IN THE SUPREME COURT OF THE STATE OF NEVADA

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NAVNEET SHARDA, an individual; TRATA INC., a Nevada corporation, Appellants, v. STEVEN BARKET, an individual, et al. Respondents.	Appeal No.: 82360 Nature of Proceedings: Appeal Court below: Eighth Judicial District Court of Nevada**,** Case No.: A-17-756274-C

APPELLANTS NAVNEET SHARDA AND TRATA INC.'S REPLY 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) that must be disclosed. These representations are made in order that the judges and justices of this court may evaluate possible disqualification or recusal.

Appellant TRATA, INC. is a Nevada corporation with no publicly held corporation owning ten percent (10%) or more of its interests, nor is it owned by a parent corporation.

Cory Reade Dows & Shafer represent the Appellants in this proceeding, and there is no parent corporation or publicly held company that owns 10% or more of its stock.

The following attorneys of the law firm Cory Reade Dows & Shafer have appeared for the Appellants: R. Christopher Reade, Esq.

Dated this 28th day of October 2021.

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STATEMENT OF FACTS

NAVNEET SHARDA (as well as SHARDA's entities CANCER CARE FOUNDATION and TRATA INC.) (hereinafter referred to as "SHARDA Appellants") made a series of four (4) loans to and against Shafik Hirji, Shafik Brown and Furniture Boutique LLC (hereinafter referred to as HIRJI Respondents) through Plaintiff STEVEN BARKET.

1. **Loan 1**: November 7, 2016, in the amount of $200,000.00. (I JA 149-167)
2. **Loan 2**: December 20, 2016, in the amount of $100,000.00. (I JA 186-204)
3. **Loan 3**: January 20, 2017, in the amount of $1,000,000.00. (I JA 205-223)
4. **Loan 4**: March 15, 2017, in the amount of $200,000.00. (II JA 268-284)

A. The Underlying Action

BARKET coerced the HIRJI Respondents to sign Change in Terms ("CIT") Agreements and Confessions of Judgment for each of the underlying Promissory Notes. (V JA 886-937) Ultimately on June 1, 2017 in the underlying action, BARKET sued the HIRJI Parties and SHARDA Parties alleging that BARKET was blocked from collecting on the underlying Notes and was entitled to enforce the underlying Notes. (I JA 1-16). In July 2017, BARKET coerced the SHARDA Parties into signing a Settlement Agreement to assign to BARKET the rights to collect on the Promissory Notes, CIT Agreements and Confessions of Judgment. (II JA 251-257) On August 11, 2017, SHARDA and TRATA filed Counterclaims against

BARKET for (1) Breach of Contract; (2) Breach of Duty of Good Faith and Fair Dealing; and (3) Tortious Interference with Contractual Relations (collectively "Counterclaims"). (XI JA 2211-2219) The nature of the dispute alleged in the Counterclaims was based solely on an Agreement dated August 15, 2016 (hereinafter "Agreement") (II JA 289-295), between Appellant Sharda and Respondent prohibiting the parties from disparaging one another. The Agreement also contained the following liquidated damages clause:

"The parties agree that in the event of a breach of this Agreement, the aggrieved party shall be entitled to liquidated damages in the amount of $250,000.00, which is intended to compensate aggrieved party for the difficult-to-calculate loss the aggrieved party would suffer from as a result of the other party's breach of this Agreement." (II JA 289-295)

This Agreement *was separate and apart* from the facts and circumstances surrounding the series of four loans and allegations asserted by Plaintiffs in Case No. A-17-756274-C.

At some point after the Agreement was signed by the parties, Respondent violated the Agreement by causing to be created a website (http://navneetshardaexamined.com) (hereinafter "Barket Website"), for the sole purpose of posting disparaging information of Appellant and casting a negative and false light onto Appellant.

B. The Williams Action

On November 1, 2017, BARKET filed a separate suit against the HIRJI Parties in Case A-17-763985-C as "Cancer Care Foundation Inc. v. Hirji *et. al*" and more specifically filed a Confession of Judgment for $1,213,088.50 on Loan 1 and Loan 2. The Action was assigned to the Honorable Timothy Williams. On April 5th, 2018, the Honorable Timothy Williams voided the underlying Confession of Judgment (III JA 515-521) in favor of CANCER CARE FOUNDATION and being enforced by BARKET on grounds that questions remained as to the validity of the subsequent Confessions of Judgment but did not void the underlying obligations or loan agreements to pay CANCER CARE FOUNDATION back its monies in accordance with the Secured Promissory Notes. The Order was very specific that the Confession of Judgment may not be used as the basis for the entry of Judgment as against Defendants; however, the Court did not rule that the underlying obligations were voided.

C. The Cadish Action

On November 1, 2017, BARKET filed a separate suit against the HIRJI Parties in Case A-17-763995-C as "Trata Inc. v. Hirji *et. al*" and more specifically filed a Confession of Judgment for $3,582,105.99 on Loan 3 and Loan 4. (III JA 384-418) The Action was assigned to the Honorable Elissa Cadish. On April 17th, 2018, the Honorable Elissa Cadish voided the underlying Confession of Judgment.

(III JA 522-530) in favor of TRATA and being enforced by BARKET but did not void the underlying obligations or loan agreements to pay TRATA back its monies in accordance with the Secured Promissory Notes. The Order was very specific that the Confession of Judgment may not be used as the basis for the entry of Judgment as against Defendants; however, the Court did not rule that the underlying obligations were voided.

D. Judge Earley Misinterprets the Earlier Orders

On November 19, 2020, the District Court in the underlying case heard the following pending Motions, Replies, and Oppositions between Plaintiffs and Defendants Hirji, Brown, and Boutique. These Motions, Replies, and Oppositions were the sole consideration before the District Court. At no point were the Counterclaims, nor the facts and circumstances surrounding the Counterclaims discussed at this hearing. The District Court erroneously granted the Motion to Dismiss all of the claims at bar and effectively ruled that the HIRJI Parties were exonerated of their debts on the underlying obligations. However, on December 4, 2020, the District Court filed a Civil Order to Statistically Close Case, citing Involuntary Dismissal.

On December 14, 2020, the District Court filed its "NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR NOVEMBER 19, 2020 ORDER DISMISSING PLAINTIFFS' MATTER WITH PREJUDICE."

The District Court based its "ORDER DISMISSING PLAINTIFFS' MATTER WITH PREJUDICE" (VI JA 1156-1171) on the doctrine of claim preclusion. Specifically, the district court ruled that the following Confessions of Judgment regarding the loans had previously been filed and considered void by various courts:

1. **Loan 1**: Confession of Judgment declared void by Judge Williams in Case No. A-17-763985-C, Order entered April 5, 2018. (III JA 515-521)
2. **Loan 2**: Confession of Judgment declared void by Judge Williams in Case No. A-17-763985-C, Order entered April 5, 2018. (III JA 515-521)
3. **Loan 3**: Confession of Judgment declared void by Judge Cadish in Case No. A-17-763995-C, Order entered April 17, 2018. (III JA 522-530)
4. **Loan 4**: Confession of Judgment declared void by Judge Cadish in Case No. A-17-763995-C, Order entered April 17, 2018. (III JA 522-530)

The court dismissed BARKET's matter with prejudice because the nature of the dispute between Plaintiffs and Defendants surrounded these four loans, and the Confessions of Judgment filed to enforce these loans were considered void in prior proceedings. Judge Earley was incorrect: the Confessions of Judgment were void; *the underlying loans were never declared void*. Judge Earley overreached and invalided the underlying promissory notes when only the CITs and COJs were at issue.

ARGUMENT

I. THE DISTRICT COURT OVERREACHED WHEN IT DISMISSED THE SHARDA APPELLANTS' COUNTERCLAIMS

Nothing in Respondents' Answering Brief can change the fact that the District Court Judge overreached when Judge Earley dismissed the SHARDA Appellants' Counterclaims which were never litigated and even mentioned in the December 14, 2020 FFCL. (VI JA 1156-1171) As this Court is aware, Orders of Dismissal are subject to a rigorous standard of review on appeal under which the appellate court must recognize all factual allegations in the Complaint as true and draw all inferences in favor of SHARDA Appellants. Buzz Stew, L.L.C. v. City of N. Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). The review of a district court's conclusions of law is *de novo*. We review a district court's conclusions of law, including whether claim or issue preclusion applies, *de novo*. Id.; G.C. Wallace, Inc. v. Eighth Judicial Dist. Court, 127 Nev. 701,___,262 P.3d 1135, 1137 (2011).

While Judge Earley used the invalidation of the CITs and the COJs as a basis for dismissal of the entire action, she improperly concluded that the underlying loans were void as well. Judge Earley was incorrect: the Confessions of Judgment were void; *the underlying loans were never declared void*.

Even if Judge Early considered this as a Motion for Summary Judgment, which she did not, even under that rigorous standard it is undisputed that the Counterclaims were never addressed or considered by the District Court and therefore those unaddressed counterclaims survive any motion to dismiss or even a summary judgment motion if converted as the FFCL is silent as to the counterclaims. Schneider v. Continental Assur. Co, 110 Nev. 1270, 1271, 885 P. 2d 572, 573 (1994). Moreover, there are questions of material fact regarding the CITs and COJs which were the subject of Judge Earley's ruling. Again, even more reason to reverse and remand back to the district court.

Nonetheless, with all factual allegations and all inferences drawn in favor of the SHARDA Appellants, it is quite evident that the District Court failed to address the Counterclaims as there is no mention of the counterclaims in the December 14, 2020 FFCL or the hearings leading up to the ruling. (VI JA 1156-1171)

II. SHARDA AND TRATA, INC. HAVE STANDING TO APPEAL THE DISTRICT COURT'S FINDINGS OF FACT ENTERED ON DECEMBER 14, 2020.

Respondents have clearly demonstrated their willingness to do and say anything in order to not have to repay the more than One Million Five Hundred Thousand Dollars ($1,500,00.00) in loans owed to the SHARDA Appellants. And so, Respondents have contrived and concocted a fable that the SHARDA Appellants do not have standing to appeal the December 14, 2020 FFCL. This

argument fails because the SHARDA Appellants have never waived or litigated their rights to be repaid on their loan proceeds. The only questions that have been litigated is whether the BARKET-induced CIT Agreements and Confessions of Judgment (II JA 290-293) were valid and enforceable. Simply put, the underlying loans have never been litigated and have never been declared void. Just because the HIRJI Respondents successfully obtained Judgments that the CIT Agreements and/or Confessions of Judgment were not valid did not and does not invalidate the underlying promissory notes and, in fact the HIRJI Respondents still owe the SHARDA Appellants in excess of One Million Five Hundred Thousand ($1,500,000.00) in unpaid loans. But even if there were some validity (which there is not) to this argument that the right to repayment was not at issue in the District Court, then that would support a reversal and remand back to the District Court to address that issue. Because the District Court improperly dismissed the SHARDA Appellants' Counterclaim which involve the right to repayment of the underlying loans, a reversal and remand back to the District Court to litigate that the counterclaims is warranted and thus the SHARDA Appellants have standing to appeal the December 14, 2020 Findings of Fact and Conclusions of Law.

Respondents hem and haw that the Confidential Settlement Agreement (II JA 290-293) between SHARDA and BARKET deprives the SHARDA Appellants standing to appeal. However, this argument falls flat since the issue of whether the

Confidential Settlement Agreement and the right to be repaid is an issue for the District Court and frankly outside the scope of this appeal. This is even more reason for this matter to be reversed and remanded back to the District Court. Moreover, the Agreement (II JA 290-293) contained the following liquidated damages clause:

"The parties agree that in the event of a breach of this Agreement, the aggrieved party shall be entitled to liquidated damages in the amount of $250,000.00, which is intended to compensate aggrieved party for the difficult-to-calculate loss the aggrieved party would suffer from as a result of the other party's breach of this Agreement." (II JA 289-295) This Agreement *was separate and apart* from the facts and circumstances surrounding the series of four loans and allegations asserted by Plaintiffs in Case No. A-17-756274-C. At some point after the Agreement was signed by the parties, BARKET violated the Agreement by causing to be created a website (http://navneetshardaexamined.com) (hereinafter "Barket Website"), for the sole purpose of posting disparaging information of Appellant and casting a negative and false light onto Appellant. Simply put, the Counterclaims were never litigated and were improperly dismissed by the District Court. In essence, HIJI Respondents are asking this Court to essentially allow them to abscond with more than One Million Five Hundred Thousand Dollars ($1,500,000.00) in

unpaid loans owed to SHARDA Appellants. Such an egregious and inequitable result is untenable and unjust.

HIRJI Respondents make another erroneous argument that Respondent TRATA does not have standing to appeal because it was never properly joined as a party pursuant to NRCP 19 or NRCP 20, did not intervene pursuant to NRCP 24 and did not file a third-party complaint against BARKET pursuant to NRCP 14. However, this is an issue that is not the subject of this appeal and was not at issue in the district court. Furthermore, this argument fails since the District Court never considered the counterclaims in the December 14, 2020 FFCL and therefore TRATA has standing to appeal. A reversal and remand back to district court is warranted in order for the District Court to properly address the SHARDA Appellants' counterclaims.

III. THE DISTRICT COURT IMPROPERLY CLOSED THE CASE WHEN IT DISMISSED THE SHARDA APPELLANTS' COUNTERCLAIMS

HIRJI Respondents hold the untenable position that the District Court properly closed the case by dismissing all the claims, including Appellants' Counterclaims. Once again, HIRJI Respondents are wrong.

As fully elaborated in the Opening Brief, res judicata (claim preclusion) does not apply here, because Case No. A-17-756274-C commenced on June 1, 2017, and the Counterclaims were filed on August 11, 2017, which occurred *prior*

to the commencement of litigation of the cases voiding the Confessions of Judgment. Appellants' Counterclaims were not considered when the District Court made the decision as the Counterclaims are not mentioned anywhere in the order.

On November 19, 2020, the District Court in the underlying case heard the following Motions, Replies, and Oppositions between Plaintiffs and Defendants Hirji, Brown, and Boutique. These Motions, Replies, and Oppositions were the sole consideration before the District Court. At no point were the Counterclaims, nor the facts and circumstances surrounding the Counterclaims discussed at this hearing. The District Court erroneously granted the Motion to Dismiss all of the claims at bar and effectively ruled that the HIRJI Parties were exonerated of their debts on the underlying obligations. However, on December 4, 2020, the District Court filed a Civil Order to Statistically Close Case, citing Involuntary Dismissal. Judge Earley was incorrect: the Confessions of Judgment were void; *the underlying loans were never declared void*. Therefore, claim preclusion prohibited the Parties from relitigating these issues.

IV. APPELLANTS' COUNTERCLAIMS PREDATE THE CONFESSION OF JUDGMENTS AT ISSUE IN THE FINDINGS OF FACT ENTERED ON DECEMBER 14, 2020, CLAIM PRECLUSION DOES NOT APPLY.

As fully elaborated in the Opening Brief, res judicata (claim preclusion) does not apply here, because Case No. A-17-756274-C commenced on June 1, 2017, and

the Counterclaims were filed on August 11, 2017, which occurred *prior* to the commencement of litigation of the cases voiding the Confessions of Judgment. Specifically:

a. Case No. A-17-763985-C: Litigation commenced on November 01, 2017, when Confession of Judgment for Loans 1 and 3 were filed.
b. Case No. A-17-763995-C: Litigation commenced on November 01, 2017, when Confession of Judgment for Loans 4 and 5 were filed.
c. Case No. A-18-770121-C: Litigation commenced on February 23, 2018, when Confession of Judgment for Loan 2 was filed.
d. Case No. A-18-770121-C: Litigation commenced on December 13, 2019, when Confession of Judgment for Loan 2 was filed.

Moreover, on August 11, 2017, Appellants filed Counterclaims against Respondent in Case No. A-17-756274-C, which commenced on June 1, 2017. (XI JA 2221-2219) The Counterclaims at issue were properly brought in the first action between the parties and could not have been subsequently brought in any of the above referenced cases. Therefore, the District Court erred in dismissing the Counterclaims based on the doctrine of claim preclusion.

Finally, the District Court dismissed the entire matter based on claim preclusion because "[e]ach and every Confession of Judgment pertaining to the loans alleged by Plaintiffs have by been adjudicated," and the Counterclaims are

"based on the same claims or any part of them that were or could have been brought in the prior cases."

At no point were the Counterclaims, nor the facts and circumstances surrounding the Counterclaims discussed at the hearing dismissing this matter. In addition, the filed Order Dismissing the Matter with Prejudice did not make a factual finding to show the Counterclaims arose out of the same transaction or occurrence of the adjudicated cases cited above.

The District Court could not make such a finding, because the Counterclaims did not arise out of the same transaction or occurrence of these cited cases. The Counterclaims were based on an Agreement between Appellant Sharda and BARKET, whereas both parties agreed not to disparage the other. This Agreement was entered into well before the existence of the four (4) loans and was completely separate and apart from the facts and circumstances surrounding the series of four loans and/or Confessions of Judgment. As such, the pertinent facts of Appellants' Counterclaims and the voided Confessions of Judgment are not so logically related to those issues of judicial economy and fairness mandate that all issues be tried in one suit. Therefore, the District Court abused its discretion in dismissing the Counterclaims based on the doctrine of claim preclusion.

V. THE FINDINGS OF FACT ENTERED ON DECEMBER 14, 2020 DID NOT CONSTITUTE A FINAL JUDGMENT OF THE COUNTERCLAIMS FOR THE PURPOSES OF RES JUDICATA (CLAIM PRECLUSION)

As fully elaborated in the Opening Brief, "Generally, the doctrine of res judicata precludes parties ... from relitigating a cause of action or an issue which has been finally determined by a court...." University of Nevada v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994). We have recognized that "there are two different species of res judicata ... issue preclusion and claim preclusion." Id. at 598, 879 P.2d at 1191. Although often used to describe both "species," in its strictest sense, the term "res judicata" refers only to claim preclusion. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396, 399 (1974).

Pursuant to the rule of claim preclusion, "[a] valid and final judgment on a claim precludes a second action on that claim or any part of it." Tarkanian, 110 Nev. at 599, 879 P.2d at 1191. "Claim preclusion applies when a second suit is brought against the same party on the same claim." In re Medomak Canning, 111 B.R. 371, 373 n. 1 (Bankr. D.Me.1990). If, as in the instant case, "the prior judgment is in favor of defendant, plaintiff is 'barred' from bringing another claim based on the same cause of action." Id. We have further stated that "[t]he modern view is that claim preclusion embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader

reach than [issue preclusion].” Tarkanian, 110 Nev. at 600, 879 P.2d at 1191. Since the Findings of Fact and Conclusions of Law entered on December 14, 2020 did not address or consider the Appellants’ Counterclaims it cannot constitute a final judgment for purposes of claim preclusion.

CONCLUSION

The District Court erred when it dismissed Appellants’ counterclaims based on claim preclusion and under NRCP 41(e)(6). The Order for Dismissal between BARKET and the HIRJI Respondents does not decide or adjudicate the SHARDA Appellants’ rights to be repaid their loans of $1,500,000 plus interest. The counterclaims should never have been dismissed by the District Court. Reversal and remand back to the District Court is warranted.

DATED this 28th day of October, 2021.

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CERTIFICATE OF COMPLIANCE

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 Microsoft Word 14 pt. Times New Roman type style.

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 typeface of 14 points or more and contains 4,246 words.

I have read the foregoing brief and to my best knowledge, information and belief, the brief 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), which requires every assertion in the brief regarding matters of record to be supported by a reference to the page of the transcript or appendix where the matter raised can be found. I understand that I may be subject to sanctions in the event that the accompanying brief if not in conformity with the requirements of the applicable Nevada Rules of Appellate Procedure.

Finally, I hereby certify that I have read this reply brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this 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.

DATED this 28th day of October 2021.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of October 2021, I electronically filed the foregoing APPELLANTS NAVNEET SHARDA AND TRATA INC.'S REPLY BRIEF with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system.

I further certify that on the above reference date service was made to the following parties by the methods therein indicated.

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