

**THE COURT OF APPEALS OF THE STATE OF NEVADA**

NONA TOBIN,

Appellant,

v.

BRIAN CHIESI, an individual; DEBORA CHIESI, an individual; QUICKEN LOANS, INC.; JOEL A. STOKES, an individual; JOEL A. STOCKS and SANDRA F. STOKES as Trustees of the JIMI JACK IRREVOCABLE TRUST; REDROCK FINANCIAL SERVICES; and NATIONSTAR MORTGAGE, LLC,

Respondents.

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Case No.: 82294

Dist. Court No.: A-19-799890-C

**APPEAL**

From the Eighth Judicial District Court, Clark County Nevada  
The Honorable Susan Johnson, Department XXII, District Court Judge  
District Court Case No. A-19-799890-C

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**APPELLANT NONA TOBIN'S OPENING BRIEF**

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## **NRAP 26.1 DISCLOSURE STATEMENT**

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 Nona Tobin (hereinafter “Tobin” or “Appellant”) is an individual, thus, there are no parent corporations or publicly held companies to be disclosed.

In the district court, Tobin was represented by John W. Thomson, Esq. of Thomson Law PC. John W. Thomson, Esq. of Thomson Law PC. Represents Tobin on appeal.

Joel A. Stokes, Sandra F. Stokes, and the Jimijack Irrevocable Trust (hereinafter the “Jimijack Parties”) were represented by Joseph Y. Hong, Esq. of Hong & Hong, A Professional Law Corporation.

Brian Chiesi, Debora Chiesi, and Quicken Loans, Inc. (hereinafter the “Chiesi Parties”) were represented by Brittany Wood, Esq., and Elizabeth E. Aronson, Esq. of the Law Office of Maurice Wood.

Sun City Anthem Community Association (hereinafter the “HOA”) was represented by Kaleb D. Anderson, Esq., David T. Ochoa, Esq. Angela T. Nakamura Ochoa, Esq. and David A. Clark, Esq. of Lipson Neilson, P.C.

Red Rock Financial Services (hereinafter “Red Rock”) was represented by David R. Koch, Esq., Steven B. Scow, Esq., and Brody B. Wight, Esq. of Koch & Scow, LLC.

Bank of America, N.A. (hereinafter “BANA”) was represented Dana J. Nitz, Esq. and Michael S. Kelley, Esq.

Nationstar Mortgage LLC was (hereinafter “Nationstar”) represented by Melanie D. Morgan, Esq., Donna M. Wittig, Esq., Karen Whelan, Esq., and Thera Cooper, Esq. of Akerman LLP.

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## **JURISDICTIONAL STATEMENT**

Appellant Nona Tobin’s instant appeal concerns three separate matters. For the first matter, the Motion to Dismiss, the basis for jurisdiction is NRAP 3A(b)(1) because this is an appeal from a final judgment. On December 3, 2020, the Order Granting Defendant Red Rock Financial Services’ (hereinafter “Red Rock”) Motion to Dismiss Complaint and all Joinders to the Motion (hereinafter the “Red Rock Order”) was filed and served. AA4486-AA4510. Notice of Entry of the Red Rock Order was filed on December 3, 2020. AA4511-4537. Appellant filed her Notice of Appeal of the Red Rock Order on December 29, 2020. AA4556-AA4557.

For the second matter, which is an appeal of an order granting attorney’s fees and costs, the basis for jurisdiction is NRAP 3A(b)(8) because orders granting attorney’s fees constitute special orders under said rule. On September 6, 2020, the Court filed the Order Granting Joel A. Stokes, Joel A. Stokes and Sandra Stokes as Trustees of the Jimijack Irrevocable Trust’s (hereinafter the “Jimijack Parties”) Joinder and Motion for Attorney’s Fees and Costs. Pursuant to EDCR 7.60(1) and/or (3) (hereinafter the “Jimijack Order”). AA4381-AA4388. On October 8, 2020, the Notice of Entry of the Jimijack Order was filed. AA4423-AA4433. On November 9, 2020, Appellant filed her Notice of Appeal of the Jimijack Order. AA4463-AA4464.

For the third matter, which is an appeal of an order granting attorney’s fees and costs, the basis for jurisdiction is NRAP 3A(b)(8) because orders granting attorney’s fees constitute special orders under said rule. On November 17, 2020, an Order was entered Granting Motion for Attorney’s Fees and Costs in favor of Brian Chiesi, Debora Chiesi, and Quicken Loans, Inc. (said parties hereinafter the “Chiesi Parties”) (said order hereinafter the “Chiesi Order”) was filed and served. On November 17, 2020, the Notice of Entry of the Chiesi Order was filed. AA4475-AA4483. On December 17, 2020, Appellant filed her Notice of Appeal of the Chiesi Order. AA4547-AA4548.

The Notices of Appeal of the Jimijack and Chiesi Orders created two appeals separate from the instant appeal (Supreme Court Case Nos. 82094 and 82234 respectively). However, the Supreme Court entered an Order Dismissing Appeals in Docket Nos. 82094 and 82234, and Disapproving Stipulation on June 22, 2021. Said Order dismissed Appeals in Docket Nos. 82094 and 82234 because the Supreme Court found that “this court lacks jurisdiction.” However, the Order stated that the issues raised in said Appeals “may be challenged in the context of Docket No. 82294 on appeal from the final judgment.”

### **ROUTING STATEMENT**

The present case is assigned to the Court of Appeals under NRAP 17(b)(6) and (7). NRAP 17(b)(6) states that the following are presumptive assigned to the

Court of Appeals: “[c]ases involving a contract dispute where the amount in controversy is less than \$75,000.” Furthermore NRAP 17(b)(7) states: “[a]ppeals from post judgment orders in civil cases” are presumptively assigned to the Court of Appeals. The present Appeal concerns the granting of a motion to dismiss in a civil case as well as the granting of two motions for attorney’s fees in the same matter.

### **STATEMENT OF ISSUES ON APPEAL**

1. Whether the district court erred in Granting Red Rock’s Motion to Dismiss, and the Related Joinders thereto;
2. Whether the district court erred in Granting the Jimijack Parties’ Motion to Attorney’s Fees and Costs; and,
3. Whether the district court erred in Granting the Chiesi Parties’ Motion for Attorney’s Fees and Costs.

## STATEMENT OF THE CASE

The instant case arises from a HOA foreclosure sale held on August 15, 2014. Tobin acquired her interest in the real property at issue, following the death of her fiancé, Gordon B. Hansen in January of 2012. Tobin intervened with claims in the two (2) underlying cases, both as successor trustee to her fiancé's trust, the Gordon B. Hansen Trust, dated August 22, 2008, and in her individual capacity, as the beneficial interest holder to the subject property.

Tobin, as a pro se litigant, initially intervened in district court case no. A-15-720032-C (hereinafter the "First Action") both: (1) as an individual, and beneficial interest holder in the subject property, and (2) as successor trustee to the Gordon B. Hansen Trust. During the First Action, the Gordon B. Hansen Trust was wound down and any right, title, or interest in the subject property was conveyed to Tobin. Tobin attempted to dismiss the Gordon B. Hansen Trust and join Red Rock as a party to the First Action, however, her efforts were thwarted by the district court. Shortly before the bench trial in the First Action, the district court struck all Tobin's pleadings as an individual and excluded her as a party to the First Action. Following the death of her fiancé, and disclaimer of interest of the other beneficial interest holder, Tobin had acquired title to the subject property. However, the district court excluded Tobin from participating in the bench trial in the First Action, and struck her pleadings. Tobin appealed, but the appellate court dismissed her appeal as she

had no standing because the district court struck her as an individual in the First Action. Therefore, Tobin had no recourse but to file her claims as an individual in district court case no. A-19-799890-C (hereinafter the “Second Action”).

In the Second Action, Tobin filed suit in her individual capacity as title holder to the subject property, and made claims against Red Rock, the HOA’s foreclosure agent, Nationstar, who Tobin claims prevented her from selling the subject property prior to the foreclosure sale, and the subsequent purchasers, the Jimijack Parties and the Chiesi Parties.

In the Second Action, Red Rock filed its motion to dismiss claiming *res judicata*, claim preclusion, and nonmutual claim preclusion (hereinafter the “doctrine of *res judicata*”). Nationstar, the Jimijack Parties, and the Chiesi Parties joined in Red Rock’s motion to dismiss, and the district court granted Red Rock’s Order, dismissal with prejudice, and awarded attorney’s fees and costs to the Jimijack Parties and the Chiesi Parties.

The district court erred in granting Red Rock’s Order based on the doctrine of *res judicata*. Tobin and Red Rock were not parties to the First Action due to the following district court actions: (1) Tobin’s pleadings, in her individual capacity, were stricken at the bench trial, and she was removed as a party; and (2) Tobin requested joinder of Red Rock was denied. Therefore, Tobin had good reasons for not participating as an individual and for not joining Red Rock in the First Action,

the district court's denial. Therefore, Red Rock's Order based on the doctrine of *res judicata* is reversible error as Tobin had good reasons for bringing her claims in the Second Action.

Additionally, because Tobin has a good faith basis for bringing the Second Action, the district court abused its discretion in granting the Jimijack Parties' attorney's fees, especially in light of counsel's failure to specifically articulate each of the *Brunzell factors*, including his education and experience. The district court further abused its discretion in awarding the Chiesi Parties' attorney's fees and costs as counsel's request appeared unreasonable in light of her familiarity with the First Action.

*Res judicata* will not be applied if injustice would result, or if the public interest requires that relitigation not be foreclosed. *Villacres v. ABM Industries, Inc.*, 189 Cal.App.4th 562, 577 (Cal.Ct.App. 2010). Tobin respectfully requests this Court to overturn Red Rock's Order, and reverse the awards of attorneys' fees in the Jimijack's Order; and the Chiesi's Order in the interest of justice and equity.

This Court should find that district court committed reversible error because it misapplied the doctrine of *res judicata* in granting the Red Rock Order and abused its discretion when awarding the Jimijack Order and Chiesi Order. Therefore, Tobin respectfully requests this Court should overturn and reverse the following orders: (1) the Red Rock Order; (2) the Jimijack Order; and (3) the Chiesi Order.

## STATEMENT OF FACTS

### I. General Background

On or about July 31, 2003, Gordon B. Hansen and his wife Marilyn Hansen purchased real property located at 273 White Sage Dr., Henderson, NV 89052, APN 191-13-811-052 (hereinafter the "Property"). AA3573-AA3576. On June 11, 2004, Marilyn Hansen quitclaimed her interest in the Property to Gordon B. Hansen. AA3578-AA3581. On or about August 22, 2008, Gordon B. Hansen executed the Gordon B. Hansen Trust (hereinafter the "Hansen Trust") which identified Tobin and Steven Hansen as beneficiaries, designated Tobin as the successor trustee, and designated Steven Hansen as alternative successor trustee. AA3583-AA3612. On August 27, 2008, Gordon B. Hansen deeded title to the Property into the Hansen Trust by way of Grant, Bargain, Sale Deed. AA3614- AA3615. Gordon B. Hansen died on January 14, 2012. AA3619.

Tobin paid the homeowners assessments and late fees for three quarters after Gordon Hansen's death. AA3564. However, there were discrepancies regarding payments applied and correspondence between Tobin and the HOA's management. AA3621-AA3630. Despite these payments, attempts to close by requesting payoffs, and the correspondence between the parties, on December 14, 2012, Red Rock, as the foreclosure agent for the HOA, recorded a Lien for Delinquent Assessments with the Clark County Recorder's Office. AA3632. On March 12, 2013, Red Rock



recorded a Notice of Default and Election to Sell with the Clark County Recorder's Office. AA3634. On February 12, 2014, Red Rock recorded a Notice of Foreclosure Sale with the Clark County Recorder's Office. AA3644-AA3645.

On August 15, 2014, Red Rock sold the Property at auction to Opportunity Homes, LLC for \$63,100.00. AA3658-AA3660. On August 22, 2014, a Foreclosure Deed was recorded with the Clark County Recorder's Office. *Id.* As a result of Red Rock's sale of the Property, there were excess proceeds in the approximate amount of \$57,282 in Red Rock's possession. AA1044. Tobin claimed issues inherent to Red Rock's sale of the Property including, but not limited to, failure to provide requisite notices, failure to accept tenders of the super priority amounts, errors in accounting, misrepresentations of fact to the Nevada Real Estate Division's Ombudsman's Office, errors in the Foreclosure Deed's recitals, and misrepresenting the assessment amounts due and owing. AA3564-AA3566.

On June 9, 2015, Opportunity Homes, LLC quitclaimed the Property to F. Bondurant, LLC. AA3849-AA3851. On June 9, 2015, F. Bondurant, LLC quitclaimed the Property to the Jimijack Parties. AA3853-AA3855. On May 1, 2019, the Jimijack Parties transferred their rights in the Property to the Chiesi Parties by way of a Grant, Bargain, Sale Deed. AA4199-AA4206.

## **II. Relevant Procedural History**

### **a. The Jimijack Parties Commence the First Action.**

On June 16, 2015, the Jimijack Parties filed a Complaint with the Eighth Judicial District Court (A-15-720032-C). AA0001-AA0008. The Complaint asserted the following claims: 1) quiet title; 2) cancellation of instruments; 3) injunctive relief; 4) breach of contract; and 5) indemnification. *Id.*

On January 11, 2016, Nationstar, apparently unaware of the First Action, instigate a separate action by filing a Complaint (A-16-730078-C). AA0012-AA0172. Nationstar's Complaint asserted the following claims: 1) quiet title/declaratory relief; 2) preliminary injunction; and 3) unjust enrichment. *Id.* On June 30, 2016, the Jimijack Parties filed a Motion to Consolidate the First Action with the A-16-730078-C matter. On July 29, 2016, Tobin, together with Steve Hansen in proper person, filed a Motion to Intervene in the A-16-730078-C matter. AA0281-AA0345. On August 26, 2016, an Order was filed granting the Jimijack Parties' Motion to Consolidate which consolidated the A-16-730078 matter into the First Action. AA0347-AA0348. On September 29, 2016, the Court issued a minute order denying without prejudice Tobin and Steven Hansen's Motion to Intervene as procedurally deficient. AA0349.

On November 15, 2016, Tobin, individually and as Trustee of the Hansen Trust, filed another Motion to Intervene. AA0350-AA0467. On January 12, 2017, an Order was entered granting Tobin and the Hansen Trust's Motion to Intervene in the First Action. AA0482-AA0486. Thereafter, the caption for the First Action read "Nona Tobin, an individual, and Trustee of the [Hansen Trust]." On January 31, 2017, the

Hansen Trust filed a Crossclaim against the HOA which included the following claims: 1) quiet title and equitable relief; 2) civil conspiracy; 3) fraudulent concealment; 4) unjust enrichment; and 5) breach of contract. AA0487-AA0582. On February 1, 2017, the Hansen Trust filed an Answer to the Jimijack Parties' Complaint and a Counterclaim which alleged the following claims: 1) quiet title and equitable relief; 2) fraudulent reconveyance; 3) unjust enrichment; 4) civil conspiracy; and 5) preliminary and permanent injunction. AA0583-AA0620.

On March 28, 2017, the Hansen Trust was wound down, and as a result it quitclaimed all of its right, title, and interest in and to the Property to Tobin, individually. AA4176-AA4179. On November 30, 2019, Tobin filed a Motion to Amend Answer, Counterclaim, and Crossclaims. AA0864-AA0897. Mr. Coppedge of Mushkin Cica Coppedge, who had made in an appearance on behalf of Tobin and the Hansen Trust on May 24, 2017, incorrectly stated in the Motion to Amend that Tobin sought to delete herself as a party because the real party in interest was the Hansen Trust. AA0867. Mr. Coppedge was apparently unaware of Tobin's quitclaim deed that had been recorded on March 28, 2017 divesting the Hansen Trust of any right, title, or interest in the Property. The Motion to Amend stated that the reasons to amend were to add a claim for money damages against the Jimijack Parties, to clarify the Hansen Trust's claim for quiet title to include all parties, and to add third-party claims against

Red Rock for failure to distribute the excess proceeds, who had thus far not been added to the litigation. AA0867.

On January 10, 2019, despite the fact that the Motion to Amend was unopposed, the Court issued a Minute Order granting the Motion to Amend as far as the Motion did not seek to add additional parties or crossclaims and did not affect the trial date. AA0898. In essence, the Court did not allow Red Rock to be added as a party to the First Action despite the fact that Red Rock was the entity that performed the HOA foreclosure and despite the fact that it still retained the excess proceeds from said sale. *Id.* As a result of the Court's ruling disallowing the Motion to Amend, no amendment was filed, and both the Hansen Trust and Tobin individually remained in the First Action. *Id.*

On February 5, 2019, the HOA moved for summary judgment seeking to validate the August 15, 2014 sale of the Property despite the numerous irregularities during the NRS 116 foreclosure process. AA0899-AA1073. On April 12, 2019, the claims between the Jimijack Parties and Nationstar were settled, and a Notice of Settlement was filed with the district court. AA1412-AA1414. On April 18, 2019, the Court's Findings of Fact and Conclusions of Law were entered granting summary judgment in favor of the HOA concluding that "the HOA properly followed the processes and procedures in foreclosing upon the Property." AA1427-AA1441. On May 1, 2019, the Jimijack Parties transferred their rights in the Property to Joel Stokes

by way of a Quitclaim Deed. AA4199-AA4201. On December 27, 2019, Joel Stokes transferred their rights in the Property to the Chiesi Parties by way of a Grant, Bargain, Sale Deed. AA4203-AA4206.

On May 23, 2019, Tobin and the Hansen Trust filed a Motion to Substitute Real Party in Interest and to Withdraw as Counsel of Record for Tobin individually. AA1800-AA1807. The Motion sought to substitute Tobin in for the Hansen Trust as the Hansen Trust had previously conveyed all of its right, title, and interest in and to the Property. *Id.* The Motion also sought to have Mr. Coppedge withdraw as counsel of record for Tobin but to continue to represent the Hansen Trust. *Id.* On May 29, 2019, while hearing Tobin and the Hansen Trust's Motion for Reconsideration, the Court elected to hear the issue presented by Tobin's Motion to Substitute. AA2407. The district court erroneously denied Tobin and the Hansen Trust's Motion and elected to strike all "representations about [Tobin] being an individual party in the case." *Id.* As a result of the lower court's order, Tobin was not allowed to participate in the remainder of the proceedings or the trial in the First Action in an individual capacity. Finally, the district court *sua sponte* took Tobin's Motion to Substitute off calendar. *Id.*

The district court conducted a bench trial on June 5, 2019 where the district court extinguished Tobin's rights, title, and interest to the Property despite Tobin not being able to appear at the bench trial in an individual capacity. AA2470. Tobin subsequently

filed several motions including a Motion to Intervene as an individual, a Motion for New Trial, and a Motion to Dismiss Pursuant to NRS 38.310(2). AA3222-AA3227. However, the district court struck Tobin's Motions from the record by concluding that Tobin was not, and had never been, a party to the case. AA3225.

**b. Having Been Excluded from the First Action, Tobin Commences the Second Action.**

On August 7, 2019, Tobin, as an individual, filed a Complaint for claims including quiet title, equitable, declaratory and injunctive relief arising from a defective HOA foreclosure sale conducted without notice on August 15, 2014 (A-19-799890), the Second Action. Tobin included as defendants in the Second Action the Jimijack Parties, Nationstar, and the Chiesi Parties. AA3239-AA3256.

On June 23, 2020, Red Rock moved to dismiss the Second Action under the doctrine of *res judicata*. AA3257-3776. On June 25, 2020, Nationstar filed a brief Joinder to Red Rock's Motion to Dismiss. AA3722-AA3778. The Jimijack Parties filed a Joinder to Red Rock's Motion to Dismiss and for Attorney's Fees Pursuant to EDCR 7.60(b) on June 25, 2020. AA3777-3800. On July 6, 2020, the Chiesi Parties filed a Joinder to Red Rock's Motion to Dismiss as well as a Request for Judicial Notice. AA3801-AA4241. On August 11, 2020, the district court heard the defendants' Motions and Joinders. AA4368-4380.

On September 6, 2020, the Court issued the Jimijack Order wherein the Court granted the Jimijack Parties' Motion for Attorney's Fees and Costs. AA4381-4388.

The district court issued the Jimijack Order even before the Red Rock Order and considered as grounds for the Order authority and relief that was not cited or relied upon in the Jimijack Parties' Joinder and Motion. *Id.* On September 16, 2020, the Chiesi Parties moved for their attorney's fees. AA4389-4407. On November 17, 2020, the Chiesi Order was entered granting the Chiesi Parties' Motion for Attorney's Fees and Costs. AA\*\*. To date, Red Rock remains in possession of the \$57,282 in excess proceeds.

### **SUMMARY OF THE ARGUMENT**

The district court incorrectly applied the doctrine of *res judicata* in granting Red Rock's motion to dismiss. In the First Action, Tobin made claims against the HOA, Nationstar, Bondurant LLC, and the Jimijack Parties to quiet title, for declaratory relief, and for other claims arising from the HOA foreclosure sale on August 15, 2014. Tobin knew that Red Rock acted as the HOA's foreclosure agent on the date of the sale, and in the motion to amend answer, counterclaims, and crossclaims, requested that the district court join Red Rock to the First Action. The district court denied Tobin's motion to join Red Rock, and rejected Tobin, in her individual capacity and struck her pleadings in her individual capacity before the bench trial in the First Action.

The First Action involved the HOA's foreclosure sale of the Property on August 15, 2014, and included various parties: (1) Nationstar, who acquired an

assignment to the deed of trust of the Property; (2) Opportunity Homes, LLC, who purchased the Property at the HOA foreclosure sale; and subsequent purchasers of the Property following the sale: F. Bondurant LLC; the Jimijack Parties; and the Chiesi Parties.

Tobin filed a Second Action against Red Rock for unjust enrichment, amongst other claims, as Red Rock still holds \$57,282 in excess proceeds from the August 15, 2014 foreclosure sale. In the Second Action, Red Rock filed its motion to dismiss based on the doctrine of *res judicata* against Tobin. The district court erred in granting Red Rock's motion to dismiss because it misapplied the Nevada Supreme Court's 3-prong test from *Five Star* and *Weddell*, discussed below. In the First Action, Tobin had good reasons for her non-participation, the district court striking Tobin, in her individual capacity, and its denial of her motion to join Red Rock. Thus, Tobin was precluded from participating and Red Rock was denied joinder by the district court. Therefore, there is no basis for Red Rock's dismissal, as the district court misapplied the doctrine of *res judicata*. Accordingly, because Red Rock's Order fails, there is no grounds for the Jimijack Order and the Chiesi Order, awarding attorney's fees and costs in the Second Action.

In the Second Action, pursuant to NRS 18.010(2)(b) and EDCR 7.60(b), because Tobin has a good faith basis for pursuing her claims, the district court abused its discretion in awarding the Jimijack Parties' and the Chiesi Parties' attorney's fees



and costs. Moreover, because Joseph Hong, Esq. failed to provide support for each of the *Brunzell* factors, and the attorney's fees included "anticipated" and not actual fees, the district court abused its discretion in awarding the Jimijack's attorney, \$500.00 per hour fee. Joseph Y. Hong, Esq. failed to expound on his education and training in becoming an attorney, and his knowledge and expertise in the subject matter of this litigation for the district court to make a determination of the reasonableness of his \$500.00 per hour fee. Mr. Hong also included "anticipated" fees for the preparation for and participation at the hearing on its joinder motion. Therefore, the district court committed an abuse of discretion in not requiring Mr. Hong to submit a Memorandum of Fees and Costs following the hearing to substantiate his actual attorney's fees and costs.

The district court further abused its discretion in awarding the Chiesi Parties' attorney's fees based on their joinder to Red Rock's motion to dismiss. As further articulated below, an attorney's fees award for 22.1 hours spent on an 11-page joinder to Red Rock's motion to dismiss, and 7-page reply, which repeats most of the same arguments made by Red Rock appears unreasonable, especially because Brittany Wood, Esq. was the attorney representing the Chiesi Parties in the First Action. Because the district court erred in improperly applying the doctrine of *res judicata* to Red Rock's motion to dismiss, and in its awards of attorney's fees

and costs to the Jimijack Parties' and the Chiesi Parties' attorneys, based on joinders to Red Rock's motion to dismiss was an abuse of the district court's discretion.

*Res judicata* will not be applied if injustice would result, or if the public interest requires that relitigation not be foreclosed. *Villacres v. ABM Industries, Inc.*, 189 Cal.App.4th 562, 577 (Cal.Ct.App. 2010). Tobin respectfully requests this Court to overturn the following orders: (1) Red Rock's Order; (2) Jimijack's Order; and (3) Chiesi's Order in the interest of justice and equity.

## **ARGUMENT**

### **I. Standard of Review**

#### **a. Standard of Review for Motions to Dismiss**

This Court reviews an order granting an NRCP 12(b)(5) motion to dismiss "is subject to a rigorous standard of review on appeal." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 227-28, 181 P.3d 670, 672 (2008) (quotations omitted). An order granting an NRCP 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted faces a rigorous standard of review on appeal, as this court must construe the pleadings liberally and accept all factual allegations in the complaint as true." *See Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d. 966, 967 (1997). Furthermore, this court must draw every fair inference in favor of the non-moving party. *Id.* "A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if

accepted by the trier of fact, would entitle him or her to relief.” *Id. Blackjack Bonding v. City of Las Vegas Muni.Ct.*, 116 Nev. 1213, 14 P.3d 1275 (2000).

The court presumes all factual allegations in the complaint are true and draws all inferences in Appellant Tobin’s favor. *Id.* at 228, 181 P.3d at 672. “But the Court is not limited to the four corners of the complaint.” 5B Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure: Civil* §1357, at 376 (3d ed. 2004). Under NRCP 10(c), “a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” A court “may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiffs claim; and (3) no party questions the authenticity of the document.” *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (internal quotation omitted); see also *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (in evaluating a motion to dismiss, “courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on [Fed. R. Civ. P.] 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference”) (citing 5B Charles Alan Wright & Arthur Miller, *supra*, § 1357). While presentation of matters *outside* the pleadings will convert the motion to dismiss to a motion for summary judgment, Fed. R. Civ. P. 12(d); NRCP 12(b), such conversion is not triggered by a court's “consideration of matters incorporated by reference or integral to the claim,”

5B Wright & Miller, *supra*, § 1357, at 376, as where the complaint "relies heavily" on a document's terms and effect, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). *See also* Kurtis A. Kemper, Annotation, *What Matters Not Contained in Pleadings May Be Considered in Ruling on a Motion to Dismiss Under Rule 12(b)(6) of the Federal Rules of Civil Procedure or Motion for Judgment on the Pleadings Under Rule 12(c) Without Conversion to Motion for Summary Judgment*, 138 A.L.R. Fed. 393 (1997) (collecting cases). Dismissal is appropriate when "it appears beyond a doubt that [the Appellant Tobin] could prove no set of facts, which, if true, would entitle [the Appellant Tobin] to relief." *Id.*

Under NRCP 8(f), "[a]ll pleadings shall be so construed as to do substantial justice." *See Chastain v. Clark Cnty. Sch. Dist.*, 109 Nev. 1172, 1178, 866 P.2d 286, 290 (1993). The Nevada Supreme Court reviews all legal conclusions *de novo*. *Id.* Whether claim preclusion is available is a question of law reviewed *de novo*. *G.C. Wallace, Inc. v. Dist. Ct.*, 127 Nev. Adv.Op.64 at 4, 262 P.3d 1135 (2011). *Res judicata* will not be applied if injustice would result, or if the public interest requires that relitigation not be foreclosed. *Villacres v. ABM Industries, Inc.*, 189 Cal.App.4th 562, 577 (Cal.Ct.App. 2010).

#### **b. Standard of Review for Motions for Attorney's Fees**

The Nevada Supreme Court has held "[a]n award of attorney fees is reviewed for an abuse of discretion." *Allianz Ins. Co. v. Gagnon*, 860 P.2d 720, 722 (1993);

*MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1292 (2016); and *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006). “An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law.” *Id.* (citing *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660–61 (2004)).

**II. The District Court Erred in Applying the Doctrine of *Res Judicata* in Granting Red Rock’s Motion to Dismiss Because Red Rock Was Not a Party to the First Action.**

This Court should overturn the Red Rock Order because the district court committed reversible error in the Second Action when it granted Red Rock’s motion to dismiss based on the doctrine of *res judicata*. The district court erred in applying the doctrine of *res judicata* because Red Rock’s Motion to Dismiss and the Joinders thereto, failed to meet the 3-prong test for *res judicata*, claim preclusion, and *nonmutual* claim preclusion articulated in *Five Star* and *Weddell*. Red Rock was not a party to the First Action. The district court denied Tobin’s request to join Red Rock as a party to the First Action, thus, she has “good reason” for not joining Red Rock to the First Action. Tobin individually was a necessary and proper party in the First Action because the Hansen Trust conveyed all of its right, title and interest in the Property to Tobin during the First Action. Tobin’s claim for unjust enrichment is valid against Red Rock, as it still holds \$57,282 in excess proceeds from the HOA

foreclosure sale, held on August 15, 2014. Therefore, the district court erred in granting dismissal of Tobin's claims in the Second Action, as there was no basis for dismissal under the doctrines of *res judicata*, claim preclusion, and *nonmutual* claim preclusion.

**a. *The Doctrine of Res Judicata Does Not Apply to Appellant's Second Action Because Red Rock Was Not a Party to the First Action.***

The district court erred in For claim preclusion and *nonmutual* claim preclusion to apply, Red Rock must meet all 3 elements of either the *Five Star* test or the *Weddell* test. A motion brought under NRCP 12(b)(5) tests the legal sufficiency of the claim as alleged by the moving party, Red Rock. Whether claim preclusion is available is a question of law reviewed *de novo*. *G.C. Wallace, Inc. v. Dist. Ct.*, 127 Nev. Adv.Op.64 at 4, 262 P.3d 1135 (2011). *Res judicata* will not be applied if injustice would result, or if the public interest requires that relitigation not be foreclosed. *Villacres v. ABM Industries, Inc.*, 189 Cal.App.4th 562, 577 (Cal.Ct.App. 2010). In *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d. 709 (2008), the Nevada Supreme Court established the 3-prong test for determining whether claim preclusion should apply: (1) the parties or their privies are the same, (2) the final judgment is valid, and the (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 ("*Five Star* test"). This case maintains that claim preclusion applies to all grounds of recovery that were or could have been brought in the first case. *Id.*

The doctrine of claim preclusion, also known as *res judicata* is designed to prevent plaintiffs and their privies from filing any claims that were or could have been asserted in a different suit. *U. of Nevada v. Tarkanian*, 110 Nev. 581, 879 P.2d 1180, 1191-92 (Nev. 1994). In *Weddell v. Sharp*, 131 Nev.Ad.Op.28, 350 P.3d 80, 84-85 (Nev. 2015), the Nevada Supreme Court extends the doctrine of claim preclusion and set forth the concept of *nonmutual* claim preclusion, which “embraces the idea that a plaintiff’s second suit against a new party should be precluded ‘if the new party can show **good reasons** why he should have been joined in the first action and the [plaintiff/Appellant] cannot show any **good reasons** to justify a second chance.’ . . . For *nonmutual* claim preclusion to apply, then a defendant must demonstrate that (1) there has been a valid final judgment in the 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 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.” *Id.* at 29(emphasis added).

The doctrine of *res judicata* cannot be used to preclude Tobin’s claims in the Second Action. While Red Rock is correct that there is a valid judgment in the First Action, Red Rock was not a party to the First Action, and Appellant attempted to

join Red Rock in the First Action, but the district court did not allow its joinder at the January 10, 2019 hearing. Thus, pursuant to *Weddell*, Appellant has “good reason” for not joining Red Rock in the First Action, that dismissal in the Second Action was reversible error by the district court because Red Rock failed to meet the 3-prong test in either *Five Star* or the *Weddell* tests. Therefore, the doctrine of *res judicata* should not have been applied by the district court as the basis for Red Rock’s dismissal.

**b. Appellant Is Also a Different Party from the First Action, and Should Be Allowed to Continue as an Individual, in her Capacity as Title Holder of the Property.**

In the First Action, Appellant, appeared pro se, attempted to obtain recognition for her dual roles, as successor trustee of the Hansen Trust, and in her individual capacity, as a beneficial interest holder to the Property following the settlor’s death in January of 2012. However, because Appellant could not represent a trust’s interest pro se, without being a licensed attorney in Nevada, she obtained counsel for the Hansen Trust and desired to return to her *pro se* status, in her individual capacity as a beneficial interest holder to the Property.

The district court in the First Action, did not recognize Appellant in her individual capacity at trial, and struck all her pleadings as rogue documents. Following the First Action, she appealed the ruling. However, the Nevada Supreme Court stated that she had no standing, as the district court ruled that Appellant, in



her individual capacity, was not a party in the underlying case at trial in the First Action. Therefore, Appellant was not recognized as a party in the First Action by either the district court and dismissed by the appellate court due to standing. Thus, Appellant had no other recourse than to file another complaint, in her individual capacity as beneficial interest holder to the Property. Pursuant to *Villacres*, in this case, the district court erred when it applied *res judicata* to Appellant's claims in the Second Action because injustice would result, if relitigation claims are foreclosed. *See Villacres* at 577.

Injustice will result if Red Rock continues to retain the excess proceeds from the HOA foreclosure sale in the approximate amount of \$57,000.00. By Red Rock's own admission in the motion to dismiss in the Second Action, it admits that it does not hold "any ownership or possessory rights to the Property, . . . and possesses the excess proceeds of the foreclosure sale." Red Rock still has the excess proceeds from the HOA foreclosure sale from August 15, 2014. Appellant, as an individual beneficial interest holder has rights, title, and interest to those excess proceeds, which remain in Red Rock's attorney's trust account. Therefore, this Court should reverse Red Rock's dismissal in the Second Action to ensure that the excess proceeds which it continues to hold are distributed in equity to its rightful owner, Appellant.

**c. Injustice Will Result if Appellant Is Not Able to Continue its Claims against Red Rock.**

Injustice will occur against Appellant if she is not allowed to proceed with her claims against Red Rock in the Second Action. Red Rock was the HOA's foreclosure agent for the Property on the date of the foreclosure sale, August 15, 2014. Red Rock admits in its Motion to Dismiss that Appellant in the Second Action is making a claim against a different party when it states:

“[T]he court in the previous case granted the **HOA's** motion for summary judgment. . . Now Tobin is bringing the same claims, but **she has named Red Rock as a defendant rather than the HOA...**Red Rock, on the other hand, was not named as a defendant in the previous action.”

See Red Rock MTD, 2:18-23; 7:27-8:1

The HOA and Red Rock are not interchangeable parties; Red Rock, and not the HOA, is the holder of the excess proceeds from the foreclosure sale of August 15, 2014. By its own admission, Red Rock claims no rights, title or interest in the Property, as follows:

“Red Rock never held any ownership or possessory rights to the Property, and it has therefore, never had access to any profits derived from the rental, transfer, and sale of the Property after the foreclosure. While it is true that Tobin has alleged that Red Rock technically possesses the excess proceeds [in the amount of \$57,000.00] of the foreclosure sale, Red Rock does not claim any interest in those excess proceeds.”

See Red Rock MTD, 10:26-27-11:1-2.

Because Red Rock continues to hold the excess proceeds from the August 15, 2014 foreclosure sale, to which Appellant has an interest is the basis and reason for

her filing the complaint in the Second Action. Appellant filed claims against Red Rock including quiet title, declaratory relief, and unjust enrichment for its failure to distribute the excess proceeds, to which it has no interest in. In Nevada, unjust enrichment exists when the plaintiff confers a benefit on defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.” Appellant, in the Second Action claims that Red Rock’s retention of the excess proceeds that she has an interest in forms the basis for her unjust enrichment claim. Injustice will result if Appellant is not able to proceed against Red Rock to obtain the excess proceeds to which it has no interest. Similarly, a justiciable controversy exists between Appellant and Red Rock and thus Appellant may seek a quiet title and a declaration from the district court pursuant to NRS 30.010 and NRS 40.010 *et seq.* Therefore, the district court committed reversible error when it dismissed Appellant’s claims against Red Rock for unjust enrichment.

### **III. The District Court Erred in Granting the Jimijack Parties and the Chiesi Parties’ Motions for Attorney’s Fees and Costs.**

This Court should overturn the district court because the district court abused its discretion in granting the Jimijack Parties’ and the Chiesi Parties’ Motions for Attorney’s Fees and Costs. The district court erred in granting Red Rock Financial Services’s Motion to Dismiss, and as a result, the JimiJack Parties’ do not have a

legal basis for attorney’s fees. The lower court compounded its error when it granted the JimiJack Parties’ and the Chiesi Parties’ Motions for Attorney’s Fees under NRS 18.010(2)(b) and EDCR 7.60(b) because Appellant’s claims in the Second Action were not groundless. The district court further erred when it did not properly consider all of the *Brunzell* factors in evaluating the Jimijack Parties’ Motion. The district court committed reversible error in awarding attorney’s fees to the Chiesi Parties because Appellant’s claims were not groundless and because the Chiesi Parties’ attorney’s fees were not reasonable under the circumstances. Finally, the district court improperly awarded costs in favor of the Jimijack Parties and the Chiesi Parties because neither party submitted documents evidencing costs beyond a simple memorandum of costs.

**a. A Court may Award Attorney’s Fees Pursuant to NRS 18.010(2)(b) Language May Only When the Nonmoving Party’s Claims are “Groundless.”**

In analyzing a request for attorneys’ fees under NRS 18.010(2)(b), the district court must identify evidence demonstrating that the claim was frivolous. *Rivero v. Rivero*, 125 Nev. 410, 441, 216 P.3d 213, 234 (2009) (citing *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687-88 (1995)). The “district court must determine if there was any credible evidence or reasonable basis for the claim at the time of filing” when deciding whether a claim was frivolous under NRS 18.010(2)(b). *Rivero*, 125 Nev. at 441 (citing *Semenza*, 111 Nev. at 1095). Even if a

party does not prevail on a claim “and it may have been without merit, that alone is insufficient for a determination that the [claim] was frivolous, warranting sanctions.” *Rivero*, 125 Nev. at 441 (observing that the mere fact that a party does not prevail “is insufficient for a determination that [the matter] was frivolous, warranting sanctions.”). The Nevada Supreme Court has defined the term “groundless” in this context as “the allegations in the complaint are not supported by any credible evidence at trial.” *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995 (1993).

**b. Sanctions Pursuant to EDCR 7.60(b) Similarly May Only be Granted When the Nonmoving Party’s Efforts are “Groundless.”**

In certain limited circumstances, a court may award attorney’s fees as sanctions pursuant to EDCR 7.60. EDCR 7.60(b) states in relevant part:

The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney’s fees when an attorney or a party without just cause:

(1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted.

...

(3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.

EDCR 7.60(b)(1) – (3). Similar to the heightened “groundless” claim standard for sanctions under NRS 18.010(2)(b), a Court may only award sanctions against party pursuant to EDCR 7.60 if the party brought a frivolous claim. *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213, 234 (2009). “Although a district court has discretion to

award attorney fees as a sanction, there must be evidence supporting the district court's finding that the claim or defense was unreasonable or brought to harass.” *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213, 234 (2009).

**c. A Court May Only Grant Attorney’s Fees if the Requested Fees are Reasonable Pursuant to *Brunzell*.**

In Nevada, the method upon which a reasonable fee is determined is subject to the discretion of the court, which is tempered only by reason and fairness. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005). Reasonable attorney's fees are based on the "lodestar" calculation set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). There the Court explained, the lodestar figure represents the "the number of hours reasonably expended on the litigation" multiplied by "a reasonable hourly rate." *Id.* Although this lodestar amount is presumed to represent an appropriate fee, it may be adjusted upward or downward under certain circumstances. *University of Nevada v. Tarkanian*, 110 Nev. 581, 590, 879 P.2d 1180, 1186 (1994).

While it is within the trial court’s discretion to determine the reasonable amount of attorney fees under a statute or rule, in exercising that discretion, the court must analyze the requested amount in light of the factors enumerated in *Brunzell v. Golden Gate National Bank*. *Id.* at 864-65. Under *Brunzell*, when courts determine the appropriate fee to award in civil cases, they must consider the following factors: 1) the quality of the advocate; 2) the character and difficulty of the work performed;

3) the work actually performed by the attorney; and 4) the result obtained. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349 (1969). The district court must “demonstrate that it considered the required factors, and the award must be supported by substantial evidence.” *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350 P.3d 1139, 1143 (2015).

**d. The District Court Abused its Discretion in Granting the Jimijack Parties’ Motion for Attorney’s Fees and Costs.**

This Court should first note, as is argued above, that the district court erred in granting Red Rock Financial Services’s Motion to Dismiss, and as a result, the Jimijack Parties’ do not have a legal basis for attorney’s fees. The lower court compounded its error when it granted the Jimijack Parties’ Motion for Attorney’s Fees under NRS 18.010(2)(b) and EDCR 7.60(b) because Appellant’s claims in the Second Action were not groundless. The district court further erred when it did not properly consider all of the *Brunzell* factors.

The district court abused its discretion when it granted the Jimijack Parties’ Motion for Attorney’s Fees pursuant to NRS 18.010(2)(b) and EDCR 7.60(b) because Appellant filed the Second Action in good faith and because Appellant’s claims were not groundless. The threshold for attorney’s fees pursuant to NRS 18.010(2)(b) and EDCR 7.60(b) is high in that a court must examine the claims and must find that “the allegations in the complaint are not supported by any credible evidence at trial.” *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995 (1993).

The *Semenza* case is particularly instructive in this Appeal. In *Semenza*, this Court determined that the district court erred in awarding attorneys' fees after concluding that a claim was brought without reasonable grounds. *Semenza*, 111 Nev. at 1096. This Court observed that although the plaintiffs' initial theory turned out to be inaccurate, that did not render their decision to file suit unreasonable or groundless. *Id.* Indeed, the Nevada Supreme Court repeated the principle that "[i]f an action is not frivolous when it is initiated, then the fact that it later becomes frivolous will not support an award of fees." *Id.* (citing *Duff v. Foster*, 110 Nev. 1306, 885 P.2d 589 (1994)); see also *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (same). The *Semenza* Court then further bolstered its decision to reverse the district court observing that there was "no evidence in the record that the Semenzas intentionally made false allegations or disregarded the truth prior to [filing suit]." *Id.*

Here, as set forth above, the district court abused its discretion in granting the JimiJack Parties' Motion for Attorney's Fees because Appellant's claims were not "groundless." Tobin's claims were brought in good faith with sufficient basis because Tobin was individually stricken from the First Action. Tobin individually was a necessary and proper party in the First Action because the Hansen Trust conveyed all of its right, title and interest in the Property to Tobin during the First Action. As argued above, the doctrine of *res judicata* do not preclude Tobin's claims



in the Second Action. Furthermore, Tobin filed a Complaint within the applicable statute of limitations so as to preserve her claims which were unable to be litigated in the First Action, thus EDCR 7.60(b)(1) does not apply.

The lower court compounded its error when it granted the JimiJack Parties' Motion for Attorney's Fees despite not considering all of the *Brunzell* factors. The district court, before the Order Granting the Motion to Dismiss was even entered<sup>1</sup>, filed an Order granting the JimiJack Parties Motion without even considering the quality of the advocate or the work actually performed by the attorney. AA4423-AA4433. As stated above, the 1) the quality of the advocate; 2) the character and difficulty of the work performed; 3) the work actually performed by the attorney; and 4) the result obtained. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349 (1969).

The district court failed to properly consider the qualities of the JimiJack Defendant's counsel. While the district courts are not required to make explicit findings on each *Brunzell* factor, the record must demonstrate that the court considered the factors and that the award is supported by substantial evidence. *See Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). In the JimiJack Parties' Joinder and Motion for Attorney's Fees, the JimiJack Parties failed to

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<sup>1</sup> The Order Granting the JimiJack Parties' Motion to Dismiss was filed on September 6, 2020 while the Motion Granting the Motion to Dismiss was not filed or entered until December 3, 2020.

provide any information concerning the quality of their advocate, Mr. Hong, for the district court to base its decision on. *See generally* AA3777-AA3800. The only information presented in the JimiJack Parties' moving papers is that Mr. Hong is the managing partner of Hong and Hong Law Office. *Id.* The Court had nothing in before it concerning Mr. Hong's education and training in becoming an attorney and in expanding his knowledge and expertise in his practice. *Id.* The Court similarly lacked information concerning Mr. Hong's experience as an attorney in terms of either time spent practicing or familiarity with the subject matter of the litigation. *Id.* Such information would be necessary for a district court to make a determination that \$500 per hour is reasonable under the circumstances. *Id.*

The district court further committed reversible error by failing to properly consider the work actually performed by the attorney. The JimiJack Defendants' Joinder and Motion lack any explanation as to what time was spent by the attorney and what time was spent by the paralegal. The JimiJack Defendants have essentially failed to properly identify the timekeepers in performing the work set forth in Mr. Hong's Declaration. Moreover, Mr. Hong's Declaration further includes time that was "anticipated" but not actually incurred. *Id.* (identifying approximately three hours of "Anticipated hours").

Finally, the district court erred in awarding the JimiJack Parties' costs. The Nevada Supreme Court has held that in determining whether to award costs, a district

court must demonstrate how such costs were necessary to and incurred in the action. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 345 P.3d 1049, 1054 (2015). In *Cadle*, the Nevada Supreme Court stated that “[i]t is clear, then, that justifying documentation must mean something more than a memorandum of costs.” AA3777-AA3800 (internal citations omitted).

Here, the district court committed reversible error in granting the Jimijack Parties’ costs without any documentation evidencing that the costs were necessary to and incurred in the action. Similar to the underlying matter in *Cadle*, the Jimijack Parties’ moving papers simply allege costs in Mr. Hong’s Declaration without any accompanying documentation for those costs. *Id.* The Nevada Supreme Court’s directive is clear that a memorandum of costs, without accompanying documentation evidencing costs, is insufficient for a district court to base an award of costs. *Id.* Therefore, this Court should reverse the district court’s order granting the Jimijack Parties’ Motion for Attorney’s and costs.

**e. The District Court Abused its Discretion in Granting the Chiesi Parties’ Motion for Attorney’s Fees and Costs.**

Because the district court erred in granting Red Rock Financial Services’s Motion to Dismiss, the award of attorney’s fees in favor of the Chiesi Parties is similarly improper. Beyond this, the district court committed reversible error in awarding attorney’s fees to the Chiesi Parties because Appellant’s claims were not

groundless and because the Chiesi Parties' attorney's fees were not reasonable under the circumstances.

The district court abused its discretion in awarding attorney's fees in favor of the Chiesi Parties because Appellant's claims were not groundless. Tobin's claims were brought in good faith with sufficient basis because Tobin was individually stricken from the First Action. Tobin individually was a necessary and proper party in the First Action because the Hansen Trust conveyed all of its right, title and interest in the Property to Tobin during the First Action. As argued above, the doctrine of *res judicata* do not preclude Tobin's claims in the Second Action.

The district court compounded its error in granting the Chiesi Parties' attorney's fees because the attorney's fees were not reasonable given the circumstances. The district court must analyze the attorney's fees requested in light of the character and difficulty of the work performed and the work actually performed by the attorney. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349 (1969).

Here, the Chiesi Parties' attorney's fees are not reasonable given the circumstances. An analysis of the Chiesi Parties' Motion for Attorney's Fees shows that the Chiesi Parties' counsel spent 6.7 billable hours (\$2,010.00) reviewing and analyzing documents, 8.3 billable hours (\$2,490.00) preparing a joinder/motion to dismiss, and 6.1 billable hours (\$1,830.00) drafting a reply brief for the matter. In

comparing and contrasting the Chiesi Parties' arguments in their Joinder with Red Rock Financial Services's Motion to Dismiss, it is clear that the Joinder did not offer any substantively new factual or legal aspects to the matter. Indeed, it appears that a large majority of the Joinder contains duplicated facts and arguments already present in Red Rock Financial Services's Motion to Dismiss. This fact is further demonstrated by a review of Nationstar Mortgage, LLC's Joinder to also filed in the same matter. Nationstar Mortgage, LLC's Joinder only contains a brief page and a half of additional facts that are particular to Nationstar Mortgage, LLC concerning the underlying litigation. Nationstar Mortgage, LLC properly did not duplicate the work in their Joinder which Redrock Financial Services had already performed in the preparation of its Motion to Dismiss.

The district court further erred in granting the Chiesi Parties' costs. Similar to its error in granting the JimiJack Parties' costs, the lower court improperly granted costs without any documentation evidencing that the costs were necessary to and incurred in the action. *See* AA4475-AA4483. Similar to the Jimijack Parties' Motion, the Chiesi Parties' Motion only contains a brief memorandum of the costs allegedly incurred by the Chiesi Parties without additional documentation. *Id.* The Supreme Court in *Cadle* is very clear that a simple memorandum of costs, without accompanying documentation evidencing said costs, is insufficient for a cost award.

*Cadle Co.*, 345 P.3d at 1054. Therefore, the Court should reverse and remand the district court's order granting the Chiesi Parties' attorney's fees and costs.

### CONCLUSION

In conclusion, the district court erred in granting Red Rock's Motion to Dismiss and the Joinders thereto, as Red Rock failed to meet the 3-prong test for the doctrine of *res judicata* articulated in *Five Star and Weddell*. Red Rock was not a party to the First Action. The district court denied Tobin's request to join Red Rock as a party to the First Action, thus, she has "good reason" for not joining Red Rock to the First Action. Tobin's claim for unjust enrichment is valid against Red Rock, as it still holds \$57,282 in excess proceeds from the HOA foreclosure sale, held on August 15, 2014. Therefore, the district court erred in granting dismissal of Tobin's claims in the Second Action, as there was no basis for dismissal under the doctrines of *res judicata*, claim preclusion, and *nonmutual* claim preclusion. The district court further erred when it abused its discretion in awarding attorney's fees and costs to attorneys for the Jimijack Parties and Chiesi Parties.

*Res judicata* will not be applied if injustice would result, or if the public interest requires that relitigation not be foreclosed. *Villacres v. ABM Industries, Inc.*, 189 Cal.App.4<sup>th</sup> 562, 577 (Cal.Ct.App. 2010). Tobin respectfully requests this Court to overturn Red Rock's Order, and reverse the awards of attorneys' fees in the Jimijack's Order; and the Chiesi's Order in the interest of justice and equity.

This Court should find that district court committed reversible error because it misapplied the doctrine of *res judicata* in granting the Red Rock Order and abused its discretion when awarding the Jimijack Order and Chiesi Order. Therefore, Tobin respectfully requests this Court should overturn and reverse the following orders: (1) the Red Rock Order; (2) the Jimijack Order; and (3) the Chiesi Order.

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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 brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman type style.

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

Proportionately spaced, has a typeface of 14 points or more, and contains 9,543 words; or

Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or

Does not exceed \_\_\_\_\_ pages.

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. I further certify that this brief complies with all applicable Nevada



Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies on September 29, 2021, a true and correct copy of APPELLANT’S OPENING BRIEF was served via the Court’s Eflex service system to the following:

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