IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY BENKO, A NEVADA RESIDENT; ET Al., Appellants, v. QUALITY LOAN SERVICE CORPORATION, A CALIFORNIA CORPORATION; ET AL., Respondents	Supreme Court No. 73484 District Court Case No. A-11-649857

APPELLANTS' REPLY BRIEF TO RESPONDENT QUALITY LOAN SERVICE CORPORATION'S SUBSTANTIVE JOINDER TO THE ANSWERING BRIEF OF RESPONDENT CALIFORNIA RECONVEYANCE COMPANY

Appeal from Eighth Judicial District Court
Clark County, Nevada

The Honorable William Kephart

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NRAP 26.1 DISCLOSURE

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

Jeffrey Benko, Camilo Martinez, Ana Martinez, Frank Scinta, Jacqueline Scinta, Susan Hjorth, Raymond Sansota, Francine Sansota, Sandra Kuhn, Jesus Gomez, Silvia Gomez, Donna Herrera, Jesse Hennigan, Susan Kallen, Robert Mandarich, James Nico, Patricia Tagliamonte, and Bijan Laghaei are individuals. They will be referred to herein as "Plaintiffs" or "Appellants."

Nicholas A. Boylan of the Law Office of Nicholas A. Boylan, APC, and Shawn Christopher of the Christopher Legal Group have appeared for the foregoing parties and intend to do so before this Court.

Dated this 10th day of July 2018.

By: *Nicholas A. Boylan*

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I. INTRODUCTION

Respondent Quality Loan Service Corporation ("QLS") presents a misleading and incomplete Statement of the Case and Facts, which Plaintiffs' allegations and the powerful evidence submitted below contradict. QLS admitted in writing it was a debt collector; these admissions are evidence to be considered in determining whether QLS is a collection agency under Nevada law, and create a fact issue precluding even summary judgment. QLS' affirmative preclusion defenses, based on a non-binding and erroneous decision in a separate proceeding ("FID Litigation") between QLS and the Nevada Financial Institutions Division ("FID") cannot, as a matter of law, be resolved in QLS' favor.

II. ARGUMENT

A. Joinder

Insofar as QLS joins in, relies on, or discusses the issues, facts, and arguments Respondent California Reconveyance Company ("CRC") presents in its brief, Plaintiffs addresses them in replying to CRC.

B. QLS' Brief Is Misleading and Incomplete

In its Statement of the Case and Facts, QLS omits crucial allegations found in Plaintiffs' operative complaint and pertinent facts supported by Plaintiffs' powerful proof, thereby creating a misleading and incomplete summary. Plaintiffs' evidence is in the record before this Court.

As part of its Nevada collection activities, QLS serviced approximately 41,000 Nevada files from 2007 to 2012. (AA005362-AA005363.) QLS admitted it received at least $19,000,000.00 in fees and $86,000,000.00 in costs for its various Nevada business activities, operations, and services in that time. (AA005364; AA005228; AA005578; AA005568; AA005448-AA005450.) Money QLS collected from borrowers was deposited, tracked, and shown in its accounting system. (AA005368.) QLS deposited collected money payable to it before sending it to lender-clients. (AA005369.) QLS' fees and costs were added to borrowers' debts for reinstatement and pay-off and sometimes fees and costs were added to bids when properties were sold, per lenders' instructions. (AA005353-AA005354; AA005238-AA005246.)

QLS made harassing collection phone calls to at least several of the named Plaintiffs. (AA005162-AA005168; AA005169; AA005177-AA005178, AA005179-AA005183; AA005189-AA005191, AA005192-AA005193, AA005194-AA005195, AA005196-AA005198; AA005203-AA005206.) QLS' database shows phone contacts, including outgoing calls with debtors, and e-mails. (AA005372-AA005373.)

QLS' counsel determined it must disclose and admit to borrowers it is a debt collector, for many years. (AA005374-AA005376.) QLS admitted this admission was not a false statement. (*Id.*) QLS' attorneys determined QLS must comply with

debt collection laws (*i.e.*, QLS is a debt collector). (AA005376.) The FID Litigation was resolved by QLS agreeing to obtain its collection agency license in Nevada. (AA005377.)

QLS' lender-clients controlled and directed its handling of the foreclosure bidding amount and bidding process. (AA005383-AA005386; AA005461; AA005463.) Clients directed QLS to include its fees and costs in bids. (*Id.*) QLS sent Nevada borrowers letters regarding foreclosure "alternatives." (AA005387-AA005389; AA005298-AA005299.) These letters would include statements Nevada debtors pay defaulted amounts to bring their loans current. (*Id.*) QLS passed all money collected to lenders. (*Id.*) All options presented in these solicitation letters were non-foreclosure collection services QLS performed. (*Id.*) In written communications, QLS told Nevada debtors they could pay money to QLS (not lenders) to get loan extensions. (AA005390-AA005392; AA005298-AA005299.) In written communications, QLS asked Nevada debtors in default to call QLS, not lenders, for collection-type options, and included the phone number for QLS' retention department. (AA005393-AA005394; AA005298-AA005299.)

QLS' lawyers required it to include in its letters to borrowers in default language to the effect: "We are a debt collector and any information will be used for that purpose." (*Id.*) QLS admitted it is possible for businesses in its industry to do collection and foreclosure work. (*Id.*) In its letters, QLS admitted it was

engaging in collection and foreclosure activity. (AA005395; AA005298-AA005299.) That was not a false statement, according to QLS. (*Id.*) For example, QLS sent a debt validation notice to Plaintiff Hjorth (dated May 2009). (AA005400-AA005404; AA005305; *see also* AA005307; AA005311.) In discovery, QLS admitted the Fair Debt Collection Practices Act ("FDCPA") requires such notices if one is a debt collector. (*Id.*) It admitted the letter states the total debt has to be paid in full, including QLS fees and costs, and invites the borrower-recipient to call QLS (not the lender), including regarding disputing the debt. (*Id.*) QLS sent this letter to comply with the FDCPA. (*Id.*)

QLS' contracts with lending clients determined the scope of its services, including collection of money for pay-off or reinstatement of defaulted loans. (AA005409-AA005411.) In 2008-2012, QLS had 300-350 employees, in the following departments: Referral (80-100 people), Foreclosure (40-50 people), TSG review, Pay-Off and Reinstatement, Legal. (AA005327-AA005330.) The Foreclosure Department had 10 units of 4-5 people each. (*Id.*) Some clients had thousands of files. (*Id.*) The total number of QLS clients in the peak period was 50-60. (AA005331.) Each unit had some Nevada files. (*Id.*)

In 2008-2012, each of the 50 people in QLS' Foreclosure Department had at least 10 calls a day with borrowers, and up to 20 calls a day (*i.e.*, 1000 calls a day or 20,000 calls a month)! (AA005335-AA005336.) During that time, QLS had

between 10-15 people in its Reinstatement and Pay-Off Department, working on reinstatements and pay-offs 8 hours a day. (AA005338-AA005340.) The department had its own fax number and e-mail address. (*Id.*) QLS regularly instructed borrowers in default to send money to QLS' accounting department. (AA005341-AA005342.) This department would deposit money received (*i.e.*, collected) into its trust account and then issue checks to clients (usually within twenty-four hours). (AA005345.) QLS had several different departments regularly communicating with debtors in default. (AA005347-AA005348.)

The forms and templates QLS used in 2007-2012 included a debt validation letter or notice. (AA005349-AA005352.) Since 2006, QLS wrote to borrowers it was a debt collector seeking to collect a debt and information would be used for that purpose. (*Id.*) There have been no pertinent differences in its Nevada activities since QLS obtained its collection agency license in 2012. (*Id.*) Its Nevada business activities were the same from 2005 to present. (AA005435-AA005436.)

QLS sent letters to Nevada debtors asking them to contact QLS (not lenders) to obtain more information regarding "options available to help you avoid foreclosure." (AA005571-AA005575.) These options expressly included deed in lieu of foreclosure transactions, loan modifications, reinstatement of defaulted loans, and short sales of property. (*Id.*) QLS expressly stated, "[p]ursuant to federal law, we are a debt collector and any information obtained will be used for that

purpose." (*Id.*) QLS presented at least six non-foreclosure options in letters to Nevada debtors. (*Id.*; AA005449-AA005453.) QLS has a separate department for loan modifications. (*Id.*) QLS informed borrowers all its collection and foreclosure activities would continue. (AA005571-AA005575; AA005454-AA005455.) QLS' chief financial officer admitted the collection activity performed by QLS' Accounting Department was receiving funds to reinstate or pay-off defaulted loans. (AA005454-AA005455.)

As a practice, policy, and procedure, QLS sent Nevada debtors detailed instructions regarding wire payments to QLS along with QLS' reinstatement and payoff letters. (AA005248-AA005280.) Nevada debtors seeking to reinstate or pay defaulted debts were to notify QLS before sending funds. (*Id.*) The wire payments were to include QLS' account information at a bank QLS specified, and the reference number, loan number, and name of the borrower to whose defaulted debt the funds were to be credited. (*Id.*) Nevada debtors making payments were to confirm QLS' receipt and identification of electronic funds. (*Id.*) The instructions stated QLS would charge Nevada debtors a $35.00 "Wire Processing fee" for each wire transaction. (*Id.*)

As a practice, policy, and procedure, QLS received detailed referral instructions from its client, Ocwen Loan Servicing, regarding the nature and scope of QLS' collection agency activities in Nevada for each file QLS handled for it.

(AA005231-AA005234; AA005413-AA005414.) Per those instructions, QLS was to inform Nevada debtors who contacted QLS its client wished to resolve the matter and refer debtors to the client to discuss "resolution opportunities." (*Id.*) QLS was to send all funds to the client if QLS received a payoff or reinstatement. (*Id.*) QLS was not to "extract" its "fees and costs from the funds" but to submit a final bill for such fees and costs to the client for subsequent payment. (*Id.*)

In 2007-2012, the reinstatement and pay-off process was as follows: checks came in from Nevada borrowers and were logged by the mailroom and validated by reception. (AA005430-AA005433.) The log would indicate the kind of checks; clerks would access QLS' system and match checks to files; checks would be delivered immediately to the Reinstatement and Pay-Off Department, where quotes would be pulled up to see if money was sent on time; QLS would call lenders as needed before electronically depositing checks into QLS' bank account. (*Id.*) QLS collected funds from borrowers and passed them to lenders about 40 times per week in 2007-2012. (AA005434-AA005435.) In 2008-2012, QLS also received about 20 checks a week—or 1000 checks a year—from third-parties to reinstate or pay defaulted debts; QLS used the same collection processing protocol for these checks. (AA005443-AA005444.)

QLS' witness testified as follows: "[A]ll the money came in and we're pumping through it and looking for the date that is most relevant and trying to get

the money out and disbursed [to the banks] as quickly as possible. We weren't too worried about which state it was." (AA005435 [emphasis added].)

Money QLS collected from Nevada borrowers, including all checks collected from them, was deposited into its trust account, called the "Nevada Trust Account." (AA005446-AA005447.)

C. QLS' Written Admissions Are Powerful Evidence

QLS admitted in writing and under oath it was a debt collector seeking to collect debts, including in its dealings with Plaintiffs and other Nevadans. (*See, e.g.*, AA005298-AA005299; AA005349-AA005352; AA005374-AA005377; AA005393-AA005395; AA005400-AA005404; AA005305; AA005571-AA005575.) The testimony of QLS' employees and its documents show QLS admitted it was a debt collector in its communications with others, including Nevada debtors, and those admissions were not false. (*Id.*) QLS now claims these admissions did not in fact admit it was a debt collector seeking to collect debts.

Such admissions are evidence to be considered in determining whether, under the circumstances, an entity is a debt collector under the FDCPA or a collection agency under Nevada law. (*See, e.g., Gburek v. Litton Loan Servicing LP* (7th Cir. 2010) 614 F.3d 380, 386 n. 3 [noting admission "does not automatically trigger the protections of the FDCPA, just as the absence of such language does not have dispositive significance."][emphasis added]; *Hart v. FCI*

Lender Servs. (2d Cir. 2015) 797 F.3d 219, 226-227 [noting "[w]e see no reason why we should not take it [*i.e.*, a letter using such language] at its word"]; *McLaughlin v. Phelan Hallinan & Schmieg, LLP* (3d Cir. 2014) 756 F.3d 240, 246 ["It is reasonable to infer that an entity that identifies itself as a debt collector, lays out the amount of the debt, and explains how to obtain current payoff quotes has engaged in a communication related to collecting a debt."][emphasis added]; *Yeager v. Ocwen Loan Servicing, LLC*, 2015 U.S. Dist. LEXIS 94149, at *25-27 n.19 (M.D. Ala. July 15, 2015); *Crippen v. Stites*, 346 B.R. 115 (E.D. Bkr. Pa. July 25, 2006); *Estes v. Love, Beal & Nixon, P.C.*, 2015 U.S. Dist. LEXIS 96715 (N.D. Okl. July 24, 2015).)

Use of such language is not dispositive standing alone, but it is not, as QLS suggests, immaterial. It is evidence to be considered in determining whether QLS qualifies as a debt collector under the FDCPA (or, here, a collection agency under Nevada law).

D. Proper Interpretation of Secondary Collection Agency Language

QLS bizarrely and incorrectly accuses Plaintiffs of ignoring the language of applicable Nevada law and administrative regulations.

The Nevada Legislature defines "collection agency" as meaning "all persons engaging, directly or indirectly, and as a primary or a secondary object, business, or pursuit, in the collection of or in soliciting or obtaining in any manner the

payment of a claim owed or due or asserted to be owed or due to another." (NRS 649.020(1) [emphasis added].) In their Opening Brief, Plaintiffs argued debt collection was, at a minimum, a secondary object of Defendants' business activities. Relying on irrelevant language from Nevada's Administrative Code, QLS now suggests Plaintiffs accuse QLS of being a secondary collection agency. Not so, as the plain language QLS cites shows.

The Nevada Legislature authorized the FID Commissioner to "adopt such regulations as may be necessary to carry out the provisions of this chapter [*i.e.*, NRS 649]." (NRS 649.053.) The FID Commissioner adopted various definitions of terms used in particular provisions of Nevada's administrative regulations, including those provisions QLS specifically cites. (*See* NAC 649.010.) The FID Commissioner defined "collection agency"—when used in NAC 649.010 to 649.050—to mean a "person or entity which is licensed pursuant to NRS 649.075 to 649.167" by the FID. (NAC 649.013.) This narrow definition is not equivalent to the Nevada Legislature's broader definition in NRS 649.020(1), which determines whether businesses are deemed to be collection agencies in Nevada. Under Nevada's scheme, the Legislature defines whether persons and entities qualify as collection agencies in Nevada, and the FID more narrowly defines the phrase for its administrative regulations as those persons or entities who already have obtained FID licenses.

Within the category of licensed collection agencies—as defined by the NAC—Nevada's administrative regulations distinguish between "[p]rimary collection agenc[ies]" and "[s]econdary collection agenc[ies]." (NAC 649.030, NAC 649.040.) The latter is "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." (NAC 649.040.) The former is "any collection agency which is not a secondary collection agency." (NAC 649.030.) Thus, by definition, primary and secondary collection agencies are those the FID has licensed. (*See* NAC 649.013.)

QLS' reliance on this "secondary collection agency" language is especially inappropriate because the distinction between primary and secondary collection agencies is not based on whether collection activities are a collection agency's primary or secondary object, business, or pursuit. Collection activities may be a primary object of secondary collection agencies, because these agencies, by definition, are merely a category of licensed collection agencies using machine derived form letters to solicit or encourage debtors to pay delinquent debts directly to their creditors. (*See* NAC 649.040.)

QLS' secondary collection agency assertions are irrelevant, and premised on a misunderstanding or mischaracterization of the pertinent provisions. They are a confused attempt to dispose of a straw man, not Plaintiffs' actual arguments.

E. Issue and Claim Preclusion Not Applicable Here

This Court should not affirm the judgment below based on preclusion.

1. It Is Improper to Raise Preclusion Here

Plaintiffs' claims were formally dismissed as a matter of law under NRCP 12(b)(5). (AA005642-AA005658.) QLS' suggestion this Court affirm the judgment on preclusion grounds is improper, because the trial court could not base its ruling on either doctrine (as Judge Scann expressly recognized). (AA000815-AA000816.) Under Nevada law, it is generally procedurally improper to raise preclusion by motion to dismiss, because affirmative defenses must be pled and proven by the party asserting them. (*See* NRCP 8(c) ["In pleading to a preceding pleading, a party shall set forth affirmatively . . . res judicata, . . . and any other matter constituting an . . . affirmative defense."]; *Bower v. Harrah's Laughlin, Inc.* (2009) 125 Nev. 470, 481, 215 P.3d 709 ["The party seeking to assert a judgment against another has the burden of proving the preclusive effect of the judgment."][emphasis added]; *Schwartz v. Schwartz*, 95 Nev. 202, 204, 591 P.2d 1137, 1139 (1979) ["Res judicata is an affirmative defense that must be specifically pleaded."].)

This Court should decline to consider QLS' affirmative defenses as procedurally improper. Considering any such defense on the merits would be unfairly prejudicial. It would require this Court to consider matters outside the

pleadings, converting a NRCP 12(b)(5) dismissal into summary judgment while failing to give Plaintiffs discovery and a "reasonable opportunity to present all material made pertinent to such a motion." (*See* NRCP 12(b) ["If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."]; *see also Redrock Valley Ranch, LLC v. Washoe County* (2011) 127 Nev. Adv. Rep. 38, 254 P.3d 641 ("*Redrock*"), 647.)

If this Court considers QLS' preclusion arguments, it should not affirm the judgment for two reasons: (1) QLS fails to prove the preclusive effect of the FID Litigation; and (2) Plaintiffs never had adequate opportunity to conduct discovery necessary to destroy these defenses, and are entitled to do so under NRCP 56(f).

2. QLS' Argument Is Unsupported by Record Citations

This Court should decline to consider QLS' preclusion defenses because QLS fails to support many assertions with record citations. At page 13 of its brief, for example, QLS purports to describe various facts, but provides no supporting citations. The same defect litters the rest of the discussion: the only portion of the record QLS relies on throughout this part of its brief is the underlying order in the FID Litigation, even though several of QLS' assertions—including its assertion the

FID did not appeal that erroneous decision—cannot be found therein. This Court should disregard such unsupported arguments and assertions. (*See, e.g.*, NRAP 28(a)(10)(A) [arguments in brief must contain citations to parts of the record relied on]; *id.* at (e) ["every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found"]; *see also Allianz Ins. Co. v. Gagnon* (1993) 109 Nev. 990, 997, 860 P.2d 720, 725 [Court need not consider contentions not supported by record citations].)

3. QLS Fails to Establish Preclusion as a Matter of Law

Preclusion does not apply unless specific requirements are met. (*Redrock*, *supra*, 127 Nev. Adv. Rep. 38, 254 P.3d at 646.) The "following factors are necessary for . . . issue preclusion: (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." (*Five Star Capital Corp. v. Ruby* (2008) 124 Nev. 1048, 1055, 194 P.3d 709 ("*Five Star*"), 713 [internal quotation marks and citation omitted; second alteration in original].) The fourth requirement means the issue in the prior case was "'actually litigated and determined by a valid and final judgment, and the determination [was]

essential to the judgment.'" (*In re Sandoval* (2010) 126 Nev. Adv. Rep. 15, 232 P.3d 422, 424 [quoting *Restatement (Second) of Judgments* ("*Restatement of Judgments*"), §27 (1982)].)

Claim preclusion only "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 on 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.* (2014) 130 Nev. Adv. Rep. 28, 321 P.3d 912, 915 [quoting *Five Star, supra*, 124 Nev. at 1054, 194 P.3d at 713].)

"[P]reclusion cannot enlarge an order that the rendering judge expressly limited." (*Holt v. Reg'l Tr. Servs. Corp.* (2011) 127 Nev. Adv. Rep. 80, 266 P.3d 602, 605.) "The availability of issue preclusion is a mixed question of law and fact, in which legal issues predominate"; moreover, even "[o]nce it is determined [to be] available, the actual decision to apply it is left to the discretion of the tribunal in which it is invoked." (*Redrock, supra*, 127 Nev. Adv. Rep. 38, 254 P.3d at 647 [internal quotation marks omitted; alterations in original].) "The party seeking to assert a judgment against another has the burden of proving the preclusive effect of the judgment." (*Bower, supra*, 125 Nev. at 481, 215 P.3d at 718.)

a. Claim Preclusion Does Not Apply

QLS's claim preclusion defense fails, because QLS cannot establish Plaintiffs' causes of action here were or could have been brought in the FID Litigation.

"Claims"—for claim preclusion—means causes of action (not factual allegations more generally). (*See Alcantara, supra*, 130 Nev. Adv. Rep. 28, 31 P.3d at 915.) For this requirement, QLS offers only its wholly unsupported contention Plaintiffs assert failure to hold a license is a deceptive trade practice which, according to QLS, is the "same claim that was brought in the FID administrative review case." (QLS Brief, at p. 15.)

QLS fails to provide any support for these assertions, and there is no indication the FID claimed QLS' failure to hold a collection agency license was a deceptive trade practice. (*See* AA000625-AA000628.) There is no evidence the FID (or the trial court there) decided whether QLS had engaged in a deceptive trade practice. (*Id.*) QLS does not even contend Plaintiffs' second cause of action was or could have been brought there, as required to satisfy this element. (*See Alcantara, supra*, 130 Nev. Adv. Rep. 28, 321 P.3d at 915.)

QLS presents no evidence, argument, or authority to show Plaintiffs' claims even could have been brought by the FID. Given the procedural posture there—the FID issued a cease and desist order, an administrative hearing was held and a ruling issued by the FID, which QLS then appealed to the Nevada trial court

(AA000625-AA000628)—the FID seemingly could not have brought such claims even if it wished to.

b. The Issues Decided Are Not Identical

For issue preclusion to apply, the issues decided must be identical. (*See Five Star*, *supra*, 124 Nev. at 1055, 194 P.3d at 713.) QLS mistakenly suggests, again without evidentiary support, the issue presented in the FID Litigation was the same as here.

The issues here are not identical to the issue framed by the order in the FID Litigation: *i.e.*, whether a deed of trust trustee "who is only exercising the power of sale under NRS chapter 107 . . . is required to obtain a license from the FID as a collection agency" when "merely exercising the power of sale specifically granted" under a deed of trust and NRS 107. (*See* AA000627.) According to the written order, the issue decided in the FID Litigation was whether a foreclosure trustee who is only exercising the power of sale under a deed of trust and NRS 107 is, by that act alone, collecting a debt or claim, or soliciting the payment of a debt as defined in NRS 649 such that the trustee must be licensed as a collection agency by the FID. (*See, e.g.*, AA000625-AA000628, at 2-3.)

Plaintiffs do not allege QLS was required to have a collection agency license solely because it recorded notices of default. QLS needed to be licensed because it

was actually a collection agency engaged in collection activity under Nevada law. (*See* AA004065-AA004224.)

The issues are not identical, but QLS attempts to mischaracterize these different issues as simply whether QLS needed to be licensed under Nevada law. QLS tries to impermissibly enlarge or exceed the expressly limited scope of the trial court's written order. Nevada law is clear: issue preclusion cannot "enlarge an order that the rendering judge expressly limited." (*Holt*, *supra*, 127 Nev. Adv. Rep. 80, 266 P.3d at 605 [emphasis added].) The defense fails accordingly.

c. QLS Fails to Establish Privity as a Matter of Law

i. Privity Is Lacking

"'Issue preclusion can only be used against a party whose due process rights have been met by virtue of that party having been a party or in privity with a party in the prior litigation.'" (*Alcantara*, *supra*, 130 Nev. Adv. Rep. 28, 321 P.3d at 917 [quoting *Bower*, *supra*, 125 Nev. at 481, 215 P.3d at 718].) A similar privity requirement applies to claim preclusion. (*Id.* at 915.) For privity, this Court has adopted the *Restatement of Judgments*' Section 41's "examples of privity that arises when a plaintiff's interests are being represented by someone else." (*Id.* at 917-918 [citing *Restatement of Judgments*, § 41 (1982)].)

QLS mistakenly contends privity exists because, according to QLS, Plaintiffs were represented in the FID Litigation by an "official or agency invested

by law with authority to represent the person's interests." (*See Restatement of Judgments*, § 41(1)(d).) QLS' defective argument is based on factual assertions unsupported by any record citation. This is especially true of its various assertions regarding the FID's role in the FID Litigation. (*See, e.g.*, QLS Brief, at 16-17.) Although QLS asserts the Attorney General acted in a *parens patriae* capacity there, nothing in the portion of the record cited by QLS supports this assertion, and there is nothing suggesting the FID acted in such a capacity either. (*See* AA000625-AA000628.)

QLS also fails to address the important guidance found in section 41(1)(d)'s comments. Comment *d* to Section 41 states:

> As an aspect of the powers and responsibilities of his office, a public official may have authority to maintain or defend litigation on behalf of individuals or of a collective public interest. That authority may be construed as exclusive, in that maintaining an action to protect the interest, or defending the interest when an action concerning it is brought by another, is treated as solely within the authority of the official or agency involved. When the authority of the official or agency is so construed, other persons correlatively are denied judicially enforceable interest in the matter, or as it may be called 'standing to sue,' and are thus unable to become parties to litigation concerning the interest. In such circumstances, the question of their being precluded in subsequent litigation by hypothesis cannot arise.
> In other circumstances, the authority of the public official or agency is coexistent with that of individuals or members of the public, such as citizens or taxpayers, in that the latter are recognized as having a legally enforceable right permitting them to bring or defend an action concerning an interest which the official or agency may also seek to protect through litigation. Where this is so, a further question presented is whether the exercise of the official or agency's authority . . . should be construed as preempting the otherwise available opportunity of the individual or members of the public to prosecute or defend litigation in the matter. Where the exercise of that

> authority is regarding as preemptive, the public official or agency represents such other persons for the purposes of litigation concerning the interests in question and the judgment is binding on them. On the other hand, the remedies that a public official is empowered to pursue may be interpreted as being supplemental to those which private persons may pursue themselves. In that circumstance, the official's maintenance of an action does not preclude other litigation by the persons affected. The opposing party, however, may be precluded from relitigating issues determined in the first action . . . .
> [emphasis added].

QLS fails to even address whether the FID's authority is exclusive, or, if not exclusive, preemptive (so that the FID Litigation would bind Plaintiffs). The failure is fatal to QLS's preclusion defenses, especially because the statutes QLS cites show the FID's authority is exclusive at least as to enforcement and regulatory actions. For instance, the FID's authority to suspend or revoke a collection agency's license (NRS 649.395(2)(a)), and to revoke management of multiple collection agencies (NRS 649.220(4)(a)-(b)), is exclusive, because solely within the FID's power (rather than coexistent with the powers of members of the public). The FID's power to issue cease and desist orders as part of its disciplinary powers—the power that led to the FID Litigation—is vested exclusively in the FID Commissioner. (*See* NRS 649.390(2).)

Because members of the general public cannot become parties to such litigation, the question of their being precluded in subsequent litigation cannot arise as a matter of law. (*See Restatement of Judgments*, § 41, cmt. *d*; *see also Democratic Cent. Comm. v. Washington Met. Area Transit Comm'n*, 842 F.2d 402,

409-410 n.52 (D.C. Cir. 1988) ["The American Law Institute distinguishes between agencies granted exclusive authority to litigate on behalf of the public and agencies whose legal authority coexists with that of private citizens. As to the former, no question of preclusion can arise because individuals have no standing to sue. As to the latter, one must determine whether the agency's action preempts individual action. Non-preemptive agency action does not prevent a later suit by an individual."][emphasis added; citations to *Restatement of Judgments*, § 41 omitted].

QLS also failed to show the FID by law has authority to represent individuals such as Plaintiffs in civil actions such as the one before this Court and recover damages on their behalf. (*Cf. Mohammed v. May Dep't Stores, Inc.* (U.S. Dist. Ct. D. Del. 2003) 273 F.Supp. 2d 531, 535 ["The EEOC is invested by law with the power to represent aggrieved individuals in civil actions against employers to recover damages for discrimination."].) Even assuming the FID has such authority, QLS cites nothing in the record showing FID actually purported to do so in the FID Litigation. To the extent the FID's authority may not be exclusive, QLS failed to establish exercise of this authority preempts individual action rather than being only supplemental to the remedies Plaintiffs may pursue themselves. (*See Restatement of Judgments*, § 41, Comment *d*.) Here, Plaintiffs' action for damages (and other remedies), would be supplemental to the remedies available to

the FID in the FID Litigation, which was prospectively concerned with enforcing compliance with Nevada law (not obtaining damages for past harm). (*See* AA000625-AA000628.)

The cases cited by QLS are not helpful to it. In *Alcantara*, the privity question did not implicate the same exclusivity and preemption considerations representation by public officials and agencies does. (*See Alcantara, supra,* 130 Nev. Adv. Rep. 28, 321 P.3d at 917-918.) Another is a California case predating by decades this Court's substantial revisions to Nevada's preclusion doctrines, and applied claim rather than issue preclusion (which are not interchangeable). (*Compare Rynsburger v. Dairymen's Fertilizer Cooperative, Inc.*, 266 Cal.App.2d 269, 275-276 (Cal. Ct. App. 1968), *with Five Star*, *supra*, 124 Nev. at 1054, 194 P.3d at 721-713 ["As a result of this lack of clarity in our case law regarding the factors relevant to determining whether claim or issue preclusion apply, we take this opportunity to establish clear tests for making such determinations. We now specifically adopt the terms of claim preclusion and issue preclusion as the proper terminology in referring to these doctrines. This will help avoid confusion and interchanging use of the two separate doctrines . . . ."].)

Rynsburger is factually distinguishable. There, the California appellate court concluded privity between three cities and private individuals existed because the private individuals were "so identified in interest" with the public parties from the

first proceeding that, "although not before the court in person, [they had been] so far represented by others that [their] interest received actual and efficient protection." (*Rynsburger*, *supra*, 266 Cal.App.2d at 277-278 [emphasis added].) The private individuals requested the public parties initiate the prior public nuisance action on their behalf, the prior lawsuit had been "filed for the purpose of benefiting all property owners" affected by the public nuisance, and many of the allegations in both cases were "substantially the same." (*Id.* at 276.)

Here, QLS cites nothing showing the FID Litigation was carried out at Plaintiffs' request, was expressly initiated on Plaintiffs' behalf, or contained substantially the same allegations as those found here. QLS cites nothing in the record even suggesting the FID sought damages for Plaintiffs (or the other remedies Plaintiffs seek, including injunctive relief). QLS identifies nothing showing the FID brought statutory consumer fraud and unjust enrichment causes of action on Plaintiffs' behalf (or the citizens of Nevada more generally).

The other cases QLS cited show why preclusion is not appropriate. (*See Nevada v. Bank of Am. Corp.* (9th Cir. 2012) 672 F.3d 661; *Alaska Sport Fishing Ass'n v. Exxon Corp.* (9th Cir. 1994) 34 F.3d 769 ("*Exxon Corp.*").) The first did not consider privity or preclusion, but concerned Nevada, through its Attorney General, filing a *parens patriae* lawsuit in which Nevada expressly asserted in pertinent part the defendants violated the Nevada Deceptive Trade Practices Act

("DTPA") by engaging in statutory consumer fraud. (*Nevada, supra,* 672 F.3d at 664.) The DTPA expressly authorized the Attorney General to bring such an action in Nevada's name, which the lawsuit did. (*Id.* at 665.) The lawsuit expressly sought "declaratory and injunctive relief, civil penalties, restitution for defrauded Nevada consumers, attorney's fees and the costs of investigation." (*Id.* at 666 [emphasis added].) The Ninth Circuit concluded Nevada was the real party—as opposed to the Nevada citizens on whose behalf Nevada expressly brought the lawsuit—for purposes of ruling on the propriety of federal jurisdiction (not privity or preclusion). (*Id.* at 669-671.)

Nevada illustrates the kinds of cases where an earlier proceeding might be entitled to preclusive effect: unlike the administrative proceeding here, the *Nevada* lawsuit was brought by Nevada expressly on behalf of its citizens, asserted claims on behalf of those citizens, and sought recovery on their behalf. Here, QLS cites nothing showing the Attorney General or FID purported to act on behalf of Nevada's citizens, and asserted claims on their behalf, or sought relief on their behalf for QLS's misconduct.

Exxon Corp. is similarly unhelpful to QLS. There, a sportfishing association and four individual sportfishers in Alaska brought a putative class action against Exxon Corporation ("Exxon"), "seeking damages for loss of use and enjoyment of natural resources resulting from the 1989 *Exxon Valdez* oil spill." (*Exxon Corp.*,

supra, 34 F.3d at 770.) Alaska and the U.S. Government, acting "in their capacities as 'trustees for the public" under the federal Clean Water Act, also filed a lawsuit against Exxon, seeking "damages for restoration of the environment and compensation for lost public uses of natural resources." (*Id.* at 771.) The government parties and Exxon entered into a settlement agreement resolving the governments' claims against Exxon, as part of which Exxon agreed to pay for natural resource damage. (*Id.*) This settlement was later given *res judicata* effect in the sportfishers' lawsuit, because the United States and Alaska had expressly acted on their citizens' behalf in suing Exxon. (*Id.* at 772-773). The trial court concluded the two cases involved the same or similar claims because the sportfishers sought the "same damages" as the governments had recovered in their settlement with Exxon. (*Id.* at 773-774 [concluding "the United States and the state of Alaska, acting as government trustees, have already recovered for the very same damages plaintiffs now seek here."].)

In discussing the *parens patriae* doctrine, the Ninth Circuit observed "State governments may act in their *parens patriae* capacity as representatives for all their citizens in a suit to recover damages for injury to a sovereign interest." (*Id.* at 772 [emphasis added].) Suing to recover damages expressly on citizens' behalf is what the governments in *Nevada* and *Exxon Corp.* did, but Nevada never did in the FID Litigation.

NRS 649.400 authorizes the FID Commissioner to seek injunctive relief—through the appropriate district attorney or by itself bringing "suit in the name and on behalf of the State of Nevada"—against collection agencies violating NRS Chapter 649 or those "engaging in the business of a collection agency without being licensed" by the FID. That the FID Commissioner could have done these things does not assist QLS, because the FID Commissioner declined to do so. Instead of a bringing a *parens patriae* lawsuit (or having the appropriate district attorney do so), the FID merely issued a cease and desist order to QLS, which was then litigated by the FID and QLS. (*See* AA000625-AA000628.) Given QLS' failure to identify anything in the record showing Nevada was acting as *parens patriae*, it would be inappropriate to conclude the parties there were somehow in privity with Plaintiffs.

ii. The Section 42 Privity Exceptions Apply

QLS fails to address *Restatement of Judgments* Section 42's exceptions to Section 41's privity rule, even though Section 41 expressly refers to and incorporates them. At least two exceptions apply: divergence of interest and lack of diligence. (*See Restatement of Judgments*, §42(1)(d)-(e), Comments *e* and *f*.)

iii. The FID's Interests Substantially Diverged from Plaintiffs' Interests

Because its interests substantially diverged from Plaintiffs' interests, the FID could not fairly represent Plaintiffs as to the matters for which QLS now invokes the FID Litigation. (*See Restatement of Judgments*, § 42(d).) The FID wanted QLS to get its license in Nevada, and QLS eventually did so. (AA005377.) The FID's interest was to insure QLS' compliance with Nevada law and FID regulations (not recover damages or other relief). The FID had no interest in—and the FID Litigation could not have led to—obtaining damages or other relief for Plaintiffs' injuries.

Once QLS obtained a license from the FID (AA005377), the FID's interests in defending the FID Litigation vastly diverged from Plaintiffs, because the FID achieved its goals, whereas Plaintiffs achieved nothing. Once the Nevada Legislature amended the relevant statutes to satisfy the FID's interests, the FID had even further reason not to appeal the FID Litigation. (*See* Opening Brief, at 42.) (These statutory revisions did not satisfy Plaintiffs' interests, since they did not provide relief for the harm QLS caused them.)

This substantial divergence of interests establishes privity does not exist because the FID could not fairly represent Plaintiffs. (*See S.O.V. v. People ex rel. M.C.*, 914 P.2d 355, 359-361 (Colo. 1996) [State and non-party child deemed not to be in privity in prior paternity suit because "child's interests in a paternity proceeding are of a different and broader nature than those of the State"]; *see also*

Democratic Cent. Comm., supra, 842 F.2d at 409-410 [no privity because "Commission's representation . . . was clearly less than the advocacy of private parties" and the "interests of PUC and Transit's farepayers differed markedly"].)

iv. QLS Knew the FID Failed to Prosecute or Defend with Due Diligence and Reasonable Prudence

The FID failed to prosecute the FID Litigation with due diligence and reasonable prudence, and QLS was on notice of facts making that failure apparent. (*See Restatement of Judgments*, § 42(e).) Despite the trial court's serious errors of law, the FID failed to appeal, demonstrating a lack of due diligence and reasonable prudence (<u>if representing Plaintiffs' interests at all</u>). (*See* AA000625-AA000628.) QLS was on notice of the FID's failure to appeal—and thus knew it failed to defend the lawsuit adequately. Because QLS had by then obtained a license from the FID, and the Nevada Legislature had amended relevant statutes in ways favorable to the FID, the FID's failure to appeal may have been sensible <u>as to its regulatory interests</u>, but was <u>not</u> due diligence and reasonable prudence as to <u>Plaintiffs' different and broader interests</u> (including recovery of damages for their injuries).

The FID's failure to appeal was such "grossly deficient" management of the litigation <u>as far as Plaintiffs' interests were concerned</u> the inadequacy would have

been apparent to QLS. (*See Restatement of Judgments*, § 42, Comment *f*; *see also Arduini v. Hart*, 774 F.3d 622, 636 (9th Cir. 2014).)

d. Factual Questions Bar Summary Judgment

Preclusion is improper here. This Court should not resolve this case as a matter of law under NRCP 12(b)(5), because factual questions bar even summary judgment. For instance, whether prior "representation has been inadequate is a question of fact." (*Restatement of Judgments*, § 42, Comment *f*; *see also Falcon v. Beverly Hills Mortgage Corp.*, 168 Ariz. 527, 531, 815 P.2d 896, 899-900 (Ariz. 1991) ["[D]ue diligence is a question of fact."].) Whether issue preclusion applies is a mixed question of law and fact. (*Redrock*, *supra*, 254 P.3d at 647; *Falcon*, *supra*, 168 Ariz. at 531, 815 P.2d at 899-900.)

QLS must plead and prove its preclusion defenses when the record does not show they apply as a matter of law. (*Bower*, *supra*, 125 Nev. at 481, 215 P.3d at 718.) QLS has not proven preclusion as a matter of law. Due process requires Plaintiffs have an opportunity for further discovery and to present evidence on this factual issue.

4. This Court Should Decline to Apply Issue Preclusion

The record shows QLS was not honest, and actively misled, or used critical omissions to mislead, the trial court in the FID Litigation, including by misrepresenting or failing to disclose many facts shown by Plaintiffs' evidence.

(*Compare* RA001256-RA001368.) Thus, in papers submitted to the trial court there, QLS represented, directly and indirectly, it did nothing more than file and serve a notice of default, a notice of sale, a mediation notice, and a danger notice, even though the evidence shows QLS was engaging in a variety of collection agency activities in Nevada during that period. (*See*, *e.g.*, *id.* at RA001300; RA001326-RA001327.)

Under such circumstances, this Court should decline to apply issue preclusion. (*Redrock*, *supra*, 127 Nev. Adv. Rep. 38, 254 P.3d at 647.) QLS should not further profit from its successful deception of the trial court in the FID Litigation.

F. NRS 598.0955 Does Not Apply

QLS seeks to obtain preclusion by relying on the FID Litigation as proof it was in compliance with Nevada's collection agency licensing requirements, and under NRS 598.0955, NRS 598.0923(1) would not apply. QLS misinterprets the non-binding, erroneous order as a conclusive ruling, binding in perpetuity, QLS was and is in compliance with Nevada's collection agency licensing laws. That is not what the order decided: it only narrowly concluded the FID's cease and desist order and related ruling was legally flawed and void. (*See* AA000625-AA000628.)

QLS begs the question to be decided by trial, on the merits and evidence: whether QLS complied with Nevada's collection agency licensing laws. It would

be inappropriate to foreclose trial based on a non-binding trial court's order, which did not address whether QLS generally and for all time was in compliance with Nevada's licensing laws.

III. CONCLUSION

This Court should reverse the judgment.

Dated this 10th day of July 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that, except as indicated herein below, 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I hereby certify this brief complies with the requirements of NRAP 32, including NRAP 32(a)(4)-(6). This brief has been prepared in a proportionally-spaced typeface (Times New Roman) of 14 points, using Microsoft Word 2010, and is double-spaced. Excluding the parts of the brief exempted by NRAP 32(a)(7)(c), the brief contains 6,987 words.

Dated this 10th day of July 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of the Law Office of Nicholas A. Boylan, APC, and not a party to this action, and that on July 10, 2018, I e-served a true and correct copy of the foregoing on those listed below:

- **APPELLANTS' REPLY BRIEF TO RESPONDENT QUALITY LOAN SERVICE CORPORATION'S SUBSTANTIVE JOINDER TO THE ANSWERING BRIEF OF RESPONDENT CALIFORNIA RECONVEYANCE COMPANY**

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on July 10, 2018.

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