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.

Supreme Court No. 68053
District Court Case No: A-14-708281-C

RESPONDENTS' ANSWERING BRIEF

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RULE 26.1 DISCLOSURE

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

Respondent Ronald Tassinari is an individual. Respondent American Vantage Brownstone LLC is a Nevada limited liability company and is owned by American Vantage Companies, a Nevada Corporation.

Undersigned counsel further certifies that the law firm of Santoro Whitmire and Attorneys Harry Marquis, James Lee, Nicholas J. Santoro and Oliver J. Pancheri are the attorneys who have appeared for Respondents in this action. The law firm of Santoro Whitmire, and attorneys Nicholas J. Santoro and Oliver J. Pancheri, Harry Marquis, and James Lee are the only attorneys and firm expected to appear for Respondents in this Court.

Dated this 21st day of July, 2016.

SANTORO WHITMIRE

By:*/s/ Oliver J. Pancheri*
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I. JURISDICTIONAL AND ROUTING STATEMENT

Respondents, Ronald Tassinari and American Vantage Brownstone LLC ("American Vantage Brownstone") (collectively the "Tassinari Parties") do not object on jurisdictional grounds to the jurisdiction of this Court to hear this Appeal.

Likewise the Tassinari Parties do not object to this Court retaining this Appeal and not assigning it to the Court of Appeals. However, the Tassinari Parties do not agree that this appeal falls under NRAP 17(a)(13) or (14).

II. COUNTERSTATEMENT OF ISSUES PRESENTED

A. WHETHER A DISMISSAL WITH PREJUDICE BASED UPON CLAIM PRECLUSION SHOULD BE OVERTURNED WHERE THE RECORD SUPPORTS A FINDING OF PRIVITY BETWEEN THE PARTIES INVOLVED IN THE TWO ACTIONS.

B. WHETHER A DISMISSAL WITH PREJUDICE BASED UPON CLAIM PRECLUSION SHOULD BE OVERTURNED WHERE ADDITIONAL DISCOVERY IS REQUESTED FOR THE FIRST TIME ON APPEAL.

C. WHETHER THE DISMISSAL WITH PREJUDICE BASED UPON CLAIM PRECLUSION SHOULD BE UPHELD IN LIGHT OF THIS COURT'S DECISION IN *WEDDELL V. SHARP*.

D. WHETHER A DISMISSAL WITH PREJUDICE BASED UPON CLAIM PRECLUSION SHOULD BE OVERTURNED BASED UPON A CLAIM THAT AN INDEPENDENT ACTION UNDER NRCP 60(B) SHOULD BE PERMITTED WHERE THE ARGUMENT WAS NOT RAISED WITH THE DISTRICT COURT AND NO RELIEF UNDER NRCP 60(B) WAS EVER SOUGHT.

III. COUNTERSTATEMENT OF THE CASE AND SUMMARY OF THE LEGAL ARGUMENT

At the heart of this appeal is an effort to avoid the implication of a duly accepted offer of judgment and the finality that resulted from the same. As this Court has recognized, the general purpose of claim preclusion is to "obtain finality by preventing a party from filing another suit that is based on the same set of facts that were present in the initial suit." *Weddell v. Sharp*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d 80, 85 (Nev. 2015), quoting *Five Star Capital Corp. v. Ruby,* 124 Nev. 1048, 1054, 194 P.3d 709, 712 (2008). The doctrine was created to address the fundamental need of any judicial system for finality; "a claim . . . which parties had a full and fair opportunity to litigate should, after judgment, forever be put to rest as between those parties." MOORE'S FEDERAL PRACTICE § 131.12[1] (citing *Montana v. United States*, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979)). In this matter, the district court did not err in granting the Tassinari Parties' Motion to Dismiss based upon the doctrine of claim preclusion, which was a recognition of the finality of the prior dismissal with prejudice.

The same operative facts are present in the first action (Case No. A653822, the "First Action") and the second action (Case No. A708281, the "Second Action"). In the First Action, Brownstone Gold Town, LLC and Brownstone Gold Town CV, LLC (collectively the "Brownstone Entities") sued Robert Mendenhall

and Sunridge Corporation (the "Mendenhall Parties") for their failure to contribute certain real property as required by an agreement entered into by the parties (the "Term Sheet"). Shortly before trial in the First Action, the Brownstone Entities settled the First Action by accepting the Mendenhall Parties' $1,200,000 Offer of Judgment. JA I:0098-0104. Thereafter, the Mendenhall Parties initiated the Second Action against the Tassinari Parties (the owner and the manager of the Brownstone Entities) claiming that they identified a basis during discovery in the First Action for claims sounding in fraud relating to the Term Sheet and while the Offer of Judgment was pending. JA I:0002-0016.

The Mendenhall Parties initiated the Second Action a few months after their failed attempt to bring their fraud claims and defenses in the First Action through a proposed amended pleading (the "Proposed Amendment"). JA I:0088.[1] The complaint filed in the Second Action simply repeated the allegations from the Proposed Amendment against the Tassinari Defendants while omitting the Brownstone Entities. JA I:0002-0010. The Tassinari Parties filed a motion to dismiss the Second Action, which was granted by the district court.

The district court did not err in granting the Tassinari Parties' Motion to Dismiss based upon the doctrine of claim preclusion. This Court, in *Five Star,*

[1] The Mendenhall Parties drew no distinction between the Brownstone Entities and the Tassinari Defendants in the Proposed Amendment, which demonstrated that the Brownstone Entities were in privity with the Tassinari Parties. JA I:0088-0095.

adopted a three-factor test for claim preclusion based on the conclusion that the previous four-factor test was "overly rigid." *Five Star*, 124 Nev. at 1054. In *Weddell*, this Court then further modified the test for claim preclusion by adopting the following three-factor test: (1) the final judgment is valid; (2) 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; and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, or the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a "good reason" for not having done so. *Weddell*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d at 85.

The district court, after considering the briefing from both parties and extensive argument, appropriately found that the Second Action was barred by the doctrine of claim preclusion. The district court expressly found that (1) the Tassinari Parties were privies to the Brownstone Entities; (2) the First Order of Dismissal was a final valid judgment; and (3) that the claims asserted by the Mendenhall Parties in the Second Action were "based upon the same claims or any of them that were or could have been brought in the First [Action]." JA I:0245-0246. As discussed below, these elements satisfied the requirements of claim preclusion under the standard set forth in *Five Star* or in the modified three-part test this Court more recently adopted in *Weddell.* The district court did not err in

finding that the Second Action was barred by claim preclusion.

The Mendenhall Parties, for the first time on appeal, contend that they should have been allowed an opportunity to conduct discovery on the issue of privity prior to the district court granting the motion to dismiss. (Opening Brief at p. 25-30). The Mendenhall Parties failed to make this argument in their Opposition or at the lengthy hearing before the district court. JA II:0111-0125, 0195-0237. As such, it should not now be heard on this appeal. Likewise, as discussed below, this contention has no merit as no additional discovery would have changed the district court's decision based upon claim preclusion. The record has more than sufficient evidence to support the district court's finding of privity.[2]

Even if the Court were to find that no privity exists between the Brownstone

[2] The Mendenhall Parties were parties to both the First Action and the Second Action. The Tassinari Parties were not parties to the First Action, but the district court found that they were in privity with the Brownstone Entities, which was supported by the underlying facts in this matter. For example, American Vantage Brownstone was a party to the Term Sheet and Tassinari served as American Vantage Brownstone's Chair. JA II:0182-0186. The Term Sheet serves as the center of the dispute in both the First Action and the Second Action. Moreover, the Term Sheet expressly stated that Brownstone was a subsidiary of American Vantage Brownstone. JA II:0188. Finally, the Mendenhall Parties own Proposed Amendment states that (1) Tassinari was a principal of both the Brownstone Entities as American Vantage Brownstone; and that (2) Tassinari was acting both individually and on behalf of the Brownstone Entities and American Vantage Brownstone in making representations to the Mendenhall Parties in order to induce them to execute the Term Sheet. JA I:0090. In fact, all of the allegations in the Proposed Amendment from the First Action were uniformly asserted against both the Brownstone Entities and the Tassinari Parties. JA I:0081-0096.

Entities and the Tassinari Defendants, the doctrine of nonmutual claim preclusion supports the district court's dismissal of the Second Action. Nonmutual claim preclusion is applicable because of the close and significant relationship between the Brownstone Entities and the Tassinari Defendants. In *Weddell*, this Court modified the test for claim preclusion to extend to defendants who were neither parties to the prior action or in privity with the parties to the action. *See Weddell*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d at 85. The Court found that the prior test under *Five Star* was "overly rigid" and adopted the doctrine of nonmutual claim preclusion. *See id.* Nonmutual claim preclusion bars the Second Action and supports the district court's dismissal.

Furthermore, the district court correctly found the First Order of Dismissal was a valid final judgment. The Mendenhall Parties, who drafted the Offer of Judgment, sought to make the preclusive effect of the Offer of Judgment broad, all-inclusive and without restriction. The Offer of Judgment expressly states that acceptance of the Offer of Judgment would serve as a full discharge and release of any and all claims "as alleged, or that could have been alleged…as well as any related or potential claims that could be asserted in [the First Action] against one another." JA I:0103. The Mendenhall Parties did not contest that the First Order of Dismissal was a final judgment. Thus, this element of claim preclusion is uncontested.

Likewise, the district court did not err in finding that the Mendenhall Parties had the opportunity to assert the claims in the First Action brought in the Second Action. Setting aside the numerous problems with the fraud claim based solely upon Tassinari signing on the line for the "Other Investor(s)," the notion that the Mendenhall Parties did not have the "opportunity" to assert their fraud claims/defenses in the First Action is simply false. The Mendenhall Parties had the same opportunity to assert counterclaims and third-party claims as any other defendant in civil litigation. The fact that the Mendenhall Parties waited over two years and until the eve of the discovery cut-off (and after the deadline to seek leave to amend had passed) to conduct the primary depositions to their case does not create an exception to the claim preclusion doctrine. Likewise, opting to serve the Offer of Judgment before completing depositions, as the Mendenhall Parties did in this matter, does not create an exception to the claim preclusion doctrine.

The Mendenhall Parties argue that claim preclusion only applies to compulsory claims and not permissive claims. Essentially, the Mendenhall Parties wish to restrict claim preclusion to compulsory counterclaims under NRCP 13(a). However, as discussed below, the Mendenhall Parties' argument runs contrary to Nevada law (e.g, *Weddell*) and would render the doctrine of claim preclusion completely meaningless. Claim preclusion squarely applies to the claims asserted in the Second Action against the Tassinari Parties and the district court correctly

dismissed that action.

The Mendenhall Parties' final argument is that the district court erred by "failing to consider that NRCP 60(b) authorizes an independent action based upon fraud." (Opening Brief at p. 53). There are a host of problems with this argument. First, the Mendenhall Parties never actually made this argument to the district court. The Mendenhall Parties have introduced this argument for the first time now on appeal and for this reason alone it should not be considered. A district court cannot be found to have erred by failing to consider an argument that was never actually made in the underlying proceedings. Second, the Mendenhall Parties never actually sought relief under NRCP 60(b). After the First Order of Dismissal was entered in the First Action, the Mendenhall Parties did not file a motion under NRCP 60(b) to have the First Order of Dismissal set aside. Likewise, the complaint filed in the Second Action is not an independent action to set aside the First Order of Dismissal. Realizing that the Second Action was rightfully dismissed based upon claim preclusion, the Mendenhall Parties attempt to transform the nature of the Second Action into something other than what it actually was in order to salvage it from dismissal. The facts of this case fail to come anywhere close to satisfying the rigorous standard for an independent action to set aside a judgment under NRCP 60(b), which can only be had in "**unusual and exceptional circumstances**" in order to prevent a "**grave miscarriage of**

justice." *Bonnell v. Lawrence*, 282 P.3d 712, 715 (Nev. 2012) [emphasis added].

In short, the Mendenhall Parties simply do not want to honor the implications of the duly accepted Offer of Judgment and improperly seek to revive the litigation that was dismissed with prejudice. Again, the purpose of claim preclusion is to "obtain finality." *Weddell*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d at 85, *quoting Five Star*, 124 Nev. at 1054, 194 P.3d at 712. The Mendenhall Parties sought to wrongfully undermine that finality by proceeding with the Second Action, which was rightfully dismissed by the district court.

IV. COUNTERSTATMENT OF THE FACTS

The Term Sheet

In or about 2005, Brownstone Gold Town, LLC ("Brownstone") became interested in developing a hotel and casino in Nevada. JA I:0033. Brownstone identified a 46 acre parcel of land located in Douglas County (the "Property") as a potential location for the hotel and casino, which was owned by Sunridge. JA I:0033. Brownstone engaged in negotiations with Sunridge for nearly two years regarding the Property during which time the manager of Brownstone created a separate entity, Brownstone Gold Town CV, LLC ("Brownstone CV"), to act as the developer and operating entity for the hotel/casino project. JA I:0033.

Finally, on December 4, 2007, Sunridge's owner, Mendenhall, entered into an agreement Brownstone (and others) entitled the Carson Valley Casino Project

Term Sheet (previously defined as the "Term Sheet"). JA II:0182. Pursuant to the Term Sheet, Mendenhall agreed to contribute the Property for the development of a 300 room hotel with over 90,000 square feet of casino space and 8,000 feet of convention space (the "Project"). JA I:0033. In exchange for the contribution of the Property, Mendenhall was to receive 27.04% membership interest in the Project. JA II:0182. Mendenhall was required to convey the Property by no later than December 27, 2007. JA II:0182. The Term Sheet further stated that Brownstone would contribute $1,500,000 for a 2.7% membership interest and that "Other Investors" would contribute $7,000,000 for a 12.6% membership interest. JA II:0183. The Term Sheet was silent as to when the contributions from the Other Investor(s) and Brownstone would take place. JA II:0182, 0186. The Term Sheet contained signature blocks for four parties – (1) American Vantage Brownstone, LLC ("American Vantage"); (2) Brownstone; (3) Mendenhall; and (4) Other Investors. JA II:0186. The Term Sheet expressly states that Brownstone is a subsidiary of American Vantage Brownstone. JA II:0182.

Mendenhall and Sunridge Fail to Honor the Term Sheet

In reliance on the Term Sheet, Brownstone spent significant time and expense to develop the Project by obtaining plans, surveys, approvals and land use entitlements, which enhanced the value of the Property. JA I:0033. However, despite making repeated assurances from December 4, 2007 through April 7, 2008

that the Property would be contributed as required by the Term Sheet, the Mendenhall Parties failed to ever contribute the Property as promised. JA I:0033-0034. In short, Mendenhall breached the Term Sheet by failing to contribute the Property. JA I:0033-0034.

The First Action Against Mendenhall and Sunridge

On December 27, 2011, the Brownstone Entities filed the First Action against the Mendenhall Parties based upon their failure to contribute the Property as required by the Term Sheet.

The Offer of Judgment

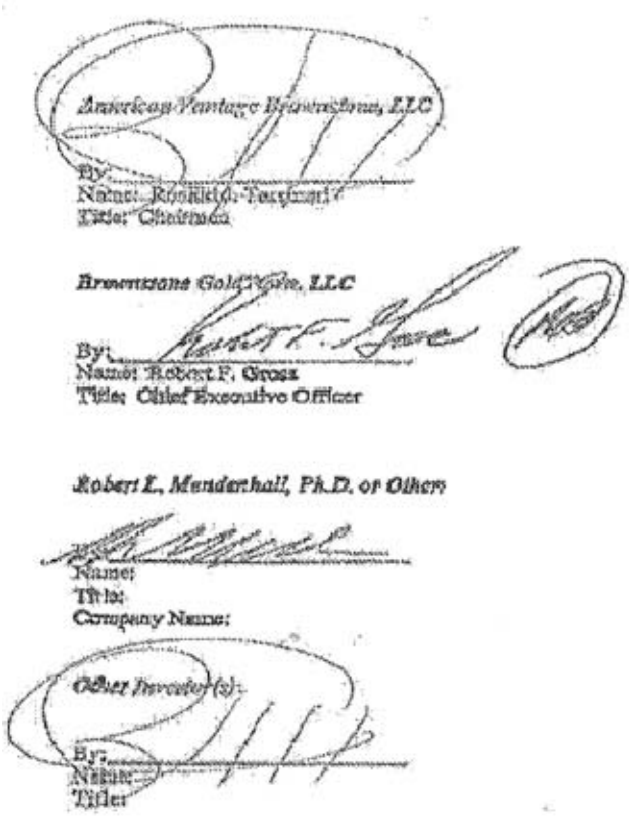
After over two years of litigation and approximately two months prior to the scheduled trial date of September 8, 2014, the Mendenhall Parties served the Offer of Judgement on July 10, 2014 offering a $1,200,000 lump sum settlement to the Brownstone Entities in exchange for dismissal of the First Action. JA I:0102. The Offer of Judgment stated that acceptance of the Offer of Judgment would serve as a full discharge and release of any and all claims "as alleged, or that could have been alleged…as well as any related or potential claims that could be asserted in [the First Action] against one another." JA I:0103. The Brownstone Entities accepted the Offer of Judgment by filing a Notice of Plaintiffs' Acceptance of Offer of Judgment on July 24, 2014. JA I:0098.

The Mendenhall Parties' Proposed Amendment

On July 21, 2014, after serving the Offer of Judgment, the Mendenhall Parties filed a Motion for Leave to an Amended Answer Counterclaim and Third Party Complaint (previously defined as the "Proposed Amendment") in the First Action. JA I:0042-0096. In addition to adding affirmative defenses and a Counterclaim, the Mendenhall Parties sought to bring a third-party complaint against American Vantage Brownstone and Ronald Tassinari. *See id.* American Vantage Brownstone was the owner of Brownstone and was a party to the Term Sheet. JA II:0182. Tassinari was an officer and managing agent of American Vantage Brownstone and signed the Term Sheet on its behalf. JA I:0005, II:0170.

The Mendenhall Parties claimed to have discovered the alleged fraud during the deposition of Tassinari, who testified that his signature was contained on the signature blocks for both American Vantage Brownstone and the Other Investor(s). JA I:0046-0048. Despite having the Term Sheet since December 2007, the Mendenhall Parties claimed that they did not discover that Tassinari had signed for both American Vantage Brownstone and the Other Investor(s) until he was deposed on July 14, 2014 – nearly seven years later and after over two years of litigating the Term Sheet. JA II:0172. Below is the signature page for the Term Sheet, which was produced by the Mendenhall Parties and shows the unique and obviously identical signatures of Tassinari for American Vantage Brownstone and

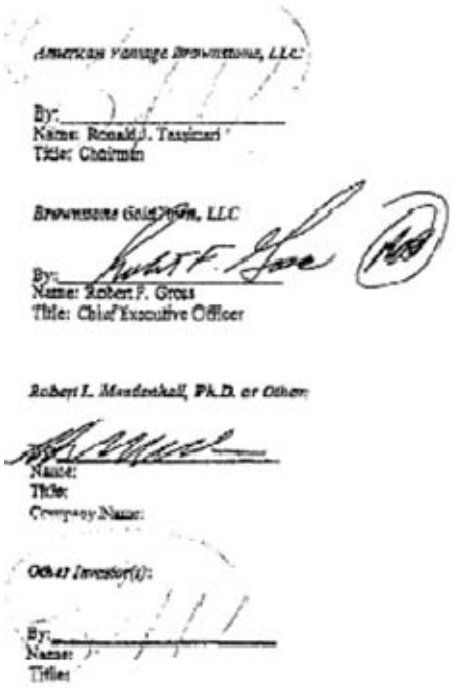
the Other Investor(s) –



JA II:0186. Even the most cursory review of the Term Sheet signature page makes it obvious that the same signature was contained on the American Vantage Brownstone and Other Investor(s) signature blocks. Certainly, Tassinari made no effort to conceal that he was signing in both locations.

The Mendenhall Parties argued that their failure to recognize sooner that Tassinari had signed for the Other Investor(s) was excusable because other deposed witnesses also did not recognize Tassinari's signature above the Other Investor(s) line on the Term Sheet. JA II:0114. However, the Mendenhall Parties

failed to disclose that the copy of the Term Sheet utilized during those depositions contained a less clear copy of the Term Sheet, which rendered Tassinari's signature nearly indecipherable. JA II:0192. Below is the Term Sheet utilized by the Mendenhall Parties during the depositions, which is considerably less legible than the version actually produced by the Mendenhall Parties –


American Vantage Companies, LLC

By:
Name: Ronald J. Tassinari
Title: Chairman

Brownstone Gold Corp., LLC

By:
Name: Robert F. Gross
Title: Chief Executive Officer

Robert L. Mendenhall, Ph.D. or Other

Name:
Title:
Company Name:

Other Investor(s):

By:
Name:
Title:

JA II: 0192. The above version fails to accurately portray the signatures on the Term Sheet. In fact, one of the witnesses expressly indicated that he would need to see a better copy of the Term Sheet in order to identify the signature on the Other Investors line. JA I:0073. The record does not reflect that the Mendenhall Parties presented the witness with a better copy, despite the fact that they themselves had produced a much clearer version of the Term Sheet. JA II:0186.

Further, at the hearing before Judge Bare, counsel for the Brownstone Entities addressed the Mendenhall Parties' assertion of a "fraud" based upon Tassinari's signature for the Other Investor(s), which was allegedly uncovered at the depositions of the Brownstone Entities' witnesses:

> MR. MARQUIS: No. No. That's -- that was, you know, he's taking bits and pieces out of the deposition. He wasn't there. It's just bits of the transcript. The fact was -- and what he's not telling, **Your Honor, is there was never a question that there was a Canadian investor. The Canadian investor had already invested substantial amounts of money, millions of dollars in the form of loans, into this transaction and that was all -- all those documents were produced in that case. It wasn't like some mystery. He had already put in millions of dollars in the form of loans and was prepared to put in additional funds** and we never got to the point of taking his deposition but he was absolutely ready to go.
>
> **The only reason he didn't put any more money in was because what did he need for the thing to go forward? He needed the dirt. He wanted to see Mr. Mendenhall and Sunridge put in the land and then he put in some more money**.
>
> So, yeah. Their whole spin that this is some stunning fraud, I mean, you know, I understand. You've got to argue and you're doing what you're going to do, but no. We don't accept or agree with that at all.
>
> And the whole -- their entire case, their entire theory that this was some fraud and some trick all boils down to these contracts, Your Honor. And when they argue that at the depositions of Mr. Gross and Ms. Morrison, they couldn't identify the signatures, remember the signatures

> that they presented in front of them were the signatures on Brownstone 00271 which are very unclear copies. Yeah. If you look at those, I don't know if anybody can identify those signatures. Maybe Mr. Tassinari can because they're his, but they are very fuzzy signatures. These are the ones they elected to stick in front of those witnesses at the deposition, but they had the clean signatures the whole time. Since December 2007, Mr. Mendenhall had this and for them to say that this was a fraud because I didn't -- I looked at their bad copy of it instead of the one that I admit that I had that clearly shows his signature because their whole fraud claim boils down to: We didn't -- not recognize those two signatures. But they had the document since 2007, Your Honor.

JA II:0234-0235. The Mendenhall Parties failed to depose the Canadian investor despite that fact that Ms. Morrison specifically identified the contact person for the Canadian investor group, Robert Sim, in her deposition. JA II:0147. Ms. Morrison's deposition took place on July 3, 2014, before the Mendenhall Parties served the Offer of Judgment. JA II:0143. Had the Mendenhall Parties deposed Mr. Sim, they could have confirmed that the investor(s) were waiting for the Mendenhall Parties to convey the land to the Project before investing more money into it, as explained by counsel for the Brownstone Entities. *See id.*

Finally, the Mendenhall Parties admitted that Mendenhall was the first to sign the Term Sheet. JA II:0129. Thus, the Mendenhall Parties could not have relied upon any existing signatures when Mendenhall chose to sign it. Additionally, as discussed above, the Mendenhall Parties never contributed the

Property irrespective of who signed the Term Sheet. Nevertheless, the Mendenhall Parties sought to add the affirmative defenses and claims predicated upon the alleged "fraud" and to add American Vantage and Tassinari as parties to the First Action.

The Dismissal of the First Action

The Brownstones Entities' acceptance of the Offer of Judgment on July 24, 2014 resulted in the First Action being dismissed with prejudice. The district court in the First Action entered an Order of Dismissal on August 29, 2014 (the "First Order of Dismissal"), which states in pertinent part as follows:

> …It is ORDERED, ADJUDGED AND DECREED that pursuant to NRCP 68(d) and NRS 17.115(2)(a), the above entitled action BE AND IS HEREBY **DISMISSED WITH PREJUDICE, FULLY DISCHARGED AND RELEASED**, with respect to any and all claims as alleged, **or that could have been alleged in this action by ROBERT L. MENDENHALL, SUNRIDGE CORPORATION, BROWNSTOWN 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 attorney's fees and costs.

JA I:0109 [emphasis added]. To the extent the Mendenhall Parties believed that they were aggrieved by the dismissal of the First Action as a result of the acceptance of the Offer of Judgment or their inability to amend the answer to bring

their fraud claims, they failed to seek any appellate review of the First Dismissal Order. Likewise, the Mendenhall Parties failed to seek any relief under NRCP 60(b) in order to have the First Order of Dismissal set aside.

The Mendenhall Parties Initiate a Second Action

On October 8, 2014, the Mendenhall Parties initiated the Second Action, which mirrored the Proposed Amendment, with the exception that the Mendenhall Parties did not include the previously proposed counterclaim against the Brownstone Entities. JA I:0002, 0081. The Second Action was heard by the Honorable Judge Rob Bare.

In response to the Complaint filed in the Second Action, Tassinari and American Vantage Brownstone (collectively the "Tassinari Parties") filed a Motion to Dismiss arguing that the First Order of Dismissal precluded the Mendenhall Parties from asserting the identical claims against them in a new action. JA I:0019. The Mendenhall Parties contend that the district court in the First Action (the Honorable Judge Ron Israel) instructed them to file a new action in order "to seek a remedy for their fraud claims…" (*See* Opening Brief at p. 5).

However, the citation for this proposition fails to support any reasonable inference that Judge Israel viewed a second action as viable or immune from claim preclusion. The Mendenhall Parties do not cite any transcript from the hearing before Judge Israel in support of this statement. Rather, the Mendenhall Parties

cite to a portion of the transcript from the hearing on the Motion to Dismiss before Judge Bare wherein Judge Bare asked counsel for the Tassinari Parties what Judge Israel had said about the Mendenhall Parties' Motion to Amend. JA II:0206-0207. The transcript reads in relevant part as follows:

> The Court: Why did [Judge Israel] 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.
>
> Mr. Marquis: Yes. He – my understanding of what he said from the bench, because I was there –
> The Court: Yeah.
>
> Mr. Marquis: Okay. Was that no question that the Offer of Judgment was going to be accepted. No question that the terms of the Offer of Judgment were going to be incorporated into his Order.
>
> ****
>
> The Court: What type of case, though, you think it was envisioned in that? It just seemed, I'm just saying, I'm not criticizing Judge Israel. I'm not. That's not the point of this. But if a judge says: Well, you can go file some other lawsuit, what was – what kind of lawsuit was envisioned in this potential filing?
>
> Mr. Marquis: I envisioned, your honor, that they would file exactly what they filed, which was their amended – their counterclaim that they sought to assert by filing their Motion to Amend. I envisioned that they would filed that exact claim against American Vantage, Brownstone and Tassinari. That's exactly what we

> envisioned and that's what we exactly told Judge Israel we were afraid that that they would do.
>
> The Court: **So, I take it maybe the judge was of the mindset: Well, let somebody else handle that. I'm done with it here. I mean that –**
>
> Mr. Marquis: **That's exactly what he said.**
>
> The Court: **And not as any indication that it had validity but rather under –**
>
> Mr. Marquis: **No. And as a matter of fact, he doubted – he said he didn't think it would survive a motion but it wasn't before him and he wasn't going to make that ruling. Somebody else was going to have to decide that.**
>
> The Court: Okay.

JA II:0207-0209 [emphasis added]. As the actual transcript from the hearing reveals, any suggestion by the Mendenhall Parties that Judge Israel viewed a subsequent action as being immune from dismissal is incorrect as there is no record of any such statement being made by him.

The Dismissal of the Second Action and the Appeal

After lengthy argument, Judge Bare took the matter under advisement and later granted the Motion to Dismiss and entered an Order Granting Defendants' Motion to Dismiss with Findings of Fact, Conclusions of Law on May 8, 2015 (the "Second Dismissal Order"). JA II:0243. In the Second Dismissal Order, the

district court found the following:

- That the Tassinari Defendants had satisfied the three-part test for determining whether claim preclusion applied as established in *Five Star*, 1051, 194 P.3d at 713;
- That American Vantage was the owner of the Brownstone Entities and that American Vantage signed the Term Sheet;
- That Tassinari signed the Term Sheet on behalf of American Vantage in his capacity as Chairman of American Vantage;
- That Tassinari managed the Brownstone Entities and acted on their behalf such that Tassinari and the Brownstone Entities had sufficient commonality and alignment for privity to exist;
- That American Vantage owned the Brownstone Entities and that the interest and motivations of American Vantage and the Brownstone Entities had sufficient commonality and alignment for privity to exist;
- That the Mendenhall Parties filed a Complaint in the Second Action that contained virtually the same allegations as those the Mendenhall Parties sought to assert with their Proposed Amendment; and
- That the claims asserted in the Second Action are based upon claims that could have been brought in the First Action and that the Mendenhall Parties' claims in the Second Action were barred by the doctrine of claim preclusion.

JA II:0244-0246.

The Mendenhall Parties appealed the Second Dismissal Order. The Mendenhall Parties' Opening Brief contains a Routing Statement indicating that the amount in controversy in this matter is "at least $1,200,000." (Opening Brief at p. 1). This is the precise amount as the Offer of Judgment, which was made to the Brownstone Defendants. The acceptance of the Offer of Judgment resulted in the termination of the First Action in which the Brownstone Entities were seeking significant damages from the Mendenhall Parties. The Mendenhall Defendants filed the Second Action against the Tassinari Defendants in order to recover the settlement funds it paid to the Brownstone Entities, which would completely undermine the Offer of Judgment duly accepted in the First Action.

V. LEGAL ARGUMENT

A. The District Court Correctly Found that the Tassinari Parties were in Privity with the Brownstone Entities.

"Contemporary courts have broadly construed the concept of privity, far beyond its literal and historic meaning, to include any situation in which the relationship between the parties is sufficiently close to supply preclusion." *Vets North, Inc. v. Libutti*, 2003 WL 21542554, at *11 (E.D.N.Y. Jan. 24, 2003). "Privity is a concept not readily susceptible of uniform definition." *Clemmer v. Hartford Ins. Co*., 587 P.2d 1098, 1102 (Cal. 1978). Privity generally exists where

there is "substantial identity" between parties, that is, when there is sufficient commonality of interest. *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980). When a person controls the affairs of the corporation, it is presumed that in any litigation involving that corporation, the individual has sufficient commonality of interest. *See Sparks Nugget, Inc. v. Commissioner*, 458 F.2d 631, 639 (9th Cir. 1972); *Irwin v. Mascott*, 370 F.3d 924, 929 (9th Cir. 2004) ("A close relationship between the named party and the non-party supports a finding of virtual representation."). The focus of the inquiry regarding privity is whether the party in the later action was "sufficiently close" to the party in the first action to as to justify applying preclusion principles. *Clemmer*, 587 P.2d at 1102. Substantial participation or control by the non-party in the named party's suit weighs heavily in favor of a finding of privity based upon virtual representation. *See ITT Rayonier, Inc*., 627 F.2d at 1003 (9th Cir. 1980) ("One who is not a party of record may be bound if he had a sufficient interest and participated in the prior action.") *citing Montana v. United States*, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979).

The Mendenhall Parties were parties to both the First Action and the Second Action. The Tassinari Parties were not parties to the First Action, but the district court found that they were in privity with the Brownstone Entities, which was supported by the underlying facts in this matter. For example, American Vantage

Brownstone was a party to the Term Sheet and Tassinari served as American Vantage Brownstone's Chair. JA II:0182-0186. The Term Sheet serves as the center of the dispute in both the First Action and the Second Action. Moreover, the Term Sheet expressly states that Brownstone was a subsidiary of American Vantage Brownstone. JA II:0188. Finally, the Mendenhall Parties own Proposed Amendment states that (1) Tassinari was a principal of both the Brownstone Entities as American Vantage Brownstone; and that (2) Tassinari was acting both individually and on behalf of the Brownstone Entities and American Vantage Brownstone in making representations to the Mendenhall Parties in order to induce them to execute the Term Sheet. JA I:0090. In fact, all of the allegations in the Proposed Amendment from the First Action were uniformly asserted against both the Brownstone Entities and the Tassinari Parties. *See id.*

Unsurprisingly, the district court expressly found, based upon the evidence presented, that Tassinari managed, led and was acting on behalf of the Brownstone Entities and that American Vantage Brownstone managed, led, owned and acted on behalf of the Brownstone Entities. JA II:0244-0245. These findings were sufficient to support a finding of privity.

The Mendenhall Parties argue that the law does not support a finding of privity under these facts. (Opening Brief at p. 20-25). Specifically, the Mendenhall Parties argue that different corporations are treated as separate entities

and that a judgment against a corporation does not automatically include individual liability for its officers. (Opening Brief at p. 22-23). The Tassinari Parties do not quibble with these basic and obvious legal tenets. However, neither of these generic legal assertions has any bearing on a determination of privity. Whether privity exists requires a determination of the relationship between the parties and whether the operative facts between the two cases are the same.

With respect to parent and subsidiary companies, numerous courts have found privity to exist between a parent company and its subsidiary. The Ninth Circuit has repeatedly found that privity can be shown through a corporate parent and its wholly-owned subsidiary. *See FDIC v. Alshuler (In re Imperial Corp. of Am.)*, 92 F.3d 1503, 1507-1508 (9th Cir. 1996) (finding res judicata applied to wholly-owned subsidiary of parent corporation); *Lake at Las Vegas Investors Group, Inc. v. Pacific Malibu Development Corp.*, 933 F.2d 724, 728 (9th Cir. 1991) (upholding final judgment against parent entity acted as res judicata bar to claims against subsidiary); *Salessi v. Commonwealth Land Title Ins. Co*., 2013 WL 5676209, 2013 U.S. Dist. LEXIS 149766 at 23 (C.D. Cal. Oct. 16, 2013) (upholding a finding of privity between a parent company and its subsidiary). Similarly, in *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 17 (1st Cir. 2003), the First Circuit Court of Appeals upheld a finding of privity between parent bank and its subsidiary. *See also Airframe Sys. v. Raytheon Co.*, 601 F.3d 9,

13 n. 3 (1st Cir. 2010) ("[c]orporate parents and subsidiaries are generally considered identical parties for claim preclusion purposes…"). In sum, there is ample legal support for the district court's finding of privity between the Brownstone Entities and American Vantage Brownstone.

Likewise, numerous courts have found privity existing between a corporation and one of its officers. The Ninth Circuit in *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) found that privity existed between a company and its controlling shareholder to support a finding of collateral estoppel. Similarly, in *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235 n. 6 (7th Cir. 1986), the Seventh Circuit found that the the doctrine of res judicata operated to bar RICO claims brought against officers of a bank where a prior case involving the bank had already been adjudicated. Several other courts have reached similar conclusions. *See Irwin v. Mascott*, 370 F.3d 924, 930 (9th Cir. 2004) (finding privity between corporation and its primary corporate officer); *Cahill v. Arthur Andersen & Co.*, 659 F. Supp. 1115, 1122 (1986), *aff'd* 822 F.2d 14 (2d Cir. 1987) ("corporations and their officers and directors are in privity for purposes of res judicata") (quotation omitted)*; In re Raftery,* 132 N.E.2d 864, 869 (N.Y. 1956) (corporation is in privity with its owners)*; JSC Sec. v. Gebbi*a, 4 F. Supp. 2d 243, 251 (S.D.N.Y. 1998) (finding that the shareholders and/or officers were in privity with the corporation such that the prior arbitration proceeding involving the corporation

precluded the subsequent lawsuit against them. Accordingly, the law also sufficiently supports the district court's finding of privity between the Brownstone Entities and Tassinari.

B. The Mendenhall Parties' Arguments Regarding Additional Discovery are Unavailing.

The Mendenhall Parties, for the first time on appeal, contend that they should have been allowed an opportunity to conduct discovery on the issue of privity prior to the district court granting the motion to dismiss. (Opening Brief at p. 25-30). The Mendenhall Parties failed to make this argument in their Opposition filed in the Second Action or at the lengthy hearing on the same and made no request under NRCP 56(f). JA II:0111-0125, 0195-0237. As such, it should not now be heard on this appeal.

This Court has previously and repeatedly held that "a point not urged in the trial court, unless it goes to jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Caroline,* 97 Nev. 49, 52-53 (1981); *see also Britz v. Consolidated Casinos Corp.,* 87 Nev. 441, 447 (1971); *Levy v. Levy,* 96 Nev. 902, 904 (1980); *Allyn v. McDonald,* 117 Nev. 907, 911 (2001). Even a de novo standard of review does not trump the general rule that a point not urged in the trial court is deemed waived and will not be considered on appeal. *See Schuck v. Signature Flight Support of Nevada, Inc.*,

126 Nev. 434, 436, 245 P.3d 542, 544 (2010) ("…a de novo standard of review does not trump the general rule that a point not urged in the trial court…is deemed to have been waived and will not be considered on appeal."). The rule that an issue raised on appeal for the first time will not be considered is not meant to be harsh, overly formalistic, or to punish litigators, but instead is meant to maintain the efficiency, fairness and integrity of the judicial system for all parties.[3] Accordingly, the Mendenhall Parties should not be heard now to argue that they needed discovery on the issue of privity when no such argument was made before the district court.

Further, there is no merit to the argument that additional discovery would have yielded a different result. The Mendenhall Parties conducted discovery in the First Action regarding the very transaction (the Term Sheet) that is the subject of the Second Action. In fact, the Mendenhall Parties claim that they uncovered the alleged "fraud" relating to the Term Sheet through that discovery.[4] Likewise, the Mendenhall Parties do not identify what specific additional discovery they would need to do on the issue of privity beyond the depositions previously conducted in

[3] *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1344-1345, 905 P.2d 168 (1995) (Appellants cannot be allowed to raise new issues on appeal because the prevailing party had no opportunity to respond to the new issues).

[4] The Mendenhall Parties freely admit that they were approaching the discovery cut-off when they chose to serve the Offer of Judgment on the Brownstone Entities. (Opening Brief at p. 11).

the First Action. Again, no request was made under NRCP 56(f) for further discovery and what that discovery might have shown.

To the contrary, the record has sufficient evidence regarding the relationship between American Vantage Brownstone, Tassinari and the Brownstone Entities. Just by way of example, the Term Sheet itself, which was included as an exhibit by both parties in the motion to dismiss briefing, expressly states that Brownstone is a subsidiary of American Vantage Brownstone. JA II:0182. Likewise, the Mendenhall Parties' Proposed Amendment states that Tassinari was the principal of both the Brownstone Entities and American Vantage Brownstone. JA I:0090. Finally, American Vantage Brownstone was a party to the Term Sheet and Tassinari signed for American Vantage Brownstone in his capacity as chairman. JA II:0186. Accordingly, the Mendenhall Parties' arguments concerning additional discovery and/or insufficient evidence fail.

C. Even if no Privity Existed, Claim Preclusion still Applies to this Matter under *Weddell.*

In *Weddell,* this Court modified the test for claim preclusion to, under certain circumstances, extend to defendants who were neither parties to the prior action or in privity with the parties to the action. The Court found that the prior test under *Five Star* was "overly rigid" and adopted the doctrine of nonmutual claim preclusion. *See Weddell*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d at 84-85.

Under nonmutual claim preclusion, the "party or privy" element has been modified to extend to a defendant, who although not a "party or privy," can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a "good reason" for not having done so. *See id.*

In discussing nonmutual claim preclusion, this Court cited *Airframe Systems, Inc. v. Raytheon Co.*, 601 F.3d 9, 17 (1st Cir. 2010), which involves a scenario wherein claim preclusion applied even though the defendant was not a party or in privity with a party to the prior action. *See Weddell*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d at 84. Airframe Systems filed a lawsuit against a parent company and one of its subsidiaries alleging that the subsidiary had engaged in copyright infringement over a span of several years, the latter portion of which was during the time that the *current* parent owned the subsidiary. *See Airframe Systems*, 601 F.3d at 11-14. That lawsuit was dismissed, and Airframe Systems then filed a second suit against the subsidiary and the *former* parent company that owned the subsidiary during the earlier portion of the subsidiary's alleged infringement. *See id*. On appeal, the First Circuit was presented with the question of whether the former parent company could assert claim preclusion even though it was not in privity with the then-current parent company. *See id*. at 16-17. The First Circuit recognized that "privity is a sufficient but not a necessary condition for a new defendant to invoke a claim preclusion defense." *Id*. at 17. The court then

concluded that the former parent company could assert claim preclusion because it had a "close and significant relationship" with the current parent company. *Id*. at 17-18. Likewise, this Court cited *Gambocz v. Yelencsics*¸ 468 F.2d 837, 839 (3d Cir. 1978) where the Third Circuit found that a plaintiff's second lawsuit alleging a conspiracy claim against three new defendants was barred by claim preclusion where the original action was dismissed and the defendants in the second action had a "close or significant relationship" with the defendants to the original action. *Weddell*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d at 84.

As this Court stated, "when considering whether a plaintiff had 'good reasons' to justify a second suit against a new defendant, many, if not most, federal courts focus on whether the new defendant had a 'close and significant relationship' with the defendant in the first suit." *Weddell*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d at 84 n. 2. In this matter, the Tassinari Defendants shared a very close and significant relationship with the Brownstone Entities. Brownstone was a subsidiary of American Vantage Brownstone, which was also a party to the Term Sheet. JA II:0182-0186. Likewise, by the Mendenhall Parties' own allegations, Tassinari was the principal of American Vantage Brownstone and the Brownstone Entities. JA I:0090 ¶ 13. As such, the Tassinari Parties shared an even closer and more significant relationship with the Brownstone Entities than the parties in the

Airframe and *Gambocz,* cases cited by this Court in *Weddell*.[5] Accordingly, even if the Court were to find that no privity exists between the Brownstone Entities and the Tassinari Defendants, the doctrine of nonmutual claim preclusion mandates dismissal because of the close or significant relationship between Brownstone Entities and the Tassinari Parties.

D. The District Court Correctly Found that the First Order of Dismissal was a Valid Final Judgment.

The First Order of Dismissal was a valid final judgement. Under NRCP 41, a dismissal with prejudice arising from the acceptance of an offer of judgment pursuant to NRCP 68(d) and NRS 17.115(2)(a) holds preclusive effect. NRCP 41(b) provides that "a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." A dismissal arising out of NRCP 68(d) and NRS 17.115(2)(a) falls

[5] The Mendenhall Parties argue that that the deposition of Gross "bound the Brownstone Entities to the lack of knowledge and lack of representation of Tassinari or [American Vantage] for the purpose of privity analysis." (Opening Brief at p. 29). However, the Mendenhall Parties' citation in support of this assertion is a portion of Gross's transcript wherein he was asked if there was another signed term sheet. JA I:0074. The citation contains no question or answer concerning the relationship between Tassinari and the Brownstone Entities or the relationship between American Vantage Brownstone and the Brownstone Entities. *See id*. The Mendenhall Parties' evidentiary assertion for a lack of privity fails to support a finding of a lack of privity and also fails to overcome the evidence demonstrating privity between the Tassinari Parties and the Brownstone Entities.

within the "any dismissal not provided for in this rule" language and operates as an adjudication upon the merits.

This Court has explained that unlike the effect of a pre-litigation settlement agreement, "once a case has been filed in court, the bar to relitigating that case after an offer of judgment has been accepted does not depend on the terms of a release but rather on the claim preclusion effect of res judicata." *May v. Anderson*, 121 Nev. 668, 674, 119 P.3d 1254, 1260 (Nev. 2005); *see also 4501 Northpoint LP v. Maricopa Cnty.*, 128 P.3d 215, 218 (Ariz. 2006) (explaining that a Rule 68 judgment, "under ordinary principles of claim preclusion," prevents the parties thereto from re-litigating the claims resolved by the judgment); *Cuellar v. Vettorel*, 332 P.3d 625, 629 (Ariz. App. 2014) (holding that Rule 68 prevents "collateral litigation" to determine liability after entry of judgment). Further, it should be noted that a dismissal with prejudice based upon an offer of judgment serves to settle a case entirely, "including claims both known and unknown, and both certain and uncertain." *Lutynski v. B.B. & J. Trucking, Inc.*, 628 A.2d 1, 5 (Conn. Ct. App. 1993) (noting that "if injuries worsen as time passes, damages will increase, and if injuries mend, the damages will decrease. These are vagaries of offers of settlement.").

The Mendenhall Parties, who drafted the Offer of Judgment, sought to make the preclusive effect of the Offer of Judgment broad, all-inclusive and without

restriction. The Offer of Judgment expressly states that acceptance of the Offer of Judgment would serve as a full discharge and release of any and all claims "as alleged, or that could have been alleged…as well as any related or potential claims that could be asserted in [the First Action] against one another." JA I:0103. The Mendenhall Parties have not contested that the First Order of Dismissal was a final judgment nor have they sought to set it aside under NRCP 60(b). Thus, this element of claim preclusion is uncontested.

E. The District Court Correctly Found that the Claims Asserted in the Second Action Could Have Been Asserted in the First Action.

The Mendenhall Parties claim they did not have an opportunity to litigate their supposed fraud claim in the First Action.[6] (Opening Brief at p. 38). Setting

[6] In support of their argument that they did not have a "full and fair opportunity to litigate" their fraud claims, the Mendenhall Parties cite an Oregon appellate court case, *Cogan v. City of Beaverton*, 203 P.3d 303, 309 (Or. Ct. App. 2009). (Opening Brief at p. 38). However, the facts in the *Cogan* decision are readily distinguishable from the facts in this matter. In *Cogan*, a land owner submitted a petition to the City of Beaverton for a minor boundary change after the city had adopted an ordinance annexing his five contiguous lots. *See id*. at 305. The City of Beaverton denied the owner's petition and the owner appealed to the Land Use Board of Appeals ("LUBA"). Shortly after the annexation, the Oregon Legislature adopted a bill (SB 887) making the City's annexation improper. The City of Beaverton argued on appeal to LUBA that the owner could not argue SB 887 on appeal because he had a "full and fair" opportunity to litigate the issue relating to the adoption of SB 887 in his original petition. *See id.* at 308. However, LUBA concluded that claim preclusion did not apply, but not for the reasons advanced by the City. Rather, LUBA's review, like most appellate bodies, was limited to the record made in the underlying proceedings before the City and LUBA declined to

aside the numerous problems with the fraud claim based solely upon the "discovery" that Tassinari signed on the line for the "Other Investor(s)," the notion that the Mendenhall Parties did not have the "opportunity" to assert their fraud claims/defenses in the First Action is simply false. The Mendenhall Parties had the same opportunity to assert counterclaims and third-party claims as any other defendant in civil litigation. They also had the right to conduct timely discovery to see if there were any potential defenses, counterclaims or third-party claims available to them. Likewise, the Mendenhall Parties had the Term Sheet for over seven years before deciding that Tassinari's signature on the line for "Other Investors" constituted some kind of fraud. Any legible version of the Term Sheet makes it obvious that the signature on behalf of American Vantage and the Other Investor(s) was identical. JA I:0058. Finally, the Mendenhall Parties' argument that they could not have brought the fraud claims in the First Action is directly undermined by the fact that they attempted to bring those claims in the First Action – albeit too late (at the close of discovery and after serving the Offer of Judgment, which was accepted). JA I:0081-0096. Again, in the First Action, the Mendenhall Parties sought to bring the same claims against both the Brownstone Entities and

(continued)
consider the additional evidence submitted by the owner on appeal relating to SB 887, which is typical for any appellate review. *See id.* at 309. This is a far cry from this matter where a second lawsuit was filed based upon the same transaction and occurrence.

the Tassinari Defendants that the Mendenhall Parties later brought solely against the Tassinari Defendants in the Second Action. This fact demonstrates that the Second Action was based on the same claims or any part of them that were or could have been brought in the First Action. Clearly, the Mendenhall Parties had the opportunity to raise the claims in the First Action.

The Mendenhall Parties claim that the Offer of Judgment "statutory scheme" in Nevada creates a "formal barrier" that should somehow serve as an exception to the claim preclusion doctrine. (Opening Brief at p. 40). Unsurprisingly, the Mendenhall Parties fail to cite to any case law, Nevada or otherwise, in which any court has found that a state's "offer of judgment" statutory scheme operated as a formal barrier that should serve as an exception to claim preclusion. (Opening Brief at p. 40-42). Conversely, this Court has addressed offers of judgment and the concept of claim preclusion explaining that "once a case has been filed in court, the bar to relitigating that case after an offer of judgment has been accepted does not depend on the terms of a release but rather on the claim preclusion effect of res judicata." *May* at 674, 119 P.3d at 1260. Accordingly, the exception that the Mendenhall Parties seek to rely upon simply does not exist.

The fact that the Mendenhall Parties waited over two years and until the eve of the discovery cut-off (and after the deadline to seek leave to amend had passed) to conduct the primary depositions to their case does not create an exception to the

claim preclusion doctrine.[7] Likewise, opting to serve the Offer of Judgment before completing depositions, as the Mendenhall Parties did in this matter, does not create an exception to the claim preclusion doctrine. Setting aside the fact that the Mendenhall Parties' fraud allegations completely lack merit, the Mendenhall Parties chose to wait until the end of the discovery period to conduct these depositions and they chose to serve the Offer of Judgment prior to taking these depositions. They cannot now be heard to complain based upon their own decisions to wait to conduct discovery and send an Offer of Judgment in the amount of $1,200,000 prior to taking depositions of the Brownstone Entities' primary witnesses.

Equally unavailing is the Mendenhall Parties' argument that Judge Israel in the First Action provided some kind of "express reservation" for fraud claims in the First Order of Dismissal. (Opening Brief at p. 44). The First Order of

[7] The Mendenhall Parties claim that they could not bring the fraud claims sooner because they had no good faith basis to do so under NRCP 11. (Opening Brief at p. 44). They further contend that their claim of fraud had not yet accrued. (Opening Brief at p. 45-46). Neither of these contentions have merit. The Mendenhall Parties contend that the claim did not accrue until they discovered that Tassinari signed the Term Sheet. However, as noted above, the Mendenhall Parties had the Term Sheet for years prior to attempting to file the Proposed Amendment. JA II:0128-0130. Additionally, the Mendenhall Parties had approximately two years to conduct discovery regarding the Term Sheet and prior to deciding to send the Offer of Judgment. Contrary to the Mendenhall Parties' assertions, they had every opportunity to investigate any claims and/or defenses they had prior to the close of discovery and prior to sending the Offer of Judgment.

Dismissal contains no reference whatsoever to the fraud claims – let alone an express reservation of them. JA I:0109. To the contrary, the First Order of Dismissal reads as a broad order of dismissal, with prejudice, of the claims asserted in the First Action in addition to any other claims that could have been asserted by the parties against each other in the First Action. JA I:0109. This is typical language for a dismissal with prejudice and would apply to all privies of the parties and any other defendant who "can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a 'good reason' for not having done so." *Weddell*, 350 P.3d at 85.

Further, the Mendenhall Parties' citation for this proposition fails to support any reasonable inference that Judge Israel imposed any form of reservation relating to future claims. JA II:0206-0207. The Mendenhall Parties do not cite any transcript from the hearing before Judge Israel in support of this statement. Rather, the Mendenhall Parties cite to a portion of the transcript from the hearing on the Motion to Dismiss before Judge Bare wherein Judge Bare asked counsel for the Tassinari Parties what Judge Israel had said about the Mendenhall Parties' Motion to Amend. JA II:0206-0207. As discussed above, a complete citation to the transcript actually shows the opposite of what the Mendenhall Parties have suggested:

> The Court: So, I take it maybe the judge was of the mindset: Well, let somebody else handle that. I'm done with it here. I mean that –
>
> Mr. Marquis: That's exactly what he said.
>
> The Court: **And not as any indication that it had validity but rather under –**
>
> Mr. Marquis: **No. And as a matter of fact, he doubted – he said he didn't think it would survive a motion but it wasn't before him and he wasn't going to make that ruling. Somebody else was going to have to decide that.**

JA II:0207-0209 [emphasis added]. As the actual transcript from the hearing reveals, any suggestion by the Mendenhall Parties that Judge Israel viewed a subsequent action as being immune from dismissal based upon claim preclusion is incorrect as there is no record of any such statement being made by him. The Mendenhall Parties' contention that Judge Israel made any reservation in the First Order of Dismissal is contrary to the record before this Court. The Mendenhall Parties had every opportunity to file their claims in the first action and their failure to do so prior to the end of discovery and until after they served the Offer of Judgment does not equate to them being deprived of the opportunity such that claim preclusion should not apply.

F. The Mendenhall's Discussion of Compulsory Counterclaims has no Relevance to the Issue of Claim Preclusion.

The Mendenhall Parties argue that claim preclusion only applies to compulsory claims and not permissive claims. Essentially, the Mendenhall Parties wish to restrict claim preclusion to compulsory counterclaims under NRCP 13(a). However, the Mendenhall Parties' argument runs contrary to Nevada law and would render the doctrine of claim preclusion completely meaningless.

In *Weddell,* this Court held that a defendant may raise a defense of claim preclusion against a plaintiff's complaint even when that defendant was not a party or privy with a defendant in an earlier action brought by the plaintiff. *Weddell,* 350 P.3d at 85. The Court modified the privity requirement established in *Five Star*, 124 Nev. 1048, 194 P.3d 709 to incorporate nonmutual claim preclusion. This Court explained that the concept of "nonmutual" claim preclusion is designed to obtain finality and promote judicial economy in situations "**where the civil procedure rules governing noncompulsory joinder, permissive counterclaims, and permissive cross-claims fall short.**" *Weddell*, 350 P.3d at 84-85 [emphasis added] citing Charles Alan Wright, et al., Federal Practice and Procedure § 4464.1 (2d ed. 2002) ("Nonmutual claim preclusion is most attractive in cases that seem to reflect no more than a last desperate effort by a plaintiff who is pursuing a thin claim against defendants who were omitted from the first action because they were

less directly involved than the original defendants.").

The facts of *Weddell* are insightful to this matter. In *Weddell*, Weddell and Michael Stewart were business partners, and they ran into a set of disputes. "The partners agreed to informally settle their disputes by presenting them to a panel of three attorneys." *Id.* at 81. That panel issued a decision that was largely "favorable to Stewart." *Id.* Stewart sought to enforce that decision by seeking a declaratory judgment of the validity of the part of the panel's decision that was favorable to Stewart. *See id.* Weddell opposed that action and filed a counterclaim in which he alleged bias on the part of the panel, and sought a declaratory judgment upholding the validity of the portion of the panel's decision that was favorable to Weddell. *See id.* 81-82. Importantly, Weddell did not assert any cross-claims against any third parties (including the panel) in the first action. *See id.* at 82. During trial in the first action, Weddell gave up, conceded judgment in favor of Stewart and dropped his counterclaim. *See id.*

Over two years later, Weddell initiated a new cause of action against the three-attorney panel regarding the conduct of the respondents during the dispute resolution process. *See id.* The attorneys filed a motion to dismiss arguing that the claims were barred by claim preclusion, which was granted by the district court. *See id.* The district court found that the three-factor test enunciated under *Five Star* was satisfied – in particular, the district court found privity to exist between

the attorneys and Stewart. *See id.*

On appeal, this Court concluded that Stewart and the respondents did not have privity under an "adequate representation" analysis and reversed the district court on that ground. *See id.* at 83. This Court, however, affirmed the granting of the motion to dismiss – finding that the claims against the attorneys were still barred by claim preclusion. In doing so, this Court took the opportunity to revisit the *Five Star* test for claim preclusion and incorporate the policies of finality and judicial economy by adopting the doctrine of nonmutual claim preclusion. *See id.* at 85. The Court adopted the doctrine of nonmutual claim preclusion because the *Five Star* test was "overly rigid." *Id.* For nonmutual claim preclusion to apply, a defendant must demonstrate that (1) there has been a valid final judgment in a previous action; (2) the subsequent action is based on the same claims or any party of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, or the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a "good reason" for not having done so. *Id.*

In *Weddell*, as in this case, there was a valid final judgment reached by consent (an accepted Offer of Judgment in this case and a confession of judgment in *Weddell*). In *Weddell*, as in this case, the lower court concluded that the claims

should have been asserted in the prior lawsuit. *See id.* And, similar to this case, Weddell claimed that "he lacked the necessary facts to bring suit against respondents until he made a confession of judgment." *Id.* at 85. Nevertheless, this Court in *Weddell* upheld the dismissal on the grounds of claim preclusion finding that Weddell's argument was not supported by the record and that he lacked good reason for not bringing the claims against the three attorneys in the original suit. *See id.*

This Court's holding in *Weddell* completely undermines the Mendenhall Parties' contention that only compulsory claims are barred by claim preclusion. In *Weddell,* Weddell was the defendant in the initial action where Stewart only sought declaratory relief. *See id.* at 81. Weddell failed to bring any counterclaim, cross-claim or thirty party claim, but rather confessed judgment and only later sued the three attorneys who were not parties to the first action. *See id.* at 81-82. If Weddell had added the attorney defendants to the first action, he would have had to have done so under NRCP 13(g). Nevertheless, the Court found that the elements of nonmutual claim preclusion barred the second action against the attorneys. Accordingly, the Mendenhall Parties' contention that claim preclusion is limited to compulsory claims is contrary to Nevada law.

Furthermore, even outside the context of nonmutual claim preclusion, the Mendenhall Parties' proposed limitation is nonsensical. If only compulsory

counterclaims were subject to claim preclusion, then claim preclusion would have no meaning and would be rendered completely unnecessary as it would be subsumed by NRCP 13(a), which already compels parties to bring compulsory counterclaims in the same proceedings. Such a narrow interpretation of claim preclusion would limit its application to parties and not their privies. As such, the Mendenhall Parties' assertion that claim preclusion should not apply to this matter because the claims in the Second Action were not compulsory counterclaims has no merit.

G. The Mendenhall Parties Never Made any Argument under NRCP 60(b) and Never Sought Relief under NRCP 60(b).

The Mendenhall Parties' final argument is that the district court erred by "failing to consider that NRCP 60(b) authorizes an independent action based upon fraud." (Opening Brief at p. 53). There are a host of problems with this argument. First, the Mendenhall Parties never actually made this argument to the district court. The Mendenhall Parties have introduced this argument for the first time now on appeal and for this reason alone it should not be considered. A district court cannot be found to have erred by failing to consider an argument that was never actually made in the underlying proceedings. Second, the reason the Mendenhall Parties did not make the argument under NRCP 60(b) is that they never actually sought relief under NRCP 60(b). After the First Order of Dismissal

was entered in the First Action, the Mendenhall Parties never filed a motion under NRCP 60(b) to have the First Order of Dismissal set aside. Likewise, the complaint filed in the Second Action is not an independent action to set aside the First Order of Dismissal. JA I:0007-0016. Realizing that the Second Action was rightfully dismissed based upon claim preclusion, the Mendenhall Parties attempt to transform the nature of the Second Action into something other than what it actually was in order to salvage it from dismissal. While the Mendenhall Parties cite to legal authority supporting the argument that NRCP 60(b) was the appropriate route to seek relief under the circumstances of this case, the Mendenhall Parties did not take that route. The Mendenhall Parties did not seek such relief and cannot now be heard to make these arguments for the first time on appeal. Moreover, the facts of this case fail to come anywhere close to satisfying the rigorous standard for an independent action to set aside a judgment under NRCP 60(b), which can only be had in **"unusual and exceptional circumstances"** in order to prevent a **"grave miscarriage of justice."** *Bonnell v. Lawrence*, 282 P.3d at 715 (emphasis added).

As discussed previously, "a point not urged in the trial court, unless it goes to jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *See Old Aztec Mine*, 97 Nev. at 52-53; *see also Britz v. Consolidated Casinos Corp.*, 87 Nev. at 447; *Levy v. Levy*, 96 Nev. at 904. The

Mendenhall Parties are precluded from arguing that the trial court erred by not allowing the Second Action to proceed under NRCP 60(b) when that argument was never raised to the trial court. The argument under NRCP 60(b) and request for relief from the First Order of Dismissal is absent from both the Opposition filed by the Mendenhall Parties and the hearing before Judge Bare. JA I:0111, II:0195. As such, it cannot now be heard on appeal.

In support of this new argument, the Mendenhall Parties cite *Nava v. Second Judicial District, et al.*, 118 Nev. 396, 46 P.3d 60 (2002), which states that the proper remedy for a party seeking relief from an offer of judgment is a motion under NRCP 60(b). In *Nava,* a plaintiff in a personal injury case discovered that an additional back surgery would be required and tried to revoke an offer of judgment, which was still pending. *See id.* at 397. This Court found that the offer of judgment could not be revoked but mentioned that relief could be sought under NRCP 60(b). *See id.* at 398, 46 P.3d at 61, n. 2. Yet, the Mendenhall Parties did not seek relief under NRCP 60(b) from the First Order of Dismissal, which resulted from the acceptance of their Offer of Judgment. The Mendenhall Parties' remedy was not to file the Second Action seeking to recover the amount of the Offer of Judgment from the Tassinari Parties, who were in privity with the Brownstone Entities.

Finally, the Mendenhall Parties' effort to paint the complaint filed in the

Second Action as an "independent action under NRCP 60(b)" in order to set aside the First Order of Dismissal is both disingenuous and unavailing. The elements of an independent action to set aside a judgment include: (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the party seeking to undo the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of said party and (5) the absence of any adequate remedy at law. *Bonnell*, 282 P.3d at 715 n. 4. None of these elements have been alleged in the complaint filed in the Second Action. The complaint filed in the Second Action names only the Tassinari Parties as defendants and fails to even mention the First Action. It makes no reference to the First Order of Dismissal and fails to even reference NRCP 60(b). And, it comes nowhere close to alleging the other elements outlined above, which are required for an independent action under NRCP 60(b).

This Court, in *Bonnell*, referenced the United States Supreme Court decision of *Unites States v. Beggerly*, 524 U.S. 38, 47, 118 S. Ct. 1862 (1998), which included a comprehensive review of Rule 60(b). *See Bonnell* at 715-718. The U.S. Supreme Court in *Beggerly* explained that relief via an independent action under NRCP 60(b) was only available to avoid a "grave miscarriage of justice." *Id.* at 716. Even setting aside the fundamental error in the Mendenhall Parties'

inclusion of an argument relating to NRCP 60(b) on appeal when it was never previously raised and where no such relief was ever sought, the facts of this case come nowhere close to meeting the elements of an independent action under NRCP 60(b). The Mendenhall Parties opted to wait until the close of discovery to conduct their discovery and opted to make the Offer of Judgment before completing their depositions. Moreover, Tassinari's signature on the Term Sheet for the "Other Investor(s)," which is the sole basis of the fraud claim, was something the Mendenhall Parties should have known years prior to filing the Second Action and fails to establish any basis for a fraud claim. The fact remains that the Mendenhall Parties simply do not want to honor the implications of the duly accepted Offer of Judgment and improperly seek to revive the litigation that was dismissed with prejudice.

VI. CONCLUSION

As this Court has recognized, the general purpose claim preclusion is to "obtain finality by preventing a party from filing another suit that is based on the same set of facts that were present in the initial suit." *Weddell*, 350 P.3d at 85, *quoting Five Star*, 124 Nev. at 1054, 194 P.3d at 712. The doctrine was created to address the fundamental need of any judicial system for finality; "a claim . . . which parties had a full and fair opportunity to litigate should, after judgment, forever be put to rest as between those parties." MOORE'S FEDERAL

PRACTICE § 131.12[1] (*citing Montana v. United States*, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979)).

The Mendenhall Parties offered to settle the First Action by paying $1,200,000 to the Brownstone Entities and the Offer of Judgment purported to settle all claims that were asserted or which could have been asserted between the parties. JA I:0038. The Offer of Judgment was accepted and it would undermine the very purpose of the accepted Offer of Judgment and claim preclusion for the Mendenhall Parties to be permitted to proceed with a second action against the principal and parent company of the Brownstone Entities in a separate action based upon the same operative facts after settling with the Brownstone Entities. It would be no different than if the Tassinari Parties initiated a new action against the Mendenhall Parties asserting the same claims against the Mendenhall Parties as were brought by the Brownstone Entities. The entry of a final judgment through the acceptance of the Offer of Judgment in the First Action provided finality to all of the parties and their privies and neither party is permitted to initiate a new action in order to revive those claims and/or defenses.

Claim preclusion bars the Mendenhall Parties' attempt to revise the First Action and undermine the duly accepted Offer of Judgment and the resulting finality it brought. The district court properly dismissed the Second Action in accordance with Nevada law. The complaint in the Second Action was not an

independent action under NRCP 60(b) and the Mendenhall Parties failed to include any argument under NRCP 60(b) to the district court. Accordingly, these arguments are not appropriate for appeal. The decision of the district court should be upheld.

Dated this 21st day of July, 2016.

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RULE 28.2 ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using Word in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionately spaced, has a typeface of 14 points and contains 12,055 words.

3. Finally, I certify that I have read this appellate 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 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 the accompanying brief is not in conformity with the requirements of the Nevada

/ /

Rules of Appellate Procedure.

Dated this 21st day of July, 2106.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Santoro Whitmire, and that on the 21st day of July, 2016, I caused to be served a true and correct copy of the **RESPONDENTS' ANSWERING BRIEF** in the following manner:

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