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

MOTION FOR LEAVE TO FILE SUR-REPLY TO APPELLANTS' REPLY BRIEF

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Respondents Ronald Tassinari and American Vantage Brownstone LLC ("American Vantage Brownstone") (collectively the "Respondents"), by and through their undersigned counsel of record, hereby submit this Motion for Leave to File Sur-Reply in Response to Appellants' Reply Brief. The proposed Sur-Reply is attached to this Motion as **Exhibit "A."** Appellants' Reply contains two principal issues that warrant this Court granting this Motion and allowing the Sur-Reply.

First, Appellants claim in their Reply that the Respondents failed to address in their Answering Brief the second element of claim preclusion - "whether 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.***"[1] [emphasis added]. Appellants dedicate an entire section of their Reply to this false argument, which is predicated upon Appellants misquoting this element of claim preclusion by omitting the language in italics cited above. (ARB at p. 15-17). Contrary to Appellants' assertions, the Respondents addressed this element at length in the Answering Brief, dedicating an entire section to the element. (RAB at p. 34-39). By not quoting the entire element from *Five Star* and *Weddell* decisions, Appellants presented a materially incomplete and misleading statement of the law to the Court

[1] This element of claim preclusion is present is present in both *Five Star Capital Corp. v. Ruby,* 124 Nev. 1048, 1054, 194 P.3d 709, 712 (2008) and *Weddell v. Sharp*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d 80, 85 (Nev. 2015).

and a mischaracterization of Respondents' argument.

Second, Appellants claim that this Court should not consider *Weddell v. Sharp*, 2015 Nev. LEXIS 35 at 14-15, 350 P.3d 80, 85 (Nev. 2015) because the Respondents did not cite to this decision in the underlying proceedings. (ARB at p. 3-4). In making this argument, Appellants fail to disclose to the Court that they themselves cited *Weddell* in their Opening Brief. (AOB at p. 20). Apparently Appellants contend that they are permitted to rely upon *Weddell* on appeal, but the Respondents are not. This is nonsensical.

Moreover, Appellants conflate the prohibition of raising new arguments on appeal with the practice of citing applicable case law on appeal. The fact that the Appellants' second action is barred by claim preclusion was not a new argument. It was the basis for the dismissal and the entire subject of this appeal. Courts have often recognized the distinction between raising a new argument and citing new legal authority. *See Schmidt v. Bank of Am., N.A.*, 223 Cal. App. 4th 1489, 1505 n.11, 168 Cal. Rptr. 3d 240, 255 (Cal. App. 2014) (Responding to the contention that the respondents had waived their right to rely upon a certain opinion on appeal because they did not cite it in their briefing in the trial court, the appellate court explained that the contention had no merit because "[w]here an appellant has not waived his right to argue an issue on appeal, he is free to cite new authority in support of that issue."). "When an appellate court reviews a question of law de

novo, the court must use its full knowledge of its own [and other relevant] precedents." *See United States v. Rapone*, 131 F.3d 188, 196, (D.C. Cir. 1997) ("In the present case, Rapone is not attempting to raise the issue of a jury trial for the first time on appeal. Rather, he simply offers new legal authority for the position that he repeatedly advanced before the district court – that he was entitled to have his case tried before a jury.") (internal quotations omitted). *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 773 n.20 (7th Cir. 2010) ("A litigant may cite new authority on appeal."); *Murray v. TXU Corp.*, No. 3:03-CV-0888-P, 2005 U.S. Dist. LEXIS 10298, at *14-15 (N.D. Tex. May 27, 2005) ("Plaintiff's third concern is Defendants citation to case law not previously cited by either party. Plaintiff offers no support for its contention, and at the same time contends the burden of validity remains with Defendants. **Assuming no new arguments are raised, the Court finds it nonsensical to believe a party must limit its research to previous briefings.**"). [emphasis added]. In sum, both parties correctly cited to *Weddell* in their appellate briefs as it is applicable authority in Nevada on the precise issue before the Court – claim preclusion.

Accordingly, Respondents respectfully request that the Court grant leave for the filing of the attached Sur-Reply so that Respondents can address Appellants' mistaken assertions of both Respondents' arguments and the applicable law. This Court "has the inherent authority to grant leave to a party to file a sur-reply when

the information in that sur-reply would be germane to the evaluation of a pending matter." *R&O Constr. Co. v. Rox Pro Int'l Grp., Ltd.*, No. 2:09-cv-01749, 2011 U.S. Dist. LEXIS 131982, at *2 (D. Nev. Nov. 15, 2011), citing *Cedars-Sinai Medical Center v. Shalala*, 177 F.3d 1126, 1129 (9th Cir. 1999). Sur-Replies are appropriate to correct a party's mischaracterization of arguments or authority in reply. *See, e.g. Prather v. AT&T Inc.*, 996 F. Supp. 2d 861, 865 n. 2 (N.D. Cal. 2013). This Court should exercise that discretion here and allow the filing of the attached Sur-Reply, which is very brief and only addresses the two issued identified in this Motion.

Dated this 1st day of November, 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 876 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 1st day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Santoro Whitmire, and that on the 1st day of November, 2016, I caused to be served a true and correct copy of the **MOTION FOR LEAVE TO FILE SUR-REPLY TO APPELLANTS' REPLY BRIEF** in the following manner:

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Exhibit A

Detached Sur-Reply
and Returned Unfiled
per order filed 11/10/16.