cause of action "had not yet accrued." *See Havas v. Engebregson*, 97 Nev. 408, 411, 633 P.2d 682, 683 (1981).

Nevada courts look at whether the party "knew or should have known of all facts material" to the claim, and whether there was a cause of action when the first "case was commenced." *Id.* To determine accrual of a fraud cause of action, the cause of action accrues "upon the discovery by the aggrieved party of the facts constituting the fraud or mistake." NRS 11.190(3)(d). Mendenhall and Sunridge's fraud claims did not accrue until Tassinari's deposition when they first learned of the fraudulent signing of the term sheet. JA 2:130; *see also Loveland Essential Group, LLC v. Grommon Farms, Inc.*, 318 P.3d 6, 14 (Colo. App. 2012) ("Thus, even if a defendant breaches a contract before the first action's filing, if the plaintiff is ignorant of the breach until after the filing and its ignorance is not due to its own negligence, the claim on the breach is considered an after-arising claim.").

In *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 374 (Ky. 2010), the court explained that claims that had accrued after the date of the filing the complaint would depend on when a plaintiff was put on notice of the cause of his injury. A plaintiff's knowledge to determine the accrual of the claim is a question of fact to be answered by the jury. *Id.* In the instant case, the facts for Mendenhall and Sunridge to allege fraud in good faith under NRCP 11 were not discovered until the time of Tassinari's deposition. JA 2:130, ¶14. According to the standard described in *Havas*, 97 Nev. at 411, 633 P.2d at 683,

Mendenhall and Sunridge did not know, nor should they have known the facts material prior to Tassinari's admission in his deposition. Further, whether Mendenhall and Sunridge knew or should have known of the facts prior to Tassinari's deposition is a factual issue for the jury. *See Siragusa*, 114 Nev. at 1391, 971 P.2d at 806; *Coomer*, 319 S.W.3d at 374.

According to the application of NRCP 11(b), claim preclusion was not a legal reason to bar Plaintiffs' fraud claims in the second lawsuit. By the time Plaintiffs had notice of the fraud in the first lawsuit, they were unable to successfully assert these claims. Defendants' suggestion that the fraud claims should have been asserted earlier in the first lawsuit would have been a violation of NRCP 11(b) and should, therefore, not serve as a basis for claim preclusion. Since Plaintiffs could not have made their fraud claims against Tassinari and AVB in the first lawsuit, this Court should reverse the District Court's dismissal order.

C. THE DISTRICT COURT ERRED BY GRANTING DEFENDANTS' MOTION TO DISMISS BASED ON CLAIM PRECLUSION WHEN THE FRAUD CLAIMS MADE IN THE SECOND LAWSUIT WERE NOT COMPULSORY CLAIMS BUT PERMISSIVE CLAIMS.

The District Court erred by granting Defendants' motion to dismiss based on claim preclusion when the claims brought in the second lawsuit were not compulsory claims but permissive claims. The District Court's dismissal order

essentially treats Plaintiffs' fraud claims in the instant case as though they were compulsory claims in the first lawsuit. However, "[t]he general rule is that a claim must have matured before it will be subject to the compulsory counterclaim rule." *Bennett*, 98 Nev. at 453, 652 P.2d at 1181. Additionally, since Plaintiffs had no legal basis to file the fraud claims against Tassinari and AVB at the outset of the first lawsuit, the second lawsuit should have continued. *See Allied*, 127 Cal.App.4th at 155. On this additional basis, the Court should reverse the District Court's dismissal order and allow Plaintiffs to prosecute their fraud claims in the District Court against Tassinari and AVB.

1. Plaintiffs' Fraud Claims Against Tassinari and AVB Were Permissive Claims Because They Did Not Mature Until After the Responsive Pleading in the First Lawsuit.

The District Court's determination that Plaintiffs' fraud claims were barred by claim preclusion effectively converted the permissive fraud claims into compulsory counterclaims. NRCP 13(a) governs compulsory counterclaims and provides:

> A pleading shall state as a counterclaim any claim which ***at the time*** of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by

> which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(emphasis added). The emphasized phrase in NRCP 13(a) "at the time" underscores the legal principle that "a claim must have matured before it will be subject to the compulsory counterclaim rule." *Bennett*, 98 Nev. at 453, 652 P.2d at 1181. Nevada law has examined claim preclusion in the context of permissive cross-claims under NRCP 13(g). *Executive Management, Ltd.*, 114 Nev. at 837, 963 P.2d at 475.

In *Executive Management, Ltd.*, this Court explained that where claims against former codefendants were permissive rather than compulsory, such claims cannot be converted into compulsory claims based upon claim preclusion. *Id.*, 114 Nev. at 837, 963 P.2d at 475. The *Executive Management, Ltd.* holding is in line with the Ninth Circuit and several other courts that have concluded that a party that does not assert a permissive cross-claim is not barred by claim preclusion since such a ruling would make the claims mandatory rather than permissive. *Id.*, 114 Nev. at 836–837; 963 P.2d at 747; s*ee also Gallagher v. Frye*, 631 F.2d 127, 130 (9th Cir. 1980) ("This Circuit has refused to apply res judicata to bar a second suit on a claim related to an earlier claim when the second claim could, but was not required, to have been joined in the first action."); *Allied*, 127 Cal.App.4th at 155 ("The general rule that a

judgment is conclusive as to matters that could have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated."). As a matter of law, permissive claims are not barred by claim preclusion in a second case.

2. Other Courts Have Similarly Concluded that After-Acquired Claims Are Permissive and, Therefore, Not Barred by Claim Preclusion in a Second Case.

A Colorado case involving a claim that arose a year after an initial suit was filed, and three months before trial, concluded that the subsequent claims were not barred by claim preclusion since the claims could not have been brought when the first case was filed. *See Loveland Essential Group, LLC*, 318 P.3d at 14 ("Thus, even if a defendant breaches a contract before the first action's filing, if the plaintiff is ignorant of the breach until after the filing and its ignorance is not due to its own negligence, the claim on the breach is considered an after-arising claim."). In *Loveland Essential Group, LLC*, the court concluded that the claims from the second case were separate claims from the first case. *Id.* at 16. The Colorado court recognized that there may be cases where preclusion is appropriate if the new claim is actually an "additional manifestation of the initial claim," but this rule does not apply if a new and independent claim arises after the original pleading is filed. *Id.* at 15. Additionally, the court determined that summary judgment based on preclusion

was not appropriate, as there were genuine issues of material fact as to whether the plaintiff knew or should have known about the subsequent claims before it filed its first complaint. *Id.*; *see also Planning and Conservation League v. Castaic Lake Water Agency*, 180 Cal.App.4th 210, 227 (2009) (stating that claim preclusion is not a bar to claims that arise after the initial complaint is filed because of "changed conditions and new facts which were not in existence at the time the action was filed"). The accrual of a claim in Nevada is also a factual issue. *See Siragusa*, 114 Nev. at 1391, 971 P.2d at 806.

Likewise, the Tenth Circuit has explained that to determine whether a defendant has to file a compulsory counterclaim, courts only look "at one discrete moment in time—the time the defendant files the responsive pleading in which he could first assert his claim—to determine whether that counterclaim should be deemed a compulsory counterclaim." *Stone v. Dep't of Aviation*, 453 F.3d 1271, 1280 (10th Cir. 2006). In *Stone*, the plaintiff did not yet have a right-to-sue letter from the EEOC for ADA-related claims at the time he defended a separate lawsuit by his employer involving wrongful termination. *Id.* at 1272–1273. The employer successfully argued in the district court that the plaintiff's ADA-related claims were compulsory counterclaims and barred by claim preclusion in the new case. *Id.* On appeal, the Tenth Circuit reversed and remanded, holding that the after-acquired claim is not considered a

compulsory counterclaim under FRCP 13(a), and a failure to interpose it will not bar its assertion in a later suit. *Id.* at 1280–1281. Relying upon the RESTATEMENT (SECOND) OF JUDGMENTS, § 22, the Tenth Circuit clarified that "[a] defendant's failure to assert a *permissive* counterclaim will not preclude that party from instead raising it as a separate claim in a later action." *Id.* at 1281 (italics in original). Thus, the law is clear that only compulsory counterclaims must be asserted by a defendant to fall within the realm of claim preclusion for a subsequent lawsuit.

In the instant case, Mendenhall and Sunridge's proposed fraud claims against Tassinari and AVB were not compulsory counterclaims because they did not mature at the time that the responsive pleading was filed. Defendants have never argued that Mendenhall and Sunridge could have filed fraud claims at the outset of the first lawsuit. Instead, the fraud claims matured near the close of the first lawsuit, at which time Mendenhall and Sunridge promptly moved to amend their pleading to include these new claims. JA 1:41–96. Since the fraud claims were merely permissive counterclaims, claim preclusion was not a bar to the second lawsuit, and the District Court erred by dismissing Plaintiffs' complaint. At a minimum, the factual issues regarding the accrual of Plaintiffs' fraud claims prevented dismissal. On this additional basis, the Court should reverse the District Court's dismissal order.

D. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER THAT NRCP 60(b) AUTHORIZES AN INDEPENDENT ACTION BASED UPON FRAUD.

The District Court erred by failing to consider that NRCP 60(b) authorizes an independent action based upon fraud. NRCP 60(b) specifically states, "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." This Court has recently addressed independent actions under NRCP 60(b) in *Bonnell*. However, the record does not reflect that the District Court considered *Bonnell* before dismissing Plaintiffs' complaint. To the extent that this Court does not reverse the District Court's dismissal order on some other basis, the Court should vacate the dismissal order and remand for the District Court to consider *Bonnell* in light of the facts of this case.

1. Remand Is the Appropriate Remedy Due to the District Court's Failure to Consider the Viability of an Independent Action Under NRCP 60(b).

If the Court determines that Plaintiffs have successfully asserted an exception to claim preclusion, and the District Court's dismissal order is reversed on the merits, the Court will not need to reach this final argument. However, even if the Court concludes that Tassinari and AVB were in privity with the Brownstone entities, the Court should, nevertheless, vacate the District

Court's dismissal order with instructions on remand to consider whether this second lawsuit fits within the exceptions outlined in *Bonnell* for an independent action under NRCP 60(b). The District Court did not articulate a reason why this case could not proceed as an independent action under NRCP 60(b). *See Jitnan v. Oliver*, 254 P.3d 623, 629 (Nev. 2011) ("Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation."). Since this Court is not a fact-finding body, it does not have the capacity to apply *Bonnell* to the facts of this case in the first instance. *See State v. Ruscetta*, 123 Nev. 299, 304, 163 P.3d 451, 455 (2007) ("This court does not act as fact-finder and is unable to make the necessary factual findings in this case."). Therefore, absent a reversal on the merits, the Court should, alternatively, vacate the District Court's dismissal order.

2. Plaintiffs Have Presented *Prima Facie* Evidence to Satisfy the *Bonnell* Standard to Pursue an Independent Action Under NRCP 60(b).

This Court has previously commented that NRCP 60(b) is an appropriate procedural mechanism to challenge an accepted offer of judgment where there are grounds for relief from the judgment. *See Nava*, 118 Nev. at 398 n. 2, 46 P.3d at 61 n. 2. Specifically, NRCP 60(b)(3) identifies "fraud . . . , misrepresentation or other misconduct of an adverse party" as a basis for relief

under this rule. NRCP 60(b) permits relief from a judgment by motion or by independent action. *Bonnell*, 282 P.3d at 714. Rule 60(b) "does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." *Id.* at 715. Resort to an independent action is rare, and "only under unusual and exceptional circumstances." *Id.* This Court has stated, "[T]he courts can never be called upon to legalize a fraud, or enable any man upon an executor contract to realize a profit from his own immoral conduct." *Havas v. Alger*, 85 Nev. 627, 632, 461 P.2d 857, 860 (1969). In certain instances, an injustice may be "sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata." *U.S. v. Beggerly*, 524 U.S. 38, 46 (1998) (citing *Marshall v. Holmes*, 14 U.S. 589, 12 S.Ct. 62 (1891) in which plaintiff alleged that the judgment taken against her in the underlying action was a result of a forged document).

In the instant case, Plaintiffs have presented at least *prima facie* evidence to satisfy the *Bonnell* standard, such that the Court should vacate and remand the District Court's dismissal order as an alternative to reversal on the merits.

a. Timeliness.

Although an independent action does not contain a specific deadline in NRCP 60(b), it is governed by laches. *Bonnell*, 282 P.3d at 715. In the instant

case, Plaintiffs filed their complaint in this second lawsuit just over 30 days after the notice of entry of the order entered in the first lawsuit. JA 1:1–10, 105–110. Thus, Plaintiffs satisfied not only the laches standard for independent actions, but also the 6-month deadline for motions filed under NRCP 60(b).

b. Plaintiffs' Exhaustion of Remedies in the First Lawsuit.

As soon as Mendenhall and Sunridge were aware of the fraud in the first lawsuit, they promptly moved to amend their pleading to include the fraud claims against Tassinari and AVB. JA 1:41–96. Judge Israel never made a decision on the motion to amend because the first lawsuit reached an ending once the Brownstone entities accepted the offer of judgment. JA 2:206. Although the parties appeared before Judge Israel for the Brownstone entities' motion to clarify (JA 1:109), there was no ruling on the requested clarifications. JA 1:105–110. Instead, Judge Israel directed Mendenhall and Sunridge to seek relief through their proposed fraud claims in "another lawsuit." JA 2:207–209. Thus, there is no other motion that Mendenhall and Sunridge could have filed in the first lawsuit.

Further, the judgment in the first lawsuit was based upon a compromise settlement and does not create an appealable order. *See Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 265, 71 P.3d 1258, 1261 (2003) ("[W]e hold

that payment of a judgment only waives the right to appeal or renders the matter moot when the payment is intended to compromise or settle the matter."). Likewise, the denial of a motion to amend a pleading is not listed as an appealable order in NRAP 3A(b) or any other court rules or statutes identifying appealable orders; thus, no right to appeal exists. *See Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (holding that an appeal must be based upon express authority for the right to exist). While an order denying a motion to amend a pleading can be "reviewed" under the umbrella of an appeal from a final judgment, there was no final, appealable judgment in the first lawsuit. *See Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (stating that interlocutory orders can be reviewed in an appeal from the final judgment). Therefore, Mendenhall and Sunridge exhausted their remedies available to them in the first lawsuit.

c. Substantive Grounds for Overcoming the Judgment from the First Lawsuit.

Bonnell discusses relief through an independent action as akin to equitable relief. *Id.* at 715. As a general matter, successful fraud claims defeat a contract. *See Pacific Maxon, Inc. v. Wilson*, 96 Nev. 867, 619 P.2d 816 (1980); *Violin v. Fireman's Fund Ins. Co.*, 81 Nev. 456, 406 P.2d 287 (1965).

These general principles support this Court's previous comment that an accepted offer of judgment can be attacked on equitable principles. *See Nava*, 118 Nev. at 398 n. 2, 46 P.3d at 61 n. 2. Thus, if Tassinari and AVB are presumed to be one and the same as the Brownstone entities, Tassinari and AVB cannot hide behind the accepted offer of judgment to defeat Plaintiffs' fraud claims. Courts reviewing the irrevocable nature of offers of judgment during the 10-day acceptance period have divided results on whether an offer of judgment can be withdrawn during this period on the basis of fraud. *McGinnis*, 465 S.W.3d at 164. However, the citing references uniformly hold that after an offer of judgment is accepted, the offer can be attacked by Rule 60(b) on the basis of fraud. *See Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1240 (4th Cir. 1989) (permitting revocation of an offer of judgment induced by fraud); *Webb v. James*, 147 F.3d 617, 620–621 (7th Cir. 1998) (holding that a FRCP 68 offer of judgment could be challenged pursuant to FRCP 60); *Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d 760, 764–765 (D.C. Cir. 1995) (stating that FRCP 68 offers can be modified or withdrawn under FRCP 60(b) if the offer is induced by actual misconduct on the part of the plaintiff). Accordingly, Plaintiffs have demonstrated at least *prima facie* evidence for this Court to vacate the District Court's dismissal order and remand with instructions based upon the substantive grounds for overcoming the judgment in the first lawsuit.

The District Court erred by not considering the standard for an independent action under NRCP 60(b) under the circumstances of this case. Therefore, the Court should vacate the dismissal order and remand, as an alternative to reversing the dismissal order on the merits.

VIII. CONCLUSION

This Court should reverse the District Court's dismissal order based upon claim preclusion, as a matter of law, since (1) Tassinari and AVB were not in privity with the Brownstone entities; (2) Plaintiffs' fraud claims could not have been made in the first lawsuit; and (3) Plaintiffs' fraud claims were not compulsory claims but permissive claims. Due to genuine factual issues within each of these issues, the Court should similarly reverse the dismissal order.

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As an alternative to reversing the dismissal order on the merits, this Court should vacate the dismissal order since the District Court failed to consider that Plaintiffs' fraud claims asserted in the second lawsuit were authorized as an independent action under NRCP 60(b).

Dated this 6th day of June, 2016.

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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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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 either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 13,962 words; or

☐ does not exceed _____ 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 6th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANTS' OPENING BRIEF** and **JOINT APPENDIX, VOLUMES 1–2** were filed electronically with the Nevada Supreme Court on the 6th day of June, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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