**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MANUEL IGLESIAS and EDWARD MOFFLY,

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK and the Honorable NANCY L. ALLF, District Court Judge,

Respondents,

and

N5HYG, LLC, and NEVADA 5, INC.,

Real Parties in Interest.

Supreme Court No.



Distr. Ct. Case No. A-17-762664-B
Dept. XXVII

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**WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, WRIT OF MANDAMUS**

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Petitioners hereby state, by and through their counsel of record, that this Court's action is required as soon as possible as the District Court continues to entertain claims by Nevada 5, Inc. ("Nevada 5") even though a Florida court has already ruled that Nevada 5 has no standing to bring claims based on the same underlying facts and dismissed Nevada 5's claims there with prejudice through a final adjudication on the merits. Nevada has adopted the issue preclusion doctrine for this precise circumstance: to prevent parties from re-litigating an issue that has already been decided by another court; to prevent multiple litigation causing vexation and expense to the parties; wasting judicial resources; maintaining consistency; avoiding oppression or harassment of the adverse party; and to lend stability to judgments, thus inspiring confidence in the judicial system. Even though this is the Second Amended Complaint that only just recently passed the dismissal stage, if Petitioners are required to defend these claims until a final judgment is reached, the entire purpose of Nevada's adoption of the issue preclusion doctrine would be undermined. Such an outcome contradicts the purpose of the issue preclusion doctrine, which is to obtain finality by preventing a party from filing another suit that is based on the same issue of fact or law was actually litigated and determined by a valid and final judgment.

KORY L. KAPLAN, ESQ.
Nevada Bar No. 13164
KAPLAN COTTNER
850 E. Bonneville Ave.
Las Vegas, Nevada 89101
(702) 381-8888
kory@kaplancottner.com

*Attorneys for Petitioners*

## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusals. Here list names of all such persons and entities and identify their connection and interest:

For Petitioners Manuel Iglesias and Edward Moffly, as individuals, have no parent corporation and/or publicly held corporation(s) owning 10% or more of the corporate party's stock. The law firm of Kaplan Cottner has appeared for Petitioners in the district court litigation that is the subject of this Petition. Prior to Kaplan Cottner's representation of Petitioners, Petitioners were represented by Joel E. Tasca, Esq., Maria A. Gall, Esq., and Kyle A. Ewing, Esq. of the law firm of Ballard Spahr LLP, 1980 Festival Plaza Drive, Suite 900, Las Vegas, Nevada 89135. Also prior to Kaplan Cottner's representation of Petitioners, Petitioners were represented by Julian W. Friedman, Esq. of the law firm of Ballard Spahr LLP, 919 3rd Avenue, Floor 37, New York, New York 10022.

For Nevada 5, Inc. and N5HYG, LLC (collectively, the "Plaintiffs"), Ogonna M. Brown, Esq. of the law firm of Lewis Roca Rothgerber Christie LLP, 3993 Howard Hughes Parkway, Suite 600, Las Vegas Nevada 89169. Also for the Plaintiffs, G. Mark Albright, Esq. and D. Chris Albright, Esq. of the law firm of Albright, Stoddard,

Warnick & Albright, 801 South Rancho Drive, Suite D-4, Las Vegas, Nevada 89106. Also for the Plaintiffs, E. Powell Miller, Esq. and Christopher Kaye, Esq. of the law firm of The Miller Law Firm, P.C., 950 West University Drive, Suite 300, Rochester, Michigan 48307.

Dated: July 6, 2021

KAPLAN COTTNER

By: /s/ Kory L. Kaplan
KORY L. KAPLAN, ESQ.
Nevada Bar No. 13164
850 E. Bonneville Ave.
Las Vegas, Nevada 89101
*Attorneys for Petitioners*

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## NRAP 21(a)(3)(A) ROUTING STATEMENT

NRAP 21(a)(3)(A) states that a writ petition must state "whether the matter falls in one of the categories of cases retained by the Supreme Court pursuant to NRAP 17(a) or presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)." This matter does not presumptively fall within a category of cases assigned to the Court of Appeals. This Petition should be retained by the Supreme Court because it originated in business court under NRAP 17(a)(9) and because it raises as a principal issue a question of statewide importance under NRAP 17(a)(12).

## I. INTRODUCTION

This Petition raises purely legal issues of statewide importance concerning a district court's refusal to estop a party from relitigating an issue already actually and necessarily decided by the Florida Circuit Court ("Florida Court") against that party. Here, the District Court committed clear error by denying Petitioners' Partial Motion for Judgment on the Pleadings on the basis that the District Court lacks the ability to entertain Nevada 5's claims as they have already been litigated and decided by the Florida Court against Nevada 5.

This case arises from Plaintiff N5HYG, LLC's ("N5HYG") purchase of stock in Hygea Holdings Corp. ("Hygea"). There is no dispute that the stock purchase agreement governing that purchase was between Hygea and N5HYG, and not Plaintiff Nevada 5, Inc. ("Nevada 5"); that the stock at issue was held at all times by

N5HYG, and never by Nevada 5; and that N5HYG was the stockholder of record, and not Nevada 5. Plaintiffs admit as much in their operative complaint. Despite these admissions that Nevada 5 neither held the stock nor purchased the stock, Nevada 5 alleges that it has standing to maintain claims arising from the stock purchase merely because it transferred the purchase monies to Hygea. Nevada 5, however, is issue precluded from maintaining this position.

The issue of Nevada 5's standing to maintain claims based on N5HYG's stock purchase has already been litigated and decided by the Florida Court against Nevada 5. In December 2020, the Florida Court ruled with prejudice that Nevada 5 lacks standing to bring any claims based on the stock transaction at issue. Accordingly, under the doctrine of issue preclusion, where "any issue that was actually and necessarily litigated in [case I] will be estopped from being relitigated in [case II]," Nevada 5 is estopped from asserting in this action that it has standing to maintain the claims arising from the stock transaction.[1] The District Court should have dismissed Nevada 5's claims as a matter of law.

However, the District Court erroneously denied Petitioners' Partial Motion for Judgment on the Pleadings in its entirety.[2] The District Court incorrectly held

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[1] *Exec. Mgmt. v. Ticor Title Ins. Co*., 114 Nev. 823, 835, 963 P.2d 465, 473 (1998) (internal quotations omitted) (brackets in original).

[2] (PA Vol. XII, PET002806-15) (Citations to the Petitioner's Appendix are herein designated "PA").

that issue preclusion did not apply because: (1) the District Court is not bound by the Florida Court's ruling on standing as set forth in the Florida Omnibus Order, as the Florida Action involved different plaintiffs in that N5HYG was not a plaintiff and entirely different defendants and different causes of action; and (2) Nevada law applies in this case, rather than the Florida Omnibus Order's interpretation of Florida law as to standing and the integration clause of the Stock Purchase Agreement. The District Court committed clear error in its Order.

First, issue preclusion bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment.[3] The determinative issue is that Nevada 5 is a party to the Florida action, and the Florida Court's ruling precludes Nevada 5 from bringing an action against any party for fraudulent misrepresentations of Hygea's financial performance and intent to go public resulting in Nevada 5's investment of $30 million for 8.57% of Hygea's outstanding shares.

Additionally, issue preclusion applies "even though the causes of action are substantially different, if the same fact issue is presented."[4] Issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the

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[3] *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356, 196 L. Ed. 2d 242 (2016); *see* Restatement (Second) of Judgments §§ 17, 27, at 148, 250 (1980); 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4416, p. 386 (2d ed. 2002).

[4] *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nevada*, 116 Nev. 415, 420, 997 P.2d 130, 134 (2000) (quoting *Clark v. Clark*, 80 Nev. 52, 56, 389 P.2d 69, 71 (1964)).

same ultimate issue previously decided in the prior case.[5] Issue preclusion applies to prevent relitigation of a specific issue that was decided in a previous suit between the parties, even if the second suit is based on different causes of action and different circumstances.[6] Thus, the fact that Nevada 5 did not have identical causes of action in this case and the Florida action is irrelevant as its claims are based on the same set of facts.

Finally, the District Court erred in basing its denial on Florida's interpretation of Florida law as opposed to Nevada's interpretation of Nevada law. Interpretation of each state's law is irrelevant, and further, Nevada 5 offered no support for its insinuation that the law in each jurisdiction is conflicting – because it cannot.

As such, issue preclusion applies and Nevada 5 cannot bring any claims against Petitioners based on the same set of facts that were dismissed with prejudice by the Florida Court.

## II. RELIEF SOUGHT

Petitioner asks this Honorable Court for a Writ of Prohibition, or in the alternative, Writ of Mandamus, directing that:

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[5] *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc*., 130 Nev. 252, 259, 321 P.3d 912, 916–17 (2014); *White v. City of Pasadena*, 671 F.3d 918, 926 (9th Cir.2012) ("Issue preclusion ... bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim") (citation omitted).

[6] *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713–14 (2008).

1. The Eighth Judicial District Court and the Honorable Nancy L. Allf (collectively, the "District Court") vacate its Order Denying Petitioners' Partial Motion for Judgment on the Pleadings, entered on March 28, 2021; and

2. The District Court dismiss Nevada 5's claims as it is issue precluded from asserting these claims.

## III. ISSUES PRESENTED

Did the District Court err when it denied Petitioners' Partial Motion for Judgment on the Pleading based on issue preclusion?

## IV. FACTS NECESSARY FOR AN UNDERSTANDING OF THE ISSUES PRESENTED BY THE PETITION

In 2016, Hygea and Plaintiff N5HYG entered into a stock purchase agreement (the "SPA").[7] Plaintiff Nevada 5 is not a party to the SPA.[8]

Indeed, pursuant to the SPA, Hygea agreed to sell 8.57% of its issued and outstanding shares to N5HYG, not Nevada 5, in exchange for $30 million.[9] Among other things, the SPA contains an integration clause, which provides that the SPA "constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes any and all prior discussions negotiations, proposal,

[7] (PA Vol. II, PET000233-289).

[8] *Id*.

[9] *Id*.

undertakings, understandings, and agreements … none of which shall ever be used as evidence of the Parties' intent."[10]

Following the stock purchase, N5HYG became disenchanted with Hygea's performance, and so it and its parent company, Nevada 5, sued.[11] Plaintiffs originally brought this action against all of Hygea's former directors, which included not only current Petitioners Iglesias and Moffly, but also twelve other individuals.[12] Plaintiffs alleged that the directors' fraudulent misrepresentations of Hygea's financial performance and intent to go public resulted in N5HYG's investment of $30 million for 8.57% of Hygea's outstanding shares and brought various claims for securities fraud, fraudulent inducement, and other fraud.[13]

Preliminary motion practice ensued.[14] Petitioners will not repeat the entire history of those motions here, only their relevant outcomes as follows:

- The Court dismissed all directors (other than Iglesias and Moffly) for lack of personal jurisdiction.[15]

[10] (PA Vol. II, PET000282).

[11] (PA Vol. I, PET000001-30).

[12] *Id.*; *see also* (PA Vol. I, PET000122-160).

[13] (PA Vol. I, PET000122-160).

[14] *See, e.g.* (PA Vol. I, PET000031-121, 166-228).

[15] (PA Vol. VII, PET001504-23).

- The Court dismissed all claims based on claim preclusion and ruled that Plaintiffs are barred from bringing further claims based on the same facts.[16]

Following these dismissals, there were effectively two cases: (1) the one before the District Court against Iglesias and Moffly and (2) a "sister" action in Florida that Plaintiffs initiated against the 12 directors dismissed from this case for lack of personal jurisdiction. The Florida action, also brought by Nevada 5, was based on the same facts as this case: the directors' fraudulent misrepresentations of Hygea's financial performance and intent to go public resulted in an investment of $30 million for 8.57% of Hygea's outstanding shares.[17]

The directors in the Florida case moved to dismiss that action, arguing that Nevada 5 lacks standing to bring any claims based on N5HYG's purchase of Hygea stock. The Florida Court agreed. On December 9, 2020, the Honorable Judge William Thomas dismissed Nevada 5's Florida Complaint in its entirety ***with prejudice***, holding that Nevada 5 lacks standing to assert its claims based on the stock transaction, because N5HYG was the stockholder, not Nevada 5.[18] The Florida Court additionally held that the integration clause in the SPA defeats Nevada

[16] (PA Vol. X, PET002333-2352).

[17] (PA Vol. XI, PET002585-2622).

[18] (PA Vol. XI, PET002623-2629).

5's claims for "fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract."[19]

The Florida Court's findings are more fully, in relevant part, as follows:

> The Plaintiff asserts to satisfy the requirements of standing, it must show that a case and controversy exists between the Plaintiff and Defendants, and that such a case and controversy continues from the commencement to the conclusion of the litigation. *Ferreiro v. Phila. Indem. Ins. Co*. 928 So. 2d 374, 377 (Fla. 3DCA 2006). To this end, Plaintiff argues that it, after relying on alleged false representations from Defendants, invested $30 million in HYGEA. Plaintiff argues that it is not asserting a claim based upon a breach of the SPA on behalf of N5HYG, it is asserting claims based on its $30 million investment based upon false pretenses. Plaintiff suggest that the fact that it paid $30 million for the shares is the relevant inquiry in regard to standing. This Court disagrees. It is true that the Plaintiff transferred the money to HYGEA. However, Plaintiff created a separate entity to actually purchase, own and hold the shares pursuant to a SPA. Therefore, this Court concludes that Plaintiff, Nevada 5, does not have standing to maintain this action, which is based entirely upon a purportedly fraudulently induced purchase of HYGEA holding stock by Nevada 5's subsidiary, N5HYG. A subsidiary is a separate legal entity from the parent company. It was the subsidiary who agreed to purchase HYGEA common stock for $30 million under specified conditions. Those specified conditions were outlined in a SPA signed by HYGEA and N5HYG. It is N5HYG not Nevada 5 who is the proper party to request adjudication of the issues identified in the Second Amended Complaint. Having established that N5HYG is the party with standing to bring this action, the Court will now briefly discuss the SPA. The integration clause in the "SPA" defeats Nevada 5's claims for fraudulent inducement. The Plaintiff cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract. In the instant case, the alleged misrepresentations consist of alleged statements about HYGEA Holdings earnings and other aspects of HYGEA's financial conditions. Yet, the "SPA" contains a specific set of representations and warranties

[19] (PA Vol. XI, PET002628).

> under the heading "Financial Matters" in which HYGEA Holdings expressly represented the truth and accuracy of its financial statements, balance sheets and earnings reports. Because the alleged misrepresentations claimed by Nevada 5 concern the precise topic of express representations and warranties in the "SPA", the "SPA's", integration clause bars Nevada 5's claims arising from these alleged misrepresentations. This is because the contract fully addressed the alleged representations that allegedly caused the fraudulent inducement.
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> …
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> **ORDERED AND ADJUDGED** the Defendants' motion to dismiss based upon Plaintiff's lack of standing is granted with prejudice. Additionally, the "SPA" merger and integration clause would bar Plaintiff's fraudulent inducement claims.[20]

As set forth further below, the Florida Court's rulings against Nevada 5 preclude Nevada 5 from asserting in this action that it has standing to maintain claims arising from the stock transaction to which N5HYG, not Nevada 5, was a party, and even if Nevada 5 had standing, the SPA's integration clause defeats its fraud-based claims.[21] Accordingly, under the doctrine of issue preclusion, where "any issue that was actually and necessarily litigated in [case I] will be estopped from being relitigated in [case II]," Nevada 5 is estopped from asserting in this action that it has standing to maintain the claims arising from the stock transaction.[22]

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[20] (PA Vol. XI, PET002626-2629).

[21] *Id*.

[22] *Exec. Mgmt.*, 114 Nev. at 835, 963 P.2d at 473 (internal quotations omitted) (brackets in original).

The Florida Court's ruling is fatal to Nevada 5's case, and the District Court was required to dismiss Nevada 5 and its claims in their entirety.

## V. STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

### A. Jurisdictional Statement

Chapter 34 of the Nevada Revised Statutes governs the issuance of extraordinary writs by courts of competent jurisdiction. Nevada law specifically authorizes this Court, by virtue of its original jurisdiction, to issue writs of certiorari, mandamus and/or prohibition when no plain, speedy and adequate remedy exists in the ordinary course of the law.[23]

Here, an appeal is not an adequate and speedy legal remedy given the infancy of the underlying litigation[24] and considerations of sound judicial administration.[25] In the absence of intervention by this Court, Petitioners will be improperly forced to defend themselves against claims that Nevada 5 has no standing to assert.

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[23] *See* NRS 34.020(2); NRS 34.170; NRS 34.330.

[24] Even though this case was initiated in 2017, it is still in its infancy as no scheduling order has even been issued yet. Due to significant motion practice, multiple amendments to the complaint, and Hygea's filing of bankruptcy, this case is very much still in its infancy.

[25] *G.C. Wallace, Inc. v. Eighth Jud. Dist. Ct. of State, ex rel. Cty. of Clark*, 127 Nev. 701, 704, 262 P.3d 1135, 1137 (2011).

For the reasons set forth in more detail below, the Court should issue a peremptory writ of prohibition and/or mandamus or other appropriate relief prohibiting the District Court from entertaining any claims made by Nevada 5.

**B. Standard of Review for a Writ of Mandamus and Writ of Prohibition**

The Court may issue a writ of mandamus to "compel the performance of an act which the law especially enjoins as a duty resulting from an office."[26] Additionally, this Court may issue a writ of mandamus to "control a manifest abuse or an arbitrary or capricious exercise of discretion."[27]

Conversely, "[t]he writ of prohibition is the counterpart of the writ of mandate."[28] A writ of prohibition "arrests the proceedings of any tribunal . . . when such proceedings are without or in excess of the jurisdiction of such tribunal."[29]

In exercising its power to entertain extraordinary writ review of district court decisions,[30] this Court has not confined itself to policing jurisdictional excesses and

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[26] NRS 34.160; *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

[27] *Cote H.*, 124 Nev. at 39, 175 P.3d at 908.

[28] NRS 34.320.

[29] *Id.*; *Stephens Media, LLC v. Eighth Judicial District Court*, 125 Nev. 849, 857, 221 P.3d 1240, 1246 (2009); *Harvey L. Lerer, Inc. v. Eighth Judicial District Court*, 111 Nev. 1165, 1168, 901 P.2d 643, 645 (1995); *see State v. Eighth Judicial Dist. Court ex rel. County of Clark*, 111 Nev. 1023, 899 P.2d 1121 (1995); *see also South Fork Band, Te–Moak Tribe v. Dist. Ct.*, 116 Nev. 805, 811, 7 P.3d 455, 459 (2000); *see also Snooks v. District Court*, 112 Nev. 798, 919 P.2d 1064 (1996).

[30] *See* Nev. Const. art. 6, § 4(1).

refusals.[31] This Court has also granted writ relief where the district court judge has committed "clear and indisputable" legal error,[32] or an "arbitrary or capricious" abuse of discretion.[33]

"In the context of writ petitions, [the Court] review[s] district court orders for an arbitrary or capricious abuse of discretion."[34] "A writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction."[35] "[The Court] review[s] questions of law," such as the interpretation of Nevada's statutes and whether a particular statute precludes subject matter jurisdiction under Nevada common law, "de novo, even in the context of writ petitions."[36] Here, the legal

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[31] *Archon Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 407 P.3d 702, 706 (Nev. 2017).

[32] *Bankers Life & Cas. Co., v. Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953); *see Smith v. Eighth Jud. Dist. Ct. In & For Cty. of Clark*, 113 Nev. 1343, 1344–45, 950 P.2d 280, 281 (1997) (writ relief may be granted when dismissal is required "pursuant to clear authority").

[33] *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006).

[34] *Helfstein v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 91, 362 P.3d 91, 94 (2015).

[35] *Id.* (citing NRS 34.320; *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012) ("A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court.")

[36] *Id.*; *see also McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005) ("Statutory interpretation is a question of law."); *Griffith v. Gonzales-Alpizar*, 132 Nev. Adv. Op. 38, 373 P.3d 86, 87 (2016) ("Subject matter jurisdiction is a question of law subject to de novo review."); *Cote H.*, 124 Nev. at 39, 175 P.3d at 908 (noting that this Court has complete discretion

conclusions, not the facts, are disputed, so this Court should exercise de novo review.[37]

This Court may exercise its discretion to consider writ petitions when the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule or when an important issue of law needs clarification and this Court's review would serve considerations of public policy or sound judicial economy and administration.[38]

### C. The District Court Erred When It Did Not Grant Petitioners' Partial Motion for Judgment on the Pleadings.

Issue preclusion, also called collateral estoppel, prevents parties from re-litigating an issue that has already been decided against that party by another court.[39] The following factors are necessary for application of issue preclusion:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action;

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to determine whether to consider a petition for a writ of mandamus or prohibition and that even when an arguably adequate remedy exists, this Court may exercise its discretion "under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition") (internal quotation marks omitted).

[37] *Sergio G. v. The Eighth Jud. Dist. Ct.*, 132 Nev. 975, 385 P.3d 617 (2016); *University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004) (reviewing de novo whether issue preclusion is available).

[38] *Int'l Game Tech.*, 122 Nev. at 142, 127 P.3d at 1096.

[39] *Thompson v. City of N. Las Vegas*, 108 Nev. 435, 439–40, 833 P.2d 1132, 1134–35 (1992).

(2) the initial ruling must have been on the merits and have become final;

(3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and

(4) the issue was actually and necessarily litigated.[40]

As discussed below, these factors are all met with respect to the issue of Nevada 5's standing and/or ability to bring fraud-based claims.

***1. The issue of Nevada 5's standing to maintain its claims has been raised in both this case and the Florida case.***

First, the Court must address whether "the issue decided in the prior litigation [is] identical to the issue presented in the current action." It is.

Standing is "a threshold question" required in every case that determines whether the court may even entertain the proceeding.[41] For a court to have jurisdiction over the case, "the party bringing the suit must establish standing."[42]

In the Florida Action, the Court there held that "Nevada 5 does not have standing to maintain this action, which is based entirely on a purportedly fraudulently induced purchase of Hygea Holdings stock by Nevada 5's subsidiary,

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[40] *Five Star Capital*, 194 P.3d 713.

[41] *Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal)*, 450 B.R. 897, 906 (9th Cir. BAP 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975)).

[42] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004), *abrogated in part on other grounds in Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1387 (2014).

N5HYG."[43] The Court also held that Nevada 5 is further barred from bringing its fraud claims based on N5HYG's stock purchase because:

> The integration clause in the "SPA" defeats Nevada 5's claims for fraudulent inducement. The Plaintiff cannot recover in fraud for alleged oral misrepresentations that are adequately covered or expressly contradicted in a later written contract. In the instant case, the alleged misrepresentations consist of alleged statements about HYGEA Holdings earnings and other aspects of HYGEA's financial conditions. Yet, the "SPA" contains a specific set of representations and warranties under the heading "Financial Matters" in which HYGEA Holdings expressly represented the truth and accuracy of its financial statements, balance sheets and earnings reports. Because the alleged misrepresentations claimed by Nevada 5 concern the precise topic of express representations and warranties in the "SPA", the "SPA's", integration clause bars Nevada 5's claims arising from these alleged misrepresentations. This is because the contract fully addressed the alleged representations that allegedly caused the fraudulent inducement.[44]

The Florida Court, in its Omnibus Order, held that Nevada 5 lacked standing to maintain any claims arising out of N5HYG's stock purchase, and also that any claims based on fraud are barred by the stock purchase agreement's integration clause. Iglesias and Moffly raise the same issues of standing and integration here, based on the exact same stock transaction between Hygea and N5HYG and the exact same stock purchase agreement. The Florida Court's decision on these issues precludes Nevada 5 from relitigating the issues in this case.

[43] (PA Vol. XI, PET002627).

[44] (PA Vol. XI, PET002628).

### *2. The Florida Order is a final ruling on the merits.*

Second, the Court must decide whether the Florida Order, issued in response to the defendants' Rule 12(b) motions, was "on the merits and [has] become final." It was.

Nevada follows the Restatement in defining "final judgment," which recognizes that a judgment is final if the court intended to definitively resolve an issue litigated between parties.[45] The Florida Order was ***with prejudice***, indicating that the issues decided therein, including that of standing and integration, was final. Indeed, the face of the Florida Order even states that it is a final judgment.

The Florida Order was also on the merits, in response to a Rule 12(b)(6) motion.[46] As NRCP 41(b) states: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, *operates as an adjudication upon the merits*." (emphasis added). Rule 41(b)'s mandate was echoed in *Zalk-Josephs Co. v. Wells-Cargo*, 81 Nev. 163, 169 (1965), in which the Nevada Supreme Court

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[45] *Kirsch v. Traber*, 134 Nev. 163, 167, 414 P.3d 818, 822 (2018); Restatement (Second) of Judgments § 13, cmt g. (Am. Law Inst. 1982) ("The test of finality ... is whether the conclusion in question is procedurally definite and not whether the court might have had doubts in reaching the decision.")

[46] (PA Vol. XI, PET002623-2629).

held that a dismissal with prejudice pursuant to Rule 12(b) is a judgment on the merits.

***3. Nevada 5 is the same plaintiff in both lawsuits.***

Third, the Court must decide whether Nevada 5, the party against whom the judgment is asserted, was a party or in privity with a party to the prior litigation.[47] It was. Here, Petitioners seek issue preclusion against Nevada 5, which is the same party against whom the judgment and findings on standing were issued in the Florida Action.

The doctrine of issue preclusion bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment.[48] The preclusion doctrine is premised on "an underlying confidence that the result achieved in the initial litigation was substantially correct."[49]

> Although we require that "the party against whom [issue preclusion] is invoked [be] a party, or in privity with a party, to the prior adjudication," *Dodge v. Cotter Corp*., 203 F.3d 1190, 1198 (10th Cir.2000), ***issue preclusion can be invoked by any third party***. *See Sil–Flo, Inc. v. SFHC, Inc*., 917 F.2d 1507, 1521 (10th Cir.1990) (allowing new defendant to assert issue preclusion against plaintiff that brought two claims on essentially the same issue); Restatement (Second) of Judgments § 29 at 291 (***"A party precluded from relitigating an issue***

[47] *In re Sandoval*, 126 Nev. 136, 139, 232 P.3d 422, 423 (2010) (citations omitted).

[48] *Bravo-Fernandez*, 137 S. Ct. at 356, 196 L. Ed. 2d 242; *see* Restatement (Second) of Judgments §§ 17, 27, at 148, 250; 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4416, p. 38.

[49] *Standefer v. United States*, 447 U.S. 10, 23, n. 18, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980).

> ***with an opposing party ... is also precluded from doing so with another person....").  To decide otherwise would be to "[p]ermit[ ] repeated litigation of the same issue as long as the supply of unrelated defendants holds out," a practice that would "reflect[ ] either the aura of the gaming table or a lack of discipline and of disinterestedness on the part of the lower courts."*** *Blonder–Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 329, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971) (internal quotation marks omitted).[50]

Thus, it is irrelevant that Petitioners are not also defendants in the Florida action. The determinative issue is that Nevada 5 is a party to the Florida action, and the Florida Court's ruling precludes Nevada 5 from bringing an action against any party for fraudulent misrepresentations of Hygea's financial performance and intent to go public resulting in Nevada 5's investment of $30 million for 8.57% of Hygea's outstanding shares. Nevada 5 has no standing to make these claims against anybody, including but not limited to Petitioners.

Therefore, the District Court incorrectly held that that issue preclusion did not apply because "the Florida Action involved different plaintiffs in that N5HYG was not a plaintiff and entirely different defendants and different causes of action."[51] Nevada 5 again cannot maintain claims against Petitioners or anyone based on the

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[50] *Park Lake Res. Ltd. Liab. v. U.S. Dep't Of Agr.*, 378 F.3d 1132, 1138 (10th Cir. 2004) (emphasis added).

[51] (PA Vol. XII, PET002811).

same set of facts as Nevada 5 lacks standing and the SPA contains a fully integrated clause.[52]

***4. The issues were actually and necessarily litigated.***

Fourth, the Court must decide whether the issue of Nevada 5's standing was actually and necessarily litigated in the Florida Action.[53] It was.

"When an issue is properly raised ... and is submitted for determination, ... the issue is actually litigated."[54] Whether the issue was necessarily litigated turns on whether "the common issue was ... necessary to the judgment in the earlier suit."[55]

In the Florida Action, the director-defendants there filed motions to dismiss, arguing that Nevada 5 lacked standing to maintain its claims based on N5HYG's purchase of Hygea stock.[56] Each of the motions had oppositions filed, replies filed, and oral argument.[57] The motions were submitted for decision. The Florida Court, in turn, decided the motions based on the issues of standing, primarily, and also the SPA's integration clause. After finding that Nevada 5 lacked standing, and also that

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[52] (PA Vol. XI, PET002623-2629).

[53] *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc*., 130 Nev. 252, 262, 321 P.3d 912, 918 (2014).

[54] *Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 406, 305 P.3d 70, 72 (2013) (quoting Restatement (Second) of Judgments § 27 cmt. d (1982)).

[55] *Id*. (quoting *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994) *holding modified on other grounds by Ticor*, 114 Nev. 823, 963 P.2d 465).

[56] (PA Vol. XI, PET002623-2629).

[57] *Id.*

the integration clause precluded any fraud-based claims, the Florida Court dismissed Nevada 5's claims *in toto* and with prejudice.[58] As such, the issues of standing and integration were actually and necessarily litigated in the Florida Action.

***5. The District Court further erred in holding that the Florida Court's Order is not binding.***

In its Order Denying Petitioners' Partial Motion for Judgment on the Pleadings, the District Court incorrectly held that "in the above-captioned action pending before this Court, Nevada law, rather than the Florida Omnibus Order's interpretation of Florida law, applies to standing, as well as the integration clause of the Stock Purchase Agreement, which is not the law in Nevada."[59]

First, the Florida Court's ruling was on the merits, in response to a Rule 12(b)(6) motion. As NRCP 41(b) states, "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Rule 41(b)'s mandate was echoed in *Zalk-Josephs*, 81 Nev. at 169, in which the Nevada Supreme Court held that a dismissal with prejudice pursuant to Rule 12(b) is a judgment on the merits.

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[58] *Id*.

[59] (PA Vol. XII, PET002811).

Florida law holds the same.[60] Because the issue of standing was actually and necessarily litigated, it was a decision on the merits. "Issue preclusion applies because the issue of SPS's standing is the same in the previous case and the current case, the decision in the previous case was on the merits and was final, and the parties are clearly in privity."[61]

The issue – standing – was actually litigated and adjudicated on the merits. It was the same issue before the District Court and Nevada 5 did not present any authority from Florida demonstrating that Florida follows different law with respect to standing. The Florida Court dismissed Nevada 5's claims with prejudice, and a

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[60] *Drady v. Hillsborough Cty. Aviation Auth*., 193 So. 2d 201, 205 (Fla. 2d DCA 1966) ("The dismissal of a cause of action can either be with prejudice, same being an adjudication on the merits, or without prejudice, which is not an adjudication on the merits and is no bar to a subsequent suit on the same cause of action."); *Hardee v. Gordon Thompson Chevrolet, Inc*., 154 So. 2d 174, 178 (Fla. Dist. Ct. App. 1963) (An order finally dismissing a complaint for failure to state a cause of action is an adjudication on the merits); *Smith v. St. Vil*, 714 So. 2d 603, 605 (Fla. Dist. Ct. App. 1998) (same); Fl. R. Civ. Pr. Rule 1.420(b) (A dismissal of an action or claim for failure to comply with the rules or any order of court is an adjudication on the merits unless the dismissal otherwise specifies).

[61] *Glass v. Select Portfolio Servicing, Inc*., 466 P.3d 939 (Nev. 2020) (quoting *LaForge*, 116 Nev. at 419, 997 P.2d at 133. *See Swanson Grp. Mfg. LLC v. Jewell*, 195 F. Supp. 3d 66, 73 (D.D.C. 2016) (court dismissed plaintiffs' previous case based on standing, and due to issue preclusion, the plaintiffs were precluded from relitigating their standing again). *See also Cutler v. Hayes*, 818 F.2d 879, 889 (D.C.Cir.1987) ("[p]rinciples of collateral estoppel clearly apply to standing determinations" and a key inquiry "is whether the issue presented in the two proceedings is substantially the same.") (internal quotation marks and footnote citation omitted).

dismissal with prejudice is an adjudication on the merits for purposes of res judicata. The Florida court did not specify that the ruling was not on the merits, and therefore the ruling is on the merits pursuant to both Nevada and Florida law.

Moreover, Nevada 5 argued that Nevada law is different from Florida law as Nevada law permits fraudulent inducement claims to proceed despite integration clauses.[62] However, Florida law holds the same, and Nevada 5 disingenuously implied that Florida's law is different than Nevada's without providing any authority (because it cannot). Nevertheless, the Florida Court still determined that Nevada 5 was precluded from asserting claims based on the same set of facts as this case, regardless of choice of law.[63]

## VI. CONCLUSION

For the foregoing reasons, this Court should issue a writ of prohibition instructing the District Court to abstain from entertaining Nevada 5's claims against Petitioners beyond taking the steps necessary to dismiss the case or, in the alternative, a writ of mandamus compelling the District Court to dismiss Nevada 5's

[62] (PA Vol. XI, PET002637).

[63] (PA Vol. XI, PET002623-2629).

claims.

Dated: July 6, 2021

KAPLAN COTTNER

By: /s/ Kory L. Kaplan
KORY L. KAPLAN, ESQ.
Nevada Bar No. 13164
850 E. Bonneville Ave.
Las Vegas, Nevada 89101
*Attorneys for Petitioners*

## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4) and 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 with 14-point, double spaced 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 typeface of 14 points or more and contains 6,936 words.

3. Finally, I hereby certify that I have read this 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.

Dated: July 6, 2021

KAPLAN COTTNER

By: /s/ Kory L. Kaplan

KORY L. KAPLAN, ESQ.
Nevada Bar No. 13164
850 E. Bonneville Ave.
Las Vegas, Nevada 89101
*Attorneys for Petitioners*

## VERIFICATION

STATE OF NEVADA )
) SS:
COUNTY OF CLARK )

I, Kory L. Kaplan, declare:

I am counsel for Petitioner named in the foregoing Petition and know the contents thereof; the pleading is true to my own knowledge, except as to those matters stated on information and belief, and as to such matters, I believe them to be true. This verification is made pursuant to NRAP 21(a)(5). Pursuant to NRS 15.010(1) and NRAP 21(a)(5), Petitioners are absent from the county where I reside and the facts within the foregoing Petition are within my knowledge.

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

Executed June 9, 2021

KORY L. KAPLAN, ESQ.

SUBSCRIBED AND SWORN to before me
this 9th day of June, 2021.

Allison Hardy

NOTARY PUBLIC in and for said
County and State

ALLISON HARDY
Notary Public-State of Nevada
APPT. NO. 19-1844-2
My Appt. Expires 02-11-2023

## CERTIFICATE OF SERVICE

I hereby certify that this ***PETITION UNDER NRAP 21 & 27 FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, WRIT OF MANDAMUS*** was filed electronically with the Nevada Supreme Court on July 6, 2021, and served electronically on participants registered with the Eflex system; any parties listed below not registered with Eflex will be mailed a copy of the foregoing via regular U.S. Mail:

Ogonna M. Brown, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy.,
Suite 600
Las Vegas, NV 89169
*Attorneys for Plaintiffs N5HYG, LLC and NEVADA 5, INC.*

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
*Attorneys for Plaintiffs N5HYG, LLC and NEVADA 5, INC.*

E. Powell Miller, Esq.
Christopher Kaye, Esq.
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, MI 48307
*Attorneys for Plaintiffs N5HYG, LLC and NEVADA 5, INC.*

The Honorable Nancy L. Allf
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, NV 89155

/s/ Sunny Southworth
An employee of Kaplan Cottner