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.

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Case No. 71085

District Court Case No. A-14-710780-B

APPELLANT'S REPLY 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 this Court and is expected to continue appearing in the proceedings in this Court.

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

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APPELLANT'S REPLY BRIEF

I. INTRODUCTION

HIGCO opens its Answering Brief by completely misstating the "single claim" embraced in its 2012 declaratory relief action:

> …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***.

Answering Brief, p. 1 (emphasis added).

Contrary to this statement, ***the 2012 Complaint seeks no such declaration and makes no mention of the fact that there were two versions of the lease***.[1] The 2012 Complaint refers to only one version of the lease and alleges that Boca Park violated it by allowing another tenant, Wahoo's, to conduct gaming on its premises. The "second" version of the lease was not introduced into the case ***until Boca Park filed its opposition*** to HIGCO's motion for summary judgment and raised the possible existence of another version of the lease that had a more restrictive exclusive use provision than the one referred to in HIGCO's Complaint as a basis

[1] If the purpose of the declaratory relief action was as stated by HIGCO, one would expect an allegation somewhere in the Complaint referring to the second "of two possible leases." There is no such allegation or any reference whatsoever in the Complaint to a second possible lease (s*ee* Appendix to Appellant's Opening Brief ("APP") at Vol. I, Part 1, APP 000002-7) and the Complaint attaches a copy of only one lease as an exhibit (APP Vol. I, Part 1, APP 000009-39).

for NRCP 56(f)[2] relief to continue the hearing on the motion for summary judgment and allow further discovery.[3] The Court Minutes of the 6/25/12 hearing on the motion reflect that, "Counsel argued as to whether the Plaintiff's lease included exclusive rights for a tavern and gaming, exceptions noted, in Boca Park and if Defendants violated that lease." *Id*. at RAPP Vol. III, Part 5, RAPP 000331. The hearing concluded with the Court continuing the hearing for 90 days to allow the parties to conduct discovery and file supplemental points and authorities. *Id*.

The purpose of the declaratory relief action was ***not*** to resolve a dispute between the parties over which of two possible versions of a lease was operative but to obtain a declaration that Boca Park granted HIGCO the exclusive right to conduct gaming in the shopping center which Boca Park breached by granting gaming rights to another tenant.

HIGCO attempts to recast its 2012 declaratory relief complaint into something it wasn't as an effort to create a basis – where none exists – to argue that the 2012

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[2] NRCP 56(f) provides:

> (f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[3] *See* Boca Park's 6/11/12 Opposition to Plaintiff's Motion for Summary Judgment. Appendix to Appellant's Reply Brief ("RAPP"), Vol. III, Part 2, RAPP 000061-80 at 65-67.

action involved different facts and circumstances than the 2014 action. This is impossible, as both actions arose from the precisely the same transaction – Boca Park's alleged breach of the exclusive gaming rights granted in HIGCO's lease by Boca Park's execution of a lease with another tenant granting that tenant the right to conduct gaming. This single breach is the foundation of ***both*** actions brought by HIGCO which resulted in:

(1) The ***2012 final judgment*** issued by Judge Denton in Case No. A-12-660548

(a) granting HIGCO's motion for summary judgment seeking a declaration that HIGCO's lease granted it "an exclusive right to conduct gaming in Boca Park Phase I,"[4] and

(b) denying[5] ***Boca Park's countermotion for summary judgment seeking a declaration that it was not in breach of the lease***;[6] and

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4 APP Vol. I, Part 4, APP 000222.

5 APP Vol. I, Part 2, APP 000064.

6 *See* Supplemental Opposition to Plaintiff's Motion for Summary Judgment and Countermotion for Summary Judgment filed 9/12/12 by Boca Park. RAPP Vol. III, Part 2, RAPP 000089 at 103 ("[Boca Park] "respectfully request[s] that the Court deny HIGCO's Motion for Summary Judgment and grant [Boca Park's] Countermotion for Summary Judgment, ***declaring that [Boca Park] is not in breach of the Lease***." (Emphasis added).

(2) The ***2016 final judgment*** issued by Judge Gonzalez in Case No. A-14-710780 awarding damages for the exact breach declared in the first action.

Under well-settled Nevada law, claim preclusion applies if "(1) the parties or their privies are the same [as here], (2) the final judgment in the first action is valid [as here], and (3) 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 [as here]." *Five Star Capital v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008). This dispute fits the *Five Star* test precisely.

HIGCO tries to escape *Five Star*'s plain holding by invoking §33 of the Restatement (Second) of Judgments,[7] a section never adopted by this Court and in

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[7] Section 33 states:

> 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, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

Here, as this Court observed in *Five Star*, claim preclusion applies to preclude HIGCO's ***entire*** second suit and the doctrine of issue preclusion has no application. ("[W]hile 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***…" 124 Nev. At 1054, 194 P.3d at 713-14 (emphasis added). Moreover, the issue of Boca Park's breach of the lease was actually and necessarily litigated in the first action. *See infra* pp.8-12.

fact contrary to Nevada's well-settled law as enunciated by *Five Star* and validated by a legion of cases following *Five Star's* holding. Although the Nevada Supreme Court has had opportunity to adopt §33, it has not done so. Rather than restricting the application of claim preclusion, which the adoption of §33 would do, this Court has applied the doctrine to its furthest limits and this case presents no reason to restreat from that position.

HIGCO argues that its breach of contract claim was not ripe until Wahoo's actually opened its gaming operations to the public (May 1, 2012, less than a week after HIGCO filed its April 23, 2012, declaratory relief action).[8] The breach of HIGCO's lease, however, occurred not when Wahoo's began offering gaming to the public, but when Boca Park executed the lease authorizing Wahoo's to do so. As the District Court found, HIGCO's claim for damages was known and ripe when HIGCO filed its 2012 declaratory relief action. APP Vol. I, Part 4, APP 000236 n. 2 ("[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.")

The District Court's denial of Boca Park's motion to dismiss concluding that HIGCO was ***not required*** to have brought its damages claims in 2012 is erroneous, violates the well-settled law of this Court and promotes duplicative cases in

[8] Answering Brief, at p. 4 ("Wahoo's began to offer gaming… no earlier than May 1, 2012.").

contravention of Nevada's strong public policy enforcing claim preclusion in the interests of sound judicial administration and fairness to litigants.

> [T]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….'

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

The District Court's judgment in favor of HIGCO should be reversed in favor of Boca Park.

II. HIGCO'S 2012 COMPLAINT AND 2014 COMPLAINT PLEAD THE EXACT SAME BREACH OF LEASE

To pursue declaratory relief, a plaintiff must present a justiciable controversy, meaning that the plaintiff ***must*** demonstrate a legally protectable interest to which the opposing party's interests are adverse, that the opposing party has an interest in contesting the plaintiff's interests and that the controversy is ripe for judicial determination. *Kress v. Cory*,65 Nev. 1, 25-26, 189 P.2d 352, 364 (1948); *MB America, Inc. v. Alaska Pacific Leasing Co.*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1291 (2016), to the same effect, *citing Kress*, *supra*, and *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (the elements identified in *Kress* are necessary to present a justiciable controversy in a declaratory relief action).

Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 887, 141 P.3d 1224, 1230-31 (2006) (addressing demands for declaratory and injunctive relief removing the Nevada Clean Indoor Air Act initiative from the general election ballot and *quoting In re T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279 (2003)), explains the ripeness and justiciability requirements of declaratory relief:

> '[R]ipeness focuses on the timing of the action…. The factors to be weighed in deciding whether a case is ripe for judicial review include: (1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review.'
>
> A primary focus in such cases has been the degree to which the harm alleged by the party seeking review is sufficiently concrete, rather than remote or hypothetical, to yield a justiciable controversy. Alleged harm that is speculative or hypothetical is insufficient: an existing controversy must be present. ***While harm need not already have been suffered, it must be probable for the issue to be ripe for judicial review***.'[9] [Emphasis added.]

According to HIGCO's Answering Brief, at p. 1, its 2012 declaratory relief complaint resulted from "the controversy over exclusive use, … Boca Park permitting a new tenant to offer gaming… in direct contradiction to language of one of [its] possible leases"[10] with Boca Park. If, as HIGCO explains, Boca Park's entry

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[9] HIGCO's Brief, at p. 23, concedes that in 2012 it knew damages to be probable:

> 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.

[10] As noted earlier, the 2012 Complaint makes no mention of the fact that there were two versions of the lease. The Complaint refers only to one version of the lease

into a lease authorizing Wahoo's to conduct gaming violated the terms of the lease attached to its 2012 Complaint, then HIGCO's damages claim was fully ripe and justiciable by April 23, 2012, regardless of the fact that Wahoo's had not yet offered gaming to the public and HIGCO was required to assert that claim in the 2012 action or be deemed barred.

By its April 23, 2012, Complaint, HIGCO alleged Boca Park's actual breach:

> ***Defendants Violate Plaintiff's Bargained-For Exclusive Use Provision*** [Emphasis in original]
>
> 14. Plaintiff is informed and believes that… 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 Lease Provision of the Lease***, 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. [Emphasis added.]

2012 Complaint, APP Vol. I, Part 1, APP 000005.

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and alleges that Boca Park violated it by allowing another tenant, Wahoo's, to conduct gaming on its premises. *See* notes 1 and 2 *supra*.

Then, at ¶¶19 and 20 of its 2012 Complaint, APP Vol. I, Part 1, APP 000006, HIGCO pled the elements of a breach of contract claim[11] against Boca Park:

> 19. A dispute has arisen and an actual controversy now exists between Plaintiff on the one hand and Defendants on the other hand, in that Plaintiff contends that the Lease contains a restrictive covenant granting Plaintiff the exclusive right in Boca Park Phase I to offer gaming to its patrons. The only exception to this covenant is the express exception for gaming at the Von's supermarket. Plaintiff also has the exclusive right to own and operate a tavern in Boca Park Phase I. The terms 'tavern' and 'gaming' are to be read separately, such that Plaintiff has an exclusive related to each category. This restrictive covenant is contained in the Lease, Fundamental Lease Provisions, (o).
>
> 20. Defendants deny that Plaintiff has been granted an Exclusive Use provision in Boca Park Phase I with respect to gaming, despite the express language of the Lease.

HIGCO's May 15, 2012, Motion for Summary Judgment (RAPP Vol. III, Part 1, RAPP 000001 at p. 3) specifically stated that Boca Park had "***breached the Parties' Lease***, by allowing a new tenant to offer gaming in Boca Park Phase I." [Emphasis added.] HIGCO reiterated that Boca Park's conduct constituted a "breach" of the Lease and asked the Court to find that Boca Park had breached the Lease, stating in the plainest of terms:

> Whether this ***breach*** was due to a lack of care, 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***. Faced with this fact, Defendants

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[11] "'Nevada law requires the plaintiff in a breach of contract action to show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach.'" *Slaughter v. Coffing*, 2017 WL 462250, *2 (unpub. Case No. 68911, Nev. App. Ct., 1/24/17), *quoting Saini v. Int'l Game Tech.*, 434 F.Supp.2d 913, 919-20 (D. Nev. 2006.

> have taken a position contrary to the express and unambiguous contractual language and necessitated the filing of this action, and this motion. ***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, ***and finding Defendants' actions to be in breach of the Lease***. [Emphasis added.]

Id. HIGCO also acknowledged in its Motion for Summary Judgment that Wahoo's was operating gaming and that breach and potential damages had not been avoided:

> ***In March 2012, Plaintiff became aware that Defendants had violated Plaintiff's bargained-for Exclusive Use Provision***. ***[D]efendants had entered into a lease agreement with Wahoo's Fish Taco that allows gaming***….
>
> * * *
>
> …. The response to demands that Defendants not allow gaming at the Wahoo's Tacos before it opened was to flatly reject Plaintiff's demand ***rather than avoid a breach and potential damages***. ***Now, the Wahoo's Taco gaming is in operation. Because gaming is in operation there, Plaintiff has been forced to file this action***….

Id., RAPP Vol. III, Part 1, RAPP 000004 and 6 (emphasis added); *see also,* 5/15/12 Declaration of Sean T. Higgins (HIGCO's principal) in support of HIGCO's Motion for Summary Judgment, RAPP Vol. III, Part 1, RAPP 000009-11, averring at ¶7 ("I became aware sometime in early March 2012… that Defendants had violated Plaintiff's bargained-for Exclusive Use Provision. Defendants violated the exclusive [use provision in the lease] by entering into a lease with Wahoo's Fish Taco that allowed gaming on Wahoo's Fish Taco leased premises."); at ¶8 ("Prior to commencement of gaming at Wahoo's Fish Taco, [I] made a demand on the landlord verbally… for an explanation of violation and to demand that the planned

gaming operations be stopped"); and at ¶9 ("This action clearly violates the bargained for agreement to an exclusive for gaming, and is damaging to The Three Angry Wives, which derives a substantial portion of its revenue from gaming.").

To the same effect, HIGCO's March 21, 2012 demand letter to Boca Park, stated in part:

> [I]t has come to our attention that ***Landlord may be in violation of a Fundamental Lease Provision***….
>
> * * *
>
> [W]e are informed and believe that [Boca Park] has entered into a new with a new tenant that would expressly violate [HIGCO's] rights to provide exclusive gaming in the Boca Park Phase I shopping center. Indeed, we understand that Wahoo's Fish Taco, the referenced tenant, has already applied for a gaming permit, with the intent to open in Boca Park Phase I with gaming.
>
> ***These two events are unambiguous violation of the Exclusivity Provision contained within the Lease***….
>
> * * *
>
> We trust that Landlord will immediately abandon its position that no gaming exclusivity provision exists, given Tenant's possession of the original, fully executed version that grants exclusivity with respect to gaming. Otherwise, ***Landlord will be liable for fraud, in addition to contractual damages arising from its failure to adhere to the Exclusivity Provision contained within the Lease***.
>
> Accordingly, ***Landlord is hereby noticed that the offering by*** [] ***Wahoo's Fish Taco of gaming*** **[]** ***constitutes a Default by Landlord under the terms of the Lease***….

RAPP Vol. III, Part 4, RAPP 000225-27 (emphasis added); *see also*, HIGCO's 9/20/12 Supplemental Reply in Support of Plaintiff's Motion for Summary Judgment (RAPP Vol. III, Part 5, RAPP 000228 at 240:2-3) ("While it is unfortunate

that ***Defendants breached the HIGCO Lease***, any fault is that of Defendants" (emphasis added)).

The District Court's determination in the 2014 case that HIGCO was ***not required*** to have brought its claim for damages in its 2012 action is contrary to well-settled Nevada law and renders declaratory relief a tool of delay, endless litigation, public distrust in the judicial system and judicial inefficiency.[12]

III. THIS COURT HAS ALREADY REJECTED HIGCO'S ARGUMENTS BASED ON THE RESTATEMENT (SECOND) OF JUDGMENTS §33

The majority decision in *Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80 (2015), which arose from a declaratory relief action, clearly manifests this Court's intention to apply claim preclusion broadly, expanding the reach of *Five Star* to embrace nonmutual claim preclusion:

> [W]e modify the privity requirement established in *Five Star Capital*… to incorporate the principles of nonmutual claim preclusion, meaning that for 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 part 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. Here, because respondents established that they should have been named as defendants in an earlier

[12] *See, Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 971 (2015), *citing* NRCP 1 (providing that the rules of procedure are to be construed and administered to secure the just, speedy, and inexpensive determination of every action).

> lawsuit and appellant failed to provide a good reason for not doing so, we affirm the district court's dismissal of appellant's complaint on the basis of claim preclusion. [Emphasis supplied.]

HIGCO's Answering Brief ignores the majority decision in *Weddell*,[13] since it ***expands*** claim preclusion, and instead focuses on the dissent. But, HIGCO's focus on the dissent is no help since dissenting Justices Pickering and Douglas rejected the majority's expansion of claim preclusion for reasons that are wholly inapplicable to the pending dispute:

> The declaratory judgment the majority deems preclusive … established only that the mediation panel's decision was valid and enforceable as between Stewart and Weddell. ***This is not the same claim, and it does not involve the same parties, as Weddell's later claims against the mediators, seeking damages for the mediators' alleged breaches of contract, fiduciary duty, and obligations of good faith and fair dealing***.

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[13] HIGCO cites *Weddell*'s dissent twice, at pp. 12 and 13 of its Brief, because *Weddell*'s dissent contains this Court's sole reference to §33 of the Restatement (Second) of Judgments. The dissent, however, does not promote §33's adoption but instead warns against over-expansion of claim preclusion by its application to non-parties (who are not even privy to a party, *i.e*., the mediators) to the first dispute.

HIGCO's citations to *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev.Adv.Op. 28, 321 P.3d 912 (2014), and to *G.C. Wallace, Inc. v. Eighth Judicial District Court*, 127 Nev. 701, 262 P.3d 1135 (2011), are also misleading. While *Alcantara* did cite various sections of the Restatement (Second) of Judgments, *e.g*., §§19, 24, 27, 46 and 47, it did not cite §33, but applied ***issue preclusion*** to preclude certain claims of decedent's heir where those claims were presented by a person in privity with the heir in a prior litigation. Similarly, while *G. C. Wallace* also cites other portions of the Restatement (Second) of Judgments, it concludes based on Nevada's statutory scheme for summary evictions that the landlord was statutorily authorized to split its claims for back rent from its demand for summary eviction. There is no Nevada statutory authority for splitting a claim to declare a breach of contract ***in one action*** and to recover damages for the same breach of the same contract ***in a later action***.

* * *

> …. Because nonmutual claim preclusion expands the persons who can assert claim preclusion beyond the parties and their privies, courts approach the doctrine 'cautiously,' 18A Wright, Miller & Cooper, [Federal Practice and Procedure] … §4463. As a rule, nonmutual claim preclusion is "'generally disfavored'" [citations omitted] and, when recognized, has been applied mainly to circumstances involving indemnification or derivative liability relationships, or to prevent indirect defeat of a prior judgment, usually one involving complex natural resource or patent law issues.' …. [Emphasis added.]

350 P.3d at 86.

The *Weddell* dissent only mentioned §33 in reference to the fact that Weddell was the defendant in Stewart's declaratory relief action and thus did not control who Stewart sued or joined and the fact that the parties who allegedly should have been joined were the mediators. Addressing nonmutual claim preclusion, the dissent focused on the lack of commonality between the disputes:

> The hallmark characteristic of – and 'only cogent argument' for – 'nonmutual claim preclusion is that the party to be precluded should have joined his new adversary in the original litigation.' [Citation omitted.] This case does not fit that mold. In the first place, the judgment the majority treats as preclusive was the declaratory judgment Stuart sued Weddell to obtain in *Stewart v. Weddell*, to the entry of which Weddell confessed…. Second, and more precisely germane to nonmutual claim preclusion, Weddell was the defendant to Stewart's declaratory judgment complaint and, as such, did not control the persons Stewart sued or joined.
>
> The majority suggests… that Weddell could have 'assert[ed] cross-claims against… the respondent[]' mediators…. I … take the majority to be saying that Weddell should have joined the mediators as additional third-party or counterclaim defendants in *Stewart v. Weddell*. But parties seeking to confirm or vacate arbitration (here mediation) awards do not join the arbitrators or mediators; they join the others who

> were party to the alternative dispute resolution process…. [I]t is not reasonable to require the mediators' joinder, on penalty of forfeiture, as parties to the dispute between Stewart and Weddell. ***Indeed, imposing such a penalty incentivizes the unnecessary expansion of litigation that claim preclusion's three-factor test seeks to avoid***.

Id., at 86-88 (emphasis added).

Weddell's dissent points to precisely the reason why HIGCO's 2014 damages case is barred by its 2012 declaratory relief case. There is obvious commonality of HIGCO's claims in the two actions: In the declaratory relief action, HIGCO sought a declaration of Boca Park's alleged breach of its lease's exclusivity provision by allowing gaming at Wahoo's; and in the damages action, HIGCO demanded damages for Boca Park's breach of the lease's exclusivity provision, again based on allowing gaming at Wahoo's. The parties in both cases are identical and identically aligned. As the District Court correctly observed, HIGCO could have asserted both claims at the same time. But, contrary to the District Court's holding, HIGCO was required to have done so in accord with well-settled Nevada law construing the purpose of claim preclusion as obtaining "'finality by preventing a party from filing another suit that is based on the same set of facts that were presented in the initial suit.'" *Weddell*, 350 P.3d at 82, *quoting Five Star*, 124 Nev. at 1054, 194 P.3d at 712.

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. . . .

IV. *FIVE STAR* AND OTHER NEVADA CASES CLEARLY WARNED HIGCO AGAINST CLAIM SPLITTING

This Court's prohibition against claim splitting was long part of Nevada law when HIGCO filed its complaint for declaratory relief on April 23, 2012 and Nevada's seminal case on claim preclusion succinctly iterating the test to apply had been on the books for more than three years:

> 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… 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***.
>
> … [***C]laim preclusion applies to preclude an entire second suit that is based on the same set of facts and circumstances as the first suit***…. [Emphasis added.]

Five Star, supra, 124 Nev. at 1055, 194 P.3d at 713-14. *Five Star* also directs that HIGCO's 2012 action for a declaration of breach suffices to bar a second complaint for damages arising from the same alleged breach:

> [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 preclusion 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. [Emphasis added.]

124 Nev. at 1058, 194 P.3d at 715; *see also Carstarphen v. Milsner*, 594 F.Supp.2d 1201, 1209 (D. Nev. 2009), relied on by HIGCO, explaining, in contrast to this dispute, that new ***and independent*** delinquencies under an agreement might give rise to multiple actions as there would be no identity of facts; *Searcy v. Esurance Insurance Co*., 2017 WL 1043288 (D. Nev. 2017), *citing Carstarphen* ("Searcy's bad faith and unfair practices claims are claim precluded to the extent that they rely on Esurance's conduct before the complaint in *Searcy I* was filed because she could have brought those claims in her complaint in *Searcy I.*").

HIGCO's 2012 and 2014 actions were based on the ***same*** – and ***only –*** alleged breach of contract – Boca Park's breach of HIGCO's lease by allowing gaming at Wahoo's. HIGCO was required to redress that single alleged breach in one action, not two.

V. THERE IS NO GAP IN NEVADA'S CLAIM PRECLUSION LAW TO BE FILLED BY APPLICATION OF §33 OF THE RESTATEMENT (SECOND) OF JUDGMENTS

As set forth in Boca Park's Opening Brief and above, there is simply no gap in Nevada law as to the claim preclusive effect of prior suits for declaratory judgment to support the District Court's reliance on Restatement (Second) of Judgments §33 as in HIGCO's case, *Andrew Robinson International, Inc. v. Hartford Fire Ins. Co.*, 657 F.3d 48, 54 (1st Cir. 2008). In *Andrew Robinson*, finding ***no reason*** in

Massachusetts law ***not to look to §33***, the U.S. District Court predicted that the Massachusetts Supreme Court would rely on §33, explaining:

> The issue that Robinson advances on appeal is… an ***open issue in this circuit***.
>
> ***
>
> [A]lthough no reported Massachusetts case explicitly adopts section 33 of the Second Restatement, at least four cases have cited approvingly to some incarnation of that section. Two of these are decisions of the SJC.

Id. (emphasis added).

By contrast, in *Stanton v. Auto Owners Ins. Co.*, 2016 WL 6269614, *7 (Mich. App. 2016), *citing Adair v. State*, 680 N.W.2d 386 (Mich. 2004)[14], the Michigan Court of Appeals expressly rejected §33' s approach:

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[14] *Adair*, 680 N.W.2d at 396, applying traditional rules of res judicata to school district and citizen actions against the state for alleged underfunding of schools determined that the citizens of Michigan would have not envisioned the repeated relitigation of the same issues:

> We consider it apparent that the people would have thought, as with all litigation, there would be the traditional rules that would preclude relitigation of similar issues by similar parties: that is, the area of law we describe formally as encompassed by the doctrine of res judicata….
>
> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. [Citation omitted.] This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the

> Although plaintiffs argue that the Restatement approach is the 'enlightened' view and cite a long list of cases from sister jurisdictions following this view, we conclude that this approach was rejected in *Adair*. While it did not directly address the same issue, the Court did consider and reject application of the same Restatement section that plaintiff urges this Court to apply. Thus, ***we conclude that res judicata applies with equal force when the first case at issue is an action for declaratory relief***. ***This logically comports with Michigan's broad approach to res judicata and Michigan's rules of pleading and joinder. The important consideration for res judicata analysis is whether the claims subject to preclusion could have been raised in the first lawsuit***. Because the court rules allow a party to seek both declaratory relief and money damages in the same lawsuit, there is no logical reason to distinguish these types of actions for res judicata purposes. In other words, where a plaintiff brings a declaratory action, the defendant can raise any counterclaims it has against that plaintiff in the same action. Claims arising from the same transaction or occurrence that could have been raised but were not are barred by operation of res judicata. [Emphasis added.]

Like Michigan, Nevada applies claim preclusion broadly. Moreover, this case is not akin to the circumstances in which a party who fears being the defendant in a suit for breach of some agreement, such as an insurance policy, or violation of some law, such as the trademark, patent or copyright acts, may take refuge in instituting an action for a judicial declaration to exonerate itself. In those situations, the use of declaratory relief serves the purpose of conserving judicial resources and promptly resolving a potential dispute. 10B Wright & Miller, Fed. Prac. & Proc. Civ. §2761 (4th ed.), explains the process:

> parties, exercising reasonably diligence, could have raised, but did not. [Citation omitted.]

> Easily the most common kind of action… is a suit by one thought to be an infringer for a declaration that he is not infringing the patent or that the patent is invalid. If declaratory relief were unavailable, a person accused of infringement would be in a difficult position. The patentee would be free to sue when and as the patentee liked and until suit was filed, the patentee could harm the alleged infringer's business by threatening suit against him and his customers. The availability of declaratory relief makes it possible for controversies of this kind to be resolved promptly. For the same reason, even if the patentee sues for infringement, defendant may counterclaim for a declaration of invalidity and noninfringement. In that way, the defendant is protected against the possibility that the patentee will dismiss the suit or that the infringement action will not resolve all of the issues between the parties.

See also, 10B Wright & Miller, Fed. Prac. & Proc. Civ. §2760 (4th ed.) (noting that the use of declaratory judgments in insurance cases has become very common: "This device has been used to determine such matters as the validity of a policy, the coverage of a liability policy, whether the insurer has waived conditions or provisions of a policy, whether the insurer is required to defend an action against its insured, whether the policy has lapsed for nonpayment of premiums, and other questions about the rights and duties of the insurer and the insured.").

There is no "open issue" or gap in Nevada claim preclusion law. In fact, the issue of claim preclusion based on a prior declaratory relief action has already been addressed by this Court in *Weddell*. It is fair to conclude that given Nevada's broad approach to claim preclusion and liberal pleading and joinder rules, a party who bases his or her declaratory judgment action on a purported breach of contract, would

be expected to include a damages claim in the same action. There is no good reason to except HIGCO from that practice.

VI. CONCLUSION

Nevada has extended the reach of claim preclusion by its decisions in *Five Star* and *Weddell* (a case arising from a declaratory judgment action) to it furthest limits. HIGCO's 2012 action for a declaration of Boca Park's breach of contract could have included a claim for damages, as the District Court concluded and HIGCO concedes. Based on Nevada law, HIGCO was required to have included its damages claim in its 2012 action. The District Court erred in its application of Nevada law and this Court should now reverse the District Court's erroneous judgment in HIGCO's favor.

DATED: May 11, 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 reply 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 reply 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 5,929 words.

3. FINALLY, I CERTIFY that I have read this Appellant's Reply 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(3)(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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: May 11, 2017. HEJMANOWSKI & McCREA LLC

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I hereby certify that on the 11th day of May 2017, I served APPELLANT'S REPLY BRIEF via the Court's electronic service program on:

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