IN THE SUPREME COURT OF THE STATE OF NEVADA

BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada limited liability company, Appellant, v. HIGCO, INC., a Nevada corporation, Respondent.	Case No. 71085 District Court Case No. CV-14-710780-B

APPELLANT'S 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 judges of this Court may evaluate possible disqualification or recusal:

Appellant BOCA PARK MARKETPLACE SYNDICATIONS GROUP MM, INC., is a Nevada corporation that is 99% owned by International Property Syndications, Ltd. ("IPS"), a Minnesota corporation, and 1% by BOCA PARK MARKETPLACE LV SYNDICATIONS GROUP MM, INC. No publicly held company owns 10% or more of the stock in IPS.

The law firm of HEJMANOWSKI & McCREA LLC has appeared for Appellant in the District Court and is expected to appear in the proceedings in this Court.

/s/Charles H. McCrea
Charles H. McCrea (SNB #104)

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JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction over this appeal from the August 2, 2016 Findings of Fact, Conclusions of Law and Judgment entered by the District Court on August 2, 2016. Notice of Entry of the District Court's Amended Judgment was given on November 7, 2016.

ROUTING STATEMENT

As this matter was commenced and concluded by entry of Findings of Fact, Conclusions of Law and Judgment by the Business Court, it is properly retained by the Supreme Court under NRAP 17(a)(10).

I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the doctrine of claim preclusion bars Plaintiff/Respondent Higco, Inc. ("Higco") from pursuing a second action for damages against Defendant/Appellant Boca Park Marketplace Syndications Group, LLC ("Boca Park") in 2014 for breach of contract based on exactly the same breach of contract prosecuted to final judgment in a prior action between the same parties in 2012.

II. STATEMENT OF THE CASE

This appeal arises from the district court's August 8, 2016, Findings of Fact, Conclusions of Law and Judgment adjudicating Boca Park liable to Higco for breach of an exclusive use provision in a commercial lease and awarding damages to Higco in the amount of $499,997.70. APP 000235-246 (Vol. I).

The doctrine of claim preclusion bars the action that culminated in the judgment now appealed from because it is the product of a ***second action*** brought by Higco against Boca Park involving the ***same breach*** of the ***same lease*** that formed the basis of a final judgment on the merits rendered against Boca Park in an earlier action that concluded two years before the instant action was commenced.

III. STATEMENT OF RELEVANT FACTS

In 2002, Boca Park, as landlord, and Higco, as tenant, entered into a lease of space to Higco in Boca Park's shopping center that included a provision granting

Higco certain exclusive rights to conduct gaming in the shopping center. APP 000082-129 (Vol. I). In 2011, Boca Park entered into a lease with another tenant, *Wahoo's Fish Taco,* granting *Wahoo's* the right to conduct gaming in the same shopping center. APP 000237 at ll. 19-23 (Vol. I). In 2012, Higco brought an action against Boca Park claiming that Boca Park had violated the exclusive use provision in Higco's lease by granting gaming rights to *Wahoo's*. APP 00065-187 (Vol. I). Although Higco could have brought a claim for damages against Boca Park for breach of contract at that time, Higco sought only declaratory relief, which was granted in a final judgment entered against Boca Park on November 7, 2012. APP 000236 at n. 2 (Vol. I).

A. HIGCO'S 2012 DECLARATORY RELIEF ACTION

Higco's first case, Eighth Judicial District Court Case No. A660548, *Higco, Inc., vs. Boca Park Parcels, LLC, et al.*, was filed April 23, 2012, and sought a judicial declaration that Higco's lease contained a restrictive covenant in its favor, granting it (doing business as a tavern named *Three Angry Wives*) the exclusive right to offer gaming, with certain limited exceptions, within Boca' Park's shopping center. 4/23/12 Complaint, APP 000001-58 (Vol. I). Higco's 2012 Complaint specifically alleged that Boca Park had entered into a lease with *Wahoo's* permitting

it to conduct gaming in alleged violation of Boca Park's contractual obligation to Higco:

> ***Defendants Violate Plaintiff's Bargained-For Exclusive Use Provision*** [Emphasis in original.]
>
> 14. Plaintiff is informed and believes that one or more of Defendants… recently entered into a lease agreement with Wahoo's Fish Taco that allows gaming in the Wahoo's Fish Taco leased premises. This location is within Boca Park Phase 1, and is within less than 660 feet of Three Angry Wives.
>
> 15. An application has been made for a gaming license at the Wahoo's Fish Taco leased premises, is currently in the final stages of licensing approval, and is expected to be granted on April 19, 2012.
>
> 16. Prior to that date, ***a demand was made by Plaintiff that Defendants not allow gaming on the Wahoo's Fish Taco leased premises in violation of the Exclusive [Use] Provision of the Lease***, [emphasis added] but Defendants have made it clear by their actions, and have stated through their representatives, that they do not believe that Plaintiff has an Exclusive Use provision in its Lease, and that the Defendants are free to allow other tenants in Boca Park Phase I to offer gaming, notwithstanding the express language of the Lease.

2012 Complaint, APP. 000005 (Vol. I).

On May 15, 2012, Higco moved for summary judgment. In its motion, Higco argued:

> ***[Boca Park] breached the Parties' Lease***, by allowing a new tenant to offer gaming in Boca Park Phase I. Whether ***this breach*** was due to a lack of care or, or a calculated economic ***breach***, the Defendants allowing a new tenant to offer gaming within Boca Park Phase I, is a ***clear violation*** of the exclusive for gaming granted Plaintiff under its Lease. [] ***Plaintiff asks the Court to enter summary judgment*** affirming the clear language of the Lease granting Plaintiff an exclusive for gaming in Boca Park Phase I, ***finding Defendants' actions to be in breach of the Lease.***

APP 000222, 224 (emphasis added).

On November 7, 2012, the district court issued its order granting Higco's motion for summary judgment, determining that Higco had an exclusive right to gaming in the Boca Park shopping center, concluding:

> [T]he controlling lease is unambiguous, and … Higco has a right to an exclusive use both for tavern and for gaming in Boca Park I, except for any tenants offering gaming in Boca Park I as of November 5, 2002, including Vons and Longs; and … the exclusive use applies to all businesses operating in Boca Park I, other than Higco, to offer gaming, unless the business allowed gaming in Boca Park I, as of November 5, 2002.

11/8/12 Notice of Entry of Order Granting Plaintiff's Motion for Summary Judgment, APP 000064 (Vol. I).

B. HIGCO'S 2014 DAMAGES ACTION

Two years after its summary judgment became final and non-appealable, Higco filed its second Complaint against Boca Park, this time demanding damages for Boca Park's alleged breach of contract and breach of the implied covenant of good faith and fair dealing with regard to the same provisions of the same lease at issue in its 2012 action. 12/5/14 Complaint, APP 000065-187 (Vol. I).

Higco's 2014 Complaint is so closely related to its 2012 action that a copy of the November 7, 2012, Order Granting Plaintiff's Motion for Summary Judgment is attached to Higco's 2014 Complaint as an exhibit and referred to in support of

Higco's allegation that "The District Court Has Already Entered Judgment Ruling that the Lease Grants Plaintiff the Exclusive Right to Offer Gaming in Boca Park I." 12/5/14 Complaint, APP 000069, at ll. 5-6 (Vol. I). Higco's 2014 Complaint then demands damages against Boca Park based on the gaming conducted by *Wahoo's*:

> 17. In 2012, Wahoo's Fish Taco ('Wahoo') entered into a lease with the Defendants and began operating at 1000 S. Rampart, Building 21 (the 'Wahoo Premises'), which is located in Boca Park I.
>
> 18. Shortly thereafter, Plaintiff became aware that Wahoo… had applied for a restricted gaming license at the Wahoo Premises.
>
> 19. Plaintiff immediately demanded that Defendants not allow gaming at the Wahoo Premises. Defendants refused the demand and consented to allow gaming to occur at the Wahoo Premises.
>
> 20. On April 19, 2012, the Nevada Gaming Control Board approved the restricted gaming license application for the Wahoo Premises.
>
> 21. Plaintiff filed an action in District Court, which Defendants litigated on the merits, to determine the issue of whether the Exclusive Use provision of the Lease applied to and prohibited gaming at the Wahoo Premises. Defendants lost that fight when the District Court entered judgment declaring that the Exclusive Use applied to all gaming in Boca Park I (excluding Von's), including Wahoo.
>
> 22. Nonetheless, from April 2012 until present, Defendants have allowed gaming to continually occur at the Wahoo Premises, to the detriment of the Plaintiff.

12/5/14 Complaint, APP 000070 (Vol I).

On January 26, 2015, Boca Park moved to dismiss Higco's 2014 Complaint on the grounds that Higco had impermissibly split its claims under *Five Star Capital* and other authorities, with its 2014 claims barred by its 2012 action. 1/26/15 Motion

to Dismiss with Prejudice, APP 000188-195 (Vol. I); *see also*, Higco's 2/12/15 Opposition, APP 000196-206 (Vol. I); and Boca Park's 2/19/15 Reply, APP 000207-232 (Vol. I). The district court denied Boca Park's motion on March 5, 2015. APP 000233-234 (Vol. I).

On March 6, 2015, Boca Park filed a petition with this Court seeking writ relief (Case No. 67525). The petition was denied on May 21, 2015.[1]

C. THE BENCH TRIAL

The parties proceeded to a bench trial on July 26, 2016, concluding on July 28, 2016.[2] In its August 2, 2016, Findings of Fact, the district court determined that Higco ***could have brought its damages claims in the 2012 action***, stating in part:

> On December 5, 2014, [Higco] filed the instant action seeking money damages for the same breach of the Lease forming the basis for the declaratory judgment entered in the First Action. The Complaint in this action asserts two causes of action: Breach of contract and breach of the implied covenant of good faith and fair dealing. ***In the instant***

[1] The order denying the petition states:

> Having considered petitioners' arguments and the supporting documents in this original proceeding, we are not persuaded that petitioners have met their burden to demonstrate that our extraordinary intervention is warranted. NRS 34.160; *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 575, 578-79, 97 P.3d 1132, 1134 (2004) (recognizing that this court generally declines to entertain writ petitions challenging district court denials of motions to dismiss). Accordingly, we
>
> ORDER the petition DENIED.

APP 000595-596 (Vol. II).

[2] Transcript of Trial, APP 000247-594 (Vol. II).

> ***action, [Higco] is asserting rights and seeking a remedy against Boca Park based on the transaction out of which the First Action arose***. [***Higco***] ***could have asserted its claims for breach of contract and breach of the implied covenant of good faith and fair dealing in the First Action but did not***. …. [Emphasis added.]

8/2/16 Findings of Fact, Conclusions of Law and Judgment, APP 000236. The district court also found that "On April 19, 2012, the Nevada Gaming Control Board approved *Wahoo's* application for a restricted gaming license," noting at n. 5 that Higco's principal, Mr. Higgins "testified that he learned of Defendants'' breach when he saw *Wahoo's* on the agenda for gaming approval." APP 000238, *see also* Reporter's Transcript of 7/26/16, APP000251 2:16-18 (Higco's counsel's opening statement argued that Boca Park had broken its promise in 2012: "Gaming there started in May of 2012…."); *id.*, at APP000296 47:1-4 (Mr. Higgins testimony that he learned of Wahoo's gaming when he saw it on the Gaming Control Board's agenda for approval); and Reporter's Transcript of 7/28/16, APP 000562 3:8-11 ("Boca Park broke that promise by entering into the *Wahoo's* lease. It happened in 2011, gaming started in 2012, in May….").

On August 8, 2016, the district court entered its Findings of Fact, Conclusions of Law and Judgment adjudicating Boca Park liable to Higco for breach of contract in the amount of $499,997.70. APP 000235-246 (Vol. I). This appeal followed.

. . . .

IV. SUMMARY OF ARGUMENT

As the district court correctly noted, Higco could have brought its damages claims against Boca Park in the 2012 action. The district court then erred by concluding that although Higco could have brought its claims for breach of contract and breach of the implied covenant of good faith and fair dealing in the 2012 action, Higco was not required to do so and declined to apply well-settled Nevada precedent requiring dismissal of the action.

Because Higco contended in the 2012 action that Boca Park had violated Higco's exclusive gaming rights by entering into the lease with *Wahoo's* and was therefore in breach its lease with Higco, Higco not only ***could have*** but ***must have*** asserted its breach of contract claims in the 2012 action and, by application of the doctrine of claim preclusion, is barred from bringing those claims in the instant action.

V. ARGUMENT

A. THIS COURT IS TO REVIEW DE NOVO THE DISTRICT COURT'S REFUSAL TO APPLY CLAIM PRECLUSION

Whether claim preclusion is applicable is a question of law to be reviewed by this Court de novo. *G.C. Wallace, Inc. v. Eighth Judicial District Court*, 127 Nev. 701, 705, 262 P.3d 1135, 1137 (2011), *citing Five Star Capital*, *supra*, 124 Nev. at

1058, 194 P.3d at 715; and *University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004).

B. HIGCO'S SECOND ACTION IS BARRED BY THE CLAIM PRECLUSION DOCTRINE

The purpose of the claim preclusion doctrine, "is to obtain finality by preventing a party from filing another lawsuit that is based on the ***same set of facts*** that were presented in the initial suit." [Emphasis added.] *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 712 (2008); *Holt v. Regional Trustee Services Corp.*, 127 Nev. 886, 891, 266 P.3d 602, 605 (2011), *quoting Redrock Valley Ranch v. Washoe County*, 127 Nev. 451, 458, 254 P.3d 641, 646 (2011), *quoting Littlejohn v. U.S.*, 321 F.3d 915, 919 (9th Cir. 2003) (claim preclusion serves to "protect the finality of decisions and prevent the proliferation of litigation…").

Five Star enunciates the current test for applying the doctrine of claim preclusion:

> We begin by setting forth the three-part test for determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) ***the subsequent action is based on the same claims that were or could have been brought in the first case***. These three factors, in varying language, are used by the majority of state and federal courts. This test maintains the well-established principle that ***claim preclusion applies to all grounds of recovery that were or could have been brought in the first case***.
>
> Thus, while claim preclusion can apply to all claims that were or could have been raised in the initial case, issue preclusion only applies

> to issues that were actually and necessarily litigated and on which there was a final decision on the merits. The reason for this distinction is because ***claim preclusion applies to preclude an entire second suit that is based on the same set of facts and circumstances as the first suit***, while issue preclusion… applies to prevent relitigation of only a specific issue that was decided in a previous suit between the parties, even if the second suit is based on different causes of action and different circumstances.

124 Nev. at 1055, 194 P.3d at 713-14 (emphasis added).[3]

Five Star Capital then analyzes the applicability of claim preclusion to the cases before it, which involved the same parties, the same state court, a judgment of dismissal of the first suit, and the filing of a second action based on a claim that was not but could have been brought in the first case. Here, there is no dispute that

[3] While *Five Star* clarified the issue of claim preclusion, it did not initiate Nevada's prohibition against a party's splitting of claims under Nevada law. Thus, *Reno Club, Inc. v. Harrah*, 70 Nev. 125, 129, 260 P.2d 304, 306 (1953), discussed the application of "res judicata" to claims that were or could have been brought in a prior proceeding between the same parties:

> The prior judgment… 'operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might, with propriety, have been litigated.' Wolford v. Wolford, 65 Nev. 710, 714, 200 P.2d 988, 990…. This principle of res judicata has also found expression in the rule against splitting causes of action, to the effect that 'a single cause of action or entire claim or demand cannot be split up or divided and separate suits maintained for various parts thereof….'

Whether termed "res judicata," or "claim preclusion" in the wake of *Five Star*, the doctrine serves the purpose of NRCP 1, which directs that Nevada's Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Higco's first case was between the same parties and decided finally on the merits. As to the third element, Higco has taken the position that although it alleged that *Wahoo's* gaming activities constituted breach of the lease, claim preclusion did not apply because it did not assert a formal claim for damages for breach of contract in the 2012 case. *Five Star Capital* disposes of Higco's argument in the clearest of terms:

> As stated in Restatement (Second) of Judgments section 19, comment a, the purposes of claim preclusion are 'based largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end' and that such reasoning may apply 'even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding….' ….
>
> [F]ive Star's argument that claim preclusion cannot apply because the second suit included an additional claim for breach of contract damages is erroneous. ***[C]laim prelusion applies to prevent a second suit based on all grounds of recovery that were or could have been brought in the first suit***. Since the second suit was based on the same facts and alleged wrongful conduct of Ruby as in the first suit, the breach of contract claim could have been brought in the first suit. As a result, claim preclusion applies, and the district court properly granted summary judgment in favor of Ruby.

124 Nev. at 1058, 194 P.3d at 715 (emphasis added).

Five Star Capital concludes by rejecting any public policy consideration requiring a different result:

> This is the exact type of case for which claim preclusion is necessary – to prevent a party from continually filing additional lawsuits until it obtains the outcome it desires by merely asserting an additional claim

> for relief. As all the necessary elements for claim preclusion are met, summary judgment was appropriate, and we therefore affirm the judgment of the district court.

124 Nev. at 1059-60, 194 P.3d at 716.

Five Star Capital has been repeatedly enforced by this Court and the Nevada Court of Appeals. *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. Adv. Op. 28, 321 P.3d 912, 915 (2014) (*citing Five Star* and explaining that the "doctrine is designed to preserve scarce judicial resources and to prevent vexation and undue expense to the parties" and is "premised on fairness to the defendant and sound judicial administration by acknowledging that litigation over a specific controversy must come to an end, even 'if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding'"); *Berkson v. LePome*, 126 Nev. 492, 500-501, 245 P.3d 560, 565-66 (2010) (noting *Five Star*'s clarification of Nevada law on claim and issue preclusion and its purpose in requiring "'that at some point litigation over the particular controversy come to an end.'"); *Nevada Contractors Ins. Co., Inc. v. Risk Services-Nevada, Inc.*, 2016 WL 3257789, *2 (unpub. Cases Nos. 61279, 62049, 62340, 64532, 6/10/16) (applying *Five Star* and affirming district court's grant of summary judgment on claim and issue preclusion grounds); *Reynolds v. Federal National Mortgage Ass'n*, 2016 WL 1616604, *1 (unpub., Case No. 68376, 4/19/16) (even though actual claims for relief differed from those

brought before, they could have been brought before and were accordingly barred by doctrine of claim preclusion).

In *Weddell v. Sharp, supra*, 350 P.3d at 84-85, this Court expanded *Five Star*'s privity requirement to include the "concept of 'nonmutual' claim preclusion" which "embraces the idea that a plaintiff[']s second suit against a new party should be precluded 'if the new party can show good reasons why he should have been joined in the first action and the [plaintiff] cannot show any good reasons to justify a second chance.'" Although the facts of this dispute do not involve any different parties, *Weddell* is nonetheless instructive as it applies claim preclusion where, as here, the first action sought and resulted in a declaratory judgment and the second action sought money damages based on claims that could have been brought in the first action. *Weddell* concludes:

> In the interest of further promoting finality of litigation and judicial economy, we adopt the doctrine of claim preclusion, meaning that a defendant may validly use claim preclusion as a defense by demonstrating 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 part of them that were or could have been brought in the first action***; and (3) privity exists between the new defendant and the previous defendant *or* the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff cannot provide a 'good reason' for failing to include the new defendant in the previous action.

350 P.3d at 85-86 (emphasis added).

VI. CONCLUSION

The district court erred in its decision that although Higco could have brought its damages claims against Boca Park in its first, 2012 action, it was not required to have done so and that the damages claims were properly pursued in the 2014 action.

This Court should reverse the district court's judgment in favor of Higco.

DATED: February 21, 2017.

Respectfully submitted,

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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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

2. I FURTHER CERTIFY that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 3,542 words.

3. FINALLY, I CERTIFY that I have read this Appellant's Opening 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 Opening Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number of the transcript or appendix where the matter relied on is to be found.

4. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: February 21, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2017, I served **APPELLANT'S OPENING BRIEF** and **APPENDIX TO APPELLANT'S OPENING BRIEF** via the Court's electronic service program on:

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