IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 73484

JEFFREY BENKO, CAMILO MARTINEZ, ANA MARTINEZ, FRANK SCINTA, JACQUELINE SCINTA; SUSAN HJORTH; RAYMOND SANSOTA; FRANCINE SANSOTA; SANDRA KUHN; JESUS GOMEZ; SILVIA GOMEZ; DONNA HERRERA; ANTOINETTE GILL; JESSE HEINNGAN; KIM MOORE; THOMAS MOORE; SUSAN KALLEN; ROBERT MANDARICH; JAMES NICO; and PATRICIA TAGLIAMONTE

Plaintiffs and Appellants

vs.

QUALITY LOAN SERVICE CORPORATION; MTC FINANCIAL INC dba TRUSTEE CORPS; MERIDIAN TRUST DEED SERVICE; NATIONAL DEFAULT SERVICING CORPORATION; CALIFORNIA RECONVEYANCE COMPANY

Defendants and Respondents

Appeal from a Judgment

Of the Eighth Judicial District Court, County of Clark

Hon. William Kephart

APPELLANT'S SUBSTANTIVE JOINDER TO THE ANSWERING BRIEF OF CALIFORNIA RECONVEYANCE COMPANY

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Appellants

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Respondents

From the Eighth Judicial District Court, Clark County, Nevada

Case No. A-11-649757-C

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 presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Quality Loan Service Corporation is wholly owned by Thomas Holthus and Kevin McCarthy. To date only McCarthy Holthus LLP has appeared in this action on behalf of Quality Loan Service Corporation.

DATED this May 9, 2018

McCARTHY HOLTHUS LLP

/s/ *Thomas N. Beckom, Esq*
Kristin A. Schuler-Hintz, Esq. (NSB#7171)
Thomas N. Beckom, Esq (NSB#12554)

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JURISDICTIONAL STATEMENT

As outlined below, jurisdiction before the Honorable Supreme Court of Nevada is proper.

NRS §2.090 states in pertinent part that

"The Supreme Court has jurisdiction to review upon appeal:

> "A judgment in an action or proceeding commenced in a district court when the matter in dispute is embraced in the general jurisdiction of the Supreme Court, and to review upon appeal from such judgment any inter mediate or decision involving the merits and necessarily affecting

> the judgment and in a criminal action, any order changing or refusing to change the place of trial of the action or proceeding."

Nev. R. App. Pro 4 further states that

> "In a civil case in which an appeal is permitted by law from a district court to the Supreme Court, the notice appeal required by Rule shall be filed with the district court clerk. Except as provide in Rule 4(a)(4), a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served."

In this instant case, the judgment being appealed is the Order Dismissing Case as a Matter of Law and Directing Judgment in Defendants' Favor in Connection with Plaintiffs' Third Amended Complaint with Prejudice. This order disposed of all claims and all parties and as such this appeal is properly before this Court.

ROUTING STATEMENT

This matter should be retained by the Nevada Supreme Court pursuant to *Nev. R. App. Pro 17*. Pursuant to *Nev. R. App. 17*, the Nevada Supreme Court has exclusive jurisdiction over all matters in its jurisdiction which are not presumptively assigned to the Court of Appeals. *NRS §2.090* states that the Nevada Supreme Court has jurisdiction over a judgment from the District Court and any matter which effects the merits of the judgment. This instant case is an appeal from a Court Order dismissing a case regarding allegations related to licensing brought by title holders

and therefore is not presumptively assigned to the Court of Appeals. *Nev. R. App. Pro 17(b).* As such jurisdiction lies with the Supreme Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, as a matter of law, a trustee under a deed of trust, duly appointed and operating under the trust deed regulatory system of NRS Chapter 107, also must possess a collection agency license from the Commissioner of the Financial Institutions Division ("FID"), under NRS Chapter 649, in order to act in the capacity of trustee.
2. Whether the Doctrines of Issue and Claim preclusion provide an alternative basis to affirm the District Court as to Quality Loan Service Corporation when Quality Loan Service Corporation prevailed in a petition for judicial review against the Financial Institutions Division and it was determined that Quality Loan Service Corporation was not a Debt Collector?
3. Whether *NRS §598.0955* provides an additional basis to affirm the District Court as to Quality Loan Service Corporation in light of the order of the District Court determining that Quality Loan Service Corporation was not a Debt Collector?

JOINDER

Quality Loan Service Corporation (QLS) expressly adopts the issues, facts and arguments in the Answering Brief filed by California Reconveyance Company (CRC) and joins in the same as if fully presented herein.

STATEMENT OF THE CASE AND FACTS

The Third Amended Complaint was dismissed as a matter of law by order of the Court and therefore the pertinent allegations as they involve QLS are as follows.

A. THE THIRD AMENDED COMPLAINT

1. Jeffrey Benko

In the Third Amended Complaint, Jeffry Benko asserted the following:

1. That he was subject to illegal collection activity *(Appx Vol 17 AA004066 ¶18-21)*.
2. That this illegal collection activity involved the filing of a Notice of Default. *(Appx Vol 17 AA004066 ¶24-25)*.
3. That the Notice of Default stated "THIS OFFICE IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE." *(Appx Vol 17 AA004067 ¶1-3)*.

2. Camilo and Ana Martinez

In the Third Amended Complaint, the Martinez's asserted the following:

1. Camilo and Ana Martinez were the subject of illegal collection agency activities from QLS. *(Appx Vol 17 AA004067 ¶5-7)*.
2. On September 12, 2008; Camilo and Ana Martinez received a Notice of Default *(Appx Vol 17 AA004067 ¶10-12)*.

3. That the Notice of Default stated "THIS OFFICE IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE." *(Appx Vol 17 AA004067 ¶15-17)*.
4. QLS sent Camilo and Ana Martinez a letter which told them to contact the Mortgage Lender for Loss mitigation options. *(Appx Vol 17 AA004067-68)*.

3. Frank and Jacqueline Scinta

In the Third Amended Complaint, the Scinta's asserted the following:

1. Frank and Jacqueline Scinta (the "Scintas") were the subject of illegal collection activity. *(Appx Vol 17 AA004068 ¶8-11).*
2. QLS filed a Notice of Default against property owned by the Scintas. *(Appx Vol 17 AA004068 ¶15-16).*
3. In this Notice of Default, QLS stated "THIS OFFICE IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION WILL BE USED FOR THAT PURPOSE". *(Appx Vol 17 AA004068 ¶20-22).*

4. Susan Hjorth

In the Third Amended Complaint, Ms. Hjorth asserted the following:

1. Hjorth was the subject of illegal collection activity. *(Appx Vol 17 AA004069 ¶7-8).*

2. QLS recorded a Notice of Default against Property owned by Hjorth. *(Appx Vol 17 AA004069 ¶11-13)*.
3. In this Notice of Default, QLS stated "THIS OFFICE IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION WILL BE USED FOR THAT PURPOSE". *(Appx Vol 17 AA004069 ¶15-17).*
4. QLS sent Hjorth a Debt Validation Notice. *(Appx Vol 17 AA004069 ¶18-20).*
5. QLS recorded a Notice of Sale. *(Appx Vol 17 AA004069 ¶27-28).*

5. Patricia Tagliamonte, aka Patty Segura

In the Third Amended Complaint, Ms. Tagliamonte asserted the following:

1. Tagliamonte was the subject of illegal collection activity. *(Appx Vol 17 AA004077 p.13 ¶13-17).*
2. QLS recorded a Notice of Sale against Tagliamonte's property. *(Appx Vol 17 AA004077 ¶16-18).*
3. In this Notice of Sale, QLS stated "THIS OFFICE IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION WILL BE USED FOR THAT PURPOSE". *(Appx Vol 17 AA004077 ¶22-26).*

SUMMARY OF ARGUMENT

QLS joins CRC's briefing and facts pursuant to *NRAP 28(i)*. However, in addition to CRC's arguments, QLS has unique legal defenses here which were

properly raised before the District Court. A deceptive trade practices claim cannot be maintained against QLS.

In 2010, the Honorable Judge Williams held that the Cease and Desist Order issued by the Financial Institutions Division (the "FID") against QLS was void *ab initio* for legal error, holding that QLS was not required to be licensed as a debt collector and accordingly was in compliance with licensing statutes. *(Appx Vol 3 AA000625-628) also* (Resp. Appx RA001451). QLS argues, over and above the arguments of CRC, (1) a Deceptive Trades Practices Act claim cannot be maintained against QLS as it is, and was, in compliance with "the with the orders or rules of, or a statute administered by, a federal, state or local governmental agency" and (2) the prior order of the Eighth Judicial District Court collaterally barred the Plaintiffs from arguing this point. *(Appx Vol 3 AA000625-628) also* (Resp. Appx RA001451)

QLS *already* litigated the issue of licensing with the entity charged with enforcement, FID and on a petition for judicial review it was determined that the FID erred in finding that QLS required a debt collection license. (Resp. Appx RA001256-001451). Appellants cannot maintain an action against QLS for consumer fraud as (1) the action is barred by issue and claim preclusion and (2) by QLS's actions were not deceptive trade practices as it was in compliance with the rules of the FID and the orders of the 8th Judicial District Court.

QLS contends, and the District Court agreed, that Appellants failed to state a claim upon which relief can be granted. Trustees are neutral entities appointed within the deed of trust, who foreclose pursuant to statutory construction. Appellants' allegations failed to state a claim upon which relief could be granted as there was nothing stated in the amended complaint outside the elements of a non-judicial foreclosure.

I.
STANDARD OF REVIEW

QLS adopts the standard of review set forth in the Brief of CRC. Additionally, the Nevada Supreme Court can, and may, "affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores Inc* 126 Nev. 592, 599 (2010).

As discussed in CRC's brief, the TAC was properly dismissed as a matter of law as to both the Consumer Fraud and Unjust Enrichment claims, if this Court reaches a contrary result, the dismissal of QLS stands on the briefing related to QLS and the FID.

II.
LAW AND ARGUMENT

QLS joins in the Brief filed by CRC pursuant to *NRAP 28(i)*. QLS supplements the briefing of CRC as follows, First, Appellants interpretation of the statute renders meaningless the legislatures specific enunciation of parties qualified as foreclosure

trustee's pursuant to *NRS §107.028(1)*. Further, Appellants interpretation of "secondary collection agency" is overbroad under Nevada's administrative code. Finally, even if CRC's briefing is unavailing to this Court, the Nevada Supreme Court should still affirm the District Court as to QLS due to the prior administrative proceeding which unequivocally ruled that QLS does not need to be a licensed debt collector.

A. QLS IS A FORECLOSURE TRUSTEE AND NOT A DEBT COLLECTOR

Respondents herein were sued for "consumer fraud" via *NRS §41.600* which permits suit for violation of Nevada Deceptive Trade Practices Act as contained in *NRS 598.0915* through *NRS 598.0925*. Appellants contend that Respondents conducted business without all required state, county, or city licenses. *NRS §598.0923(1)*. However, between the FID and QLS there is already a ruling that QLS does not require a license as a debt collection agency. Appellants, unlike the licensing agency, and the Nevada Legislature, contend that foreclosure trustee's require a debt collection license.

A foreclosure trustee is not a collection agency. The Nevada Legislature in 2011, provided with the opportunity to require Foreclosure Trustee's to be licensed as collection agencies, instead provided a list of entities qualified as foreclosure trustees, including collection agencies. *NRS §107.028(1)*. To follow Appellant's

interpretation ignores the legislature's review of the law and history and decision to allow different entities to serve as foreclosure trustees. Accordingly, the District Court correctly found that as a matter of law acting as a foreclosure trustee does not render a foreclosure trustee a "collection agency."

The arguments advanced by CRC are correct (1) nothing in the Third Amended Complaint alleged actions outside of the duties of a trustee; (2) a foreclosure trustee acts as common agent for both the borrower and lender; (3) NRS Chapter 649 does not purport to govern foreclosure trustees; (4) enforcing a security interest is not a "claim"; (5) the Plaintiffs lack a cognizable injury; and (6) the unjust enrichment claim fails as a matter of law.

1. QLS Engaged Only in the Activities of A Foreclosure Trustee.

As correctly pointed out by CRC in their answering brief, the Third Amended Complaint does not contain any allegations that the Respondents engaged in any activity which was not authorized by NRS *§107.080 et. seq.* The QLS Appellants generally allege that the Notice of Default constitutes debt collection[1]. A Notice of Default is expressly authorized by NRS *§107.080 et. seq.,* and is a basic duty of a foreclosure trustee. This does not support a finding of collection activity. Two of the QLS Appellants argue that the Notice of Sale elevated the actions of QLS to

[1] (Appx Vol 17 AA004066 ¶24-25); (Appx Vol 17 AA004067 ¶10-12); (Appx Vol 17 AA004068 ¶15-16); (Appx Vol 17 AA004069 ¶11-13)

collection activity[2] yet again this is specifically authorized by NRS *§107.080 et. seq.*,

2. The Debt Validation and Mini Miranda Were Merely Cautionary Measures

Appellants allege that Respondents capitulated to being Debt Collectors by inserting language and making verbal states that they are a "debt collector and that any information obtained is for the purposes of debt collection." Additionally, Hjorth claims that a Debt Validation notice rises to the level of debt collection. However, these precautionary tactics do not change the nature of the trustee. *15 U.S.C. §1692e(11)* provides that it is *per se* misleading to fail to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

This language is what is referred to generally as a "Mini-Miranda" in litigation under the FDCPA. *Gatter v. Richland Holdings Inc.*, 2016 U.S. Dist. LEXIS 47194

[2] (Appx Vol 17 AA004077 ¶16-18); (Appx Vol 17 AA004069 ¶27-28).

(D.Nev. 2016). Appellants argue the inclusion of the "Mini-Miranda" is the foreclosure trustee's agreement that it is a debt collector, this is untrue.

Whether a foreclosure trustee is required to comply with the *FDCPA* is a disputed issue. As noted by a Federal Court in California:

> Plaintiffs' insistence that First American [a California Foreclosure Trustee] was engaged in debt collection activity because the notice of default states "First American [] MAY BE ACTING AS A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT. ANY INFORMATION OBTAINED MAY BE USED FOR THAT PURPOSE" is unpersuasive. Rather than establishing that First American was engaged in debt collection activity, this warning is consistent with the inconsistency in the case law regarding a mortgage foreclosure trustee's FDCPA liability."
>
> *Natividad v. Wells Fargo Fargo Bank N.A.,* 2013 U.S. Dist. LEXIS 74067 (N.D. Cal 2013)

Engaging in protective activity is not an affirmation of status, utilization of the "Mini-Miranda" as a risk management tactic pending a determination regarding foreclosure trustees and the FDCPA is not agreement to being a debt collector. See, *Ho v. Rencontrust Co. N.A.,* 840 F.3d 618 (9th Cir. 2016) (holding foreclosure trustees are not debt collectors in the 9th Circuit) *See also, Rockridge Trust v. Wells Fargo N.A.,* 985 F.Supp.2d 1110 (2013) (holding that irrespective of a "Mini Miranda", a foreclosure trustee that follows state statute is not a debt collector); *Gonzalez v. CAN Foreclosure Serv.,* 2011 U.S. Dist. LEXIS 70029 (S.D. Cal 2011) (Same) *Akil v. Carrington Mortg. Sers. LLC.,* 2013 U.S. Dist. LEXIS 100113 (E.D. Cal. 2013).

The same holds true for the Debt Validation notice sent to Hjorth. Debt validation notices are required by *15 U.S.C. §1692g* as above, sending a Debt Validation Notice is wise risk management and not agreement to status as a collection agency.

3. The Parties to this Action are Not Secondary Collection Agencies under the Nevada Administrative Code

Appellants argue the "secondary object" language within *NRS 649.020,* renders the Respondents debt collectors. This argument ignores the Nevada Administrative Code.

"Secondary collection agency" is governed and defined by *Nev. Adm. Code 649.030* and states:

> Secondary collection agency' means a collection agency which engages directly or indirectly in the solicitation or encouragement of debtors to pay delinquent debts directly to the debtors' creditors through the use of machine-derived form letters.

Moreover, "Machine-derived form letters" are specifically, "letters which are automatically prepared by a machine and which are designed to be mailed without the addition of any further words to them, except for the addition of the appropriate names and addresses." *NAC §649.020.*

Appellants complaint is devoid of any allegations regarding the use of machine derived form letters, and merely alleges QLS recorded and mailed (as required by

statute, a Notice of Default and, in some instances Notices of Sale. Accordingly, Appellants argument fails.

B. A DECEPTIVE TRADE PRACTICES CLAIM FAILS AGAINST QLS UNDER NRS §598.0955 AS QLS WAS IN COMPLIANCE WITH THE RULES AND STATUTE ADMINISTERED BY THE FID.

The arguments of Appellants as to QLS fail; as between the FID and QLS there is already a Court order in response to a Petition for Judicial Review holding that QLS is not a debt collector and not required to hold a debt collection license and holding that the Cease and Desist Order by the FID to QLS was void due to legal error because QLS was not required to be licensed. *(Appx Vol 3 AA000625-628)*

NRS §598.0955, entitled "Applicability of NRS 598.0903 to 598.0999 inclusive" states in pertinent part:

> 1. The provisions of NRS 598.0903 to NRS 598.0999 inclusive do not apply to:
>
> **a. Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state or local governmental agency"** (Emphasis Added)

The Order of Judge Williams in *Quality Loan Service Corporation v. State of Nevada* (*Appx Vol 3 AA000625-628)* held that QLS was not required to be licensed during the relevant period. The FID cannot compel QLS to license as a Collection agency. Accordingly, QLS is, and was, in compliance with the orders and rules of the FID based on the Order on the Petition for Judicial Review. *(Appx Vol 3*

AA000625-628). The Deceptive Trade Practices Act is unavailable to Appellants, as QLS is in compliance with the FID.

C. THE ENTIRE COMPLAINT FAILS AGAINST QLS UNDER THE DOCTRINES OF ISSUE AND CLAIM PRECLUSION

The doctrine of res judicata, and its twin doctrines of claim preclusion and issue preclusion require the Court to give full effect to Judge Williams' Order holding that QLS is not a debt collector and is not required to be licensed as such. The issue is whether there is sufficient privity between the FID and the Appellants herein, to apply the doctrines of claim preclusion and issue preclusion to Appellants' claim for damages, despite Judge Williams' holding that QLS is not a debt collector and is not required to be licensed as such, which was not appealed by the FID. (*Appx Vol 3 AA000625-628*).

Appellants are in privity with the FID litigation by way of Nevada's *parens patrea* doctrine which is codified in *NRS § 649.400.* The Attorney General is allowed in the discharge of its duties to represent all the citizens and property owners of Nevada in actions involving collection licensing. On this basis, the order of Judge Williams is *res judicata* and cannot be overturned. *(Appx Vol 3 AA000625-628*).

Claim preclusion (barring parties from litigating claims that were or could have been brought in prior litigation) applies if (1) the same parties ***or their privies*** are involved in both cases, (2) a valid final judgment has been entered, and (3) the

subsequent action is based upon the same claims or any part of them that were or could have been brought in the first case. *Alcantara v. Wal-Mart Stores, Inc*., 321 P.3d 912, 915 (Nev. 2014) (emphasis added). Issue preclusion is an equitable doctrine employed to conserve judicial resources, maintain consistency, and avoid harassment of oppression of a party in serial litigation. *Id.* at 916. Issue preclusion requires that: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party ***or in privity*** with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. *Id.* (citing *Five Star Capital Corp. v. Rudy*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (emphasis added).

1. The Elements of Issue and Claim Preclusion Are Present.

The FID is the Nevada state agency charged with licensing debt collection. In 2010, the FID took the position that QLS's as foreclosure trustee's exercise of the power of sale pursuant to N*RS 107.080 et. seq.,* was the collection of a debt, requiring QLS to hold a debt collector's license. The FID issued a cease and desist order against QLS (believed to be the first one in its history) requiring QLS to cease any actions to foreclose deeds of trust unless, and until, QLS obtained a debt collectors' license. QLS challenged the order and ultimately sought judicial review of the FID decision in the Eighth Judicial District Court before the Honorable

Timothy Williams. In his decision reversing the FID, the Honorable Judge Williams held that the activities related to foreclosure of deeds of trust, as set forth in *NRS chapter 107*, was beyond the regulatory jurisdiction of the FID, and was governed only by the oversight of the Nevada Judiciary. *(Appx Vol 3 AA000625-628).* The District Court ruled that the finding by the FID that QLS was required to be a licensed debt collector was “”void ab initio due to legal error by the FID.” *Id.*

Judge Williams held QLS was not required to hold a debt collection license, and foreclosure on deeds of trust was NOT the collection of a debt. *(Appx Vol 3 AA000625-628).* Judge Williams’ Order was not appealed, and is now binding law between FID and QLS. *NRS §233B.150.* Therefore the second element of both the issue and claim preclusion tests have been satisfied as this order is final. *Alcantara v. Wal-Mart Stores, Inc*., 321 P.3d 912, 915 (Nev. 2014)

Next, the FID administrative review action directly involved the question of whether QLS needed to be licensed pursuant to Nevada law. “Issue preclusion may apply ‘even though the causes of action are substantially different, if the same fact issue is presented.’” *LaForge v. State ex rel. Univ. & Cmty. College Sys.*, 116 Nev. 415, 420 (2000) (quoting *Clark v. Clark*, 80 Nev. 52, 56 (1964)). “Issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case.” *Alcantara*, 321 P.3d at 916-17. Here the Appellants assert QLS must hold a debt collection

license and that failure to have one is a deceptive trade practice. This is the same claim that was brought in the FID administrative review case, whether QLS was required to hold a debt collection license. This satisfies the third prong of the claim preclusion test as well as the first prong of the issue preclusion test. *Alcantara v. Wal-Mart Stores, Inc*., 321 P.3d 912, 915 (Nev. 2014).

Further, it is apparent that the FID administrative petition was actually and necessarily litigated; there was a hearing before the FID, followed by an administrative review, with briefing and testimony. This satisfies the fourth prong of the issue preclusion test. *Alcantara v. Wal-Mart Stores, Inc*., 321 P.3d 912, 915 (Nev. 2014)

There is only one other issue, the Appellants were not parties to the FID proceedings, accordingly, the Appellants must be found to be in privity with the FID for issue and claim preclusion to apply. The Plaintiffs herein are in privity with the FID under the doctrine of *parens patriae* because the State of Nevada acted on behalf of all property owners in Nevada in the prior proceeding between the FID and QLS.

2. The Plaintiffs are in privity with the State of Nevada under the Doctrine of *Parens Patriae.*

When the FID ordered QLS to cease and desist from foreclosure activity until it obtained a debt collection license, and the Attorney General defended the

administrative order requiring that QLS be licensed, the Attorney General, acted on behalf of all property owners in Nevada in its capacity as *parens patriae*. *(Appx Vol 3 AA000625-628)*. This includes the Appellants. As such "all Nevadans" included the parties to this action; as they are in privity with the attorney general and the order from that proceeding is *res judicata*.

The Nevada Supreme Court has specifically adopted the Restatement (2d) of Judgments section 41 as it applies to privity between a regulatory agency and the public. *See Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d at 917-18. Section 41 provides in relevant part: "(1) A person who is not a party to an action but who is represented by a party is bound by … a judgment as though he were a party. A person is represented by a party who is: … (d) *An official of or agency invested by law with authority to represent the person's interests*; …." (Emphasis added).

"State governments may act in *parens patriae* capacity as representatives for all their citizens in a suit to recover damages for injury to a sovereign interest. *Alaska Sport Fishing Ass'n. v. Exon Corp.*, 34 F.3d 769 (9th Cir 1994). It is well settled that the licensing and regulation of entities involved in the foreclosure industry has *always* involved a Sovereign interest of the state of Nevada. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661 (9th Cir 2012) (finding that Nevada had a sovereign interest in regulating bank foreclosures). When the FID defended against QLS's petition for judicial review, it acted within its sovereign interest to enforce the laws on behalf of

the citizens of Nevada. This generated the necessary element of privity to bar this action as to QLS. In fact all enforcement actions are litigated by the State of Nevada, as expressly authorized by statute, in Nevada's capacity as *parens patrea*. *NRS §649.385, §649.390; §649.400*.

"Under the *parens patriae* doctrine "a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interest of all its citizens." *Alaska Sport Fishing Ass'n (Id.).* In fact, it is presumed that the state will adequately represent the position of its citizens. *Id.* The U.S. Supreme Court has noted that citizens of a State are in privity with the State when they litigate a matter as *parens patriae*. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.,* 443 U.S. 658 at FN 32 (1979) (when "individuals and groups are citizens of the State…, which was a party to the relevant proceeding…'they, in their common public rights as citizens of the State were represented by the State in those proceedings, and, like it, were bound by the judgment."). There is a wealth of U.S. Supreme Court precedent for the proposition that the State's representation of its citizens in a proceeding creates privity for *res judicata* purposes and its citizens are bound by the actions of the State. See, *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958); *Wyoming v. Colorado,* 286 U.S. 494 (1932); *Mo v. Illinois,* 180 U.S. 208 (1901); *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907).

QLS, per litigated Order of the Court is not required to hold a debt collection license, and the FID cannot compel QLS to get a debt collection license. *(Appx Vol 3 AA000625-628).* Appellants however allege they are entitled to damages on the theory that foreclosure trustees are required to hold debt collection licenses (without a determination under NRS § 649.390 that any such license is required). But, QLS has already been determined not to require a debt collection license. The necessary link in the chain fails, as there can be no damages for failing to hold a debt collection license when the determination has already been made that one is not required. As *parens patriae* the State of Nevada simply does not inconsistently parent but instead has a streamlined and consistent set of rules. QLS cannot be told to act one way by the FID and then told to act a different way based on a change in departments.

The *Exxon* case out of the 9th Circuit is directly on point for this issue. After the infamous *Exxon Valdez* oil spill, Exxon was sued in 1989 by the Alaska Sport Fishing Association for remediation of the environmental damage caused by the spill. *Alaska Sport Fishing Ass'n. v. Exon Corp.*, 34 F.3d 769 (9th Cir 1994). Afterwards, Exxon was sued by the state of Alaska for the exact same thing. *Id.* Exxon entered into a consent judgment with Alaska to remediate the environmental damage and immediately thereafter, Exxon moved for summary judgment in the first case arguing that Alaska acted as *parens patriae* for the first set of Plaintiffs and therefore they were in privity with Alaska and that the consent judgment was *res*

judicata. *Id.* The trial court dismissed the case on res judicata grounds and on appeal, in a very short written opinion, the 9th Circuit held that when a state acts in its capacity as *parens patriae,* its citizenry cannot maintain an action on the same grounds because its citizenry is in privity for res judicata purposes and therefore the judgment is binding. *Id.*

The same result was reached in in California case, *Rynsburger v. Dairymen's Fertilizer Co-op. Inc.* A case involving homeowners' claims that a fertilizer plant was creating a public nuisance. *Rynsburger v. Dairymen's Fertilizer Co-op. Inc.*, 266 Cal. App. 2d 269, 271-72 (1968). The cities impacted by the plant filed an action for injunction to prevent private nuisance. *Id.* at 272-73. The cities' action proceeded to trial and judgment was entered that allowed the fertilizer plant to continue operating. *Id.* at 273. The homeowners then sought to revive their own claims against the company, arguing that the judgment in the cities' nuisance action was not res judicata to their claims. *Id.* at 274. The court disagreed, and found the homeowners were in privity with the city plaintiffs because all property owners similarly injured by a nuisance constitute a class, and that class was well represented in the cities' nuisance abatement action. *Id.* at 277-78.

Here, as in *Exxon* and *Ryansburger*, the issue of QLS's requirements was litigated with the administrative body responsible for licensing and enforcement. The State of Nevada issued a "Cease and Desist" Order based on *parens patriea*

status as enforcer of Nevada law. (*Appx Vol 3 AA000625-628*); NRS §649.390. QLS appealed the administrative action and received an order from the hearing in which the FID of the State of Nevada was represented by the attorney general during the proceeding. (*Appx Vol 3 AA000625-628*). QLS appealed the order to the District Court and the Attorney General for the State of Nevada, on behalf of all property owners in Nevada, appeared to defend the ruling and the statute. *Id.* The Court held that QLS was not a debt collector and was not required to be licensed, and the Attorney General did not appeal. *Id.* The Attorney General is empowered to defend the laws of this state and/ or refer the matter to the District Attorney for prosecution. *NRS § 649.400.* The Appellants, as property owners in Nevada, were represented by the Attorney General of the State of Nevada in *parens patriae*. Whether or not the action was filed before or after is irrelevant, what matters is that this matter was fully litigated and the Appellants were represented by the attorney general. On this basis, there is privity between the parties. Accordingly, the District Court correctly dismissed the TAC.

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IV.
CONCLUSION

For the above stated reasons, the Judgment of the District Court should be affirmed.

Dated this 9th day of May 2018

McCarthy Holthus LLP

/s/ *Thomas N. Beckom*
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition 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 in 14 Point Font Times New Roman
2. I further certify that this Petition complies with the page-or type-volume limitations of NRAP 32(a)(7) because the brief contains 6204 words and is 22 pages long.

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. Further I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters of the record to 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 sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th Day of May 2018

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