IN THE SUPREME COURT OF THE STATE OF NEVADA

BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada Limited Liability Company, Appellant, vs. HIGCO, INC., A Nevada Corporation, Respondents.	Case No.: 71085 Appeal from the Eighth Judicial District Court, Case No. A-14-710780-B, The Honorable Elizabeth Gonzalez Presiding.

RESPONDENT'S ANSWERING BRIEF

GARMAN TURNER GORDON LLP
Eric R. Olsen, Esq.
Nevada Bar No. 3127
Dylan T. Ciciliano, Esq.
Nevada Bar No. 12348
650 White Drive, # 100
Las Vegas, Nevada 89119
Telephone: (725) 777-3000
Facsimile: (725) 777-3112

Attorneys for Respondent

NRAP 26.1 DISCLOSURE

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

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, Respondents, by and through counsel, Garman Turner Gordon LLP, state and Respondent Higco Inc., A Nevada Corporation has no parent corporation or publicly held corporation owning 10% or more of Higco, Inc.

Dated this 24th day of March 2017.

GARMAN TURNER GORDON LLP

By _____

ERIC R. OLSEN, ESQ.
Nevada Bar No. 3127
Dylan T. Ciciliano, Esq.
Nevada Bar No. 12348
650 White Drive, Suite 100
Las Vegas, NV 89119
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. STATEMENT OF THE ISSUE

To Appellant Boca Park Marketplace Syndications Group, LLC's (collectively, with Defendants Boca Park Parcels, LLC, Boca Park Marketplace LV, LLC, Boca Park Marketplace LV Syndications Group MM, Inc., and Boca Park Marketplace Syndications Group, LLC, "Boca Park") Statement of the Issue Presented for Review, Respondent Higco, Inc. ("HIGCO") would add the clarification that in 2012, HIGCO brought an action containing a single claim – a claim for declaratory relief. That single claim sought a declaration as to which of two possible leases controlled HIGCO's relationship with Boca Park. This was important, because the version of the lease advocated by HIGCO contained a more expansive exclusive use provision. The event that led to the declaratory relief action, and the controversy over exclusive use, was Boca Park permitting a new tenant to offer gaming in the Boca Park center, subject to government approvals, in direct contradiction to language of one of the possible leases. HIGCO did not bring a claim for breach of contract, or any other coercive claim in that action. The present action is based on Boca Park's breach of the lease that was determined to be controlling in the first action.

Thus, the issue for review is whether an action for declaratory relief to determine whether a contract is valid and controlling bars a subsequent action for breach of that contract.

II. STATEMENT OF THE CASE

To Boca Park's Statement of the Case, HIGCO would reincorporate its own, more accurate statements of the previous action, as set forth in the Statement of the Issue.

III. FACTUAL BACKGROUND

A. IN 2002, HIGCO AND BOCA PARK EXECUTED TWO VERSIONS OF AN EXCLUSIVE USE PROVISION

On or about November 5, 2002, Plaintiff and Defendant Boca Park Parcels, LLC entered into a lease for a property in Boca Park Phase I ("HIGCO Lease"). APP 000082 - 129 (Vol. I). The Lease contains an exclusive use for gaming and for taverns in the Boca Park I (the "Exclusive Use").

During the HIGCO Lease negotiations, HIGCO and Boca Park agreed upon a proposed Exclusive Use Clause, under which Boca PARK would:

> . . . grant Higco an exclusive for Boca Park I for a tavern and gaming, except for any tenants currently located in the center which allow gaming (i.e. Vons, Longs).

(the "Exclusive Use Clause"). 11/7/2012 Order Granting Plaintiff's Motion for Summary Judgment, APP 000059-64 (Vol. I). The Exclusive Use Clause granted HIGCO the right to exclusively operate a tavern and a gaming operation in Boca Park I. Id. at APP 000061, ¶2. The only exception to this exclusive was for then existing tenants in Boca Park I that offered gaming, Von's Grocery and Long's Drugs. Id.

For whatever reason, a version of the lease that was executed on November 5, 2002, contained a different exclusive use clause referring only to taverns, and not to gaming. Id. at APP 000061, ¶4.[1]

On January 20, 2003, Boca Park sent HIGCO a corrected Higco Lease for HIGCO's initials, that purported to clarify the exclusive use. Id. at APP 000061, ¶5. The accompanying corrected lease page contained the Exclusive Use Clause that included both taverns and gaming. Id. at APP 000062, at ¶5. This Exclusive Use clause was initialed and dated by Boca Park. Id. On or after January 20, 2003, Boca Park delivered a complete copy of the corrected lease to HIGCO, including the Exclusive Use Clause. Id. at ¶6.

The Lease commenced on September 20, 2003. 8/2/2016 Findings of Facts, Conclusions of Law and Judgment, APP 000237, at ¶7 (Vol. I).

B. THE WAHOO'S LEASE PERMITTED IT TO OFFER GAMING.

On or about April 29, 2011, Wahoo's Fish Taco's ("Wahoo's") entered into a lease with Appellant Boca Park Marketplace LV Syndications Group, LLC in Boca Park I (the "Wahoo's Lease"). The Wahoo's Lease specifically contemplated that Wahoo's could offer gaming. APP 000237, at ¶11 (Vol. I). Wahoo's lease commenced on November 8, 2011, but Wahoo's did not initially

[1] This "different" lease would ultimately lead to the dispute addressed herein.

occupy that premises and commence business.

HIGCO did not obtain a copy of the Wahoo's Lease until the present litigation. Trial Transcript - Day 1, APP 000295:21-23 (Vol. II). Just prior to April 2012, HIGCO learned that Wahoo's had submitted a gaming application to the Nevada Gaming Control Board. Trial Transcript - Day 1, APP 000295:24-000296:4 (Vol. II). On April 19, 2012, the Nevada Gaming Control Board approved Wahoo's application for a restricted gaming license. APP 000238, ¶16. (Vol. I).

Wahoo's began to offer gaming at the Boca Park location no earlier than May 1, 2012. Id. at ¶17.

C. PRIOR TO WAHOO'S OFFERING GAMING, HIGCO BROUGHT A DECLARATORY RELIEF ACTION TO OBTAIN A JUDICIAL DETERMINATION AS TO WHICH VERSION OF THE HIGCO LEASE CONTROLLED.

When HIGCO learned of Wahoo's gaming application, it approached Boca Park (the landlord) and reminded Boca Park that HIGCO had an exclusive for gaming in Boca Park Phase I. Trial Transcript - Day 1, APP 000297:24-000298:3 (Vol. II). In response, Boca Park denied that HIGCO had any such exclusive. Trial Transcript - Day 2, APP 000453:20-000454:24 (Vol. II). According to Boca Park representatives, when they checked their files, the exclusive use clause was not attached to the HIGCO Lease. Id. Upon learning of HIGCO's position, Boca Park's response was that the parties should "sit down six months or a year from

[then] and try and ascertain if there is any negative effect on [HIGCO's] business" from Wahoo's. Trial Transcript - Day 2, APP 000454: 19-23 (Vol. II).

On April 23, 2012, before Wahoo's offered any gaming on the premises, HIGCO initiated Case No. A-12-660548-B in the Eighth Judicial District Court of Nevada. 4/23/2012 Complaint, APP 000001 – 58 (Vol. I-II). That Declaratory Relief Action asserted a single claim, for declaratory relief, requesting that the Court determine which purported version of the lease controlled. APP 000006, ¶¶18. – 21 (Vol. I). HIGCO alleged no other claims.

Throughout the Declaratory Relief Action, Boca Park argued that the HIGCO Lease was ambiguous, that the HIGCO Lease did not include an Exclusive Use Provision for gaming, and that the so-called "after-executed" Exclusive Use Provision was unenforceable. Among other things, Boca Park argued that no exclusive applied, because Wahoo's was a "supper club" and not a tavern. Trial Transcript - Day 2, APP 000466; *See* Opposition to Plaintiff's Motion for Summary Judgment, on file in Case No. A-12-660548-B.

In granting summary judgment in HIGCO's favor on November 7, 2012, the Honorable Judge Mark Denton explained that the issue in the Declaratory Relief Action was whether the HIGCO Lease included an exclusive use for gaming. November 7, 2012 Order Granting Plaintiff's Motion for Summary Judgment, APP 000063:8-17 (Vol. I). The Court ordered that

> ...the controlling lease is unambiguous, and that 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 Von's and Longs; and that the exclusive use applies to all businesses operating in Boca Park I, such that Defendants shall not allow any business in Boca Park I, other than Higco, to offer gaming, unless the business allowed gaming in Boca Park I, as of November 5, 2002.

APP 000064:1-7 (Vol. I). The Court was not asked to find a breach, and there was no finding or order regarding any breach of the HIGCO Lease. APP000059-000064. Boca Park did not appeal the judicial declaration and was bound by it.

D. THE PRESENT ACTION IS LIMITED TO CLAIMS FOR BREACH OF CONTRACT.

After numerous failed settlement attempts that followed, on December 5, 2014, HIGCO filed the present action. 12/5/2014 Complaint Case No. A-14-710780-B, APP 000065-187 (Vol. I). In it, HIGCO brought two claims for relief, one for breach of contract and the other for breach of the implied covenant to good faith and fair dealing. Id. at APP 000070-000072 (Vol. I).

On March 5, 2015, the District Court denied Boca Park's motion to dismiss the action based on a defense of claim preclusion. 3/5/2015 Order Denying Defendant's Motion to Dismiss, APP 000233-234 (Vol. I). The next day, Boca Park filed a petition with this Court seeking relief by writ. That petition (Case No, 67525) was denied, on May 21, 2015. Ultimately, the District Court found in HIGCO's favor and entered judgment for breach against Boca Park, in the

amount of $499,997.70.

IV. SUMMARY OF ARGUMENT

Boca Park promotes the false narrative that, in the Declaratory Relief Action, HIGCO obtained a declaration determining that Boca Park breached the HIGCO Lease. That story is belied by the facts leading up to the Declaratory Relief Action, Boca Park's position in that action, and Judge Denton's determination. Contrary to Boca Park's narrative, at the time of the Declaratory Relief Action, HIGCO and Boca Park had a dispute as to which of two possible leases controlled HIGCO and Boca Park's relationship; one granted HIGCO an exclusive use for gaming and the other one did not. While the event that led the parties to discuss the HIGCO Lease and spark controversy was Wahoo's application to the gaming commission, Wahoo's had not, at that time, begun to offer gaming.

Prior to Wahoo's offering gaming in Boca Park, HIGCO brought the Declaratory Relief Action seeking only a single cause of action for Declaratory Relief. HIGCO requested that the District Court determine which of the two leases controlled. The District Court determined that HIGCO, in fact, had an exclusive use for gaming. HIGCO then attempted to resolve the dispute with Boca Park, to no avail. Thereafter, in 2014, HIGCO brought the present action against Boca Park alleging breach of the exclusive use provision of the HIGCO

Lease and seeking damages, resulting specifically from Wahoo's offering gaming to its customers across the Boca Park parking lot from HIGCO's Three Angry Wives Pub.

Nevada Revised Statutes Chapter 30 provides for a speedy and efficient declaration of a parties' rights under a contract, by and through a claim for declaratory relief. This special claim for relief is kind of preventative device specifically designed to terminate controversy and avoid full-blown (possibly "nuclear") litigation. Accordingly, the Restatement (Second) of Judgments § 33 (1982), the vast majority of all courts, as well as public policy, hold that a declaratory relief action, like the one that preceded this present action, does not preclude a later action for breach of the contract as to which rights were previously declared. Plainly, HIGCO's request that the District Court determine which of two possible leases was valid and to interpret the language of the applicable exclusive did not preclude a later claim for breach of the valid lease.

Claim preclusion would only applies to those claims that were ripe at the time the first action is filed. Did HIGCO think that it would be a breach of the Exclusive Use Clause it advocated, if Boca Park were to allow competing gaming to go forward and damages were to result? Certainly. The Declaratory Relief Action, however, only asked the Court to determine which clause applied. It is undisputed in the record that Wahoo's had not begun to offer gaming when

HIGCO brought the Declaratory Relief Action, and Boca Park had caused not yet caused HIGCO to suffer damages from any breach of the Lease.

Effectively, the Declaratory Relief Action is not based on the same facts as the present action. While the controversy arose as a result of Wahoo's filing an application with the Gaming Control Board, the Declaratory Relief Action was based solely on determining which version of the HIGCO Lease, and therefore which Exclusive Use Clause, was enforceable, not whether Boca Park violated the Lease.[2] The subsequent action, this action, was based on a set of facts where the enforceable lease and Exclusive Use were determined, gaming had commenced at Wahoo's, and HIGCO had been damaged. Thus, claim preclusion does not apply.

V. ARGUMENT

A. NEVADA'S JURISPRUDENCE ON CLAIM PRECLUSION IS ROOTED IN THE RESTATEMENT (SECOND) OF JUDGMENTS.

Nevada's claim preclusion test is firmly rooted in "the Restatement (Second) of Judgments." G.C. Wallace, Inc. v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark, 127 Nev. 701, 707, 262 P.3d 1135, 1139

[2] Indeed, a wise landlord could have been anticipated to resolve the controversy before its tenant suffered damages, particularly after the Court determined the tenant had a relevant Exclusive Use. This landlord encouraged its tenant to wait and see whether any damages were incurred.

(2011)(citations omitted). The Nevada Supreme Court has frequently noted its "long-standing reliance on the Restatement (Second) of Judgments in the issue and claim preclusion context." Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc., 130 Nev. Adv. Op. 28, 321 P.3d 912, 917–18 (2014). Additionally, the Court's "most recent jurisprudence on claim preclusion is informed by the practice of 'the majority of state and federal courts.'" Carstarphen v. Milsner, 594 F. Supp. 2d 1201, 1210 (D. Nev. 2009)(citing Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) holding modified by Weddell v. Sharp, 131 Nev. Adv. Op. 28, 350 P.3d 80 (2015)); Frei ex rel. Litem v. Goodsell, 129 Nev. Adv. Op. 43, 305 P.3d 70, 72 (2013)(relying on the Massachusetts Supreme Judicial Court in resolving issues of claim preclusion.).

Furthermore, the Nevada Supreme Court continues to recognize that there are "numerous exceptions to the doctrine of claim preclusion." G.C. Wallace, Inc. v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark, 127 Nev. 701, 702, 262 P.3d 1135, 1139 (2011) (citing Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1054, 194 P.3d 709, 716 (2008) holding modified by Weddell v. Sharp, 131 Nev. Adv. Op. 28, 350 P.3d 80 (2015)).

1. Declaratory Relief Actions are excepted from claim preclusion.

One well recognized exception to doctrine of claim preclusion is the exception for declaratory judgments. Under this exception, a declaratory

judgment does not preclude a subsequent action for damages arising out of the same nucleus of operative facts. The exception is articulated in the Restatement (Second) of Judgments Section 33, the findings of the vast majority of state and federal courts, and sound public policy.

a. The Restatement (Second) of Judgment unambiguously enumerates the Declaratory Judgment exception.

According to Section 33 of the Restatement (Second) of Judgments, "[a] valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared."[3] Unambiguously, the comments state that "[a] plaintiff who wins a declaratory judgment may go on to seek further relief, even in an action on the same claim which prompted the action for a declaratory judgment." Id. cmt. c. "This further relief may include damages which had accrued at the time the declaratory relief was sought; it is irrelevant that the further relief could have been requested initially." Id. Thus, the Restatement (Second) of Judgments specifically intends that subsequent to a declaratory judgment, a party may bring a second action for damages whether or not the party could have sought the

[3] Boca Park's opening brief remarks that the District Court in this matter relied on the Declaratory Judgment. Such reliance is consistent with the rule advocated by HIGCO and relevant NRS. Restatement (Second) of Judgments § 33 (1982); Nev. Rev. Stat. Ann. § 30.030 (West).

damages in the first action.

While the Nevada Supreme Court has not expressly adopted Section 33 of the Restatement (Second) of Judgments, it looks favorably upon the Restatement (Second) of Judgments in general, and recently recognized the rule set forth in Section 33. See generally Weddell v. Sharp, 131 Nev. Adv. Op. 28, 350 P.3d 80, 87 (2015), reh'g denied (July 23, 2015) (dissent)(recognizing that it "is questionable whether a declaratory judgment carries claim . . . preclusive effect) (citing Restatement (Second) of Judgments § 33 (1982); 18A Wright, Miller & Cooper, *supra,* § 4446 (describing the claim-preclusion effects of a declaratory judgment as "shrouded in miserable obscurity"). The Court should continue its reliance upon the Restatement (Second) of Judgments and find that HIGCO's Declaratory Relief Action does not preclude the subsequent action for damages.[4] Alcantara ex rel. Alcantara, 130 Nev. Adv. Op. 28, 321 P.3d at 917–18 (2014);

[4] Certain Courts recognize that the Declaratory Judgment Exception does not apply if the party sought coercive relief in the first action. Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190, 196 (2d Cir. 2010); Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156, 164 (4th Cir.2008) ("Federal courts have consistently held that the declaratory judgment exception applies only if the prior action solely sought declaratory relief."); 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4446, at 313–14 ("So long as the request for declaratory relief is combined or followed with coercive relief, the claim-preclusion rules that apply to actions for coercive relief apply with full force."). This Court need not consider this limitation on the exception here, because HIGCO's Declaratory Relief Action sought only declaratory relief.

G.C. Wallace, Inc., 127 Nev. at 707, 262 P.3d at 1139; see also Weddell, 131 Nev. Adv. Op. 28, 350 P.3d at 87.

b. Federal and State Courts uniformly recognize the Declaratory Judgment Exception.

Most courts around the country have adopted HIGCO's position on this issue. In adopting the Section 33 of the Restatement (Second) of Judgments, the First Circuit Court of Appeals canvassed other jurisdictions and determined that the clear majority of the courts have adopted the rationale set forth in Section 33 of the Restatement (Second) of Judgments. See Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co., 547 F.3d 48, 53 (1st Cir. 2008).[5] Since the First Circuit's

[5] State Courts adopting the Restatement on this point: Stilwyn, Inc., 353 P.3d at 1077 (Idaho 2015); Jackinsky v. Jackinsky, 894 P.2d 650, 656 (Alaska 1995); Aerojet–Gen. Corp. v. Am. Excess Ins. Co., 117 Cal.Rptr.2d 427, 441–42 (Cal.Ct.App.2002); Eason v. Bd. of County Comm'rs, 961 P.2d 537, 540 (Colo.Ct.App.1997); Salvatore v. Ohio Cas. Ins. Co., 2001 WL 823265, at *2 (Conn.Super.Ct. June 18, 2001); N. Shore Realty Corp. v. Gallaher, 99 So.2d 255, 257 (Fla.Dist.Ct.App.1957); Bankers & Shippers Ins. Co. v. Electro Enters., Inc., 287 Md. 641, 415 A.2d 278, 285–86 (Md.1980); Ganaway v. Shelter Mut. Ins. Co., 795 S.W.2d 554, 562 (Mo.Ct.App.1990); Radkay v. Confalone, 133 N.H. 294, 575 A.2d 355, 357–58 (N.H.1990); Donnelly v. United Fruit Co., 75 N.J.Super. 383, 183 A.2d 415, 419 (N.J.Super.Ct.App.Div.1962); Principal Mut. Life Ins. Co. v. Straus, 116 N.M. 412, 863 P.2d 447, 451 (N.M.1993); State ex rel. Shemo v. Mayfield Heights, 95 Ohio St.3d 59, 765 N.E.2d 345, 355 (Ohio 2002); Carver v. Heikkila, 465 N.W.2d 183, 186 (S.D.1991); Martin v. Martin, Martin & Richards, Inc., 989 S.W.2d 357, 359 (Tex.1998). State Courts adopting the same rule without reference to the Restatement: Cooke v. Gaidry, 309 Ky. 727, 218 S.W.2d 960, 962 (Ky.1949); Warwick v. Pearl River Valley Water Supply Dist., 271 So.2d 94, 96 (Miss.1972); In re Cox, 97 N.C.App. 312, 388 S.E.2d 199, 201 (N.C.Ct.App.1990); Okla. Alcoholic Bev. Control Bd. v. Cent. Liquor Co., 421 P.2d 244, 247 (Okla.1966); Robison v. Asbill, 328 S.C. 450, 492

decision in Andrew Robinson, other courts have adopted the Declaratory Relief Exception. See generally, Stilwyn, Inc. v. Rokan Corp., 353 P.3d 1067, 1078 (Idaho 2015); Duane Reade, Inc., 600 F.3d at 196 (2d Cir. 2010); Laurel Sand & Gravel, Inc., 519 F.3d at 164 (4th Cir.2008).

There is no reason for this Court to depart from the well-established and recognized Declaratory Judgment Exception in this case. Thus, in keeping with the clear majority of state and federal courts, this Court should recognize the Declaratory Judgment Exception. See, Five Star Capital Corp., 124 Nev. at 1054, 194 P.3d at 713 (2008).

S.E.2d 400, 401 (S.C.Ct.App.1997); Klaus v. Vander Heyden, 106 Wis.2d 353, 316 N.W.2d 664, 672 (Wis.1982). Federal Courts applying State Law and recognizing the rule. Ventas, Inc. v. HCP, Inc., 647 F.3d 291, 304 (6th Cir. 2011); Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190, 196 (2d Cir. 2010); Stericycle, Inc. v. City of Delavan, 120 F.3d 657, 659 (7th Cir.1997) (applying Wisconsin law); Harborside Refrig. Servs., Inc. v. Vogel, 959 F.2d 368, 373 (2d Cir.1992)(applying New York law); Cimasi v. City of Fenton, 838 F.2d 298, 299 (8th Cir.1988) (applying Missouri law); Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 970 F.Supp. 1289, 1303 (N.D.Ohio 1997) (applying Ohio law); Umhey v. County of Orange, 957 F.Supp. 525, 528 (S.D.N.Y.1997) (applying New York law). Surveying courts who found that common law embraces the rule: Empire Fire & Marine Ins. Co. v. J. Transp., Inc., 880 F.2d 1291, 1296 (11th Cir.1989); Smith v. City of Chicago, 820 F.2d 916, 919 (7th Cir.1987); Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 536–37 (5th Cir.1978); Lube 495, Inc. v. Jiffy Lube, 813 F.Supp. 100, 111–12 (D.Mass.1993); Horn & Hardart Co. v. Nat'l R.R. Pass. Corp., 659 F.Supp. 1258, 1265 (D.D.C.1987); In re Wash. Pub. Power Supply Sys. Sec. Litig., 623 F.Supp. 1466, 1473 (W.D.Wash.1985); Solomon v. Emanuelson, 586 F.Supp. 280, 283 (D.Conn.1984).

c. Public Policy favors the Declaratory Judgment Exception.

Declaratory Relief is a creature of statute, which exists as a result of the Nevada Legislature creating NRS Chapter 30. This Court has recognized more than once that claim preclusion cannot be used to contravene the Legislature's policy decisions. Alcantara ex rel. Alcantara, 130 Nev. Adv. Op. 28, 321 P.3d at 915–16(citing S. Cal. Edison v. First Judicial Dist. Court, 127 Nev. ——, —— n. 5, 255 P.3d 231, 237 n. 5 (2011) ("[C]laim preclusion could not be used to contravene the Legislature's policy decision."). While the purpose of claim preclusion is to bring finality to litigation, the purpose of declaratory relief is to promptly and efficiently clarify legal relationships. To the extent that these policies conflict, case law dictates that the policies of the declaratory relief shall prevail.

As expressed in the statute, the purpose of declaratory relief "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and [is] to be liberally construed and administered." NRS 30.140; Las Vegas Plywood & Lumber, Inc. v. D & D Enterprises, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982)(remedial statutes are liberally construed). Declaratory relief should be applied consistent with the public policy reasons expressly provided for in NRS 30.140. Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe, 124 Nev. 193, 200-01, 179 P.3d 556, 560-

61 (2008). The statute and public policy afford a party the opportunity to seek clarity from a court as to the rights of both parties, without having to initiate full blown litigation. It, therefore, encourages settlement and non-coercive results.

In adopting the Uniform Declaratory Judgment Act, the Nevada Legislature recognized that a declaratory judgment would not necessarily bring finality to the dispute. Several provisions of the act reflect the potential for subsequent litigations. NRS 30.050 (recognizing a contract may be construed before or after a breach); NRS 30.080 (recognizing that declaratory relief may not terminate the controversy giving rise to the proceeding); NRS 30.100 (providing that further relief based on a declaratory judgment may be afforded). Thus, the statute itself recognizes that declaratory relief may result in additional litigation.[6]

In contrast to a "cause of action," "a declaratory judgment in essence does not carry with it the element of coercion as to either party." Aronoff v. Katleman, 75 Nev. 424, 432, 345 P.2d 221, 225 (1959) (internal citations omitted). Instead, it only determines "legal rights without undertaking to compel either party to pay money or to take some other action to satisfy such rights as are determined to exist by the declaratory judgment." Id.; Nevada Mgmt. Co. v. Jack, 75 Nev. 232,

[6] Furthermore, the district court has the discretion to refuse declaratory relief if it will not resolve the controversy, such that the district court can address any concerns that declaratory relief is being used abusively. NRS 30.080.

235, 338 P.2d 71, 73 (1959)(setting forth the requirements for declaratory relief); see also Kolender v. Lawson, 461 U.S. 352, 355 (1983)(requiring only a likelihood of injury for declaratory relief); Maffeo v. Nevada, No. 2:09-CV-02274, 2010 WL 4136985, at *6 (D. Nev. Oct. 19, 2010) *aff'd sub nom.* Maffeo v. Nevada, ex rel. Bd. of Regents of Nevada Sys. of Higher Educ., 461 F. App'x 629 (9th Cir. 2011).

In considering the potentially competing interests, other courts have recognized that declaratory relief allows courts "to clarify the legal relationships of parties before they have been disturbed thereby tending towards avoidance of full-blown litigation." Andrew Robinson Int'l, Inc., 547 F.3d at 58 (quoting Harborside, 959 F.2d at 373). As such "it would frustrate this [ ] policy were parties required to bring, as part of a declaratory judgment action, all conceivable claims and counterclaims on pain of preclusion." Id.; see also id. (quoting Mass. Gen. Laws ch. 231A, § 5 (allowing "[f]urther relief based on a declaratory judgment" whenever necessary or proper) for the proposition that declaratory relief anticipates the possibility of further litigation. It has also been recognized that "the Second Restatement has weighed these competing policy rationales and concluded . . . that, on balance, public policy is furthered rather than retarded by the ready availability of a no-strings-attached declaratory remedy that is simpler,

faster, and less nuclear than a suit for coercive relief." Stilwyn, Inc., 353 P.3d at 1078 (quoting Andrew Robinson Int'l, Inc., 547 F.3d at 58).

This Court has previously acknowledged that certain special proceedings should, as a matter of public policy, be excepted from claim preclusion. In G.C. Wallace, Inc., the Nevada Supreme Court found that "summary eviction proceedings" are unique and designed by the legislature as "a swift and straightforward procedure for determining who is entitled to immediate possession." 127 Nev. at 709, 262 P.3d at 1140. On that basis, this Court found that NRS chapter 40 "must be construed as exempting summary eviction proceedings from the doctrine of claim preclusion in some instances." Id. at 711, 262 P.3d at 1141. The Nevada Supreme Court recognized in G.C. Wallace, Inc. that by providing a statutory procedure for summary eviction the Nevada legislature intended a speedy and efficient means of relief without resorting to full scale litigation. This Court should also recognize the sound policy and legislative intent for the statutorily sanctioned declaratory relief mechanism to act as a speedy and efficient means of relief, and be able to see that the course of events in this action is consistent with that sound policy.

Because declaratory relief is designed to provide an efficient resolution of disputes between parties without resort to full-blown litigation, a declaratory judgment action should not be seen to preclude future litigation. The action

before this Court is a perfect illustration of the intended purpose declaratory relief. Here, there were two versions of the HIGCO Lease, one containing an exclusive for gaming and one not. Prior to Wahoo's ever offering gaming—i.e. prior to breach of the HIGCO Lease—a dispute arose between landlord and tenant as to which version of HIGCO's Lease controlled. The event that caused the dispute to come to light was certainly the knowledge that Wahoo's had applied for a gaming license across the parking lot from HIGCO's premises. The controversy concerned the sudden appearance of two versions of the Exclusive Use Clause, only one of which clearly provided an exclusive for gaming. HIGCO brought the Declaratory Relief Action, seeking a determination as to which lease controlled. The matter swiftly proceeded to judgment. Once the Judge Denton determined the controlling lease and declared the Exclusive Use, consistent with the public policy goals of the Uniform Declaratory Judgments Act, HIGCO used the Court's Declaration to further settlement negotiations. While Boca Park ultimately refused to consider any settlement,[7] sound public policy dictates that HIGCO did not lose its right to pursue Boca Park's breach of the HIGCO Lease

[7] In light of Boca Park's position that claim preclusion precluded any subsequent action for damages, their refusal to consider resolution of this matter is conspicuous indeed and counter to the Uniform Declarator Judgment Act's purpose.

thereafter. To find otherwise would contradict the clear, unambiguous terms and intent of NRS 30, as well as public policy.

2. HIGCO's AFTER-ARISING CLAIM FOR BREACH OF CONTRACT IS NOT BARRED BY THE CLAIM PRECLUSION DOCTRINE.

a. Claim Preclusion does not bar claims that arise after the filing of a complaint.

Claim preclusion requires that 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." Five Star Capital Corp., 124 Nev. at 1054, 194 P.3d at 713. The Restatement (Second) of Judgments provides: "A judgment in an action for breach of contract does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action." Restatement (Second) of Judgments § 26 cmt. g (1982).

The majority rule applied in Nevada "is that claim preclusion extends to claims in existence at the time of the filing of the original complaint in the first lawsuit and any additional claims actually asserted by supplemental pleading." Carstarphen, 594 F. Supp. 2d at 1210 (applying Nevada law) (emphasis added); Chudacoff v. Univ. Med. Ctr. of S. Nevada, 2011 WL 1792708, at *4 (D. Nev. May 11, 2011). In predicting what the Nevada Supreme Court would do, the Nevada District Court determined that this Court would "adopt the majority rule

regarding when the claim preclusion bar takes effect." Carstarphen, 594 F. Supp. 2d at 1210. It ruled that "claim preclusion extends to claims in existence at the time of the filing of the original complaint in the first lawsuit and any additional claims actually asserted by supplemental pleading." Id.[8] Thus, "an action need include only the portions of the claim due at the time of commencing that action" and there is no obligation to file a supplemental complaint. Id. (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4409 (2d ed. 2002)); NRCP 15(d) (a party "may" supplement after-arising claims, but is not obligated to do so). Other courts are in accord.[9]

---

[8] In reaching its conclusion, the Nevada Federal District Court surveyed courts from around the Country, and cited to the following: Hatch v. Boulder Town Council, 471 F.3d 1142, 1149 (10th Cir.2006) ("[A] claim should not be precluded merely because it is based on facts that arose prior to the entry of judgment in the previous action"); Rawe v. Liberty Mut. Fire Ins. Co., 462 F.3d 521, 530 (6th Cir.2006) (noting that the "majority rule" is " 'that an action need include only the portions of a claim due at the time of commencing the action' because 'the opportunity to file a supplemental complaint is not an obligation' ") (quoting 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4409 (2d ed. 2002)); Baker Group v. Burlington N. & Santa Fe Ry., 228 F.3d 883, 886 (8th Cir.2000) (similar); Computer Assocs. Int'l, Inc. v. Altai, Inc., 126 F.3d 365, 369–70 (2d Cir.1997) ("For the purposes of res judicata, 'the scope of litigation is framed by the complaint at the time it is filed' ") (quoting L.A. Branch NAACP v. L.A. Unified Sch. Dist., 750 F.2d 731, 739 (9th Cir.1984)); Doe v. Allied–Signal, Inc., 985 F.2d 908, 915 (7th Cir.1993) (stating that "plaintiffs need not amend filings to include issues that arise after the original suit is lodged"); Manning v. City of Auburn, 953 F.2d 1355, 1360 (11th Cir.1992) (similar to Rawe).

[9] Camus v. State Farm Mut. Auto. Ins. Co., 151 P.3d 678, 683 (Colo. App. 2006) (collecting federal and state cases); Mitchell v. City of Moore, 218 F.3d 1190, 1202 (10th Cir.2000); Florida Power & Light Co. v. United States, 198 F.3d 1358

Generally, "[c]ourts use the date of the filing of the original complaint as the cutoff for determining what claims could have been brought." E.g., 47 Am. Jur. 2d Judgments § 475 (citing Allied Fire Prot. v. Diede Const., Inc., 127 Cal. App. 4th 150, 155 (Cal. Ct. App. 2005) ("Res judicata is not a bar to claims that arise after the initial complaint is filed.")). With respect to breach of contract claims, only the breaches "occurring prior to commencement of the first action constitute part of a single claim or cause of action." Loveland Essential Grp., LLC v. Grommon Farms, Inc., 318 P.3d 6, 12 (Colo. App. 2012) (quoting 18 Charles Alan Wright et al., Federal Practice and Procedure § 4409, at 212 (2d ed. 2007)).

B. HIGCO's claims did not exist as of the date of the Declaratory Relief Action

In Nevada, a plaintiff alleges a breach of contract by pleading four elements: (1) formation of a valid contract; (2) performance or excuse of performance by the plaintiff; (3) material breach by the defendant; and (4) damages. Johnston v. Int'l Mixed Martial Arts Fed'n, 2015 WL 273619, at *3 (D. Nev. Jan. 22, 2015)(citing Bernard v. Rockhill Dev. Co., 734 P.2d 1238, 1240 (Nev.1987)). Likewise, a necessary element of a breach of the implied covenant

---

(Fed.Cir.1999); Pleming v. Universal—Rundle Corp., 142 F.3d 1354 (11th Cir.1998); S.E.C. v. First Jersey Sec., Inc., 101 F.3d 1450 (2d Cir.1996).

of good faith and fair dealing is damages. Eagle SPE NV 1, Inc. v. S. Highlands Dev. Corp., 36 F. Supp. 3d 981, 990 (D. Nev. 2014).

While the Nevada Gaming Control Board approved Wahoo's application for a restricted gaming license on April 19, 2012, Wahoo's began to offer gaming no earlier than May 1, 2012. APP 000238, at ¶17. (Vol. I).

On April 23, 2012, at least a week before Wahoo's could have legally offered gaming in Boca Park, HIGCO initiated the Declaratory Relief Action. The only cause of action was for declaratory relief. At the time of the Declaratory Relief Action, facts necessary for HIGCO's claims for breach of contract and breach of the covenant of good faith and fair dealing claim did not exist.

Did HIGCO think that it would be a breach of the Exclusive Use Clause it advocated, if Boca Park were to allow competing gaming to go forward and damages were to result? Certainly. Did it use the word "breach" to describe its perspective in moving papers? Probably. HIGCO did not, however, allege any claim for breach. There had been no actual breach of the HIGCO Lease and no quantifiable damages. While Boca Park had given permission to Wahoo's under its lease to offer gaming, that was subject to approval of gaming authorities, and gaming was not being offered as of the filing of the Complaint. At that point, Wahoo's might never have commenced offering gaming. HIGCO's claims for breach of contract and breach of the covenant of good faith and fair dealing would

not, therefore, have been ripe at the time of the Declaratory Relief Action.

Likewise, no damages had accrued as of commencement of that earlier action. Even assuming *arguendo* that a probable future breach would provide the premise for HIGCO to file a breach of contract action, there could be no damages until Wahoo's began competing against HIGCO. Indeed, HIGCO would have had the burden of proving that it suffered damages and/or would suffer damages in the future from Wahoo's competition. As this Court has repeatedly recognized, there must be reasonable certainty relating of any future damages. Banks ex rel. Banks v. Sunrise Hosp., 120 Nev. 822, 837, 102 P.3d 52, 62 (2004); Houston Expl. Inc. v. Meredith, 102 Nev. 510, 512, 728 P.2d 437, 438 (1986); Sierra Pac. Power Co. v. Anderson, 77 Nev. 68, 75–76, 358 P.2d 892, 896 (1961); see also Burger v. Galey, 2014 WL 3778972, at *4 (D. Nev. July 31, 2014). As of the date HIGCO filed the Declaratory Relief Action, there were no damages and averment of future damages would have been purely speculative. Again, Wahoo's might never have offered gaming, or it might have failed. Given that, Boca Park would have surely responded an allegation of breach of contract at that time with a motion to dismiss based on ripeness.

The District Court in this case found that Wahoo's began offering gaming on May 1, 2012, and found that HIGCO suffered damages from that point forward. APP 000238, at ¶17. (Vol. I). Thus, the District Court confirmed that

the element of damages had not ripened by April 23, 2012. Furthermore, and significantly, HIGCO determined its damages by comparing which of its customers gamed at Wahoo's as well. APP 000244, at ¶40. (Vol. I). That analysis required that HIGCO compare more than a year of gaming records and analyze the amounts that each of their customers expended at Wahoo's. Id. at APP 000244, at ¶40. (Vol. I). The analysis, and the District Court's finding, confirmed that HIGCO had no basis to bring a claim for damages as part of the Declaratory Relief Action. It would be legally inconsistent to say, as Boca Park seems to, that a party with no actual damages must attempt to prove speculative future damages, before any present damages accrue, rather than choosing available and expeditious declaratory relief.[10]

[10] Though it makes no mention of the issue in argument, in its fact section Boca Park emphasizes the sentence in Judge Gonzalez findings of fact stating that HIGCO "could have brought" its claims in the earlier action. Boca Park, understandably avoids arguing claim preclusion from that language, because the District Court specifically addressed the finding in its Order Denying Plaintiff's Motion to Amend Findings of Fact, Conclusions of Law, and Judgment, entered on November 2, 2016. In her Order, Judge Gonzalez said, in pertinent part:

> Specifically, the Court finds that Higco could have brought its claims for breach of contract and breach of the covenant of good faith and fair dealing when it sought relief under NRS Chapter 30, but consistent with its Order Denying Defendants Motion to Dismiss finds that Higco was not required to do so.

Even if the Court does not adopt the Declaratory Judgment Exception, *per se,* claim preclusion does not apply here, because all elements, including breach and damages, did not accrue until after HIGCO filed its Declaratory Relief Action. Because claim preclusion would only apply to claims that were ripe at the time the Declaratory Relief Action was filed, it is irrelevant that other claims might have accrued during the pendency of the Declaratory Relief Action. HIGCO had no obligation to amend its first complaint prior to entry of the Declaratory Judgment. Thus, the doctrine of claim preclusion does not apply in this case.

1. THE DECLARATORY RELIEF ACTION IS NOT BASED ON THE SAME FACTS AS THE BREACH OF CONTRACT CLAIM.

For claim preclusion to apply, "the subsequent action [must be] based on the same claims or any part of them that were or could have been brought in the first case." Five Star Capital Corp., 124 Nev. at 1054, 194 P.3d at 713. A prior judgment does not merge every possible claim that two parties could have held against one another. Instead, there must be a unity of claims, i.e. the claims are "based on the same facts and alleged wrongful conduct." C.J. Wallace, Inc., 127

See, Order Denying Plaintiff's Motion to Amend Findings of Fact, Conclusions of Law, and Judgment, entered on November 2, 2016. Boca Park did not appeal from that Order.

Nev. at 707, 262 P.3d at 1139 (citing Five Star, 124 Nev. at 1058, 194 P.3d at 715).

At first blush, it might appear that both cases arose from the same facts. Certainly, both cases involved a lease of the premises at Boca Park between the HIGCO and the Defendants, with the specter of competing gaming looming across the parking lot. However, the facts of the first case were, as follows: HIGCO had been operating under a lease for about 10 years as the only gaming property (except for a drug store and a grocery); it found out that a new tenant in the center was on the agenda for gaming approval; HIGCO showed landlord its exclusive for gaming and landlord said it had another lease with no exclusive for gaming but only for taverns. Those were the facts upon which Judge Denton was asked for a declaratory judgment. The Declaratory Relief Action was solely to determine which version of the HIGCO Lease was valid and controlling.[11] Contrary to Boca Park's basic assumption, HIGCO did not seek, nor did the Court consider, whether Wahoo's gaming operations would breach the HIGCO Lease. That is found nowhere in the prayer or the Court's judgment. Neither Wahoo's Lease, nor its gaming operations were at issue or relevant to the Declaratory

[11] Wahoo's gaming application was only mentioned in the Declaratory Relief Action as it gave context to when the issues surrounding the different versions of the HIGCO Lease arose.

Relief Action. The District Court's judgment in the Declaratory Relief Action was limited to which version of HIGCO's Lease was valid and controlling. As the determination of the controlling lease does not address the wrongful conduct of the present action—i.e. Wahoo's gaming operations in breach of the exclusive—claim preclusion does not apply.

VI. CONCLUSION

The Declaratory Relief Action was based on the very narrow question of which of two possible versions of HIGCO's Lease was controlling. The two versions of the lease contained different exclusive use provisions. After the district court rendered judgment in HIGCO's favor, HIGCO brought a claim for Boca Park's breach of the exclusive use provision. The Restatement (Second) of Judgments, §33 is clear that a declaratory judgment does not preclude a later claim for damages, even when a party could have brought the damages claim along with declaratory relief. The clear majority of courts embrace § 33 of the Restatement (Second) of Judgments, as does the public policy supporting declaratory relief.

Furthermore, claim preclusion only applies to those claims existing at the time of the first action and a party has no obligation to amend their complaint to include after-arising facts. Here, it is undisputed that Wahoo's did not offer gaming until after HIGCO filed the Declaratory Relief Action. Thus, there was

no actual breach or damages prior to HIGCO filing the Declaratory Relief Action. As such, claim preclusion does not apply.

Finally, because claim preclusion only applies to the same claims as previously litigated, claim preclusion does not apply here. The Declaratory Relief Action was solely restricted to which version of the lease controls, whereas the current action focuses on whether Boca Park breached the lease. Accordingly, the actions do not address the same claims.

Dated this 21st day of March, 2017.

GARMAN TURNER GORDON LLP

By _____
ERIC R. OLSEN, ESQ.
Nevada Bar No. 3127
Dylan T. Ciciliano, Esq.
Nevada Bar No. 12348
650 White Drive, Suite 100
Las Vegas, NV 89119
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 7,157 words;

or ☐ does not exceed _____ pages.

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

Dated this 21st day of March, 2017.

GARMAN TURNER GORDON LLP

By _____

ERIC R. OLSEN, ESQ.
Nevada Bar No. 3127
Dylan T. Ciciliano, Esq.
Nevada Bar No. 12348
650 White Drive, Suite 100
Las Vegas, Nevada 89119
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENTS ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 24th day of March, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Charles H. McCrea
Hejmanowski & McCrea, LLC
520 South Fourth Street
Suite 320
Las Vegas, NV 89101

An employee of Garman Turner Gordon LLP
4853-2202-2213, v. 4