

SUPREME COURT OF NEVADA

Case No. 82294

NONA TOBIN, an individual,

Appellant,

v.

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

Respondents,

Appeal from the Eighth Judicial District Court,
Clark County, Nevada

District Court Case No. A-19-799890-C

The Honorable SUSAN JOHNSON

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**RESPONDENT RED ROCK
FINANCIAL SERVICES'
ANSWERING BRIEF**

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NRAP 26.1 DISCLOSURE

This NRAP 26.1 Disclosure is made in connection with RESPONDENT RED ROCK FINANCIAL SERVICES' ANSWERING BRIEF. The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a).

1. Respondent Red Rock Financial Services is wholly owned by FSRM (NV), Inc.
2. Steven B. Scow (Nevada Bar Number 9906) of Koch & Scow, LLC is the only attorney that has or is expected to appear for Respondent in this matter.

Dated this 15th day of November 2021

/s/ Steven B. Scow
Steven B. Scow
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii.

ROUTING STATEMENT 1

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

 A. Appellant is Impermissibly Seeking Permission to
 Relitigate the Same Facts and Issues..... 4

 B. Tobin Unsuccessfully Brings Claims Against the HOA 4

 C. Appellant Brings this Second Action Seeking Again
 to Invalidate the 2014 Sale 8

 D. No Party Prevented Tobin From Previously Filing
 Suit in Her Individual Capacity 10

 E. Red Rock Is and Was in Privity with the HOA 12

SUMMARY OF THE ARGUMENT 14

ARGUMENT 14

 I. Standard of Review 14

 II. The Lower Court Did Not Err in Finding
 as a Matter of Law that Claim Preclusion Applied
 to Appellant’s Second Identical Case 15

 III. Privity is an Essential Aspect of Claim Preclusion
 and Must be Considered or Claim Preclusion Would
 Have No Effect..... 19

IV. Appellant’s Unjust Enrichment Claim Fails as a
Matter of Law 21

V. No Injustice will Result if the Lower Court Decision is
Upheld 22

VI. New Arguments Should Not be Made for the First Time
on Appeal..... 23

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

<i>Baxter v. Dignity Health</i> , 357 P.3d 927, 930 (Nev. 2015).....	14
<i>Bower v. Harrah’s Laughlin, Inc.</i> , 215 P.3d 709, 718 (Nev. 2009).....	10
<i>Certified Fire Prot. Inc. v. Precision Constr.</i> , 283 P.3d 250, 257 (Nev. 2012).....	22
<i>Five Star Capital Corp. v. Ruby</i> , 194 P.3d 709, 712 (Nev. 2008).....	15
<i>Hampe v. Foote</i> , 118 Nev. 405, 408, 47 P.3d 438, 439 (2002).....	14
<i>Old Aztec Mine, Inc. v. Brown</i> , 97 Nev. 49, 52, 623 P.2 nd 981, 983 (Nev. 1981)	24
<i>Schoenleber v. Harrah's Laughlin, Inc.</i> , 423 F. Supp. 2d 1109, 1112 (D. Nev. 2006)	20
<i>Stockmeier v. Nevada Dept. of Corrections Psychol. Rev. Panel</i> , 183 P.3d 133, 135 (Nev. 2008).....	14
<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency</i> , 322 F.3d 1064, 1081-82 (9th Cir. 2003).....	20
<i>Tobin v. Stokes</i> , 79295-COA, 2021 Nev. App. Unpub. LEXIS 199, 2021 WL 1401498 (Nev. App. Apr. 12, 2021).....	7
<i>U. of Nevada v. Tarkanian</i> , 879 P.2d 1180, 1191–92 (Nev. 1994).....	15
<i>U.S. v. ITT Rayonier</i> , 627 F.2d 996, 1003 (9th Cir.1980).....	20

Unionamerica Mtg. v. McDonald,
97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981)..... 22

Weddell v. Sharp,
350 P.3d 80, 85 (Nev. 2015)..... 15, 16, 20

RULES

NRCP 12(b)(5) 14

TREATISES

18A Charles Alan Wright, et al.,
Federal Practice and Procedure § 4464.1 (2d ed.2002)..... 16

ROUTING STATEMENT

Pursuant to NRAP 17, this case is neither required to be maintained by this Court, nor is it 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 PRESENTED FOR REVIEW

1. Was the lower court's dismissal of Appellant's claims proper given that identical causes of action involving the same parties were previously dismissed through a valid final judgment?
2. Should privity be ignored when considering the doctrine of claim preclusion?
3. Is Appellant in privity with the Trust that she was the trustee and sole beneficiary of? and, is an association's designated collection agent in privity with the association?
4. Was Appellant's claim for unjust enrichment properly dismissed since she provided no benefit to Red Rock?
5. Will injustice result if Appellant's identical claims are not allowed to be relitigated?
6. Can Appellant raise new arguments for the first time on appeal?

STATEMENT OF THE CASE

This appeal primarily concerns whether claim preclusion applies to parties and their privities. Appellant Nona Tobin (“Appellant” or “Tobin”) suggests that this Court’s consistent application of claim preclusion to parties and their privities should be disregarded so she can void a homeowner foreclosure sale that occurred way back in 2014. That sale was conducted on behalf of Sun City Anthem Community Association (the “HOA”) by Red Rock Financial Services (“Red Rock”), and Appellant has already challenged the foreclosure in a prior case; however, Appellant’s challenge failed as the lower court and intermediate court of appeals specifically found that the HOA’s 2014 sale was properly conducted.

Undeterred, Appellant filed a brand new suit – this case – raising the same claims that failed in the first matter. Red Rock filed a motion to dismiss based on claim preclusion, and nonmutual claim preclusion, which was joined by the other respondents. The lower court correctly entered an order dismissing Appellant’s causes of action because all of the elements of claim preclusion and nonmutual claim preclusion applied barring Appellant’s second suit. Appellant appealed the order.

STATEMENT OF THE FACTS

A. Appellant is Impermissibly Seeking Permission to Relitigate the Same Facts and Issues.

The claims Appellant brought in this action have already been litigated and dismissed in a previous case. Appellant would have this Court believe that no court has actually considered any of her claims. That is not true, and Appellant ignores the fact that courts have addressed her claims several times, each time finding the claims have no merit since Red Rock properly conducted the underlying foreclosure at issue.

B. Tobin Unsuccessfully Brings Claims Against the HOA and Other Respondents.

The first action arose in 2015 as District Court Case No. A-15-720032-C (the “First Action”) when the successors-in-interest to the purchasers at the HOA foreclosure sale brought suit to quiet title the property in their name. The foreclosure sale occurred on August 15, 2014, and involved the property located at 2763 White Sage Drive, Henderson, Nevada 89052 (the “Property”). [AA 3666-75; Finding of Fact No. 30.] At the time of the sale, the Property was owned by the Gordon B. Hansen Trust (the “Trust”). [*Id.*; Finding of Fact No. 3.]

As part of the First Action, Appellant, in her capacity as successor trustee of the Trust, filed a crossclaim against the HOA on January 31, 2017

(the “Crossclaim”) asserting that the HOA, through its collection agent Red Rock, wrongfully foreclosed on the Property. [AA 3272-93.] The central allegation in the Crossclaim was that Red Rock committed fraud and wrongfully colluded with several parties, including the HOA, in foreclosing on the Property without complying with the requirements of NRS Chapter 116 or the HOA’s governing documents. [*Id.*; see AA 3276-3292.] The Crossclaim listed a host of allegations of wrongdoing against Red Rock, including claims that Red Rock failed to provide the Trust with proper notice of the foreclosure sale and that Red Rock misstated the amounts due and owing to the HOA under the HOA lien. [*Id.*]

The Crossclaim contained a cause of action against the HOA for quiet title and equitable relief claiming that Red Rock’s actions caused the foreclosure sale to be null and void. [*Id.*] Appellant also brought causes of action for civil conspiracy, fraud, unjust enrichment, and breach of contract. The allegations of each of those claims centered around Red Rock. [*Id.*] The Crossclaim alleged it was Red Rock that conspired, Red Rock that committed fraud, Red Rock that was unjustly enriched, and Red Rock that breached the contract. Curiously enough, however, the Crossclaim only named the HOA and did not include Red Rock as a party to that case. [*Id.*]

Despite the fact that the HOA foreclosure extinguished the Trust's interest in the Property, Appellant, in her capacity as the trustee of the Trust, recorded a wild deed on March 28, 2017, purporting to transfer the Property to Appellant, in her individual capacity. [AA 3813-17 and AA 4176-79.]

On February 5, 2019, the HOA brought a motion for summary judgment seeking dismissal of the Crossclaim. [AA 3369-3388.] The HOA argued that Red Rock complied with all requirements of law in foreclosing on the Property, and the HOA carefully presented the trial court with all of the notices Red Rock provided. [*Id.*] Appellant, on behalf of the Trust, filed an opposition attempting to defend her allegations with a self-serving declaration from Appellant claiming the Trust owned the Property. [AA 3545-3571.] On April 17, 2019, the lower court in the First Action issued an order granting the HOA's motion in its entirety reasoning that "[t]he totality of the facts evidence that the HOA properly followed the processes and procedures in foreclosing upon the Property." [AA 3834-43; emphasis added.]

As part of the First Action, Appellant, as the trustee of the Trust, also pursued identical claims against the other respondents or their predecessors-in-interest. [AA 3677-3700.] After a trial on the merits, the lower court issued an order on June 24, 2019, denying each of Appellant's claims

because the claims were precluded by the order granting the HOA's motion for summary judgment and because Red Rock complied with all requirements of law in foreclosing on the Property. [AA3123-36.] The court applied issue and claim preclusion as it pertained to the other parties. [*Id.*; see Conclusion of Law Nos. 2-4.]

In addition, the lower court found that even if the claims were not barred by issue and claim preclusion, the counterclaims failed based on Appellant's own trial testimony in which she acknowledged the Property had been subject to multiple short sales, the Trust was in default with the lender and the HOA, and Appellant had received the Notice of Foreclosure Sale. [*Id.*; see Conclusion of Law No. 5.]

Appellant appealed the First Action and the court of appeals denied the appeal. *See Tobin v. Stokes*, 79295-COA, 2021 Nev. App. Unpub. LEXIS 199, 2021 WL 1401498 (Nev. App. Apr. 12, 2021). In a detailed opinion, the Nevada Court of Appeals affirmed the district court judgment in the First Action, finding that the HOA foreclosure was valid because the Trust was continuously in default on obligations that were properly included in the HOA's lien from the date the underlying notice of delinquent assessment lien was recorded to the date of the foreclosure sale. [*Id.*]

C. Appellant Brings this Second Action Seeking Again to Invalidate the 2014 Sale.

Shortly after all of her claims were denied at trial in the First Action, Appellant refused to acknowledge her defeat and filed a whole new complaint against Red Rock and the other respondents on August 7, 2019, which she amended on June 3, 2020. [AA 3191-3221, AA 3239-56.] Appellant brought the claims, not as a trustee, but in her individual capacity now alleging that she personally was the owner of the Property at the time Red Rock foreclosed. [AA 3239-56.] Other than asserting claims in her individual capacity, Appellant's second action was nearly identical to the First Action and alleged, once again, that Red Rock did not comply with the requirements of law in foreclosing on the Property in August 2014. [*Id.*] The amended complaint contained a claim for quiet title, declaratory relief, and unjust enrichment against Red Rock, all claiming that the foreclosure sale was wrongful because Red Rock failed to provide proper notice to Appellant and apparently misstated the amounts due and owing to the HOA under the HOA lien. [*Id.*]

On June 23, 2020, Red Rock filed a motion to dismiss Appellant's new case arguing that each of Appellant's claims against Red Rock were barred by the doctrines of claim preclusion and/or nonmutual claim preclusion. [AA 3257-3776.] Red Rock filed its motion based on the

allegations in the amended complaint. [*Id.*] Red Rock’s motion to dismiss was joined by the other respondents. [See, e.g., AA 3777-3800.] On July 20, 2020, Tobin filed an opposition to the motion to dismiss asserting that the parties had to be the same and there should be no consideration of privity. [AA 4255-4343.]

The district court granted the motion to dismiss in its entirety and an order was entered on December 3, 2020 dismissing Appellant’s claims. [AA 4486-4510.] The district court reasoned that the doctrines of claim preclusion and nonmutual claim preclusion applied, and made the following legal findings:

“24. In this case, there was a valid final judgment on all of the claims Tobin brought against the HOA and all other parties to the foreclosure sale. In granting summary judgment and issuing a decision after a bench trial, the trial court in the previous action finally held that the foreclosure conducted by Red Rock was lawful and that Tobin’s claims were all improper.

25. The current action is based on the same claims that were or could have been brought in the first action. In both actions Tobin is challenging the validity of the foreclosure sale conducted by Red Rock based on Red Rock’s actions during the foreclosure sale.

26. The plaintiff in this action is the same or in privity to the plaintiff in the previous action. While Tobin did file on behalf of the Trust in the first case and in her individual capacity in this case, Tobin as an individual is clearly in privity with Tobin as a trustee. Tobin obtained her interest in the Property that was the subject of the previous action through the Trust by inheritance, succession, or purchase, and, even if Tobin were not the trustee of the Trust, she would be in privity with the Trust. *See, Bower v. Harrah's Laughlin, Inc.*, 215 P.3d 709, 718 (Nev. 2009).

27. All of the Defendants or their privities were or should have been named in the previous action.”

[*Id.*]

In light of another negative ruling, Appellant filed the instant appeal.

D. No Party Prevented Tobin From Previously Filing Suit in Her Individual Capacity.

Contrary to Appellant's assertions in her opening brief, she, as an individual, never properly or timely attempted to file any pleadings to appear in the First Action. While she asserts that she obtained an order to intervene in the First Action [AA 4255-4343; see Opposition at 3:10-14], it is clear from a review of the order that Appellant as trustee of the Trust was allowed to intervene, not Appellant the individual. [AA 4269-71; see, Exhibit 1 of

Tobin's Opposition.] Thereafter, Appellant, as trustee, filed her cross-claims wherein she alleged that the Trust owned the Property. [AA 3272-93; see, Exhibit 1 to Red Rock's Motion to Dismiss.]

After Appellant, as trustee, lost her claims on summary judgment and at trial, and after her counsel received an oral ruling granting a motion to withdraw, Appellant, representing herself, began filing a number of motions in her individual capacity. This caused some confusion with the lower court, but the district court finally determined that Appellant as an individual had never appeared in the First Action and that all of her motions were rogue filings. [AA 4278-88; *see* Exhibit 3 of Appellant's respective opposition.]

Appellant was given the opportunity to participate in the First Action in her individual capacity, but she did not. If she had claims to assert individually she could have properly and timely intervened just as she did for the Trust. Based upon Appellant's assertion that the Property was owned by the Trust, she did not intervene in her individual capacity. Once the Trust lost the First Action, Appellant then changed her position asserting her individual ownership of the Property. Appellant's attempt to subsequently paint herself as a victim who never had her day in court because of the actions of the other parties and the courts is inaccurate and dishonest.

There is no doubt that Appellant as an individual is in privity with Appellant as a trustee.

E. Red Rock is and was in Privity With the HOA.

Although Red Rock was not an actual litigant in the First Action, the pleadings show that Red Rock should have been named in the previous suit and Appellant has no good reason for excluding Red Rock from the First Action. Red Rock was the designated collection agent for the HOA, and it was Red Rock's actions that were the basis of Appellant's allegations to void the HOA's foreclosure sale of the Property.

Red Rock was the focal point of the First Action and the primary antagonist of the Crossclaim and related counterclaims. Red Rock is mentioned in a majority of the paragraphs in those pleadings. [AA 3272-93.] The entirety of the causes of action in the Crossclaim against the HOA read as though Appellant intended to name Red Rock, and only failed to name Red Rock as an unintended oversight. The actions of Red Rock were, moreover, the focal point of the HOA's motion for summary judgment and the trial on the merits. [AA 3369-3543; AA 3123-36.] Red Rock would certainly qualify as a necessary party to the First Action under NRCP 19, and Appellant erred in failing to timely name Red Rock.

By the time Appellant tried to formally add Red Rock as a party in the First Action, the case was four years old and three months from the close of discovery. Contrary to what Appellant represented in her opening brief, however, the lower court granted her motion with limitations based upon Appellant's own representations in open court. [AA 3762-63.] Specifically, the minutes from the January 10, 2019 hearing show that Appellant's counsel was present for the unopposed motion to amend, and counsel represented that Appellant was not seeking to add any new claims; based on the court's understanding of the representations, the lower court granted the motion clarifying that Appellant was not adding parties or cross-claims, to which there was no objection. [*Id.*]

The motion to amend was not the only chance to add Red Rock. In another order two years prior, on January 10, 2017, Appellant was granted permission to intervene, as trustee of the Trust, and was ordered to file any Crossclaims within 20 days of entry of that order; Appellant did not file any crossclaims against Red Rock. [AA 4269-71.]

In summary, Appellant had multiple opportunities to name Red Rock in the First Action, and without question she could have named Red Rock in the Crossclaim where all the allegations revolved around Red Rock's actions. [AA 3272-93.] For whatever reason, following the time

Appellant's motion to intervene was granted, she waited two years to amend her pleadings, and even then the lower court granted her motion to amend but no formal claims were filed. [AA 3762-63.] Appellant had ample opportunities to name Red Rock in the First Action, and she does not get the opportunity to retry all of her failed claims that were properly dismissed based on claim preclusion.

SUMMARY OF THE ARGUMENT

The district court properly dismissed Appellant's amended complaint based on claim preclusion and non-mutual claim preclusion. There is no injustice in allowing the lower court's decision to stand.

ARGUMENT

I. Standard of Review

When this Court reviews a district court's dismissal of an action pursuant to NRCP 12(b)(5) for failure to state a claim, it determines whether "the allegations [in the complaint] are insufficient to establish the elements of a claim for relief." *Stockmeier v. Nevada Dept. of Corrections Psychol. Rev. Panel*, 183 P.3d 133, 135 (Nev. 2008) (quoting *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002)). In evaluating a motion to dismiss, this Court "primarily focus[es] on the allegations in the complaint," but it is not limited to the four corners of the complaint. *Baxter v. Dignity Health*,

357 P.3d 927, 930 (Nev. 2015). The court will consider a copy of any written instrument attached as an exhibit to the pleading as well as unattached evidence if the evidence is mentioned in the complaint, the document is central to the plaintiff's claim, and no party questions the authenticity of the document. *Id.*

In this case, the allegations contained in the amended complaint were insufficient to establish the elements of any claim for relief because Appellant alleged facts that irrefutably demonstrate her claims are barred by the doctrine of claim preclusion.

II. The Lower Court Did Not Err in Finding as a Matter of Law that Claim Preclusion Applied to Appellant's Second Identical Case.

The lower court properly applied the doctrine of claim preclusion in this matter. In general, claim preclusion is designed to prevent plaintiffs from filing any claims that were or could have been asserted in a different suit. *U. of Nevada v. Tarkanian*, 879 P.2d 1180, 1191–92 (Nev. 1994). This doctrine is designed to “obtain finality by preventing a party from filing another suit that is based on the same set of facts that were present in the initial suit.” *Weddell v. Sharp*, 350 P.3d 80, 85 (Nev. 2015) (quoting *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 712 (Nev. 2008)). The concept of nonmutual claim preclusion, which has been expressly adopted by this Court, extends the doctrine and “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] cannot show any good reasons to justify a second chance.’ ” *Weddell v. Sharp*, 350 P.3d 80, 84–85 (Nev. 2015) (quoting 18A Charles Alan Wright, et al., Federal Practice and Procedure § 4464.1 (2d ed.2002) (emphasis added).

Courts apply the doctrines of claim preclusion and nonmutual claim preclusion when:

- (1) There is a valid final judgment,
- (2) a subsequent action is based on the same claims or any part of them that were or could have been brought in the first action, and
- (3) “the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, or the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a ‘good reason’ for not having done so.”

Id. at 85.

Here, there was a valid final judgment on all of the claims Appellant brought against the HOA and all other parties to the foreclosure sale. In granting summary judgment and issuing a decision after a bench trial, the

trial court in the First Action finally held that the foreclosure conducted by Red Rock was lawful and that Appellant's claims were all improper. The lower court, in granting summary judgment in favor of the HOA in the First Action, found that "[t]he totality of the facts evidence that the HOA properly followed the processes and procedures in foreclosing upon the Property." Despite Appellant's attacks against Red Rock's actions, the lower court found that Red Rock properly conducted the foreclosure sale.

Furthermore, the current action is based on the same claims that were or could have been brought in the First Action. In both actions Appellant is challenging the validity of the foreclosure sale conducted by Red Rock based on Red Rock's actions in connection with that foreclosure sale. In both actions, Appellant asserts that Red Rock acted wrongfully for a host of reasons that are nearly identical in both cases and include claims that Red Rock failed to provide proper notice and misstated the amounts due and owing under the HOA lien. Each and every claim in the First Action and this action stem from those same allegations. All of the claims Appellant brought in this action, she brought in the First Action. If there were new claims in this case, those new claims certainly could have been brought in the First Action since this case is based on the exact same claims and exact same facts as in the First Action.

In regard to the parties, Appellant is the same or in privity to the plaintiff in the First Action. Appellant filed the First Action on behalf of the Trust and then filed this case in her individual capacity, presumably to avoid claim preclusion, which is impermissible. Appellant as an individual, however, is clearly in privity with Appellant as the trustee (and certainly where the trustee is pursuing Appellant's interests as the only alleged beneficiary of the Trust). The parties are, in fact, the same flesh and blood person. Appellant cannot avoid claim preclusion just by switching masks or by formulating new ownership theories of the Property.

Red Rock, on the other hand, was not named as a defendant in the First Action, but Red Rock's principal, the HOA, was in the middle of the action. As discussed above, Red Rock was the focal point of the First Action and the primary antagonist of the Crossclaim and related counterclaims. The entirety of the causes of action in the Crossclaim against the HOA read as though Appellant intended to name Red Rock, and only failed to name Red Rock as an unintended oversight. The actions of Red Rock were, moreover, the focal point of the HOA's motion for summary judgment and the trial on the merits. Red Rock would certainly qualify as a necessary party to the First Action under NRCP 19, and Appellant erred in failing to timely name Red Rock. Appellant had no good reason not to name

Red Rock in the First Action, and she does not get the opportunity to retry all of her failed claims just because she previously made mistakes in naming parties.

This case is essentially the poster child for nonmutual claim preclusion. In fact, the doctrine seems specifically designed to address Appellant's inequitable efforts to parcel out her claims in front of different courts in hopes that something will stick. If the doctrine does not apply here, it will not apply anywhere. The lower court correctly applied the doctrine of claim preclusion in dismissing, with prejudice, Appellant's claims in their entirety. Appellant offers this Court nothing in her opening brief to justify a reversal of the lower court's decision.

III. Privity is an Essential Aspect of Claim Preclusion and Must be Considered or Claim Preclusion Would Have No Effect.

Despite the well-settled application of claim preclusion by this Court, Appellant's appeal suggests that nonmutual claim preclusion should be discarded. Appellant suggests that she should be permitted to relitigate claims finally dismissed in the First Action because Red Rock was not previously a litigating party and because Appellant brought the First Action as a trustee and brought the current case as an individual. While Appellant's suggestion would certainly be convenient for her own unwarranted litigious purposes, the law is not on her side.

Appellant flatly ignores the fact that claim preclusion applies when “the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit.” *Weddell v. Sharp*, 350 P.3d 80, 85 (Nev. 2015) (emphasis added). As discussed above, Red Rock’s actions were the centerpiece of the First Action, and Red Rock was the designated agent for the HOA, who actively litigated the First Action. Red Rock is undoubtedly in privity with the HOA. Likewise, Appellant the trustee is surely in privity with Appellant the individual. This was the central argument not only of Red Rock’s motion, but of all of the joinders to the motion. Appellant dealt with the argument by ignoring it entirely, and she would have this Court turn a blind eye and completely ignore the concept of privity.

Privity is commonly seen as a “flexible concept dependent on the particular relationship between the parties in each individual set of cases.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency*, 322 F.3d 1064, 1081-82 (9th Cir. 2003). “Courts have recognized that a non-party may be bound if a party is so closely aligned with its interests as to be its ‘virtual representative.’” *Schoenleber v. Harrah's Laughlin, Inc.*, 423 F. Supp. 2d 1109, 1112 (D. Nev. 2006) (quoting *U.S. v. ITT Rayonier*, 627 F.2d 996, 1003 (9th Cir.1980)). There can be no doubt that Appellant is in privity with herself. Her interests are exactly the same as an individual as they were

as a trustee, which was to preserve title to the Property by voiding the HOA's foreclosure sale.

Claim preclusion prevents subsequent actions by privies specifically to prevent the types of games Appellant is now playing. The doctrine does not overlook wily parties that attempt to avoid final outcomes by slightly altering their legal identity. This is especially true when the same exact individual is bringing suit. As such, Appellant should not be permitted to bring suit on the theory that the Trust owned the Property, then transfer the Property into her own name through a "wild deed", continue to prosecute her action as a trustee, and then file a new suit in her individual capacity after losing as a trustee in the First Action. Appellant is in privity with herself and her claims are precluded.

IV. Appellant's Unjust Enrichment Claim Fails as a Matter of Law.

Even if claim preclusion did not apply, Appellant incorrectly argues that Red Rock's retention of excess proceeds forms the basis of her unjust enrichment claim. In Nevada, "unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.'" *Certified Fire Prot. Inc. v.*

Precision Constr., 283 P.3d 250, 257 (Nev. 2012) (quoting *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981)).

Not only did Appellant not confer any benefit, but Red Rock has not retained any of the benefits that form the basis of her claims. Red Rock has 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. The excess proceeds have been retained through the ongoing litigation since Appellant was seeking to void the foreclosure sale, but once Appellant's claims in this matter were dismissed with prejudice, Red Rock was able to interplead the funds (and as discussed below, that process has already been initiated). In fact, Red Rock has been forced to retain the excess proceeds far longer than it normally would have because of Appellant's repetitive filings and appeals. If Appellant chooses to assert an interest in the excess proceeds, an action for unjust enrichment is an inappropriate vehicle to make such a claim. The unjust enrichment claim was properly dismissed.

V. No Injustice Will Result if the Lower Court Decision is Upheld.

Appellant's argument that an injustice will occur if she is not allowed to proceed with her claims against Red Rock is without merit and her reasoning is circular. First and foremost, if the lower court's decision were

to be reversed, then that means the doctrine of claim preclusion is no more. That would be an enormous injustice.

Addressing Appellants arguments more directly, she suggests that because Red Rock is holding the excess proceeds the Court should reverse and remand to allow her to continue to litigate. This is where Appellant's reasoning becomes dizzyingly circular because Appellant's claims in the First Action focus on quiet title and declaratory relief – Appellant is overtly seeking to have the foreclosure sale set aside and voided so she can be declared the rightful owner of the Property. Not only has this argument been rejected over and over again, but if it were correct that the 2014 sale should again be considered by the lower courts, then that would mean all the parties go back to square one. If at the end of another full round of litigation the sale were actually set aside, Appellant would have no right to claim the excess proceeds because they would then go back to the original purchaser. This type of repetitive litigation would be a gross misapplication of the law, and an extreme waste of court resources and party resources.

In order to prevent injustice, the Court should dismiss Appellant's appeal.

VI. New Arguments Should Not be Made for the First Time on Appeal.

As noted by the Chiesi Respondents in footnote 1 of their answering

brief, Appellant’s opening brief raises new arguments for the first time on Appeal. This is improper. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2nd 981, 983 (Nev. 1981). The notion that Appellant is now abandoning her rights to the Property and instead asserting a claim to excess proceeds from the 2014 foreclosure sale is a new twist – though it is completely untruthful.

Appellant fails to inform the Court that an interpleader action is already pending in the Eighth Judicial District Court as Case No. A-21-828840-C. That case was initiated on February 3, 2021, shortly after Appellant’s claims underlying this appeal were dismissed, with prejudice. Given that Appellant’s second action to void the foreclosure sale failed, an interpleader is now proper so the district court can make a determination regarding who should receive those excess proceeds.

Appellant’s new alleged plan to abandon rights to the Property is severely undercut by Appellant’s actions in the interpleader case.¹

CONCLUSION

Each of Appellant’s claims are barred by the doctrine of claim preclusion and nonmutual claim preclusion as they are based on the same

¹ Appellant has appeared in that case, and she is again aggressively attempting to void the HOA’s 2014 foreclosure sale.

claims against the same parties or their privies, and the lower court entered a valid final judgment. Moreover, privity cannot be ignored when applying claim preclusion. Appellant should not be permitted to re-write the doctrine of claim preclusion.

Appellant's new assertions pertaining to excess proceeds are improperly raised for the first time on appeal, but Appellant's unjust enrichment claim nonetheless fails as a matter of law since she provided no benefit to Red Rock, nor did Red Rock appreciate or accept such a benefit.

For all the reasons discussed above, and as discussed in the Chiesi Respondents' answering brief, this Court should affirm the district court.

DATED November 15, 2021.

Respectfully submitted,

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NRAP 28.2 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 (a)(6) because: this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32 (a)(7)(c), it is proportionately spaced, has a type face of 14 points and contains 5,854 words.

3. Finally, I hereby certify that I have read this Respondent Red Rock Financial Service’s Answering 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 Nevada Rules of Appellate Procedure.

Dated: November 15, 2021

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