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 ALLF, District Court Judge,

Respondents,

and

N5HYG, LLC, A MICHIGAN LIMITED LIABILITY COMPANY; AND, NEVADA 5, INC., A NEVADA CORPORATION,

Real Parties in Interest.

Supreme Court No.

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

PETITIONERS' APPENDIX TO *PETITION* UNDER NRAP 21 FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, WRIT OF MANDAMUS

(VOLUME IV)

Pursuant to NRAP 30, Petitioners MANUEL IGLESIAS and EDWARD MOFFLY, hereby submit their *Petitioners' Appendix to Petition Under NRAP 21 for Writ Of Prohibition, or in the Alternative, Writ Of Mandamus*.

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

PROOF OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Kaplan Cottner; that, in accordance therewith, I caused a copy of **PETITIONERS' APPENDIX TO *PETITION* UNDER NRAP 21 FOR WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, WRIT OF MANDAMUS** to be mailed on the 9th day of June, 2021, by depositing, in a sealed envelope, a true and correct copy in the United States mail, postage prepaid a Compact Disc containing PDF copies and via email, and addressed to the following:

Attorneys of Record	Parties Represented
Ogonna M. Brown, Esq. 3993 Howard Hughes Parkway Suite 600 Las Vegas, NV 89169	*N5HYG, LLC, a Michigan limited liability company; and, in the event the Court grants the pending Motion for Reconsideration, NEVADA 5, INC., a Nevada corporation*
G. Mark Albright, Esq. D. Chris Albright, Esq. 801 South Rancho Drive Suite D-4 Las Vegas, NV 89106	*N5HYG, LLC, a Michigan limited liability company; and, in the event the Court grants the pending Motion for Reconsideration, NEVADA 5, INC., a Nevada corporation*
E. Powell Miller, Esq. (*pro hac vice*) Christopher Kaye, Esq. (*pro hac vice*) 950 W. University Dr. Suite 300 Rochester, MI 48307	*N5HYG, LLC, a Michigan limited liability company; and, in the event the Court grants the pending Motion for Reconsideration, NEVADA 5, INC., a Nevada corporation*
The Honorable Nancy Allf Eighth Judicial District Court Department 27 200 Lewis Avenue Las Vegas, NV 89155	*Presiding Judge over Case No. A-17-762664-B*

/s/ Sunny Southworth
An employee of Kaplan Cottner

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“Exhibit 8”

“Exhibit 8”

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FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

CLAUDIO ARELLANO; CROWN EQUITIES LLC; FIFTH AVENUE 2254 LLC; HALEVI ENTERPRISES LLC; HALEVI SV I LLC, et al,

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT

BEFORE THE HONORABLE JAMES E. WILSON JR.

VOLUME V

PAGES 894 - 975

DATE: Friday, May 18, 2018
TIME: 1:00 p.m.
LOCATION: Carson City District Court
885 E. Musser Street
Carson City, Nevada

REPORTER: Daren Bloxham RPR/CSR-685

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APPEARANCES:

THE MILLER LAW FIRM, PC
By: Mr. Christopher D. Kaye
Mr. David B. Viar
Mr. William Kallas
950 West University Drive, Suite 300
Rochester, Michigan 48307
248.841.2200
cdk@millerlawpc.com
dbv@millerlawpc.com
wk@millerlawpc.com
Appearing on behalf of the Plaintiffs

OAKLAND LAW GROUP
By: Mr. Kevin J. Watts
38955 Hills Tech Drive
Farmington Hills, Michigan 48331
248.536.3282
kwatts@oaklandlawgroup.com
Appearing on behalf of the Plaintiffs

HOLLEY DRIGGS WALCH FINE WRAY PUZEY THOMPSON
By: Mr. Clark V. Vellis
800 S. Meadows Parkway, Suite 800
Reno, Nevada 89521
775.851.8700
cvellis@nevadafirm.com
Appearing on behalf of the Plaintiffs

BALLARD SPAHR, LLP
By: Mr. Kyle E. Ewing
Ms. Maria A. Gall
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135
702.471.7000
ewingk@ballardspahr.com
gallm@ballardspahr.com
Appearing on behalf of the Defendant

KAEMPFER CROWELL
By: Mr. Severin A. Carlson
Ms. Tara Zimmerman
50 West Liberty Street, Suite 700
Reno, Nevada 89501
775.852.3900
scarlson@kcnvlaw.com
tzimmerman@kcnvlaw.com
Appearing on behalf of the Defendant

I N D E X

P-R-O-C-E-E-D-I-N-G-S
--oOo--

THE COURT: Please be seated. 18 OC 71 -- that's not the case number. Do I have the right case?

COURT CLERK: Yeah, that's the right case number.

THE COURT: 18 OC 71. Arellano v. Hygea. All counsel are present. This is the time for closing argument.

Mr. Kaye?

MR. KAYE: Thank you, Your Honor. If I may approach, I have some slides that I would like to present to the Court, provide a copy to opposing counsel. I was going to say so far we're in better shape than at the beginning of the week, but you never know.

I would also like to ask before we begin of a time check?

THE COURT: How much time would you like --

MR. KAYE: Your Honor, I think I have 12 minutes, and I think we can do this in 12 minutes, but I think 20 minutes would be more than sufficient.

THE COURT: The purpose for the time limits was to make sure we got it done this week. With the evidence being done, I don't have a problem with you

taking 20 minutes --

MR. KAYE: Thank you.

THE COURT: -- in your opening portion. Go ahead.

CLOSING ARGUMENT

MR. KAYE: And I would also state for the record that I intend to preserve rebuttal, and some of the materials here are rebuttal related.

Your Honor, when we were here on Monday, and we didn't have the system working, we talked about the statutory criteria we would need to meet. We just need to meet one of these statutory criteria in order to justify the appointment of a receiver. I think we've gone well beyond that burden and the need for a receiver is clear.

First of all, Hygea's leadership has been guilty of misfeasance, malfeasance, or nonfeasance. Your Honor, we spoke about this on Monday and talked about all the problems that the corporation had had even figuring out its finances, figuring out what was happening at the corporation, the disputes and the apparent misimpressions about the corporations' financial performance.

What we've learned this week has not only proven these things are right, but I believe it's

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reinforced them and shown things we didn't even realize were wrong.

For example, one of the things we talked about the other day were the claims from management about the company's financial performance, reduced here to an EBITDA figure, which was a topic of discussion.

Mr. Iglesias testified this was really a heated debate or heated discussion I believe was his term. His projection, management's projection, was based on investment -- an investment into the company of $130 million that didn't happen. Well, I think any of us could boast of a very healthy personal annual income if you just assume you're going to get $130 million.

We heard from Tim Dragelin, a consultant brought in to Hygea, who told us that Mr. Iglesias admitted to him Hygea's management had intentionally manipulated its books.

We heard from Mr. Dragelin that Hygea was sorely deficient in its "internal controls," the very internal controls that can help to avoid things like assets being -- being dissipated and the very sorts of problems that we have heard about all this past week. And what did management do with respect to the internal control recommendations that Mr. Dragelin made? He

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didn't think that they did anything.

Your Honor, indeed, this whole past week has seemed like an extended tale of misfeasance, malfeasance, or nonfeasance. And what did the board of directors do throughout all of this? The board of directors sat by as this crisis materialized, got worse, and brought Hygea to the brink of failure.

We've seen the meeting minutes where time after time audited financial statements are said to be coming very shortly. The co-chair of the board, Mr. McGowan, said that that's -- as reported in the minutes to say that's a life or death issue for the corporation.

Yet they still haven't arrived, despite contractual obligations, all those promises, even a court order for this quality of earnings report be in some sense audited because, again, defendants promised that. Defendants said it would happen. Again, it hasn't happened.

I think there's been more oversight of the corporation in this week in this courtroom than there has been and there was with the board of directors as this crisis unfolded.

And yet -- and yet after all of that, one week ago, just one week ago, after a national search

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throughout the entire country, the board of directors hires as its new CEO Dr. Collins, one of its own members. That's doubling down on the failed strategy of a failed leadership team that allowed this corporation to get to the brink of failure and brought us to this courtroom today.

Dr. Collins and the board failed to protect the corporation, and that's why we are here trying to protect the corporation because the situation is grave. The corporation is insolvent or, although not insolvent, is for any cause not able to pay its debts or other obligations as they mature.

When we were here on Monday, we talked about this, missed loan payments, two of them from the summer of 2017, missed tax payments, missed medication payments, unpaid executives. All those things have been demonstrated this week. I don't think there's really any dispute about them anymore.

In fact, though, what we've learned this past week is that the situation is far, far worse than what we thought on Monday. Apparently the current CFO, Mr. Savchenko, admits that the company is currently operating at a loss.

But it's even worse than that. Defendants' own testimony, Mr. Greene, indicates that they're in

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his cash flow analysis a figure of a negative $1.8 million, negative $1.8 million.

And that was before you add in the interest on the -- on the American Express debt. That I believe was $8 million in debt. It's before you add in $175,000 that they're supposed to be paying one of the plaintiffs each month in this case.

It's before you add in the over $2 million owed to Dr. Gaylis' practice and the over $2 million that is owed for -- on Dr. Gaylis' medication with CuraScript. It's before you account for the mounting pile of litigation well outside of this courtroom and having nothing to do with the plaintiffs in this case.

So that's the bare minimum of the deficit under their own expert's analysis. I mean, I could stop talking right now. That statute is met. Frankly, the statute is met up at the top of the page where the company is currently operating at a loss.

But it's so much worse, and it is worthwhile to talk about it. When we talk about the deficit, we have to talk about the Bridging Finance situation. Defendants talk about Bridging Finance as if that's a solution. We'll just borrow more money from Bridging Finance.

Bridging Finance isn't a solution. The

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relationship with Bridging Finance is part of the problem. Right now Hygea is no longer even making an effort to pay those interest payments to hide the -- to Bridging Finance. Remember in the opening, we talked about two missed payments from 2017? Now they've just stopped making the payments altogether.

The current balance on the Bridging loan is over $70 million at an interest rate of 14 percent. Because they're not making any payments, they're "capitalizing" the loan.

That means, as we've heard, that the monthly interest payments are added to the principal. That, in turn, means that $1 million to $1.1 million are added to that principal every single month, on top of the deficit that their expert reports.

And that means that that principal, that loan, is growing and gobbling up the value of Hygea, unless you think that this is some sort of exaggeration.

Remember, again, from the draft meeting minutes from August of 2017, Natasha Sharpe from Bridging said back then before things got so bad that the Bridging loan was too expensive for Hygea to retain. It was unsustainable in August of 2017. Since then it's gotten bigger, and things have got worse.

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And now -- now the only way that the corporation seems to be keeping its doors open is because Bridging has apparently -- apparently infused an additional $3 million, without lending it to Hygea, but through some sort of transaction routed through Mr. Iglesias, under which Mr. Iglesias offered onerous personal guarantees right down to his farm.

That's not a solution, that's not sustainable. I mean, are we going to go down the list over the months to come as cash runs out and have each board member pledge all their assets? That's not a solution. That's not something that can save the corporation.

And, indeed, that brings us to another independent statutory criteria that boils down to the fact that the corporation is at serious risk of being unable to continue.

And, indeed, the corporation will not survive, I believe, based on the evidence that we've seen here unless the Court acts to appoint not a liquidating receiver, but a receiver who can come in, provide the oversight, the management, the operational stability that the corporation needs to get it up on its feet and allow it to be the successful corporation that we've heard it can and should be.

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And with that, I would reserve the rest of my time for rebuttal, Your Honor.

THE COURT: Ms. Gall?

CLOSING ARGUMENT

MS. GALL: Good afternoon, Your Honor. First, I'd like to frame this case for the Court. This is plaintiffs' case. They bear the burden of proof and the burden of persuasion on every element, including standing, which I will not repeat here today given the argument we had yesterday before Your Honor.

NRS 78.650, which is the only statutory basis remaining for plaintiffs' claims, is titled "Stockholders Application for Injunction and Appointment of a Receiver."

That's very important, I believe, because if the Court is to appoint a receiver, it must not only appoint the receiver, it must issue a permanent injunction enjoining the board of directors from acting.

Now, the standard for a permanent injunction as set forth in the Nevada Supreme Court, in Chateau Vegas Wine v. Southern Wine Spirits is permanent injunctive relief may be granted only if there is, 1, no adequate remedy at law; 2, a balancing of the equities favors the moving party; and, 3, a success on

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the merits is demonstrated.

With respect to the merits, plaintiffs bear the burden of demonstrating by a preponderance of the evidence, so they must show that it is more likely than not that under subsection (B), the directors have been guilty of gross mismanagement in the conduct of the corporation's affairs.

And the direct -- under Subsection (C), that the directors have been guilty of misfeasance, malfeasance, or nonfeasance. I'd like to talk about what those words mean in the context of Nevada law and other instructive law.

Nevada -- first, Nevada does not have a stand-alone cause of action for gross mismanagement. However, if we look to Delaware, which also lacks a stand-alone cause of action for gross mismanagement, we see that such a claim for gross mismanagement is treated as one for breach of fiduciary duty.

And when you see courts, including Nevada courts, talking about misfeasance, malfeasance, or nonfeasance, they talk about those terms in the context of duties owed.

And that is consistent with Nevada's receivership cases, such as Bedore v. Familian, which is at 122 Nev. 5, 125 P.3d 116-A, where the Nevada

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Supreme Court analyzed 78.650 in terms of breach of fiduciary duty.

And in Nevada for a breach of fiduciary duty, Nevada demands proof of intentional misconduct, fraud, or a knowing valuation of the law before a breach can be found.

However, before the Court even reaches consideration of intentional misconduct or knowing violation of the law, the Court, when it's -- when it's considering a breach of duty, must first provide the business judgment role and provide the directors a presumption that they acted in good faith and in the best interests of the company.

Under the business judgment rule, courts will not second guess directors' decisions unless it is shown that the directors are incapable of invoking the protections of the business judgment rule. For instance, if the directors are financially interested or otherwise interested in a challenge transaction.

Here, there are no allegations, let alone evidence, let alone a preponderance of the evidence that Hygea's directors are not entitled to the protections of the business judgment rule.

But even if the Court were to look beyond the business judgment rule, there is no evidence that --

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that the directors engaged in intentional misconduct or knowing violation of the law.

In rendering its decision on defendants' judgment at motion for judgment as a matter of law, Your Honor stated that he believed that there was some evidence that Hygea's management's failure to be able to account for cash flow to the degree an audited statement could be prepared creates the reasonable inference that the directors may have breached a duty.

However, the Court has heard testimony from Mr. Iglesias and Mr. Savchenko that the audited financial statements can be prepared and that there is nothing preventing the company from completing the audited financial statements other than the director's decision to not do so because the company is no longer going public.

That is a statutorily protected business decision. Indeed, the Court has heard testimony that the reason that the directors have made this decision, because they are not going public, and, thus, because audited financial statements are no longer needed, and, thus, they have instead obtained a quality of earnings report, is to conserve company assets. Indeed, completing unneeded audited financial statements at this point in time might constitute a waste of

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corporate assets.

Your Honor, that brings me to subsections (D) and E of 78.650. In the context of subsections (D) and (E), conserving corporate assets and preventing waste, sacrifice, or loss requires that directors take affirmative steps to ensure that the corporation's assets are protected and used for the benefit of the corporation and, by extension, its stockholder.

For instance, the fiduciary duty to conserve assets for the benefit of the corporation precludes, for instance, the directors taking actions that work to their own advantage and to the detriment of the company, including self-dealing or negotiating large salary payouts.

We've actually seen evidence that the directors -- two of the directors, when we were in management, have foregone pay for the benefit of the corporation.

Subsections (D) and (E), they require more than a mere cash constraint. They require evidence that the directors did not act for the benefit of a corporation. And here there is no evidence, and certainly not any preponderance of the evidence, that the directors have not acted for the benefit of the company and its stockholders.

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Indeed, Mr. Savchenko testified that he is not aware of any instance in which the company has used its cash and assets for anything other than the benefit of the company.

To the extent the company's current cash constraint could even be considered the result of the directors' failure to conserve or directors' actions leading to waste, those decisions are first entitled to the protections of the business judgment rule.

If plaintiffs can get past the business judgment rule, for which there is no evidence, then they must show that the directors' actions were the result of intentional misconduct or knowing violation of the law. They have not done so.

With respect to the cash constraint, Hygea and its directors, since the first moment that they appear in the Eighth Judicial District Court and in this Court, have always been transparent about the company's current financials.

Plaintiffs point to subsection (I), that although the corporation is not insolvent, it is not for any cause -- is for any cause not able to pay its debts or other obligations as they mature.

I think it's very important to consider what the -- what the terms "as they mature" mean. We take a

look at Black's Law Dictionary. It defines maturity as "debts coming due."

Now, plaintiffs have pointed to certain of the companies' purported debts, such as the Bridging loan and the American Express credit line. What plaintiffs have not offered is whether those debts are actually due, as that term is understood. They are not, and defendants have presented no evidence that they are due, they are being called in today.

Rather, what we have is evidence in the record showing that they are not. For instance, in the declaration of Natasha Sharpe, the chief investment officer of Bridging, Ms. Sharpe testified that the loan is not in default. The creditor who owns that loan has not demanded it.

In addition, I think it's important what is not in the record. Plaintiffs have asked this Court to take judicial notice of litigations in which Hygea is involved. Plaintiffs offered into evidence an index of those litigations.

Glaringly absent from that list is any lawsuit by Bridging, any lawsuit by American Express; and they mention the CuraScript debt, any lawsuit by CuraScript. That is because the company is managing its debts despite its current cash constraint.

Now, Mr. Savchenko testified about how the company's managing its debts and obligations in the face of the company's cash flow challenges, including with the help of its lender and largest stakeholder, Bridging Finance, who has extended additional credit to Hygea to its operations.

He explained that Hygea is ensuring that it meets its critical obligations while having negotiated its long-term debt holders. Mr. Savchenko also walked the Court through his 2018 cash flow projections, which project an imminent turnaround for the company.

In that regard, we also provided the testimony of a qualified expert, Mr. Craig Greene, a forensic accountant. Mr. Greene testified as to Mr. Savchenko's 2018 cash flow analysis, saying that it was rooted in sound accounting principles. And that as projections, they were reliable within a reasonable degree of accounting certainty.

Mr. Savchenko also testified with respect to his cash flow analysis that they were indeed conservative, and he did not include a large revenue item in terms of payment in tens of millions of dollars from the federal government's Center for Medicare and Medicaid Services.

That large payment, which Hygea will receive,

will solve the short and midterm cash problems of Hygea. Multiple witnesses testified that this payment will likely arrive later in 2018.

In addition, in terms of the finance side of Hygea's operations, Mr. Savchenko provided illuminating testimony on the operational changes that Hygea has instituted to ensure that its financial condition continues to improve and continues to stay strong.

He testified that Hygea has put into place internal controls to close out accounting at the practice level the end of each month. He also testified that Hygea has worked to reduce payroll substantially by eliminating less necessary employees.

He also testified that Hygea has worked to reduce other inefficiencies contributing to expense, such as rent for office space not being fully utilized. And he also testified that treasury controls were implemented.

And Hygea has strengthened its accounting subdepartment related to Medicare risk adjustments to ensure that Hygea was collecting any revenue associated with risk adjustments that it is entitled for services offered during prior reporting periods.

For these reasons, Your Honor, plaintiffs cannot succeed on the merits with respect to the

subsections underlying 78.650(1). Even if plaintiffs could show a success on the merits through a preponderance of the evidence, plaintiffs have not and cannot show that they are -- that they have no other legal remedy.

Indeed, the vast majority of plaintiffs' complaints stem from the Stock Purchase Agreement between the lead plaintiff, N5HYG, and the company. Plaintiffs -- we have heard much testimony about the 2014 and 2015 audited financial statements.

If plaintiffs believe they have a right to these audits under their Stock Purchase Agreement, plaintiffs can seek to enforce that right through their breach of contract claim in federal court.

Plaintiffs complain about the corporation not being transparent and about the corporation's books and records. Whether plaintiffs believe they have a right to the books and records either by their position as stockholders or by some contractual right, then plaintiffs can enforce that right either through a books and records action or, again, through their pending breach of contract claim in federal court.

Plaintiffs complain that Mr. Iglesias made misrepresentations in the form of projections about the company's financials in the time leading up to N5HYG's

stock purchase.
But, again, plaintiff N5HYG can then seek damages for such misrepresentations through its securities claim in federal court. Plaintiffs have a legal remedy for each and every one of their complaints.
Indeed, defendants submit that the Court must ask about plaintiffs' true motivation in filing this action when they already had an action pending, and when they were also readily receiving, as we saw from Mr. Dragelin, confidential information from one of Hygea's agents, not one of their agents.
Plaintiffs are seeking, clearly seeking, to do in this courtroom what they cannot or they have chosen not to do in Hygea's boardroom, including by their own admitted relinquishment of a board seat.
N5HYG, if it believed that the directors were engaged in mismanagement, it could have taken its board seat, and it could have directly influenced the management of the corporation, but it chose not to do so.
The Court should also look at the proposed order for an appointment of a receiver that plaintiffs submitted. It is incredibly telling about their motivation for filing this lawsuit.

The proposed order, which was filed on May 9, provides that the receiver is to open the books and records of the corporation to the stockholders and to complete the 2014 and '15 audited financial statements. Those requirements benefit one stockholder - N5HYG.
In short, the plaintiffs, in particular N5HYG, come to this Court asking for equity, but they do not show that they come with clean hands. And with respect to equity, the Court must engage in a balancing of equities. And plaintiffs have not shown that that balance weighs in their favor.
As to the appointment of a receiver, the Nevada Supreme Court in Hines v. Plante, 99 Nev. 259, 661 P.2d 880, has stated this. I think it is very important, Your Honor. "The appointment of a receiver is a harsh and extreme remedy which should be used sparingly and only when the securing of ultimate justice requires it."
A corollary of this rule is that if the desired outcome may be achieved by some method other than appointing a receiver, then this course should be followed.
The reasons for the above rules are fundamental. Appointing a receiver to supervise the affairs of a business is potentially costly, as the

receiver typically must be paid for his or her services.
A receivership also significantly impinges on the right of the individuals or corporations to conduct their business affairs as they see fit and may endanger the viability of a business.
The existence of a receivership can also impose a substantial administrative burden on the Court. Justice here does not demand appointment of a receiver; rather, what justice demands is that this Court ask a very simple question: Would Hygea do better under a receiver than under its current management?
Hygea -- what we have seen is Hygea is solvent. Hygea is managing its debts. Hygea is operating under the direction of a well-qualified and active board of directors, including through a slate of new C-suite executives.
Indeed, the appointment of a receiver would not only add to Hygea's expenses during a time of cash constraint, but it would almost certainly render an otherwise solvent corporation insolvent, achieving the exact opposite result that the plaintiffs purport to seek.
In short, as Mr. Iglesias and Drs. Collins

and Mann have testified, and even Dr. Gaylis, one of plaintiffs' witnesses has testified, if a receiver is appointed, Hygea would stand to risk losing its contracts with HMO plans, all of whom have a contractual right to terminate the contract with Hygea in the case that a receiver is appointed to manage the company's affairs.
It's also demonstrated, if an HMO canceled its contract with Hygea, the Medicare Advantage patient panel associated with that HMO would be immediately and automatically reassigned to another provider, and Hygea would permanently lose its ability to generate revenue by optimizing capitation for that particular patient panel.
Even more alarming, if that patient panel is reassigned, the new medical management organization to which the patient panel would be reassigned will have the right to receive all surpluses going forward, even those that are properly attributable to the coding and services provided by Hygea from 2016 through 2018.
In other words, the free cash flows associated with revenue and accounts receivable already booked by Hygea would be immediately and irrevocably assigned to a third party because the money follows the patient panel.

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Moreover, with respect to equities, the Court has heard from a number of Hygea stockholders during this time. Plaintiffs comprise only a small minority of the stockholders. The Court also heard from Mr. Iglesias, whose family holds approximately 25 percent of the company's shares, as well as Drs. Collins and Mann, who, in addition to directors, are stockholders.

They do not believe a receiver is in the best interest of the company, including because a receiver would cause the cancellation of 70 percent of the company's revenue in HMO contracts.

Plaintiffs dispute that that -- those contracts would be canceled, but plaintiffs have failed to put on a single witness from the healthcare field that supports this proposition.

On the other hand, the Court has heard from at least three persons, Mr. Iglesias and Drs. Collins and Mann, who all have extensive experience in the healthcare field and in the HMO field, who have all testified to this certainty.

Moreover, the Court has before it the HMO contracts, which plainly state that the receivership is a basis for termination, including in certain cases mandatory termination.

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Even if the Court determines that the interests of justice demand some remedy, the Court must first consider whether there exists an alternative and equally efficient method of achieving the purpose for which the receiver has sought.

Now, this is where plaintiffs' inconsistencies arise. Plaintiffs identify the cash constraints as a basis for receivership, and that a receiver is needed as a result of those cash constraints.

Well, I would like to know how is a receiver going to bring in more money to the company? What is a receiver, who will probably charge at least $500 an hour and also have his or her own counsel, what are they going to do to bring in more money into the company?

That question, Your Honor, has not been answered. If the issue is that the company is losing money due to mismanagement, we have seen no evidence of that. A receiver cannot bring more money into this company.

Finally, I'd like to direct the Court's attention to 78.650, subsection (4), which states that the Court may, if good cause exists therefore, appoint a receiver, but in all cases, directors who have been

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guilty of no negligence, nor active breach of duty, must be preferred in the appointment.

Plaintiffs -- apologize. Defendants have offered Dr. Keith Collins, whose qualifications this Court has already heard. Dr. Collins is a licensed physician with over 20 years of experience in founding and senior management of HMOs and physician networks, both on the medical side and the business side.

Dr. Collins has been in senior management for healthcare companies providing medical care in multiple states, many of which have grown into multibillion dollar companies, including companies in south Florida, which, as we have heard, has a unique healthcare market.

Dr. Collins has institutional knowledge of Hygea. And under 78.650, if the Court decides there is no other alternative, that this is a last remedy, then the Court must consider Dr. Collins before it considers any other receiver. And on that point, I'll note plaintiffs have not presented any evidence that their proposed receiver, Mr. Wade, is qualified.

That all said, we stand behind that when the Court looks at the merits, when the Court looks at whether there is any other legal remedy, and when the Court balances the equities, there is no basis for the

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appointment of a receiver under 78.650. And we would ask that the Court find in favor of defendants. Thank you.

THE COURT: I didn't yesterday want to again have -- have any argument about the 10 percent. If there's anything else you want to tell me about that, I'm -- I heard what you said yesterday, but --

MS. GALL: What I would like to say about the 10 percent rule is that that is plaintiffs' burden to demonstrate. They bear the burden of demonstrating standing, which is a part of subject matter jurisdiction.

I would like to also say they bear that burden not by a preponderance of the evidence, but by clear and convincing evidence, with "clear and convincing" meaning under Nevada law it must be so clear as to leave no substantial doubt.

Plaintiffs, Your Honor --

THE COURT: Where does that standard come from?

MS. GALL: In Re: Discipline of Drakulich, 111 Nev. 1556, 908 P.2d 709.

THE COURT: And that says what? What's the holding with that case?

MS. GALL: That case sets forth the standing

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of clear and convincing evidence. If the --
THE COURT: I mean, what -- what makes the burden of proving the 10 percent by clear and convincing as opposed to a preponderance?
MS. GALL: If the Court looks at I believe it's the Whitmore case, I can provide the citation to Your Honor, I believe that standing under that must be proved by clear and convincing.
THE COURT: Okay.
MS. GALL: But even if the Court considered by a preponderance of the evidence, I would say plaintiffs haven't even met a preponderance of the evidence because plaintiffs have introduced no evidence and actually have actively strived to keep out evidence of the number of shares issued and outstanding, both at the time they filed the complaint and as of today.
Your Honor, they did this despite having requested and having moved that Hygea provide them with a copy of a VStock Transfer list. On the other hand, we've provided and they've agreed to admit into evidence the declaration of Mr. Moffly, which at Exhibit 87, beginning at paragraph 44, reflects the total number of issued and outstanding shares as of January 29th, 2018, merely days after plaintiffs filed this action in the Eighth Judicial District.

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So, Your Honor, I submit there is evidence in the record at least as of the filing of the complaint as to the denominator that the Court has to consider when determining whether plaintiffs have met the 10 percent threshold.
THE COURT: And you think that -- I thought that you had argued or your side, not necessarily you specifically, but that the key time for the 10 percent was when the Court was looking at the application?
MS. GALL: I agree, Your Honor. I agree that under Medical Device Alliance v. AHR, that it clearly says that the district court does not have jurisdiction to appoint a corporate receiver unless the applicant or holders of one-tenth of the issued and outstanding stock has legal title at the time the court considers the application.
I do agree with that, Your Honor, but what I would state is defendants do not bear that burden, plaintiffs bear that burden. They have not presented and have actively tried to keep out today's VStock Transfer list.
We are happy even as of today to provide that list. And they do not want it admitted, Your Honor. They have requested it, and they do want to submit it to this Court. And I do not know how they can meet any

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evidentiary burden if they won't proffer to this Court what we readily offer.
THE COURT: Thank you.
MS. GALL: Thank you.
THE COURT: Mr. Kaye, I'm going to allow you to tell me whatever you want, but I would like to start with that 10 percent.
REBUTTAL ARGUMENT
MR. KAYE: Certainly, Your Honor. That was my intention as well.
THE COURT: What is the denominator?
MR. KAYE: Your Honor --
THE COURT: What's the number?
MR. KAYE: -- I will confess that I don't have it handy. But we can certainly -- we can certainly get it. We'll certainly give you that answer.
THE COURT: Is it the Moffly affidavit?
MR. KAYE: It is not the Moffly affidavit.
THE COURT: Okay.
MR. KAYE: It is the figure that we worked through, and I did not -- did not put it up on the screen here today. But it's the one we worked through during the opening, which is if you take the number of shares that N5HYG bought and then you apply the

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warranty given in -- in Exhibit 2, that those shares constitute an 8.57 percent. That gives you the denominator.
And then when you add the other shares that the other plaintiffs have to the shares of N5HYG, which constitute 8.57 percent, that resulting total exceeds 10 percent of that denominator. And that is the evidence that is in the record. And we have met our burden.
First of all, I want to speak very briefly to Whitmore because what it appears to be is a case -- a Supreme Court case dealing with competency issues and -- and standing to assert status as a next friend.
I don't believe that that applies here if it's the same Whitmore standing case that -- that defendants referenced. The other case that defendants referenced I believe simply talks about what the clear and convincing standard is.
I can also tell you that our shareholder totals based on the declarations and Exhibit 2 and based on the stipulated facts is 29,350,700, and that the denominator is 273,483,081. That is the evidence that is in the record.
Now, as to the VStock list, I will note again that defendants -- I don't know that I noted this

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before, but defendants withdrew that proffer. So the suggestion that somehow -- somehow plaintiffs compelled that I think is -- is incorrect.

Had that argument continued, had that -- that proffer continued, we don't know what would have happened, nor do we know what would have happened as we litigated the merits of those documents. It's all would have, could have, should have at this point. It's not in the record.

What is in the record is the warranty in Exhibit 2, Stock Purchase Agreement, the non-dilution provision in the Stock Purchase Agreement, that -- that said that any -- any dilution would have to be noticed to N5HYG.

Mr. Fowler's testimony is that he received no such notice, and the defendants claim that while they're -- there would have been notice, and Dr. Mann's testimony I think there was -- on that point was so interesting. He suggested that -- that notice -- his words, "I suspect that they would have been notified at a shareholder's meeting."

And I asked him, "When was the last shareholder's meeting you've attended?"

He said, "I've not been to one."

In fact, Mr. Fowler testified that he never

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received notice of any shareholders' meeting because it doesn't appear like one happened. And that's on top of the fact that he testified that he received -- did not receive the notice under the contractual provision.

So we have all that evidence, including the roster that was included with the Stock Purchase Agreement in Exhibit 2. It's Schedule 4.5.1. And on the other hand, we have Mr. Moffly's say-so that he said in a declaration about an exhibit that he did -- not exhibit, quite pointedly, a document that he claimed that he looked at, that he did not attach to his declaration, that was not admitted into evidence.

Now, we can argue quite a bit as to whether or not that is in some sense excluded under the hearsay rule or the best evidence rule, but at the very least the principles that -- that guide those rules and that inform those rules apply. And this is within a declaration that the Court has already indicated and it's already in the motion in limine that it would give minimal evidentiary weight to.

So we have everything in Exhibit 2 and the -- the known totals of the plaintiffs' shareholdings up against the very minimal evidentiary weight, if any, that might be afforded to Mr. Moffly's declaration. And the suggestions that, oh, there must have been

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notice, although as we saw with Dr. Mann, it was a meeting that apparently never happened.

I would suggest that even if a clear and convincing standard applies, and I don't believe that it does, that the weight of those two different bodies of evidence is so disproportionate that that would be -- that would be well met.

THE COURT: I'm struggling with this 10 percent. It seems like -- I've got now before me the PowerPoint from the opening.

MR. KAYE: Thank you.

THE COURT: And it seems like this is telling me what it should be based upon the non-dilution agreement, but not necessarily what it is this week when I'm considering the application.

MR. KAYE: Your Honor, we don't know what it is this week, and I say that both in terms of -- well, I think we can only speak in terms of the evidentiary record as we stand here today. And based on the evidentiary record, we don't know what it is this week.

Frankly, we don't know what it is this week even if you were to give Mr. Moffly's declaration all the significance in the world, that's some time ago as well. And perhaps shares have been in some sense destroyed or disintegrated. It's -- we don't have

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evidence of that.

What we do have -- what we do have is the evidence of what they were in October of 2016, and the evidence that notice of dilution was not given after that. Now, there is evidence in the record, and I would have to concede, that there has been testimony that new shares have been issued.

Now, there's some -- there is some question, and I do think it's worth pointing out, that the shares that were -- some shares were apparently used as "currency" we heard for the acquisition of new practices. But Mr. Fowler testified that he understood that to mean treasury shares. That is shares that were also issued but owned by the corporation.

Setting that aside, there has been some suggestion from witnesses that there has been dilution, that there has been new shares issued, such as I think their contention would be. And I think it's fair to extrapolate that out, that there has been dilution.

But two things: First of all, there has not been evidence from any of that that the dilution would be substantial enough so as to draw the plaintiffs below 10 percent. The best evidence on the record for that still remains the information from October of 2016.

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Beyond that, that information about the dilution -- the alleged dilution, and this is a rather unusual situation in which you have a defendant arguing, Yes, yes, we improperly diluted the plaintiff, which I do think goes to the equities that defendants discussed.

But that testimony I don't think is -- I think has to be taken with a grain of salt in terms of credibility. Once again, I refer to -- to Dr. Mann's testimony that, well -- well, this must have happened, and the notification must have happened at a meeting that he did not attend.

I would add to that, also, we have seen evidence in the record that there was a tremendous amount of apparent confusion within Hygea's top management as to what the shareholder roster was and what the list was.

So in a sense, this whole process is trying to nail Jello to the wall. I think we saw Mr. Savchenko, an exhibit in which Mr. Savchenko suggested that he did not trust the shareholder registry, didn't -- didn't know if the document was complete.

We've also heard from Mr. Fowler, his testimony, that he was trying to get ahold of that

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information because he was looking to set up a shareholder meeting, and he couldn't get ahold of that information because, once again, the Jello to the wall analogy I think still adheres.

It was very difficult to figure that out, what, in fact -- at least from the plaintiffs' perspective. From the plaintiffs' perspective, it was very difficult to figure that out, and that suggests that it was hard for management to figure it out as well.

So that not just casts doubt on what Mr. Moffly said in his declaration, but, frankly, it casts doubt as to these more -- more generalized bits of testimony about the issuance of new shares.

We don't know if those -- we really don't know what was happening with that, just as the plaintiffs couldn't figure out what was happening with that when they were trying to get the information in 2017.

THE COURT: How can I make a determination if the plaintiffs own 10 percent if I don't know how many shares are issued this week?

MR. KAYE: Your Honor, I think there's a couple of answers to that. First of all, once again, the best evidence we have of that is what was in the

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Stock Purchase Agreement and the extrapolations therefrom, including the shareholder roster that was provided with that document. That's, once again, the best evidence.

THE COURT: It's the best evidence in the record. Is it the best evidence that's available?

MR. KAYE: Your Honor, I think it is the best evidence that's available. And this gets to -- I will say, candidly, I'm a little bit leery of getting into some of the -- some of the -- may have been evidentiary issues, they may have been issues that went to if something was admitted, but there's some of those issues relating to the document that defendants at one point were looking to get in yesterday and then withdrew.

I will say this, and I'm happy to discuss this at more length. There would have -- I think there would have been a robust -- you know, a robust discussion as to the accuracy and the completeness of that document.

And I think that robust -- that may have happened at the -- as we continued to argue whether or not it should be admitted or it might have been admitted, and we might have been arguing about it as an exhibit, but I think there would have been a robust

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discussion about that.

Because, frankly, it remains -- and here I'll -- well, it remains the fact that within the record, there are multiple indications that it's just not clear how many shares are out there.

And without speculating too much or going too far afield of the -- of the evidentiary record, had those documents come in, I would be standing here today and I'd be arguing that that confusion still adheres, and that it remains unclear.

And that gets also to the equities, but it also gets to some of the fundamental issues in this case. Management cannot escape accountability. Accountability isn't even quite -- isn't even the right word.

Management cannot -- cannot evade the judicial protection of this corporation and maintain control over the corporation by failing to have a grasp of how many shares are issued and outstanding at a given time.

Moreover -- moreover, it is not just unfair to plaintiffs to have to go in and prove information that is kept behind closed doors, and in some circumstances might not even exist, where there's debate or discussion or ambiguity about how many shares

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are outstanding, but it also -- it also impairs the viability of the statutory system because you're inherently going to have -- look, there's going to be some corporations where there is a settled stock roster, and this is not a significant evidentiary issue or a significant issue.

We have seen in the papers -- excuse me -- in the papers the defendants have presented, they've made the argument that it's constantly changing, constantly churning. That raises its own questions.

But on this issue -- on this issue, it presents a situation in which, well, it almost becomes a loophole in the statute because, first of all, plaintiffs are coming in inherently without information. We're the outsiders. We don't know what happens behind closed doors.

Second of all, it creates the possible situation where, okay, you were at 10 percent, but now we've diluted you, and you can no longer act to protect the corporation.

You know, there's the -- we could face the sort of situation where we're about to make -- have a decision here, and someone rushes in the courtroom with a bevy of new certificates and drives the plaintiffs below 10 percent.

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So I think what we have to do is look within the record to what is the best evidence that's out there. And that's the evidence that we've set forth.

THE COURT: Well, what I -- I think I'm hearing is that you may have had difficulty in securing the information to show how many shares at some point, and I don't know Monday when we started the trial, today, yesterday, I don't know when. And I guess two things. My intention really is not to argue with you. I'm struggling with this.

MR. KAYE: Uh-huh (affirmative).

THE COURT: I think it was Learned Hand who said something to the effect the difficulty of the task does not excuse our failure to meet the burden. And if not knowing falls on somebody, doesn't it fall on the plaintiff, who has the burden of proof?

MR. KAYE: Your Honor, I think in this circumstance, in this circumstance where the equities are so strongly at play and where we're the outsiders again, I don't think it does. I'm reminded of something here from the record that Mr. Fowler testified to.

"When did N5HYG first become aware that Hygea was claiming that it sold additional stock in Hygea?

"Honestly, when we filed the lawsuit."

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And what that I think illustrates is that this is not -- you know, this is not a situation where -- where a plaintiff comes in and makes an allegation about something but doesn't -- doesn't, perhaps, on the expectation, well, once we get into court, we might find that out. That's not this situation.

And there are times when that happens. And there are times -- there are times when plaintiffs do that. And there's probably times where plaintiffs file a lawsuit and the burden is very difficult, and even if there's something there, they're not able to meet that burden because of the nature of the burden.

But I think this is different. This is something where they -- where we came into court, as you've seen in the testimony, fully thinking that plaintiffs had 10 percent. And all those figures are set forth in the initial papers that were filed in Las Vegas.

THE COURT: And it was disputed from the outset, right? When they responded, they said no.

MR. KAYE: That's correct, Your Honor. Their response -- the response, and that's -- I believe we can extrapolate from Mr. Fowler's testimony that that's -- that's how he learned about that claim.

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(Cellphone rings.)

I am exceedingly, exceedingly sorry. I had no idea that was on.

THE COURT: You're forgiven.

MR. KAYE: Thank you, Your Honor. You know, we get this to work, and then I do that.

THE COURT: Well, the other thing that kind of concerns me about it, I understand the time constraints, but had you asked for continuance, you could have gotten the continuance. And I understand it's important to get this done now, and that's why you're going to have a decision, at least a verbal decision this afternoon.

But, again, if there are mechanisms -- you could have attempted to secure the records from VStock. You may have disagreed with those, but then I'd have more information about right now than I currently have. So I don't want to be beat a dead horse on this, but if there's anything you want to tell me, I'm happy to listen.

MR. KAYE: Your Honor, the only other thing that I would add, and I don't want to belabor any points myself, only thing I would add is when we -- again, when we look within the record, the evidence from the time of the Stock Purchase Agreement and the

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inferences drawn therefrom suggest that at this point in time, plaintiffs have more than 10 percent of the stock. That's the evidence and the inferences that are within the -- that are within the record.

And is it possible to imagine an alternative record? I think it is possible to imagine an alternative record. I think, frankly, we'd still be having similar debates, although they would be differently constituted.

But that is -- to which I mean even if there was -- even if we had in our hand a VStock list, stretching, again, beyond the -- beyond the evidentiary record here, I do think that we'd be probably going through slides about the VStock list if we had secured it and admitted it or if the defendants had admitted it.

And, again, that was the defendants' decision to withdraw that. So there's a very clear to me -- a very clear prima facia case based on the evidence from October of 2016 and the inferences to be drawn therefrom that the plaintiffs are above 10 percent. And the evidence that defendants seem to -- the evidence that might shed light on defendants' position to the contrary they withdrew.

The one other point I would add, as we have

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stated throughout, given the fact that defendants made that warranty in the Stock Purchase Agreement, and given the fact that they didn't just make that warranty, but that they promised to give notification in the event of dilution, there is an estoppel issue.

And they are estopped from this point at denying those figures, especially given the fact that, once again, defendants are the custodians of this corporation, and they do owe fiduciary duties to the shareholders. And playing hide the ball in terms of what the actual numbers of shares might be is inconsistent with the spirit of those fiduciary obligations.

THE COURT: Go ahead with the rest of your argument.

MR. KAYE: Thank you, Your Honor.

I want to address a couple of additional points, and I do appreciate very much the opportunity to discuss those, and also the apology I have to say.

First of all, I left my slides about the business judgment rule at home because I didn't think we'd be getting into that, because these are not in the formal sense of the record business decisions. They're not transactions that the board entered into with a third party, except in the most minimal technical way.

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I suppose you could say the decision to hire an auditor is in some sense a business decision, but that's not what the business judgment rule is about. That's about challenging a board decision to enter into this transaction or enter into that transaction. It's not about this holistic -- holistic situation of mismanagement.

It also suggests that the business judgment rule is subsumed within 78.650. 78.650 clearly anticipates the issues at play in the business judgment rule. And there's this sort of circulator to it -- to defendants' argument.

Once again, also, we only need to meet one of the criteria. There's an "or" in the statute. And so the suggestion that the board is -- that the protections of the business judgment rule almost greatly weaken the protections afforded to shareholders under the statute is I think quite misguided.

I also want to talk briefly about plaintiffs' motivation and our true motivation. That's a term that defendants use. Our true motivation is to save the correspondence. And we have no legal remedy that can keep it alive. And that's an effort that plaintiffs are undertaking for the benefit of all the shareholders.

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Defendants' counsel mentioned harsh and extreme distress. What we have heard about all week is harsh and extreme distress. And I want to speak now to a few points, a few other points that counsel discussed.

First of all is the suggestion that things are getting better because on Friday, a new CEO was hired from the board of directors. Now, I already talked about that a little bit.

I do think in some sense that vindicates plaintiffs. It's a recognition that things need to change. Unfortunately, the change is to double down on the same failed team and the same failed strategy. It's rearranging deck chairs on the Titanic.

I also think the Court can pretty easily conclude from what we heard this week that Mr. Iglesias is not going anywhere except higher up on the organization chart as co-chair of the board.

We heard him talk about him and his family's role in Hygea, how it's a -- is ownership through a series of entities that he couldn't all remember that were created as part of an asset protection strategy. He may have technically stepped aside from the throne, but he is the power behind the throne and, indeed, on the organizational chart above the throne.

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We saw this as well with the very mysterious arrangement he seems to have with Bridging Finance. Unless there be any doubt that the board is unaware of his continued significance, Mr. Iglesias told us that as to the argument with Bridging, the board was "intimately aware of this transaction."

Moreover -- moreover, this gets a little bit to something that defense counsel said about what would a receiver do differently than what the corporation is poised to do itself?

Well, Mr. Iglesias testified that all these problems that we heard about stemmed at least in large part because, We grew too fast possibly. But he said, We stopped making acquisitions over the last year, and perhaps that would suggest that things were getting better.

Yet what did Mr. -- what did Dr. Collins testify to? That if they were -- if the corporation were to secure additional resources, and we heard the suggestion again as has been said so many times to so many participants in this situation, that there's a big amount of money that's going to be coming down pretty soon.

What did Dr. Collins say? That if the corporation were to secure additional resources, would

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you become more inquisitive again? Would you go on another spending spree?

"Absolutely."

That in itself is an admission that the supposedly new team is going to go back to the same failed strategy.

We've also heard and we've heard a lot about the HMO contracts. Now, as we've seen, they all have -- all the ones that we've seen have provisions that allow them to be terminated without cause.

We also saw in the documents that oftentimes -- I think across the board, they're not even with Hygea itself, but with a -- with a subsidiary or a practice group.

But defendants then move off of the technical arguments that, oh, receivership is a grounds for termination and say that receivership would be bad because it would be an indication of financial distress, after all we've seen for the past week is a story of financial distress.

And what we just talked about a little while ago from their own expert on $1.8 million deficits, on top of all the other debts and obligations that are out there, that's financial distress.

And this idea that we can't admit and

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acknowledge and solve the problem because of the HMOs constitutes defendants' hiding behind the HMOs, looking for an excuse. And it is the oh so dangerous reasoning of we better not try to solve the problem because that would mean that we're admitting that we have a problem.

I think that an HMO would approach this situation much the way that I believe the Court should approach the situation and much the way that Dr. Gaylis himself, Hygea -- one of Hygea's leaders, as he discussed it in his deposition.

"Maybe we don't call them a receiver," is the question. "But we find an individual who had both medical experience and accounting and finance experience, not a liquidating receiver, someone to stand the company up, make it work, put an end to the failed strategies and the mismanagement of the past and put the corporation on the solid footing that can allow it to be sustainable and successful as so many suggested it can be."

What did Dr. Gaylis say to that? "How could I disagree with that?"

And we ask the Court to save Hygea, and we ask the Court to agree with Dr. Gaylis. Thank you, Your Honor.

THE COURT: Thank you. So a brief

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explanation, and then we're going to take a recess. So I've listened as we've gone through. I've taken notes. If I was more efficient, I could have taken those notes on the computer and, perhaps, had a written order for you this afternoon. I'm not.

I have preliminary impressions that I've made. I'm going to spend a few minutes, maybe more than just a few, reviewing what I've heard in closing argument.

When I come back in, I am going to read from my notes the contents of an order that I'll order one of the parties to prepare so that if either party wants a second opinion, we have a written order that can take it up from here.

So it's going to be at least 15 minutes. It might be a little longer. I won't keep you just hanging in here all afternoon. So we'll be in recess for some amount of time.

(Recess taken at 2:16, resuming at 2:51.)

THE COURT: 18 OC 71, Arellano v. Hygea. All counsel are present.

MR. VELLIS: Your Honor, Mr. Kaye is coming in.

THE COURT: I thought everyone was present.

MR. KAYE: My apologies, Your Honor.

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THE COURT: No worries.
Ms. Gall, I'm going to have you prepare the order. What -- I'm going to have you send out a draft of that to Mr. Kaye before you submit it. You can submit a hard copy, that would be fine, but I want an electronic copy as well.
It's very likely that I will make changes to the draft once I've received it because I'm a better writer than I am a speaker. And so as I'm reviewing it, there undoubtedly will be changes. I will get it done as quickly as I can.
So the first section of these would be findings of fact, conclusions of law. The first section will be a procedural background, which will be a fairly brief description of how we got here today.
But -- and I'm not expecting you to keep up with me because I have a lot that I'm going to say, and you have the benefit of having the transcript available to you. So -- so I'm not going to tell you what to put in that procedural background, just describe how we got here.
The next section will be findings of fact. The first sentence of that will be that the Court finds the following facts were proved by a preponderance of the evidence. And then the findings, I'm going to go

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through them in the way that I have them in my notes.
So sometimes I'll get a couple pieces of a puzzle here and over here, and you can reorganize them if you want to put the pieces of the puzzle together in an orderly way. This might be a little less than orderly.
So the first, I'm going to refer to N5HYG as "N5" throughout, but in the order I want you to put N5HYG entered a Stock Purchase Agreement in October of 2016 in which it, N5, purchased 23,437,500 shares, which represent 8.57 percent of the issued and outstanding stock of Hygea.
Section 6.4(a) of that agreement gives N5 an antidilution right and the right to notice if Hygea is issuing stock that would dilute N5's percentage ownership share.
There's a dividend requirement of 7 percent per annum payable at $175,000 per month. In section -- strike the "section" part.
Hygea stopped paying the monthly -- the $175,000 per month after June of 2017 and currently owes N5 1,750,000 for those missed payments. Hygea has a number of creditors, including Dr. Gaylis, 2-1/2 million due to him; American Express, 8.5 million; Bridging Finance, somewhere between 60 and 75 million

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at 15 percent interest.
Hygea has not been good at or even adequately good at sharing financial information with shareholders. Some information that it has shared has not been accurate. Hygea has not provided audited statements. That was important for a time when Hygea was hoping to go public.
At the point that Hygea decided to not go public, Hygea decided not to pursue audited statements. They were not -- audited statements are not required by any regulatory agency for a private organization, and there was a business decision not to incur the expense or other resources in obtaining audited statements.
Do you have the exhibit list? I don't think I have my -- is Exhibit 20 admitted? I don't see it. Can you tell me? I'll accept your representation. Is Exhibit 20 admitted?
MR. KAYE: I'm not sure, Your Honor. We're trying to figure that out yourselves.
MS. GALL: Yes, Your Honor, it is admitted over an objection.
THE COURT: All right. I can't remember from my note.
COURT CLERK: Yes, it was admitted on the 14th.

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THE COURT: Exhibit 20 included as an attachment a shareholder register as of August 2017. That showed 9 -- I'm not sure what my point was there, so drop that.
COURT CLERK: Judge, you have 20 -- only part of it was admitted that I can see. Marked the other part of it as 28.
THE COURT: I'm looking at Exhibit 41 that I checked and is admitted. That's the minutes of the August 9, 2017, meeting.
COURT CLERK: That was partially admitted as well.
THE COURT: Not the entire exhibit? Which portions were omitted?
COURT CLERK: I wasn't in here for it. The portion that was omitted was the first two pages and then --
THE COURT: Not the minutes? They're not even in there?
COURT CLERK: This is 41-A.
MR. KAYE: Your Honor, I believe it's kept in that book as 41-A and 41-B.
COURT CLERK: And C.
THE COURT: Okay. So is this -- what exhibit number is that? I have 41.

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COURT CLERK: 41-B.
THE COURT: Is that admitted?
COURT CLERK: Yes.
THE COURT: All right. So I'm looking at the minutes at the annual meeting, August 9, 2017. I think these are draft or proposed -- maybe not. In the fifth paragraph on the second page of five, the CEO is reporting that the focus is now going to be to maximize the return on our own system and focusing inward, slowing acquisitions and concentrating on Hygea's advantageous position politically.
The CEO -- the last paragraph reported that one of the blemishes on Hygea's progress is cash flow. There are substantial obligations coming soon, including an approximate $9 million payment to the VRG Group MedPlan sellers on August 24, which the company will not be able to honor.
The CEO, starting at the very top of page 3 of 5, wishes to raise 15 to 20 million in equity through a private placement in case the company's plans for going public are further delayed.
In the second full paragraph on page 3, Mr. Dragelin pointed out that numerous of the companies processes were not formalized, acquisitions are not integrated into Hygea's system, and there's a lack of

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coordination among the company's departments and other matters with the result that information flow is not where it should be.
The next paragraph, Mr. Dragelin further advised that various deficiencies in the organization are being overcome. Mr. Savchenko was brought on board as finance director for his expertise in both financial and more general accounting. Various trust issues are being addressed. The corporate's liquidity needs must be resolved.
He said the company needs realtime financials on a monthly basis. This is the paragraph that Mr. McGowan opined that the company can live or die on the audits. Dr. Gaylis said the company needs to do a better job of integrating acquired practices to market to replace hospitals with our resources and to develop better contracts.
Exhibit 25 is the email from Christopher Fowler to Dan McGowan. He lists items that he wants to see addressed. He, Mr. Fowler, items that he wants to see addressed or clarified, including that the board of directors never received the Bridging Finance cash flows, which clearly show the negative monthly numbers.
The projections provided by the board of directors don't include acquisition payables of

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16.4 million, which creates a 5 million plus in negative cash flow. This email is dated September 20, 2017.
Projections must include written assumptions. The board of directors is not being informed of outstanding legal matters. Board of directors should undertake to review all outstanding contracts.
CEO failures, failure to provide timely or accurately -- accurate quarterly and annual audited financial statements to shareholders, failure to inform the board of directors of current or pending defaults under multiple agreements which could affect cash flow, significantly underperforming versus plan, and failed to provide timely accurate projections with assumptions to the board of directors, failure to adhere to corporate policies and procedures.
Hygea has not produced audited financial statements since 2013. Liquidation of Hygea would result in loss of shareholder equity. Hygea used some stock as currency to buy medical practices. Treasury stock is not the issuance of new shares, so they would not dilute N5's percentage ownership share.
There's consistent testimony that Hygea was a rapidly growing corporation, was also consistent with testimony that that rapid growth caused a lot of

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challenges for Hygea. Dan Miller was employed by Hygea as chief operations officer. He left because Hygea failed to pay him.
There was a time that Hygea was not able to pay its executives in a timely way. There's consistent testimony that Hygea needed operational changes. Hygea had a history of not closing financial statements, making it difficult for the business to manage.
I may have said 2.5 that was owed to Dr. Gaylis. I believe his testimony, his deposition was 2.3 million, excuse me, that has not been paid. Hygea stopped for a time at least using a recognized payroll company and went to paper to pay payroll checks. The checks were received by the Hygea employees more sporadically. There was no explanation as to why that change was made.
Hygea offered Dr. Gaylis to be the president of Hygea in November of 2017. He declined that position because he did not get information that Hygea was compliant with taxes, dealing with obligations, and how the obligations would be met. The 2 1/2 million that I mentioned earlier about Dr. Gaylis, that was for the drugs that Dr. Gaylis used in his practice.
Dr. Gaylis is still affiliated with Hygea. Dr. Gaylis communicated in February 28, 2018, that

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Hygea needed an immediate change of management or a receiver, and he was talking about a complete change in Hygea management. He also testified, Dr. Gaylis, that if a receiver is appointed, it's likely that the HMO contracts Hygea has would be terminated.

Hygea hired FTI Consulting and Timothy Dragelin, and a team from FTI consulted with Hygea. FTI's mission with Hygea was to assist in completing the audits for 2014-2015, with the hope of taking Hygea public, to develop a work plan for the company and a work plan for an RTO, reverse takeover.

Hygea's books and records were not complete while Mr. Dragelin continued to work with them. There were no financials and, therefore, in no shape to be audited.

The fact that the financials were not completed, that there was significant discord in the management team and a lack of support, which I understood to mean supporting documentation to complete financials, posed significant impediments to Hygea's profitable operation.

There was no financial management before Mr. Savchenko came on board. Once he did come on board, he was helpful in moving forward the -- Hygea's ability to prepare financial documents. There was just

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a lack of support for large revenue numbers, a lack of documentation regarding acquisitions and loans.

Mr. Dragelin -- FTI's role was as a consultant, so they made proposals to Hygea. Hygea declined to accept some of those proposals, and there were a number regarding financial numbers that Hygea was proposing and that FTI thought could be supported.

Mr. Dragelin explained how at the end of 2017, Hygea would have real data on the costs. Two adjustments, the preliminary in September of 2018 and July of 2019 for the adjustments, and how what Hygea would be paid in 2018 relates back to data from 2016 and 2017, and that a reasonable adjustment rate would be in the 5 to 10 percent range.

Mr. Dragelin observed officers of Hygea ignoring issues, financial issues, important financial issues. Some acquisitions were not valued. Hygea sometimes made assumptions that were not appropriate and resulted in overvaluing the acquisition or acquisitions.

Some of Hygea's financial numbers that were discussed with Mr. Dragelin did not have credibility. They were outside the bounds of what -- of credible assumptions. Another big issue was who could approve vendors, who could pay them, who had access to cash.

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He witnessed, Mr. Dragelin, an intentional misstatement of financial information when Mr. Iglesias told him that a transaction would be structured as a loan, and there was some misunderstanding by Mr. Iglesias about balance sheet EBITDA.

FTI left Hygea, I think "departed" was the word Mr. Dragelin used, in July or maybe late June of 2017. Hygea was continually delinquent in paying FTI's fees. Mr. Dragelin opined that Hygea needed a change in management and a large infusion of cash.

I think I've already said, but if I didn't, there's no regulatory requirement that a private company have audited financials. I'm pretty sure I said that with an earlier witness, under an earlier witness's notes.

The Hygea board of directors minutes from January 27, 2017, indicate that the 2014-15 audits would be complete within a matter of weeks. They're still as of today not complete, but there was an explanation that Hygea made the decision not to go public and, therefore, discontinued its pursuit of audited financial statements.

The HMO contracts that a receiver would put at increased risk of cancellation account for 70 percent of Hygea's revenue.

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In February of 2018, payroll checks issued to Dr. Edward Persaud, two of his employees, bounced. Hygea had prioritized maximizing revenue and failed to pay attention to operational efficiencies that resulted in limited infrastructure, records, and processes to make, monitor, and manage Hygea's money.

Hygea has approved a new CEO, CFO, and COO. Keith Collins as CEO. Mr. Iglesias resigned as CEO, continues now as co-chair of the board. Mr. -- name just went blank in my mind -- Iglesias' family is the largest shareholder of Hygea.

If HMO contracts were terminated, that could be the death nail for Hygea. Mr. Iglesias' family loaned Hygea $4 million in 2017. This year he secured a $3 million promissory note and another million dollars from a family trust.

Mr. Iglesias acknowledged that he lacked the expertise to take Hygea to the next level. He testified that Hygea shares are -- issued shares are 432 million.

The relationship between Hygea and RIN soured when the board decided to sell the company to an equity company rather than attempt to go public.

Everyone involved -- parties involved in the case indicate that their goal is to have Hygea succeed

so that the shareholders will continue to have value. Bridging Finance I think is the name, Bridging's funding Hygea's short-term cash shortfall.

Dr. Collins stated his educational and experience background, which includes being a director of Hygea since March of 2013, being the chief medical officer of an HMO with six small plans, which became a multibillion dollar organization in 16 states and is publicly traded.

He was a VP or vice president for business development that included acquisition turnarounds, shored up several HMOs. He was the founding CEO of the fastest growing HMO in New York City for a time.

Senior vice president of Health -- can't read my writing -- Suick [sic] New York -- in New York, New Jersey, has 20 years of creating physician networks, all successful to some extent, none have failed.

Dan McGowan is the co-chair of the board. He is a leader -- was a leader in New York healthcare. Glenn Marrichi is -- I didn't write it down -- was a -- I think CEO of a national marketing company.

Mr. Savchenko has a very strong financial background, including absorbing other organizations. When Hygea acquires a company, it takes 6, 12, 18, to

24 months to get payments income but gets the expenses immediately.

Dr. Collins, since he has become CEO, has been active with the board to make it more effective. They meet more frequently, every week to 10 days. All of the board officers have changed, president, secretary, treasury. There's a new governance committee to oversee practices to more effectively govern the larger organization and create a system of checks and balances.

Dr. Gaylis is the vice president of medical affairs. CFO is Mr. Savchenko. Dr. Collins has also made changes in the key 12 employees. He's interviewed them, people that they interface with, made some changes there.

Hygea is forecasting -- Hygea management is forecasting cash surpluses beginning in January of this year. Dr. Collins pointed out that federal regulations regarding a person that takes Medicare, if it fails, that those persons would be forever tainted, and that his reputation, which he highly values, would be tainted.

Hygea decided in the fall of 2017 not to pursue going public. Hygea has not always been able to pay its debt timely. Hygea has experienced projected

income not happening.

Hygea is not paying Bridging. Its monthly interest is being capitalized until the agreement was that either Hygea went public or was sold. Bridging is helping pay the short-term critical debts of Hygea.

The projected operating cash flow through 2018 shows an operating loss through June of 2018, and then compared to the size of the business, relatively modest positive cash flow for the last six months of 2018.

The Bridging loan is accumulating interest at 14 percent, around a million dollars per month. The cash flow projections don't include consideration of the million dollar interest to Bridging and $8 million on an American Express credit card.

So the next section will be "legal principles." The first will be NRS 75.650, subsections 1 and 2, that I have reduced to this. Holders of one-tenth of issued and outstanding stock may apply for appointment of a receiver whenever, and then under subsection 1(B), the directors are guilty of fraud, collusion, gross negligence in conduct or control of the corporation's affairs.

(C), director guilty of misfeasance, malfeasance, or nonfeasance; (D), corporation is unable

to conduct the business or conserve its asset by reason of acts of negligence or refusal of directors to function.

(E), corporate assets in danger of waste, sacrifice, or loss; (I), the corporation is for any reason not able to pay its debts as they mature.

Also, NRS 650 subsection (4), that a court may, if good cause exists, appoint a receiver, but in all cases a director who has been guilty of no negligence or active breach must be preferred in making the appointment.

And then Searchlight Development, Inc. v. Martello, 84 Nev. 102 at 109, 1968, court has no jurisdiction to consider appointment of a receiver unless the applicant holds one-tenth of issued and outstanding stock at the time the court considers the application.

The next section is "analysis." And the first part of the analysis is the 10 percent issue. And as the Nevada Supreme Court said in the Searchlight Development case, the time that matters for the 10 percent ownership of issued and outstanding stock is when the court considers the application.

The parties stipulated to the amount of shares that the plaintiffs own, so the Court has the

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numerator for the 10 percent calculation. But the Court does not have any evidence of the total number of issued and outstanding shares as of today, this week, or this month, or at any time during the last 88 days since Mr. Moffly made his declaration on February 19th or back to the Stock Purchase Agreement in October of 2016.

But neither of those, Mr. Moffly's declaration or the Stock Purchase Agreement, inform the Court as to what the issued and outstanding shares are as of the beginning of this trial on Monday or through today.

The plaintiffs have argued -- this is my take on it -- that it would be unfair to hold them -- to place the burden of a failure to show 10 percent stock ownership because that information is within the possession of either Hygea or Hygea's agent, VStock.

That would be a stronger argument if plaintiffs came in with evidence of its efforts to obtain information as to what the current issued and outstanding stock is.

There are discovery procedures to obtain that information. This was an expedited process. The Court could have ordered production of documents or at least tried to get Hygea to produce information from VStock.

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The plaintiffs assume that any information they would have received regarding the numbers or number of issued and outstanding stock would be inaccurate. That may or may not be. We don't know because -- because they didn't get any information.

So is that fair? In answering that question, the Court considers what the plaintiffs did which the Court finds was hardly anything in trying to determine the actual number of shares issued and outstanding as of Monday through this week.

The defendants did not -- there's no evidence that the defendants in any way interfered with the plaintiffs' ability to secure that information. The plaintiffs accepted the risk of having the burden of not knowing the number of shares issued and outstanding by proceeding to trial without obtaining the information, asking for a continuance to obtain the information.

Had they come in with evidence that they had tried in good faith to secure the number of issued and outstanding shares and showed inaccuracies or an outright refusal or inability to produce share numbers, the Court could have adjusted that burden by making adverse inferences against Hygea, precluding Hygea from even arguing that the plaintiffs owned less than

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10 percent, and probably other ways that I haven't thought of as I sit here today.

But none of that -- there's none of that in the record. The Court does not know what the number of issued and outstanding shares are. Therefore, it cannot make the calculation of whether plaintiffs own one-tenth of the issued and outstanding stock.

So under the Searchlight Development case, the court -- that court used jurisdiction. The Court does not have jurisdiction to consider the matter. An appellate court may disagree with me on that, and for that reason I'm going to go ahead and analyze the other issues so that if the appellate court does disagree, it will have my findings of fact and conclusions of law to make a determination on whether or not they are correct.

So turning to the NRS 78.650 factors, the Court finds that the subsection 1(B) factors, that the directors were guilty of fraud or collusion, there's not a preponderance of evidence to show that or gross mismanagement.

Under Subsection (C), that the directors have been guilty of misfeasance, malfeasance, the Court finds there's not a preponderance of evidence to show that the directors are guilty of either of those.

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However, the Court does find that the directors are guilty of nonfeasance.

There was an analogy -- I don't remember which witness said it, that it was like the directors were asleep at the wheel. It's easy for the plaintiffs to come in and for the Court now to sit and pass judgment on them.

I would analogize this more to being in the driver seat and seeing the huge success of the business with all the acquisitions that they were making and not paying attention to what was going in the back room. They should have been paying attention to what was going on in the back room.

But the Court concludes that's not misfeasance or malfeasance, but nonfeasance. That nonfeasance resulted in, under subsection (D), the business not being able to conserve its assets by reason of the neglect of the directors to function. It also resulted in, under subsection (E), the corporate assets being in danger of waste, sacrifice or loss.

And (I) that Hygea has been only able to pay its debts and other obligations as they mature or become due through costly agreements and/or loans -- the fact that the Court finds that the directors were guilty of nonfeasance, placing the assets at risk does

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not mean that a receiver is automatically appointed.
The legislature could have said that if the court finds any of the things under subsection (1) are found, that a receiver would be appointed. But subsection (4) of that 78.650, the court may, if good cause exists, appoint a receiver. So that gives the Court discretion to consider other factors.
The Court considers that Hygea's business model is ingenious, successful, or can be if properly managed. The reason Hygea is in the trouble it's in is because its infrastructure, records, and processes did not keep pace with its rapid acquisition of medical practices.
The directors should have caught on before they did and addressed the infrastructure, records, and processes. The Court considers under the good cause standard the fact that all parties profess the desire to have Hygea continue to operate.
The Court considers the fact that the appointment of a receiver will in best case scenario increase the risk that HMOs will cancel the contracts they have with Hygea and could very well be the death of Hygea. If that occurs, all of the parties lose.
The Court has considered the remaining portion of 78.506(4) that says if a receiver's going to

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be appointed, innocent directors have to be preferred, but the Court has found that the directors are not innocent, but guilty of nonfeasance. So there's not a preference that any of the directors be appointed.
Under the circumstances of this case, the Court concludes that not appointing a receiver and allowing Dr. Collins to act as CEO and not appoint him as a receiver is Hygea's best avenue for survival.
The Court's considered that appointing a receiver, in addition to the increased risk of HMOs canceling their contracts, heaping additional confusion on Hygea, who has just changed its C-suite executives for another leader, and time for that leader to get things rolling. The Court concludes that Dr. Collins is qualified to lead Hygea as CEO, at least as qualified as the receiver proposed by the plaintiffs.
So I started kind of shifting down into conclusions of law, but I want another heading, "conclusions of law." The first is calculations based on the number of shares and percentage of ownership in the Stock Purchase Agreement is not evidenced by a preponderance of the evidence that the plaintiffs own 10 percent of Hygea's stock as of now or this week.
Because there's no evidence that the plaintiffs hold one-tenth of the issued and outstanding

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stock, this Court has no jurisdiction to consider the matter and, therefore, the complaint must be denied.
Again, if an appellate Court disagrees with that conclusion, this Court also concludes that Hygea's board of directors as a whole is guilty of nonfeasance, resulting in Hygea being unable to conserve assets and creating a danger of waste or loss of assets.
I want to amend that. HVO's non-management directors as a whole are guilty of nonfeasance. There's no evidence of any particular non-office director being guilty of any specific ground, in other words, I don't know that some director didn't say something trying to change things and was voted down or not heard or whatever.
The Court concludes that good cause does not exist to appoint a receiver. Good cause exists not to give a non-officer director of Hygea a preference in appointment. Court concludes that good cause exists to allow Dr. Collins to serve as CEO of Hygea. And, again, the plaintiffs' complaint must be denied.
So the last section of the order is that "plaintiffs' complaint is denied."
Do you have any questions about what needs to be in the order?
MS. GALL: I do not, Your Honor.

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THE COURT: Anything else before we adjourn?
MS. GALL: Your Honor, just one matter is that we will be filing a post-judgment motion for fees based on our offer of judgment. I just wanted to alert the Court to that.
THE COURT: Okay.
MS. GALL: Your Honor, should we also dispose of the motion for contempt that this Court left, I believe, pending for the trial of the matter?
THE COURT: Mr. Kaye?
MR. KAYE: Your Honor, a couple of things. I'm happy to discuss that issue. First of all, I do want to -- some of this is just my unfamiliarity with Nevada procedures, to which I apologize.
I do want to ask if there's anything we need to do other than continuing with the -- if there's anything that the Court would like us to do for the preservation of appeal or reconsideration rights other than following through with the order process?
THE COURT: There's not. So what I am going to ask you to do is have that order to me -- not me, a draft of the order to Mr. Kaye by next Wednesday.
MS. GALL: Understood.
THE COURT: So the purpose of that review is just for you to make sure that it says what I've said,

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not that you agree with it.
MR. KAYE: Certainly. I've been through a couple of them at this point, Your Honor.
THE COURT: So, again, it's very likely that I'm going to change what is submitted to me. But I'm going to do that as quickly as I can. I'm gone next week and immediately going to a murder trial when I get back.
But I appreciate that it's important to get this in a position where you can take the next step. So if you'll have it to him by Wednesday and submit it then -- submit the proposed order on Friday, again, electronically.
You don't happen to use Wordperfect, do you?
MS. GALL: I can make sure it gets to you in Wordperfect form.
THE COURT: You don't have to. I'll have somebody else do it. I'll make the changes, but -- anyway, so if there's a disagreement about what I've said, then on Friday, you need to file written objections.
I will look at the file when I get back, probably make some proposed changes anyway. But if there's no objections, then I'm going to assume there are none, and I'll just make the changes.

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If there are objections, I'll check the record and try to correct it on my own. If I'm not able to do that, then we might have to do a phone conference or some other way to work out those details.
MR. KAYE: Certainly, Your Honor.
THE COURT: So you should have a signed order by the first part of the week after next. I think -- well, I'm not even -- I have appeals filed sometimes before the written order is done, and the Supreme Court allows that. But you're not -- you have 30 days from the notice of entry of order.
MR. KAYE: Certainly. I just wanted to make sure that there was nothing that the Court -- that the Court was requiring from us.
THE COURT: No, there's nothing.
MR. KAYE: The other issue that I would raise, and I raise this now and would be happy to do this in a written motion as well, but when we were here on the -- I believe it was the status conference and the case was consolidated, the evidentiary hearing and trial were consolidated, we had those this week, and the Court left open, and I believe it's reflected in the order, though I don't have a that order in front of me right now, the possibility of disassociating the two and continuing the trial or continuing the case for

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trial in the event there's good cause.
And plaintiffs -- plaintiffs move for that on two bases. One is the basis that the Court has raised of the -- of the evidence and the evidentiary record relating to the 10 percent ownership issue.
The other reason is, as the Court has suggested in the -- what has orally been given, as I believe this was under analysis or conclusions, I don't remember exactly, the Court -- the Court finds in its -- I believe its good cause analysis that Dr. Collins should be allowed to proceed, and his new management team should be allowed to proceed in lieu of -- even if there were jurisdiction in lieu of the appointment of a receiver.
Now, where the good cause on that issue comes in is that I believe the testimony was that Dr. Collins was appointed as permanent CEO last Friday. So it seems to me that there is good cause to see what happens over the next period of time and continue this case for a later trial on those limited issues, sort of what's happened from here on out, as well as the 10 percent issue.
THE COURT: What I'll have you do is file a written motion so they'll have an opportunity to respond.

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MR. KAYE: Certainly. I wanted to state that for the record to make sure we had that.
THE COURT: Understood.
MR. KAYE: Thank you, Your Honor.
MS. GALL: Thank you, Your Honor.
THE COURT: I am going to return these binders so that we don't have to store them. I'm not sure who brought them. All of them?
MR. VELLIS: All of them, Your Honor. I needed a handcart last time I came down. I didn't bring the handcart with me.
COURT CLERK: We have one in our office.
THE COURT: Yeah. We're not letting you get away.
All right. With that, we will be adjourned. Thank you.
(The proceedings concluded at 3:54 p.m.)

C E R T I F I C A T E

STATE OF NEVADA)
COUNTY OF CLARK)

I, Daren S. Bloxham, a Certified Shorthand Reporter and Registered Professional Reporter, do hereby certify: That I reported the proceedings commencing on the 18th of May, 2018.

That I thereafter transcribed my said shorthand notes into typewriting; and that the typewritten transcript is a complete, true, and accurate transcription of my said shorthand notes.

I further certify that I am not a relative or employee of counsel of any of the parties, nor a relative or employee of the parties involved in said action, nor a person financially interested in the action.

Witness my signature at Las Vegas, Nevada, on this 20th day of May, 2018.

Daren Bloxham

DAREN S. BLOXHAM
C.C.R. #685

“Exhibit 9”

“Exhibit 9”

OPPO
G. MARK ALBRIGHT, ESQ., NBN 1394
D. CHRIS ALBRIGHT, ESQ., NBN 4904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111; Fax: (702) 384-0605
gma@albrightstoddard.com; dca@albrightstoddard.com

E. POWELL MILLER, ESQ.
CHRISTOPHER D. KAYE, ESQ.
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 841-2222
epm@millerlawpc.com; cdk@millerlawpc.com
Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

N5HYG, LLC, a Michigan limited liability company; and NEVADA 5, INC., a Nevada corporation,

Plaintiffs,

vs.

HYGEA HOLDINGS CORP., a Nevada corporation; et al.

Defendants.

CASE NO.: A-17-762664-B
DEPT. NO.: 27
Hon. Judge Nancy L. Allf

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND

[ORAL ARGUMENT REQUESTED]

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

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LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-1
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

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A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-41
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-41
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

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LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

Other Authorities

Rules

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Plaintiffs N5HYG, LLC, a Michigan limited liability company, and NEVADA 5, INC., a Nevada corporation ("Plaintiffs"), by and through their undersigned counsel of record, hereby file with this Court Plaintiffs' Opposition to Motion to Dismiss the First Amended Complaint and to Strike Supplemental Pleadings and Jury Demand ("Opposition"). This Opposition is made and based upon the memorandum of points and authorities, as well as pleadings and records of this case, and any oral argument this Court entertains on the hearing for the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants misled Plaintiffs into entering into a $30 million Stock Purchase Agreement ("SPA") to purchase over 8.5% of a failing company. They told Plaintiffs that the medical practice holding company had robust earnings, a $350 million value, and was primed for listing on a public stock exchange. These financial representations were wildly off the mark; the valuation of the company is a small fraction of what was represented; the "business" is based on inaccurate and fanciful accounting; and an exchange listing was, therefore, out of the question. Despite this, Defendants seek to close the courthouse door.

First, Defendants claim that Plaintiffs are barred from bringing this case because, after they filed it, one of them joined with other shareholders to seek appointment of a receiver. But the claims here were not at issue there, and could not have been litigated in that case. In fact, during the Receivership Court, Defendants loudly and consistently argued that the cases were distinct. Their stark about-face suggests a desparation to avoid defending their conduct on the merits.

Second, while several Defendants now claim immunity from Nevada jurisdiction, all of them either approved or signed the SPA with the Nevada forum selection clause. The case should not be bifurcated. Indeed, even the non-signing Defendants were officers and directors of a Nevada company, who expressly authorized the sale of wildly inflated stock through the SPA that acknowledged all their knowledge of the warranted "facts" as to the company's supposed success.

Moreover, they cannot demand that the claims against them as "control persons" under state and federal Securities Acts be bifurcated from the claims that must be litigated in Nevada under the SPA's forum selection clause.

Defendants also seek immunity because they claim they do not understand the claims against them. But the First Amended Complaint ("FAC") is replete with specific details of Defendants' misconduct – even though Defendants have concealed, and continue to conceal, the true depths of their misrepresentations. They finally raise a series of tendentious challenges to Plaintiffs' pleading. Again, none of these justify immunity. Defendants held out Hygea as a company worth over $350 million, when its true value is a tiny fraction of that. Hygea's executives transmitted grossly misleading financial information to Plaintiffs. And, charged with knowledge of Hygea's operations and performance, Defendant Board of Directors (the "Board") members cannot credibly argue that they were unaware that Hygea's true value was a fraction of what was claimed; had no knowledge the facts regarding the sale of more than 8.5% of the company for $30 million, when in fact the entire company probably was not even worth that much; or were ignorant of the details of a transaction that Defendants claimed would begin the process of the stock's listing on an exchange.

Rather, the Board, comprised of wealthy and sophisticated professionals, oversaw and directed all of this, signed off on the misleading financial figures, and approved the SPA and inflated valuation, all to secure $30 million from Plaintiffs that served as an existential lifeline to Defendants' scheme – and which has been an outright loss for Plaintiffs.[1]

II. FACTUAL BACKGROUND

Defendant Hygea Holdings Corp. ("Hygea") is a Nevada corporation which purports to acquire and manage medical practices. It is managed by a team of executive officers and a fourteen-member Board of Directors. ¶ 2.[2] In 2016, Defendants arranged for Hygea to undertake a public

[1] For all the reasons set forth herein, the FAC states strong *prima facie* claims against all Defendants. But at the very least, should the Court find that any claims are improperly pled or any facts inadequately alleged, Plaintiffs respectfully request leave to amend the FAC. *See* NRCP 15(a)(leave to amend should be freely granted in the interest of justice).

[2] As used throughout, "¶" refers to a paragraph in Plaintiffs' First Amended Complaint and jury demand.

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issuance of stock in what appears to have been a desperate bid to secure cash from investors in order to keep the corporation afloat. ¶ 27. At the time of the offering, Manuel Iglesias ("Iglesias") was the CEO, and Edward Moffly ("Moffly") was the CFO. ¶¶ 3-4. Defendants other than Iglesias, Moffly, and Hygea itself (the "Director Defendants") joined the CEO and CFO on Hygea's Board. All of the Defendants wrongfully secured $30 million from Plaintiffs and repeatedly breached their obligations to the Plaintiffs. ¶ 1.

Plaintiff Nevada 5, Inc. ("Nevada 5") is a Nevada Corporation. ¶ 25. In 2016, as part of the offering, Iglesias and Moffly approached Nevada 5's agents about the possibility of an investment in Hygea. ¶¶ 31-32. At the direction and authorization of the Board, they began a campaign of misrepresentations in order to induce Plaintiffs to invest in the company. ¶ 17.

Central to the campaign were two interlocking sets of misrepresentations: Hygea's supposedly-robust financial performance, and the claim that, after Nevada 5's investment, Hygea would be listed on a public stock exchange. In fact, the financial performance was dismal, and Defendants must have known that Hygea was in no shape for listing on a public exchange. ¶ 34.

Specifically, Defendants made the representations to personnel of Plaintiffs' authorized agent, RIN Capital. ¶ 35. Many of the details are summarized in Section B(1), *infra*, in response to Defendants' misguided contention that they do not understand the fraud claims against them, despite the voluminous "who, what, when, and where" details. But to summarize: Defendants made misrepresentations in person, by phone, and by email on July 6 and June 27, 2016; August 2, 9, and 10, 2016; September 14, 16, 20-22, 27, and 29, 2016; and October 4 and 5, 2016. ¶¶ 37-42, 52. Much of the campaign consisted of providing misleading and inaccurate financial materials. *Id.* In at least one instance, the Board approved a wildly misleading report on earnings before interest, taxes, debt, and amortization, or "EBITDA," which was then provided to Plaintiffs. ¶ 41(k).

Over the course of the misrepresentations, it became clear that the proposed vehicle for an exchange listing – premised, again, on the rosy financial representations – was a "reverse takeover,"

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or RTO, with a company on the Toronto Stock Exchange. Effectively, the publicly traded company would "takeover" Hygea in exchange for the publicly traded company's stock, resulting in Hygea's *de facto* presence on the exchange as a new publicly traded company. Defendants represented that this would happen nearly immediately upon Plaintiffs' investment. ¶¶ 36, 42.

In response to the misrepresentations, the rosy financial information, and the failure to disclose Hygea's true condition, Nevada 5 formed Plaintiff N5HYG, LLC ("N5HYG") to execute a Stock Purchase Agreement dated October 5, 2016 (the "SPA"). ¶ 44. Under its terms, Plaintiffs paid $30 million for 23,437,500 shares, or 8.57 percent, of Hygea's Common Stock. *See* SPA, Exhibit A to Defs' Br, Dkt. No. 11-1 at § 3.3 (purchase price) and recitals (number of shares and percentage); *see also* ¶ 46. The parties agreed that the price per share "reflected the fair market value" of the company; doing the math, Defendants therefore agreed that the company was worth at least $350 million.[3] ¶ 47. This valuation reflected the range of financial performance that Defendants had represented Hygea to have been achieving. ¶ 48.

Iglesias and Moffly joined Hygea as parties to the SPA. *See* SPA, preface and definition of "Seller Principals." And consistent with its involvement throughout, the Board affirmatively approved the SPA, including its valuation figures and financial representations. *See* SPA at § 3.4.3. *See also* Ex. A.[4] Moreover, the SPA—that Iglesias and Moffly signed, and that the Board approved—contained a mandatory forum selection clause in Clark County, Nevada. *See* SPA at 8.11.1. The SPA reflected, encompassed, and even warranted many of the misrepresentations that Defendants had made during the negotiations and assured Plaintiffs as to the financial information that had been presented. ¶ 50. For example, it vouched for the accuracy of the financial statements provided during the negotiations. *Id.* Moreover, it imputed this knowledge to all Defendants, defining "Seller's Knowledge" as:

[3] Section 4.6.1 of the SPA also assured that the company's books would show at least $95 million in equity.
[4] Defendants attached the "body" of the SPA to their Motion while excluding this deliverable.

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> the knowledge of ... each ... member of the board of directors (or equivalent governing body) of Seller and each Subsidiary. ... [A]ny such individual shall be deemed to have knowledge of a particular fact or other matter if ... a prudent individual could be expected to discover or otherwise become aware of such fact or other matter after reasonable investigation. SPA, Def'ns., p. 9.

Hygea even provided a certification of the representations signed by Iglesias. ¶ 52.

It turned out that these representations were false. Of course, many of the details remain in Defendants' sole possession, but Plaintiffs have learned more than enough to state strong claims here. ¶ 53. The RTO process did not begin immediately upon Plaintiffs' investment as represented; it was not completed around the end of 2016 or beginning of 2017 as promised; and it still has not happened. ¶ 54. In fact, far from enjoying robust growth, Hygea was severely distressed. ¶ 57.[5]

The pre-investment misrepresentation of the company's condition has been effectively confirmed by the limited review that Defendants have permitted. Hygea was forced to hire outside consultant FTI to review its finances. Moffly and Iglesias consistently frustrated them. ¶ 58. Nonetheless, the FTI team was able to conclude that Hygea's numbers were never what they stated. For example, at a June 29, 2017 meeting, Plaintiffs learned that Defendants were partially disclosing their previous misrepresentations, conceding that Hygea's 2016 EBITDA was far less than Defendants claimed before the investment. ¶ 59. But even this EBITDA was inaccurate: at the meeting, a senior FTI consultant reported that the "corrected" 2016 EBITDA was "fabricated," and that the actual number was about a seventh of the "corrected" figure. ¶ 60.

Then, on July 12, 2017, the senior FTI representative called Chris Fowler at RIN. He reported that Hygea was refusing to provide cash flow projections; he could not secure the checking accounts; the bank accounts were improperly under Iglesias and Moffly's personal control; and that Iglesias had admitted to "cooking the books" to avoid "issues" with a previous lender.¶ 61.

[5] Defendants have also failed to fulfill their obligations under the SPA. Under Section 6.6, Defendants promised to provide accurate and complete 2014 and 2015 financials by November 30, 2016. ¶ 68. They have never done so. ¶ 69. Defendants also owe Plaintiffs funds due under the SPA. ¶ 57.

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Despite the roadblocks he had faced, the senior FTI representative was able to conclude and report to Fowler that "their numbers," that is, Hygea's financial performance figures for 2014 through 2016, "are not the same as the ones they gave" to Plaintiffs during the lead-up to Plaintiffs' investment. He added that he would not "come up with bullshit for [the] auditors," who supposedly would review the financial information. ¶ 62. It appeared possible that some of the earlier numbers had been manipulated through improper accounting. ¶ 60. For example, it has become clear that Defendants were baldly misrepresenting the value to Hygea of certain acquired medical practices. Even if Hygea acquired the practice late in a year, it credited itself all of the practice's revenue from that year. Defendants claimed that this was permitted by preexisting "management agreements." But a senior FTI representative called three separate selling physicians to inquire about the purported management agreements, none of whom knew anything about them. ¶ 72.

In other words, Defendants represented a healthy company poised for an imminent RTO; robust financial performance; and warranted specific financial information reflecting such success. It turns out that Hygea's actual performance fell far short of these claims; the numbers were wrong; there was, and likely will be, no RTO; and the company is not a healthy business but rather a *de facto* mirage. ¶ 67. Defendants have also continued to pressure outside accountants for an endorsement of Hygea's books. ¶ 71. But as one outside accountant apparently told Iglesias and Moffly, "You can badger me, but I won't sign off on these" financials that Hygea presented. ¶ 65.

On October 5, 2017, Plaintiffs were compelled to file the above-captioned action. Defendants improperly removed to Federal Court.[6] In the meantime, Hygea's condition continued to worsen. On January 30, 2018, as this Court is aware, Plaintiff N5HYG joined thirteen other

[6] Their theories were specious: they first claimed that the case should be removed because the Complaint raised a "federal question" through its claims under the Securities Act of 1933. When Plaintiffs pointed out that this statute had an express non-removal provision, Defendants raised a new, untimely theory: that the Complaint had "artfully pled" a claim under the Exchange Act of 1934. This argument was untimely *and* substantively baseless: not only is the "artful pleading" doctrine a narrow exception to the general rule that the plaintiff is the master of the complaint, but the United States Supreme Court has expressly rejected the argument that a case can be removed due to "artful pleading" of a claim under the Exchange Act of 1934. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning* --- U.S. ----, 136 S. Ct. 1562, 1568-1569 (2016). The federal court accordingly remanded the case, but not before Defendants had successfully – and wrongfully – delayed the case for about six months.

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shareholders, to seek a receivership primarily under the specialized statutory procedure of NRS 78.650 (the "Receivership Action"). As discussed in detail below, that case was narrowly tailored and did not address the issues in this case except in the most general way. In fact, Defendants consistently insisted that the cases were separate and asked the Receivership Court to respect the distinction between them. Indeed, the claims at issue here could not have been brought in the Receivership Action. As this Court will recall, it found that, under NRS 78.630 and NRS 78.650, the Receivership Action had to be litigated in Carson City; meanwhile, the claims at issue here are subject to a forum selection clause providing for venue in Clark County. In any event, the Carson City Court found that it lacked jurisdiction over the Receivership Court because, it found, there was insufficient evidence that the plaintiffs combined held more than ten percent of Hygea's stock. It nonetheless rendered *de facto* advisory findings concluding that, while the Court lacked good cause to appoint a receiver in light of recent executive changes, the company had suffered mismanagement and its executives had misstated its financials. **Exhibit 1** at 5:22-23, 19:14-24. Even so, Defendants ask this Court to dismiss Plaintiffs' claims.

III. LEGAL ARGUMENT

I. Plaintiffs' Claims Are Not Precluded

Relying on arguments which are directly contrary to their position in the Receivership Action, Defendants claim that the Receivership Action was conclusive as to whether they owe Plaintiffs money. In addition to constituting a patent "about-face" from their prior assertions, Defendants are wrong on the merits for several reasons. As Defendants concede, in order for claim preclusion to apply, they must demonstrate that "(1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the instant lawsuit as 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

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reason for not having done so." *Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80, 82 (Nev. 2015), reh'g denied (July 23, 2015). None of these three necessary factors are present here. There is not a valid judgment in the previous action for purposes of *res judicata*, because the Receivership Court found that it lacked jurisdiction; the claims in the two actions are distinct, and the claims here could not have been brought in the Receivership Action; and the cases do not share the same parties. Indeed, throughout the receivership case, Defendants argued that the two cases were—and should be—entirely distinct. They cannot now secure immunity for their conduct by arguing the opposite.

A. There is No Valid and Final Judgment Because the Receivership Court Found that it Lacked Jurisdiction

As a threshold matter, *res judicata* does not apply because the Receivership Court found that it lacked jurisdiction. A judgment entered by a court on the ground that the court lacks jurisdiction has not issued a "valid" judgment, and the judgment is therefore not entitled to preclusive effect. *See Five Star Capital Corp. v. Rudy*, 124 Nev. 1048, 1054 n. 27, 194 P.3d 709, 713 n. 27 (Nev. 2008) ("While the requirement of a valid final judgment does not necessarily require a determination on the merits, it does not include a case that was dismissed . . . for some reason (*jurisdiction*, venue, failure to join a party) that is not meant to have preclusive effect," citing Rest. 2d Judgments § 19 cmt. a, § 20 (1982); NRCP 41(b))(emphasis added). "A dismissal for lack of subject matter jurisdiction is *not* on the merits and consequently will not bar a later suit." *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1277 (7th Cir. 1983) (citing *Costello v. United States*, 365 U.S. 265, 284–88 (1961))(emphasis in original). The Receivership Court found that the receivership plaintiffs had not shown that they held "10 percent of the outstanding stock entitled to vote" under NRS 78.630(1) and, therefore, that it lacked jurisdiction over the Receivership Court. **Exhibit 1** at 18:23-24 (Court holding it "cannot consider appointment of a receiver," *citing Searchlight Dev., Inc. v. Martello,* 84 Nev. 102, 109, 437 P.2d 86, 90 (1968)). Although it proceeded to make *de facto* advisory findings in case "[a]n appellate court may disagree with th[e] Court's

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analysis on the 10% issue," **Exhibit 1** at 19:2-4, the Court's finding of lack of jurisdiction is fatal to any preclusive effect. *See Five Star*, 124 Nev. 1054 n. 27.

Notably, Defendants argued throughout the Receivership Action that that Court lacked jurisdiction. *See* **Exhibit 2**, Defs' Tr Stmt at 7:19-21 ("Among other things, NRS 78.650 and 78.630 demand that the stockholder(s) petitioning for the appointment of a receiver hold 10% of the corporation's issued and outstanding stock. Plaintiffs fail to meet this threshold requirement for standing *and jurisdiction*")(emphasis added); *Id.* at 8 ("*the Court lacks jurisdiction* to appoint a receiver")(emphasis added). Thus, they are judicially estopped from arguing otherwise now. *See Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468–69 (2007) ("Judicial estoppel applies when the following five criteria are met: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake") (quotation omitted). *See also Mull v. Motion Picture Indus. Health Plan*, No. CV 12-06693-VBF-MAN, 2014 WL 1514812, *17 (C.D. Cal. Feb. 4, 2014) ("The judicial-estoppel doctrine preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit the exigency of the moment.") (citation and quotations omitted).

B. The Claims are Different and could not have been Brought in the same Action

1. Plaintiffs' claims are unique to this action

The general rule is that unique proceedings such as a statutory request for appointmenrt of a receiver cannot form a basis for the application of claim preclusion. By its very nature, a receivership action contemplates an expedited and narrowly-tailored proceeding, not intended to address other claims and remedies. Indeed, Defendants' Trial Statement in the receivership action extensively quoted *Vila v. Grand Island Electric Light etc. Co.*, 68 Neb. 222, 97 N.W. 613, 616 (1903): "The

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law of receiverships is *peculiar in its nature*... the appointment of a receiver does not affect, either directly or indirectly, the nature of any primary right, but is simply a means by which primary rights may be more efficiently preserved, protected and enforced in judicial proceedings. *It adjudicates and determines the rights of no party to the proceeding and grants no final relief, directly or indirectly.*" (emphasis added). *See* **Exhibit 2**, Defs' Tr Stmt at 13:24-14:17. Again, they are estopped from making an about face.

The Nevada Supreme Court recognized the non-preclusive effect of receivership actions in *Johnson v. Steel, Inc.*, 100 Nev. 181, 678 P.2d 676 (1984), *overruled on other grounds, Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006). There, the lower court held that its denial of the appellant's claim for appointment of a receiver acted to bar her other pending claims. The Supreme Court reversed, holding that "[t]he district court's denial of appellant's motion for the appointment of a receiver *pendente lite* does not preclude the appellant from asserting her stated claims" because "[t]he use of a receiver *pendente lite* is an ancillary remedy used to preserve the value of assets pending outcome of the principal case." *Id.* (citing *Bowler v. Leonard,* 70 Nev. 370, 269 P.2d 833 (1954)). "The appointment determines no substantive rights between the parties but is merely a means of preserving the status quo." *Id.* (citing *Isaac v. Milton Mfg. Co.,* 33 F. Supp. 732 (1940)). "Accordingly, an order appointing a receiver or denying a motion to appoint a receiver is not a final judgment on the merits." *Id.* (citing *C & H Const. & Paving Co. v. Citizens Bank,* 93 N.M. 150, 597 P.2d 1190 (N.M. App. 1979); *Isaac v. Milton Mfg. Co.,* 33 F. Supp. 732 (1940); *Lloyds of Texas v. Bobbitt,* 55 S.W.2d 803 (Tex. Ct. App. 1932); *State v. Mulloy,* 329 Mo. 1, 43 S.W.2d 806 (1931). Thus, "[t]he doctrine of *res judicata* was therefore improperly applied by the district court." *Id.* (citing *C & H Const. & Paving Co. v. Citizens Bank,* 93 N.M. 150, 597 P.2d 1190). Similarly, here, the Carson City Court's failure to appoint a receiver simply lacks any preclusive effect in this case. *See also Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1217 (Nev. 2008) (Receivership Court's determination lacked preclusive effect);

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Mercantile Bank Mortg. Co. v. Kamminga, No. 307563, 2012 WL 4215742, *5 (Mich. App. Sept. 20, 2012) ("Plaintiff's receivership action," which "sought equitable relief in the form of judicial appointment of a receiver to protect the property from waste, which was for the benefit of all the parties" was, like the Receivership Court here, "a stand-alone statutory claim" and *res judicata* did not apply); *Davis v. Yageo Corp.*, 481 F.3d 661, 680–82 (9th Cir. 2007).

The Receivership Action involved only one claim—the appointment of a receiver—and sought no damages award. *See* Emergency Petition for Appointment of a Receiver (Jan. 26, 2018), **Exhibit 3**. On the contrary, this action presents twenty-one distinct causes of action which have not been brought or adjudicated in the Receivership Action, and, which as discussed below, could not have been brought there, and which seeks a damages award. Neither the claims nor the relief requested here were before the Receivership Court. Thus, there is no danger of N5HYG getting "two bites at the apple," as Defendants posit—it hasn't yet gotten a first bite.[7]

Meanwhile, under Defendants' theory that Plaintiffs must bring all potential damage claims during a receivership action, courts would be faced with unwieldy litigation that would effectively destroy the NRS 78.650 system. The statute clearly anticipates that multiple shareholders will band together in order to seek a receiver. Yet such shareholders will inevitably also have their own damages claims against the corporation and its management. If the petitioning shareholders—who could number in the dozens or more—all have to bring their damages claims in order to preserve them, every NRS 78. 650 proceeding would turn into a three-ring circus.[8]

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[7] Defendants' recitation of "similar" allegations in the two complaints is meaningless. Many of them are anodyne context, such as the identity of the CEO or the terms of Plaintiffs' purchase. Others present background necessary for the Receivership Court to understand how Hygea arrived at its then-current financial and managerial state—the only time period material to the Court's determination, as the Court and Defendants agreed: "Your Honor, I believe that [today] is the relevant time period for this Court to consider." May 16 Trial Trans., p. 598; "[THE COURT] I mean, it strikes me as correct that it doesn't really matter what went on before. What we're looking at is what's going on now. MS. GALL: Right." May 15 Trial Trans. p. 288:6-9). Again, the key focus of a claim preclusion analysis is not some incidental overlap; it is avoiding an improper "second bite at the apple." The overlap here hardly raises this specter, and Defendants cannot impute to Plaintiffs a "general sensation of buyer's remorse" in order to make these two distinct cases the same.

[8] Defendants also claim that Plaintiffs improperly used the Receivership Action to conduct discovery in this matter. That is false, as the discovery in the Receivership Action was narrowly-tailored, very limited, and geared solely to

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2. Defendants are estopped from arguing that all claims could have been brought in the same action

a. Defendants are estopped from arguing that Plaintiffs could have brought their damages claims in the Receivership Action

Defendants are estopped from arguing that Plaintiffs here could have brought the Receivership Action in this case. First, the primary statute under which N5HYG and the receivership plaintiffs brought the Receivership Action vests jurisdiction in the Nevada state court—not federal court. *See, e.g.,* NRS 78.650(1) (directing a party to apply only to a Nevada district court in seeking to appoint a receiver); NRS 78.630(1) (same). At the time of the Receivership Action in January 2018, Defendants had already improperly removed this case to federal court, where it sat, in stayed status, for six months until remanded to this Court in June. Defendants cannot reasonably insist that a different set of plaintiffs should have filed an emergency receivership action in the wrong court, and as part of another pending action which was *itself* in the wrong court.

Second, Defendants successfully resisted the receivership plaintiffs' efforts to bring the Receivership Action in this Court instead of Carson City, citing the "strict locality requirements of NRS 78.630 and 78.650." Defs' Br. at 5 n. 4. As this Court will recall, Plaintiff N5HYG's Stock Purchase Agreement has a forum selection clause that requires Plaintiffs to bring their damages claim here. *See* **Exhibit 4** at § 8.11.1.

After the receivership plaintiffs initially brought their Receivership Action here, Defendants moved to transfer venue, arguing that "under the plain language of NRS 78.650 and 78.630, [the] action had to be filed [in] … the First Judicial district Court in Carson City, Nevada." **Exhibit 5** at 3:5-7. This Court agreed and ordered the receivership case transferred. **Exhibit 6** at 2:1-6. Having

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address the receivership. Specifically, the Receivership Court ordered the Defendants to produce a very limited set of documents targeted solely to the receivership action. **Exhibit 14** p. 3-4 at ¶ 5 (Court ordering Defendants to produce a specific list of enumerated documents). Significantly, Plaintiffs never requested the documents that would be critical here: for example, communications between the Defendants leading up to Plaintiffs' investment; documents related to the promised RTO process; or the company's electronic data. Defendants now complain that Plaintiffs should have brought the damages claims in the Receivership Action. But that would have opened the door to the much broader discovery they firmly resisted in that case.

successfully argued that the Receivership Action must be litigated in Carson City, and having agreed by contract to litigate damages claims here (yet, improperly removing this case to federal court, which had no jurisdiction over either action), Defendants are estopped from arguing that Plaintiffs could have brought their damages claims in the Receivership Action, or vice versa. *See, e.g.*, *Marcuse*, 123 Nev. 287, 163 P.3d 468–69; *Mull*, 2014 WL 1514812, *17.

Hygea also faults N5HYG for "choos[ing] not to reassert [in the Receivership Action] the claims that were then pending in Federal Court—and are now before this Court." Defs' Br. at 6:1-3. Leaving aside the different parties and the distinct nature of those two cases, had N5HYG simply restarted this action under the umbrella of the Receivership Action, Defendants would have undoubtedly cried foul. Having brought their damages claims here, Plaintiffs faced a risk that any refiling of them would jeopardize their damages case, or else result in the transfer of Receivership Action to a federal court which, Defendants would have argued, lacked the authority to appoint a receiver under the statute. *See, e.g., Sherry v. Sherry*, No. 62895, 2015 WL 1798857, *1 (Nev. Apr. 16, 2015) ("where substantially identical actions are proceeding in different courts, the court of the later-filed action should defer to the jurisdiction of the court of the first-filed action by either dismissing, staying, or transferring the later filed suit." (citation and quotations omitted)).

In other words, no matter what Plaintiffs had done, Defendants would be arguing that N5HYG could not join in the Receivership Action and join in this damages claim. Yet Defendants cannot get out of their contractual promises, or their obligations to avoid defrauding investors, simply because one of the investors joined in a Receivership Action.[9]

b. Defendants have repeatedly said that the actions are distinct

Even aside from the issue of *where* Plaintiffs had to litigate their claims, Defendants have time and again argued in the Receivership Action that the claims in this case are distinct and must

[9] Defendants' "insolvency" argument is a red herring. Under NRS 78.650, Plaintiffs could show either that Hygea was "insolvent" or, "although not insolvent, unable to pay obligations as they came due." NRS 78.650(h)-(i). Plaintiffs' pursuit of the alternative showing hardly indicates some nefarious intent.

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only be litigated (and were being litigated) in this separate action. Defendants and their counsel fully accepted that two litigations would be necessary for Plaintiffs to adjudicate their claims:

- This action does not arise in connection with a stock purchase agreement. There has been no breach of contract or fraud based on the agreement. There have been no claims brought based on the agreement. **Exhibit 7**, Feb 21, 2018 Tr. at 19:25-20:3 (emphasis added).[10]

- I do know I have in my notes here that he talked about breach of the -- the SPA. Well, they have a litigation against Hygea for that. It's pending before Judge Mahan. *There's not a claim for breach of the SPA here.* And in any event a breach -- a breach of contract isn't even a basis for a receivership. **Exhibit 7**, Feb 21, 2018 Tr. at 48:45-8 (emphasis added).

- If Plaintiff N5HYG believes it has a contractual right to an audit, *then it should seek to enforce that purported right.* **Exhibit 2**, Defs Tr Stmt at 19:4-6.

- *its breach of contract claim [then] pending in federal court.* **Exhibit 2**, Defs' Tr Stmt at 19:4-6[11] (emphasis added).

- Your Honor, what we will see and what we will see as a repeating theme throughout this lawsuit is that if plaintiffs had an issue about the issued and outstanding stock, they have a remedy at law. *They can bring a breach of contract action.* If they, feel that Hygea has violated that antidilution provision, which as plaintiffs counsel just stated, it merely provides a preemptive right, *then they can bring a lawsuit for breach of contract against Hygea. but a receivership action is not the forum to enforce their contractual rights.* May 14, 2018 Tr. at 42:12-22 (emphasis added).

- Well, the stock purchase agreement is a contract, and if they seek to enforce that contract or if they believe that Hygea has violated the contract, *then they should bring a breach of contract claim seeking to enforce that right. But a receivership action and the extraordinary and harsh remedy of a receivership is not the proper basis to enforce their rights -- their purported rights under a contract.* May 14, 2018 Tr. at 48:20-49:3 (emphasis added).

- Moreover… we've heard plaintiffs complain about this purported mismanagement of the company. However, again, they have a legal remedy. *They can bring a breach of fiduciary duty action.* May 14, 2018 Tr. at 49:4-8 (emphasis added).

- MS. GALL: I am, Your Honor. I have one point of clarification about a comment, Your Honor, just made about the Court having to determine whether or not there's been a breach of contract.
  THE COURT: I should have just said all legal issues, not -- I understand there's not a breach of contract claim.

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[10] Unless indicated, these statements are from Defendants' counsel.

[11] For references to the transcript of the Receivership Trial, please see Defendants' Appendix of Exhibits to Defs' Br. at Exhibit H.

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MS. GALL: Understood, Your Honor, because that claim is pending in another litigation, does the Court anticipate it will be making a determination on breach of contract?
THE COURT: No.
MS. GALL: Okay. Understood, Your Honor. May 14 Tr. at 108-109.

- We have heard complaints from plaintiff about the audits, a lot about the audits, which is reflected in a Stock Purchase Agreement between N5HYG and Hygea. But, again, *that is a breach of contract claim, not a basis for the appointment of a receivership*. May 16, 2018 Tr. at 598:14-19.

- Even if Hygea has violated the antidilution provision, which we do not admit that we have done *because that is a claim based in contract, and there is a breach of contract action that N5HYG has brought against us in another Court,* it doesn't matter because NRS 78.650 provides very -- I'm going to read here, "Unambiguously provides any holder or holders of one-tenth of the issued and outstanding stock may apply to the district court for an order dissolving the corporation and appointing a receiver to wind up its affairs." May 17, 2018 Tr. at 885:14-24 (emphasis added).

- Indeed, the vast majority of plaintiffs' complaints stem from the Stock Purchase Agreement between the lead plaintiff, N5HYG, and the company. Plaintiffs -- we have heard much testimony about the 2014 and 2015 audited financial statements. *If plaintiffs believe they have a right to these audits under their Stock Purchase Agreement, plaintiffs can seek to enforce that right through their breach of contract claim in federal court.* May 18, 2018 Tr. at 914:6-14.

- Plaintiffs complain about the corporation not being transparent and about the corporation's books and records. Whether plaintiffs believe they have a right to the books and records either by their position as stockholders or by some contractual right, *then plaintiffs can enforce that right either through a books and records action or, again, through their pending breach of contract claim [then] in federal court.* May 18, 2018 Tr. at 914:15-22.
- Plaintiffs complain that Mr. Iglesias made misrepresentations in the form of projections about the company's financials in the time leading up to N5HYG's stock purchase. But, again, *plaintiff N5HYG can then seek damages for such misrepresentations through its securities claim [then] in federal court.* Plaintiffs have a legal remedy for each and every one of their complaints. May 18, 2018 Tr. at 914:23-915:6 (emphasis added).[12]

[12] Defendants also pervasively objected to the introduction of *any* evidence bearing any relation to damages theories. *See, e.g.,* May 14, 2018 Tr. at 87:17 ("this is not a breach of contract action").

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Defendants have thus admitted that these cases should be distinguished and cannot now claim the opposite.[13] They are estopped from contradicting their earlier arguments[14] and, at the very least, they consented to litigation of the different issues in different cases.[15]

And as Defendants' own Wright & Miller authority concludes, "[a] defendant who expressly asserts that one part of a claim should not be advanced in one action because it is properly the subject of a separate pending action should lose any claim-splitting argument, whether as a matter of express consent or estoppel." § 4404 Sequence of Actions and Judgments, 18 Fed. Prac. & Proc. Juris. § 4404 (3d ed.) (citing *Joleewu, Ltd. v. City of Austin*, 916 F.2d 250, 252–254 (5th Cir. 1990), opinion vacated on a different issue, *Joleewu, Ltd. v. City of Austin*, 934 F.2d 621 (5th Cir. 1991)). In *Joleewu*, after the property owner brought an inverse condemnation action against a city, the city brought a condemnation proceeding. In the condemnation proceeding the city expressly stated that no consideration should be given to losses it caused to the property owner because those losses would be considered in the separate inverse condemnation action. *Id.* Then, just like the Defendants here, the City changed course: after the condemnation award, the city argued in the inverse condemnation action that the property owner's failure to seek damages for

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[13] Likewise, N5HYG consistently maintained in the Receivership Action that these actions are distinct. For example, the Complaint in the receivership action states:

> Plaintiff N5HYG joined in filing a complaint for damages against Hygea, Iglesias, Moffly, and Hygea's Board of Directors captioned as case number. . . . Further, this action involves different parties, a discreet claim under a Nevada statute which specifically confers jurisdiction on this Court, and seeks a remedy separate, apart, and distinct from the existing litigation. Rec'ship Comp. at ¶ 58.

N5HYG further articulated that these claims were distinct at oral arguments regarding jurisdiction in the Receivership Action:

> Some of the more perhaps -- some of them --some of them are administrative, some of them go to the substance. Once again, their defenses, such as they are, are that they've got these good financials that are just around the corner. We are entitled to see those financials under the stock purchase agreement. *Now, once again, this is not a -- this is not a case of -- for -- for breach of the stock purchase agreement.* But that is illustrative, that sheds some light here. That we have been promised those financials. In fact, we've been promised financials going back several years, since October of 2016, and they have not appeared yet. Transcript at 51-52.

[14] As the prevailing party in the receivership action, they are judicially estopped from abandoning the contentions they made there. *See Marcuse, supra*, 123 Nev. 287, 163 P.3d 468–69.

inverse condemnation in the condemnation action precluded damages. *Id.* The Court found that this assertion was "devoid of justice, honesty, and fair dealing." *Id.*; *see also Pueschel v. U.S.*, 369 F.3d 345, 356 (4th Cir. 2004) (when defendant in one action informed court that claim had been asserted in other action, as defendants did here, they "in effect agreed to . . . splitting" of the claim, even though it was a single claim as opposed to the distinct claims at issue here).[16]

Defendants are thus estopped from contradicting their earlier arguments and, at the very least, they consented to litigation of the different claims in different cases. [17]

C. The Parties are Not the Same in the Two Actions

The final prong of Nevada's claim preclusion test asks whether "the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit." *Weddell*, 350 P.3d 85. That is not the case here. Defendants entirely disregard that N5HYG was but one of the petitioners in the Receivership Action—none of the thirteen other petitioners are parties to this matter or privies of Plaintiffs.[18] Although Nevada courts have found that the presence of additional parties does not preclude a finding of privity, their presence is preclusive here.[19] N5HYG was one of fourteen

[16] As Defendants note, they did make a claim splitting affirmative defense in the receivership action, even without Plaintiffs bringing their damage claims in that case. But this just undermines their argument even further. As Defendants' cited authority Wright & Miller explains, such a claim splitting argument is the "flip side" of a claim preclusion defense: "One growing trend is to import the tests of claim preclusion into a 'claim–splitting' doctrine that enables a court, as a matter of discretion, to dismiss an action that presents the same claim, as measured by claim–preclusion tests, as another pending action. This doctrine may properly take account of the reasons that make separate actions appropriate, particularly when there are differences in the parties, different courts present different procedural opportunities or even jurisdictional reach, or different sources of law may be better suited to resolution by different courts." § 4404 Sequence of Actions and Judgments, 18 Fed. Prac. & Proc. Juris. § 4404 (3d ed.). Here, if the Receivership Court had deemed this to be claim-splitting, as Defendants contend, it would simply have ruled as such and dismissed on that basis.

[17] Nobody – not the Recieverhsip Court, not Plaintiffs, and not Defendants – ever thought that the Receivership Action was intended to resolve, or did resolve the monetary claims. For example, the Receivership Court found that Hygea owed N5HYG nearly $2 million under the contract. **Exhibit 1** at ¶ 3. However the Receivership Court never even suggested that this should be reduced to judgment. Defendants certainly have not shown any inclination to pay it on the basis of the Receivership Court's conclusion. It would be perverse indeed for Hygea to get out of its contractual obligations here through another court's finding that Hygea had breached the contract.

[18] Defendants cite *Weddel v. Sharp* to suggest that Plaintiffs should have named the former directors, who are Defendants here, in the Receivership Action. But why would Plaintiffs name former directors in an action to protect the corporation's present interests through a receiver? And Hygea itself argued in the Receivership Action that the current directors were necessary parties, and then stipulated to their admission. It did not say anything about former directors.

[19] Defendants cite *Mendenhall v Tassini*, 403 P.3d at 369 (Nev. 2017) for the proposition that "any situation in which the relationship between the parties is sufficiently close to supply preclusion" establishes privity. Defs' Br. at 13. But the only "relationship" between N5HYG and the other receivership plaintiffs was that they were all receivership plaintiffs.

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shareholders that had banded together to seek to protect Hygea through the appointment of a receiver and, as discussed above, the statutory framework assumes that multiple shareholders may combine in order to meet the ten percent ownership threshold. N5HYG's presence in such a petitioning group does not immunize Hygea from damages, any more than the other thirteen petitioners would be barred from seeking their own damages claims against Hygea should the merits warrant.[20, 21]

Moreover, as Defendants admit, there are three Defendants in this matter who were not parties to the Receivership Action—nor was Nevada 5.[22] Therefore, the seventeen parties who are missing from one suit or the other cannot plausibly be considered "almost exactly the same parties," as Defendants assert.[23] Defendants' *res judicata* argument fails.

II. Plaintiffs' Amendments Are Not Barred As Supplemental Allegations

Only a few weeks ago, Hygea sought to set aside the default entered against it, arguing that the FAC was an "amendment" which opened up the default. *See* Opposition to Plaintiffs' Motion for Default Judgment and its Countermotion to Set Aside Default, p. 4. Now, continuing to change

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[20] Defendants try to establish privity by claiming that "Plaintiffs . . . bring claims against" former board members who were not parties to the Receivership Action "in their capacity as Hygea directors and not individually." Defs' Br. at 14. They offer no explanation as to how these "capacities" differ, and it is common sense that these people did not stop being individuals when they assumed their roles on the Board. As to whether their conduct was within or outside their role as Directors, Plaintiffs have properly pled in the alternative, as it remains unclear at this time. *See* Section VI, *infra.*

[21] In *Morris v Caberto*, the parties were identical with one difference – as opposed to here, where the vast majority of the receivership parties are not parties here and where a substantial minority of the parties here were not parties to the receivership action. *Morris v. Caberto*, No. 2:16-CV-02416-GMN-NJK, 2017 WL 2720231, *3 (D. Nev. June 22, 2017). *Hanna v. Mariposa County Sheriff Department* considered the unique issue of public official liability. No. 1:12-CV-00501-AWI, 2014 WL 2547836, *6 (E.D. Cal. June 5, 2014), *report and recommendation adopted*, No. 1:12-CV-00501-AWI-SA, 2014 WL 3615779 (E.D. Cal. July 22, 2014). And none of their cases dealing with supposed privity between an employer and an employee, including *Harrington v. Ward*, No. CIV.06-460-CL, 2007 WL 2816214, *4 (D. Or. Sept. 27, 2007), addressed board members or any sort of governing fiduciary.

[22] As Defendants concede, the parties in *Smith v. Accredited Home Lenders, Inc.* were "almost exactly the same." *Smith v. Accredited Home Lenders, Inc.*, No. 2:16-CV-00869-MMD-CWH, 2017 WL 3567518, *2 (D. Nev. Aug. 17, 2017). Moreover, that opinion, which was all but summary in nature, notes in its very limited reasoning that the "few additional financial corporations" named as defendants in the second complaint were contemplated by the first complaint as "Does 1-100." *Id.* Therefore, the parties in *Smith*, with the exception of one plaintiff, who appears to have been related to the original plaintiff, were entirely identical. *Id.* That is not the case here.

[23] Defendants also cite *Index Fund v. Hagopian* for the proposition that claim preclusion can apply "when new defendants are closely related to the earlier defendants." Defs' Br. At 14. But the actual quote is, "it has been held in numerous other situations, that when new defendants are closely related to the earlier defendants, *and the second action is based on the same claim*, nonmutual claim preclusion is justified." *Index Fund, Inc. v. Hagopian*, 677 F. Supp. 710, 716 (S.D.N.Y. 1987) (emphasis added) (citations omitted). Here, the claims are entirely different.

positions to suit the exigencies of the moment, Hygea argues that the FAC was not an amendment. Again, Hygea should be estopped.

Regardless, NRCP 15(d) permits a party to "serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." "Further, NRCP 15(d) is intended to promote as complete an adjudication as possible by allowing the addition of claims that arise after the initial pleadings have been filed." *Szilagyi v. Testa*, 99 Nev. 834, 839-40, 673 P.2d 495, 499 (1983) (citing *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982)). The FAC serves precisely these purposes and there is no basis to strike any portion of it. Moreover, much of the allegedly "supplemental" matter is actually further materialization or exposure of the pre-suit situation, such as Mr. Iglesias's testimony that he had misrepresented the EBITDA figure because he expected a huge influx of cash that never materialized. At the very least, in the alternative, the Court should grant leave for supplemental allegations. There is no reason for the parties to withhold the factual landscape from the Court.

III. The Court Should Enforce The SPA, Including The Jury Waiver, Against All Defendants

As Defendants point out, the SPA contains a jury waiver provision. And Plaintiffs agree that all Defendants should be bound by the terms of the SPA they all approved, even if not all of them signed an express waiver of their right to a jury trial. Plaintiffs therefore withdraw their jury demand.

IV. Nevada 5 Has Standing And Is A Real Party In Interest

Having taken $30 million from Nevada 5, Defendants claim that their victim cannot sue them because the stock is titled in the name of N5HYG. This argument fails for several reasons.

First, Defendants made their pre-SPA misrepresentations to Nevada 5. ¶¶ 27-44, 52. Indeed, had Nevada 5 not appeared as a Plaintiff, Defendants would no doubt be arguing that N5HYG could not plead all the elements of a fraud claim, as it was not in existence to receive representations.

Second, Nevada 5 formed N5HYG for the sole purpose of the stock purchase. Where a party forms an entity for the purpose of a fraudulently-induced transaction, it has standing to challenge

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the transaction. *See Sutter v. General Petroleum Corp.*, 170 P.2d 898, 901-902 (Cal. 1946) (holding individual who, by reason of defendants' false statements, was induced "to form and invest in a corporation," had injury distinct from injury suffered by corporation). *See also Lu v. Chi*, 86 F.3d 1162, 1996 WL 287251, *1 (9th Cir. 1996), *as amended* (Aug. 8, 1996)("[a]s to fraud, plaintiffs correctly argue that the duty not to defraud them did not require any privity"). Nevada 5 was injured as soon as it moved forward with the purchase, as the mere execution of an agreement "[gives] rise to the cause of action of fraud in the inducement." *Mendenhall v. Tassinari*, 403 P.3d 364, 371 (Nev. 2017). Put another way, Nevada 5 would never have created N5HYG and used it to pay $30 million were it not for Defendants' fraud.[24]

Third, Nevada 5 has met its burden to plead each claim it makes and, aside from their general Rule 9(b) argument addressed in Section VI(B)(2), *infra*, pp. 27-31, Defendants do not argue otherwise. *Fourth*, for the statutory counts, Nevada 5 clearly falls within the expanded conception of "buyer." "The statutory terms ["offer" and "sell"] ... are expansive enough to encompass the entire selling process," *Pinter v. Dahl*, 486 US 622, 643 (1988) (quotation omitted) (alterations in original), and both the Nevada and the federal Securities Act leave the terms "buy" and "buyer" undefined. Nev. Rev. Stat. Ann. §§ 90.211 – 90.309, 15 U.S.C.A. § 77*b*.

Fifth, estoppel applies because, once again, Hygea has argued the opposite of its present position in other litigation. In a declaratory relief action filed against its insurance carrier, Hygea asserted that Nevada 5 in fact does have its own claim in this case:

- "The Underlying Action seeks damages suffered by a legally distinct entity other than N5HYG. Seventeen (17) causes of action are asserted by both Nevada 5 and N5HYG.1 Ex. B. Only four are brought solely by N5HYG. **Exhibit 8**, Hygea Response to Liberty Mutual MTD, pp. 2-3.

- "(1) Nevada 5, Inc. is not alleged to be either the direct or beneficial owner of any of Hygea's stock, and (2) Nevada 5, Inc. itself – not on behalf of N5HYG – asserts seventeen (17) causes of action against Insureds under the Policy several of which could give rise to covered liability. The possibilities are legion . . ." *Id.* at 11.

[24] As shown herein, Plaintiffs do not claim, as Defendants imply, that Nevada 5 has standing to assert claims in this suit by virtue of being the parent company to N5HYG. Defs' Br. at 17–18. The cases Defendants cite for this proposition therefore do not impact the standing analysis.

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- "Nevada 5 plausibly has damages of its own, distinct from those asserted by the stockholder (N5HYG) – it would not be a necessary part to the Underlying Action were this not the case." *Id.* at 11-12.

Hygea has further explained that "[n]one of Nevada 5's theories of liability against [Hygea] are brought or maintained 'on behalf of' or 'at the behest of' N5HYG." *Id.* Hygea's contrary arguments here are opportunistic.

V. Nevada Has Jurisdiction Over All Defendants

A. Nevada has Specific Jurisdiction over the Director Defendants

Defendants Hygea, Moffly, and Iglesias agreed to this forum, and Nevada jurisdiction, in the Stock Purchase Agreement. *See* Stock Purchase Agreement at 8.11.1. There is no reason to bifurcate the case, because Nevada also has personal jurisdiction over the Director Defendants. The Director Defendants purposefully decided to be the directors of a Nevada corporation; affirmatively approved the sale of over eight percent of the company to the Nevada plaintiff; affirmatively approved the sale contract, which approved Nevada's jurisdiction over any resulting dispute; have continued to control the Nevada defendant; and have continued to violate their duties towards the Nevada plaintiff. They are not immune from Nevada's jurisdiction.[25]

As discussed in their response to Defendant Gonzaelez's Motion to Dismiss, Pl. Opposition at § III(A), adopted here by reference, Plaintiffs effectively served all of the Defendants in Nevada; Defendants all purposefully availed themselves of Nevada activity; "but for" Defendants' conduct, Plaintiffs would not have been injured; and it would be reasonable to litigate in Nevada. Moreoever, in addition to Iglesias and Moffly, several Defendants are or were officers: McGowan (Co-Chair of

[25] Plaintiffs' response to Mr. Gonzalez discusses the test for specific personal jurisdiction. Although it is not entirely clear from their arguments, the Director Defendants' entire argument on specific jurisdiction appears to rest on the second prong of this test, as they cite *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, for the proposition that "the *suit* must arise out of or relate to the defendant's contacts with the *forum*," and that this is "principally, *an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.*" Defs' Br at 20 (quoting --- U.S. ----, 137 S. Ct. 1773, 1780 (2017)) (first emphasis in original, second emphasis in Defs. Br.). The Director Defendants go on to argue, seemingly taking the most literal possible reading of *Bristol-Myers Squibb*, that Plaintiff pleaded no "facts establishing what activity at issue took place in Nevada, much less how the [Director] Defendants were involved in such activity." Defs. Br. at 20. Plaintiffs have, of course, asserted dozens of allegations of harm which the Director Defendants directed at Nevada 5, a Nevada corporation.

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the Board); Kelly (Vice Chairman of the Board); Loar (Assistant Secretary); Williams (General Counsel); and Collins (currently the CEO). *See* ¶¶ 5–6, 8–9, 11. **Exhibit 9** at Ex. C. (Board Resolution identifying positions). And "holding one's self out as an officer in a [Nevada] corporation is sufficient to subject an individual to specific jurisdiction in [Nevada] for torts allegedly committed in connection with the [Nevada] corporation." *R. Prasad Indus. v. Flat Irons Envtl. Sols. Corp.*, No. CV-12-08261-PCT-JAT, 2017 WL 4409463, *1 (D. Ariz. Oct. 4, 2017)(citing *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1319-24 (9th Cir. 1998)).

B. Defendants' Conduct in the Receivership Action Precludes their Argument Here

Defendants' jurisdictional arguments are selective at best – their previous conduct has shown that membership on Hygea's Board entails explicit availment of Nevada's judiciary. In the Receivership Action, Hygea moved that its directors should be defendants. **Exhibit 10** at 12:23 through 14:2. In the resulting stipulation, Hygea expressly stipulated to the naming of Manuel Iglesias, Edward Moffly, Joe Companella, Martha Castillo, Daniel T. McGowan, Frank Kelly, Jr., Keith Collins, M.D., Jack Mann, M.D., and Glenn T. Marrichi as defendants (the "Common Defendants"). **Exhibit 11** at ¶ 3. In fact, the stipulation even provided for service on these Common Defendants through Hygea's Registered Agent under NRS 75.160. *Id.* at ¶ 5. The Common Defendants answered the amended complaint in the Recievership Action, and did not challenge the Nevada court's jurisdiction over them. **Exhibit 12.** They proceeded to appear through counsel at trial, with Defendants Collins and Mann joining Mr. Iglesias in Carson City to testify. All of this is entirely inconsistent with these Common Defendants' current argument that NRS 75.160 is insufficient to secure jurisdiction, and that their service as directors of a Nevada corporation is merely an attenuated contact with the State. When their control over the corporation was challenged, they were willing to be served through the statute and appear in Nevada. In fact, through their co-defendant, they insisted upon it.

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The Common Defendants' conduct was enough to vest Nevada with personal jurisdiction over them. The requirement of personal jurisdiction can be waived and a "variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (citing *Nat'l Requip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964)). Though such consent is often given by contract or waiver, the Supreme Court has frequently upheld assertion of personal jurisdiction over consenting defendants, regardless of that defendant's other contacts with the state or of that state's power to serve process to the defendants. *See Ins. Corp. of Ireland*, 456 U.S. 703 (collecting cases). "[A] party's consent to a court's jurisdiction may take place prior to the suit's institution" or "after the suit has started." *Gen. Contracting & Trading Co., LLC v. Interpole, Inc.*, 940 F.2d 20, 22 (1st Cir. 1991) (internal citations omitted). Though when considering the proper term to refer to "submission to a court's jurisdiction, it is possible to attempt fine distinctions between 'waiver' and 'consent,'" such distinctions" have been viewed as "artificial and unnecessary." *Id.* The Common Defendants' failure to object to personal jurisdiction was also dispositive. *Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark,* 116 Nev. 650, 656, 6 P.3d 982, 986 (2000) ("Objections to personal jurisdiction, process, or service of process are waived [] if not made in a timely motion or not included in a responsive pleading such as an answer"). The Common Defendants have thus waived their personal jurisdiction challenge and are estopped from asserting it. *See, e.g., Marcuse*, 123 Nev. at 287, 163 P.3d at 468–69; *Mull*, 2014 WL 1514812, *17.

Defendants' choices are fatal to their selective claims of immunity from Nevada jurisdiction. They chose to serve as directors of a Nevada corporation; they chose to allow themselves to be served by a registered agent in Nevada; they chose to approve a contract containing a Nevada forum selection clause; and they chose to participate as parties to a separate Nevada litigation.

VI. Plaintiffs Have Stated Claims Against All Defendants

A. Standard of Review

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In considering a motion for dismissal under NRCP 12(b)(5), the court "'must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party].'" *Vacation Vill., Inc. v. Hitachi Am., Ltd.,* 110 Nev. 481, 484, 874 P.2d 744, 746 (1994) (citing *Squires v. Sierra Nev. Educational Found.,* 107 Nev. 902, 905, 823 P.2d 256, 257 (1991) and *Merluzzi v. Larson,* 96 Nev. 409, 411, 610 P.2d 739, 741 (1980)). "All factual allegations of the complaint must be accepted as true." *Id.* (citing *Capital Mortgage Holding v. Hahn,* 101 Nev. 314, 315, 705 P.2d 126 (1985)). "A complaint will not be dismissed for failure to state a claim 'unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief.'" *Id.* (citing and quoting *Edgar v. Wagner,* 101 Nev. 226, 228, 699 P.2d 110, 112 (1985) and *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

Thus, "a district court order granting an NRCP 12(b)(5) motion to dismiss is subject to rigorous appellate review." *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 19, 293 P.3d 869, 871–72 (2013) (citation omitted). "In reviewing the dismissal order, t[he] court will accept a plaintiff's factual allegations as true, however, these 'allegations must be legally sufficient to constitute the elements of the claim asserted.'" *Id.* (citation omitted). Moreover, in "reviewing the district court's dismissal order, every reasonable inference is drawn in the plaintiffs' favor." *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (citation omitted). *See also Rhodes v. Designer Distribution Servs., LLC,* 128 Nev. 929, 381 P.3d 655 (2012).[26]

"The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846,

[26] The Nevada Supreme Court "has not adopted" the more defendant-friendly, but still accommodating, federal standard that "[a] motion to dismiss for failure to state a claim should be granted only if the party asserting the claim is unable to articulate 'enough facts to state a claim to relief that is plausible on its face.'" *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 18, 293 P.3d 869, 871 (Nev. 2013) (referencing *Garcia,* 2009 WL 5206016, *4 (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) for the federal standard).

858 P.2d 1258, 1262 (Nev. 1993) (citing *Ravera v. City of Reno,* 100 Nev. 68, 70, 675 P.2d 407, 408 (Nev. 1984); *W. States Constr. v. Michoff*, 108 Nev. 931, 840 P.2d 1220, 1223 (Nev. 1992)). Defendants here cannot seriousoly claim that they lack "fair notice" of the claims against them.

B. Plaintiffs have stated Fraud Claims

1. The claims are not barred by an integration clause or parol evidence

Neither the SPA's "Integration Clause" nor the parol evidence rule give Defendants immunity. *First*, the entire agreement was fraudulently induced, thereby rendering any "integration clause" irrelevant and making parol evidence admissible. *See Blanchard v. Blanchard*, 108 Nev. 908, 912, 839 P.2d 1320, 1322–23 (Nev. 1992) ("integration clauses do not bar claims for misrepresentation")(citations omitted).[27] This is consistent with Nevada's well-settled willingness to entertain "parol evidence of fraud to establish the invalidity of the instrument," for example by showing "some fraud in the procurement of the instrument, or some breach of confidence concerning its use." *Tallman v. First Nat. Bank of Nev.*, 66 Nev. 248, 258, 208 P.2d 302, 307 (Nev. 1949). *See also Khan v. Bakhsh*, 129 Nev. 554, 558, 306 P.3d 411, 413 (Nev. 2013) (citation omitted) ("[e]xtrinsic or oral evidence, however, is admissible to prove fraud in the inducement of an agreement"); *Insulation Contracting & Supply, Inc. v. S3H, Inc.*, No. 62856, 2015 WL 5774180, *2 (Nev. Sept. 29, 2015).[28] Other states agree. *See, e.g., ABRY Partners V, L.P. v. F & W Acquisition LLC,* 891 A.2d 1032, 1061 (Del. Ch. 2006) ("Delaware courts have shared [a] distaste for immunizing fraud" in misrepresentation cases involving merger clauses).[29]

[27] *Road & Highway Builders v N Nev Rebar*, 284 P3d 377 (2012) is irrelevant. Defendants never show how the SPA "contradicts" their misrepresentations and, in fact, as shown throughout, it adopted them.

[28] Defendants conflate the integration and parol evidence concepts and rely on *Tallman v. First National Bank*, 66 Nev. 248 (1949) for the proposition that "fraud is not established by showing parol agreements at variance with a written instrument and there is no inference of a fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed." *Id.* at 259. But the fraud here is not based on parol agreements at variance with the SPA. Rather, it is based on information – including voluminous financial information – that turned out to be false.

[29] Additionally, *contra* Defendants' assertion, the SPA explicitly anticipated listing on an exchange, thus reflecting and encompassing the representations on this point. *See, e.g.,* Agreement at § 6.3 (certain payments to Plaintiffs cease upon exchange listing); § 6.4 (post-listing dilution protection).

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Second, the provision in question never disavows pre-contract "representations." Instead, it disavows "negotiations" – a standard explanation that the terms of the agreement are encompassed in the contract's text. But the fraud claim has nothing to do with the SPA's terms. Rather, it primarily concerns the misrepresentations that Defendants made in order to get Plaintiffs to enter into it.

Third, the very integration clause upon which Defendants rely incorporates the representations into the SPA's text. Specifically, the purported integration clause expressly adopts "any documents, Schedules, instruments, or certificates referred to herein or delivered in connection herewith" as binding representations. *See* SPA § 8.4. Yet while the FAC refers extensively to such additional representations and documentation, *see, e.g.*, ¶¶ 27-43, 52, Defendants never address them. At the least, what documents fell within the clause is a fact issue.

Fourth, Plaintiffs have alleged numerous misrepresentations expressly set forth *within* the SPA itself. ¶¶ 46-51, 68-69. In fact, Article 4 is in its entirety a series of representations.[30]

2. Plaintiffs have exceeded the requirements of Nev. R. Civ. P. 9(b)

Defendants do not substantively dispute their common law fraud liability.[31] Defendants nonetheless claim they should elude accountability under NRCP 9(b). But Nevada pleading standards are to be construed liberally. *Brown v. Kellar,* 97 Nev. 582, 583, 636 P.2d 874, 874 (Nev. 1981) ("On a motion to dismiss for failure to state a claim for relief, the trial court and this court must construe the pleading liberally and draw every fair intendment in favor of the plaintiff.")

[30] Defendants claim the SPA does not "make any representations or promises regarding the future success or financial strength of the company." Defs Br. at 14. But, again, it warranted Hygea's then-current financial strength. **Exhibit 4** at §§ 4.6.1, 4.25; *see also* ¶ 50.

[31] The elements of a common law fraud claim are "1. A false representation made by the defendant; 2. Defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation); 3. Defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; 4. Plaintiff's justifiable reliance upon the misrepresentation; and 5. Damage to the plaintiff resulting from such reliance." *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992) (citation omitted). Moreover, "a defendant may be found liable for misrepresentation even when the defendant does not make an express misrepresentation, but instead makes a representation which is misleading because it partially suppresses or conceals information." *Blanchard*, 839 P.2d 1322 (quotations omitted).Here, Defendants knew, or were responsible for knowing, that Hygea's true financial position was grossly at-odds with the rosy performance and valuation figures they provided to Plaintiffs and that they represented an imminent RTO that was impossible given the business's true condition. As a result, Plaintiffs paid them $30 million for over eight percent of a company that was, in the aggregate, worth perhaps that much..

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(citation omitted). Moreover, Nevada courts generally interpret NRCP 9(b) in a manner consistent with FRCP 9(b). *See, e.g., Rocker v. KPMG LLP,* 122 Nev. 1185, 1193, 148 P.3d 703, 708 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 181 P.3d 670 (2008) ("Under Federal Rule of Civil Procedure 9(b), which contains language identical to NRCP 9(b), federal courts have recognized an exception to particularized pleading"); *see also, id.* at n. 15, *citing Nelson v. Heer,* 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) ("We have previously recognized that federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules") (citation omitted); *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.,* 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) ("the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts"). "While mere conclusory allegations of fraud will not suffice, statements of the time, place and nature of the alleged fraudulent activities will." *Bosse v. Crowell Collier & Macmillan*, 565 F.2d 602, 611 (9th Cir. 1977) (citation omitted). Rule 9(b)'s "requirements should not be read as a formalism, decoupled from the general rules of notice pleading." *US ex rel SNAPP, Inc. v. Ford Motor Co*, 532 F.3d 496, 503 (6th Cir. 2008) (citation omitted). *See also U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.,* 501 F.3d 493, 503 (6th Cir. 2007) ("the purpose of Rule 9 is not to reintroduce formalities to pleading, but is instead to provide defendants with a more specific form of notice as to the particulars of their alleged misconduct"). Once again, these standards are not meant to impose an artful pleading requirement.. While "allegations of 'date, place, and time' fulfill these functions[,] nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Seville Indus. Mach. Corp. v Southmost Mach. Corp.,* 742 F.2d 786, 791 (3rd Cir. 1984) *abrogated in part on other grounds by Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

In short, the complaint must merely state what is false or misleading and why it is false, which "can be satisfied 'by pointing to inconsistent contemporaneous statements or information

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(such as internal reports) which were made by or available to the defendants.'" *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1161 (9th Cir. 2009) (citation omitted).[32] Moreover, "Rule 9(b) does not ... require plaintiffs in a securities fraud case to set forth facts which, because no discovery has yet occurred, are in the exclusive possession of the defendants." *Deutsch v. Flannery*, 823 F.2d 1361, 1366 (9th Cir. 1987) (citation omitted). *See also Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)(relaxed standard applicable for allegations of fraud with respect to matters within the opposing party's knowledge or control);[33,34] *Rocker v. KPMG LLP*, 122 Nev. 1185, 1194-95, 148 P.3d 703, 709 (Nev. 2006), overruled on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 226, 181 P.3d 670 (Nev. 2008) (adopting relaxed pleading standards in situation where "facts necessary for pleading with particularity 'are peculiarly within the defendant's knowledge or are readily obtainable by him'").

Here, the FAC goes well beyond these requirements, despite the fact that much of the relevant information remains solely – and improperly – in Defendants' possession. *First*, many of

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[32] Moreover, no scienter is required for liability under the securities act, because defendants may be liable for innocent or negligent material misstatements or omissions. *See Miller v. Thane Intern., Inc.*, 519 F.3d 879, 886 (9th Cir. 2008) (Section 12(a)(2)); *see also Mallen v. Alphatec Holdings, Inc.*, 861 F. Supp. 2d 1111, 1123 (S.D. Cal. 2012), *aff'd sub nom. Fresno Cty. Employees' Ret. Ass'n v. Alphatec Holdings, Inc.*, 607 F. App'x 694 (9th Cir. 2015). Even where scienter is required, it need only be pled generally. *Ronconi v. Larkin*, 253 F.3d 423, 429 n. 6 (9th Cir. 2001) (citing *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir.1994) ("plaintiffs may aver scienter ... simply by saying that scienter existed."). Defendants' claimed Private Securities Litigation Reform Act ("PSLRA") pleading standards are thus irrelevant: again, Plaintiffs need not even plead scienter for their claims here; they have more-than adequately pled inaccurate financial information; and even if they did, Plaintiffs have pled facts from which an inference of scienter is clear. In fact, it is hardly clear that the PSLRA even applies at all. *See, e.g., Higginbotham v. Baxter International,* 495 F.3d 753, 756 (7th Cir. 2007) (the "PSLRA applies only to a 'suit that is brought as a plaintiff class action[']). Thus, Defendants' reliance on cases such as *Desaigoudar v. Meyercord*, 223 F.3d 1020 (9th Cir. 2000), which applies to scienter-based Exchange Act claims, is thus misplaced.

[33] Defendants argue that Plaintiffs' registration claim is based on their failure to file Form D, arguing that there is no cause of action for such failure under the federal Act. But none of the cases cited address claims under the Uniform Act adopted by states such as Nevada, and Plaintiffs' federal registration claim alleges that Defendants were entirely ineligible for the Regulation D exemption, not merely that they failed to file Form D. *See* ¶ 111. Indeed, the single case cited for the proposition that Regulation D does not provide a private right of action does not involve Regulation D at all. *See Levitt v. J.P. Morgan Secs. Inc.*, 9 F. Supp. 3d 259 (E.D.N.Y. 2014).

[34] Defendants' *Hamby* case is a red herring. Plaintiffs' claim is based on Defendants' failure to file a registration statement, not their failure to file a Form D illustrating their exemption from the registration requirement, for which they were ineligible anyway as set forth herein. Nonetheless, Defendants' failure to file the exemption-claiming Form D is telling and, as *Hamby* explains, such failure can suggest a registration violation. *Hamby v. Clearwater Consulting Concepts, LLC,* 428 F. Supp. 2d 915, 920 n. 1 (E.D. Ark. 2006) (Court acknowledging that "[s]ince a willful violation of Rule 503 is a felony under Securities Act section 24, it is unlikely that the [Securities Exchange] Commission or a court would allow someone who knows the form is to be filed, and purposely fails to file it, to have the benefit of a Regulation D exemption" (citation and quotations omitted)).

the representations were set forth, warranted, or adopted in the SPA itself. *See, e.g.,* ¶ 47 (implied value of $350 million), ¶ 50 (SPA reflected many of the representations that Defendants had made throughout the negotiations; warranted the financial information provided under Section 4.6.1; and assured that the company's books were accurate under Section 4.25).

Second, as discussed above, the SPA expressly provides that the "Sellers Knowledge" is imputed to the Board of Directors. *See* Stock Purchase Agreement, Definitions, page 9. They are thus estopped from denying knowledge now. The goal of warranties such as the Sellers Knowledge representation "is to assure one or both parties to an agreement that there are no facts known to one and not the other that might affect the desirability of entering into the agreement, and to prevent the assertion of different facts at a later date." *1st Commerce Bank v. James J. Stevinson,* No. 54713, 2013 WL 593686, *5 (Nev. Feb. 13, 2013)(*quoting Lawyers Title Ins. v. Honolulu Fed. S & L,* 900 F.2d 159, 163 (9th Cir.1990)) (additional citations omitted).

Third, Plaintiffs have described the misrepresentations with amply sufficient detail:

- **When:** June 27, 2016. **What:** Confidential Information Memorandum, or "CIM," with financial information for 2014 and 2015. ¶ 41(a).

- **When:** August 2, 2016. **Who:** Dan Miller for Plaintiffs and Moffly for Defendants. **What:** Final quarterly financial data for Hygea used by analysts to prepare a Quality of Earning, or "QoE," report, and a purported Hygea audit. ¶ 41(b).

- **When:** August 9, 2016. **What:** Access to a purported transaction "data room." ¶ 41(c).

- **When:** August 10, 2016. **Who:** Miller for Plaintiffs, and Moffly for Defendants. **What:** Timeline for Defendant Hygea's public offering. ¶ 41(d).

- **When:** September 14, 2016. **Who:** Miller for Plaintiffs, and Moffly for Defendants. **What:** Formal transmission of the CIM. ¶ 41(e).

- **When:** September 16, 2016. **Who:** Miller for Plaintiffs, and Moffly for Defendants. **What:** Proposed deal structure, including a favorable third-party valuation that Moffly said *understated* the company's true value. ¶ 41(f).

- **When:** On September 20-21, 2016. **Who:** Moffly for Defendants. **What:** Moffly states that the final trial balances for June 30, 2016 would be finished soon. ¶ 41(g).

- **When:** September 20, 2016. **Who:** Dan Miller for Plaintiffs, and Moffly for Defendants. **What:** Favorable Hygea financial statements for 2013 to 2015. ¶ 41(h).

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• **When:** September 22, 2016. **Who:** Chief Compliance Officer Tom Herrmann. **What:** Assurances regarding physician compensation and contracts. ¶ 41(i).

• **When:** September 27, 2016. **What:** Offering Memorandum sent to RIN, containing favorable representations. ¶ 41(j).

• **When:** September 29, 2016. **Who:** Miller for Plaintiffs, and Moffly and the Board for Defendants. **What:** Capital table structure analysis, approved by third-party valuation service and Hygea's Board, showing favorable 2016 EBITDA. ¶ 41(k).

• **When:** October 4, 2016. **Who:** Miller for Plaintiffs, and Moffly for Defendants. **What:** "Quality of Earnings" dated October 3, 2016 sent, showing continued healthy performance, along with favorable "trailing twelve months" figures. ¶ 41(l)-(m).

• **When:** October 5, 2016. **Who:** Iglesias and Moffly for Defendants, Miller and others for Plaintiffs. **What:** Verification of the QoE. ¶ 41(n).

• **Who:** Throughout the process, the Board authorized, directed, and oversaw the campaign to induce Plaintiffs' investment. ¶¶ 1, 17, 27, 32-35, 39, 41-42, 45, 186.

And contrary to their assertions, the Director Defendants actively engaged in the scheme:

• Despite representing that Hygea would issue of shares on a public stock exchange, all Defendants—including the Board—knew or should have known that Hygea's then-existing financial situation made a public-exchange listing impossible at the time Plaintiffs acquired the shares. ¶¶ 34, 56.

• The Board member Defendants approved Hygea's entry into the SPA and such approval explicitly referenced some of the financial figures reflecting the false representations. ¶ 45.

• At the time of Plaintiffs investment, the Board knew or should have known that Plaintiffs were investing based on false information. *Id.*

• The board represented an EBITDA figure that proved to be false and approved additional misleading valuation information as well; the actual EBIDTA fell far short of all indicated figures. ¶ 41(k).

• As discussed above, the SPA expressly provides that the extensively cited and warranted "Sellers Knowledge" is imputed to *all* of the Defendants, including the Board of Directors. *See* Stock Purchase Agreement, Definitions, page 9. Thus, Defendants had knowledge of the misrepresentations contained within the Agreement.[35]

Moreover, *contra* Defendants' conclusory suggestions, Plaintiffs have explained in detail how the representations were clearly false:

• The promised RTO has not happened. ¶ 54.

[35] Defendants' claim that "Plaintiffs plead no facts that any of Non-Guarantor Defendants ever made *any* representations to *any* Plaintiff," Defs' Br at 24 (emphasis in original), is thus misleading at best.

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• Hygea is running out of cash: it has failed to pay sums due to Plaintiffs under the Agreement; it has nearly failed to make payroll; and it owes about $10 million to American Express. ¶ 44

• Defendants promised to provide accurate and complete 2014 and 2015 financials by November 30, 2016; they still have not done so. ¶ 68-69.

• Defendants now concede that Hygea's 2016 EBITDA was far less than claimed. ¶ 59.

• A consultant reported that the even claimed "corrected" 2016 EBITDA was "fabricated," and that the actual number was about a seventh of the "corrected" figure. ¶ 60.

• On July 12, 2017, the consultant reported that Hygea was refusing to provide cash flow projections; that he could not secure the checking accounts; that the bank accounts were improperly under Iglesias and Moffly's personal control; that Iglesias had admitted to "cooking the books" to avoid "issues" with a previous lender; and that – despite all this – Hygea had recently bought new medical practices. ¶ 61.

• The consultant reported that Hygea's financial performance figures for 2014 through 2016, "are not the same as the ones they gave" to Plaintiffs before investing. ¶ 62.

• The consultant said he would not "come up with bullshit for [the] auditors," who supposedly would review the financial information. ¶ 62.

• The consultant concluded that the EBITDA figures that were supportable were a fraction of those represented by Defendants. ¶ 63.

• At least one EBITDA figure was apparently based on a $130 million influx into Hygea that never materialized. ¶ 67.

• Defendants misallocated the pre-purchase revenue of acquired practices to inflate their financial figures. ¶ 72.

• Defendants have tried to pressure outside auditors, at least one of whom has said, "[y]ou can badger me, but I won't sign off on these" financials that Hygea presented. ¶ 65.

These allegations are more than detailed enough.[36,37]

3. Plaintiffs' federal securities law claims are adequately stated

a. Plaintiffs state a claim for federal statutory securities fraud

[36] Defendants claim that the allegations are "wishy washy." Defs' Br at 24. But they do so by misleadingly citing only allegations that provide an overview of the misleading information and ignoring the specific allegations. For instance, they claim that "Plaintiffs do not identify the purportedly inaccurate financial figures contained in such documents *with any specificity whatsoever.*" Defs' Br. at 24 (emphasis in original). But Paragraphs 59 through 67 and 72 specify it explicitly: the false EBITDA figures and the SPA's misleading valuation figures.

[37] Moreover, as explained in the response to Mr. Gonzalez's Motion to Dismiss, even if, *arguendo*, the FAC did not satisfy Rule 9(b) as to any claims or defendants, the statutory securities fraud claims would survive.

Defendants claim immunity, arguing there was no "public offering." This is wrong. The FAC alleges at length that the shares at issue were issued as part of a public offering. For example, Hygea's offering was made to investors at large without any pre-existing relationship to Hygea, ¶ 27; an investment bank, CEA, was involved in soliciting Hygea's offering, ¶ 28; and Plaintiffs' $30 million investment in exchange for shares of Hygea's common stock was clearly significant, ¶ 46. Moreover, the materials provided by Defendants to Plaintiffs constitute one or more documents that describe a public offering or otherwise contain the sort of information that would be included in an SEC-filed registration statement. ¶ 94. These allegations close the book on this issue.

Even if they did not, Defendants' argument would fail. Under the Securities Act, "public offering" is not used in the popular sense of an "offering on a public exchange." *See West v. Innotrac Corp.*, 463 F. Supp. 2d 1169, 1177 (D. Nev. 2006) ("[t]here is no language in *Gustafson[, supra]* indicating that a public offering should be strictly defined as an offering made to the public at large."). Rather, the "flexible test" for determining the offering's nature focuses on "(1) the number of offerees; (2) the sophistication of the offerees; (3) the size and manner of the offering; and (4) the relationship of the offerees to the issuer." *Id.* at 1176 (citing *S.E.C. v. Murphy*, 626 F.2d 633, 644–45 (9th Cir.1980)). "For an offering to be private, the test must be met with respect to *each* purchaser and offeree." *Id.* (emphasis added).

Here, the "relationship" factor alone is dispositive: "[a] court may only conclude that the investors do not need the protection of the Act if all the offerees have relationships with the issuer affording them access to or disclosure of the sort of information about the issuer that registration reveals," *id.* at 1179 (citing *Murphy*, 262 F.2d at 647), whereas here, Defendants pervasively misled Plaintiffs and withheld information. Moreover, at least one of the factors, the size and manner of the offering, entails within it multiple fact-sensitive subfactors. *Id.* at 1178 (citing *Murphy* at 645).

Defendants fail to address any of these complex issues. Instead, they seek to conflate "public offering" as the term is defined for Securities Act jurisprudence with the colloquial meaning,

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"offering on a public exchange" – for example, the sort of offering that Defendants falsely represented was imminent. Defs' Br. At 25-26. But as discussed above, the popular meaning is *not* the same as the meaning under the statute. Even if Defendants did seek to address the *West* factors, such an analysis would be inapt at this stage of the case. *See id.* at 1179 (issue is fact-sensitive).

Moreover, as set forth below, Defendants violated the federal Securities Act when they failed to file a registration statement. They cannot seek to benefit from this violation by claiming that it absolves them of liability for their participation in the fraud.[38]

b. Plaintiffs state a claim for failure to comply with federal registration requirements

As explained in Plaintiffs' response to Defendant Gonzalez's motion on this issue (incorporated by reference), Plaintiffs state valid registration claims. *See* Pl. Opposition at § III(D)(1)(b).

c. Plaintiffs state a claim for federal control person liability

For control person liability, Plaintiffs must allege: (1) a primary violation of federal securities law, and (2) the defendant exercised actual power or control over the primary violator. *Howard v. Everex Systs., Inc.,* 228 F.3d 1057, 1065 (9th Cir. 2000).[39] It "is an intensely factual question, involving scrutiny of the defendant's participation in the day-to-day affairs of the corporation and the defendant's power to control corporate actions." *Id.* (internal quotation omitted). "[I]t is not necessary to show actual participation or the exercise of actual power. . . ." *Id.*

In addition, Plaintiffs need not show that the control persons had scienter or that they culpably participated in the wrongdoing. *Paracor Finance, Inc. v. General Elec. Capital Corp.,* 96 F.3d 1151, 1161 (9th Cir. 1996). Thus, "[t]o establish the liability of a controlling person, the

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[38] While an issuance subject to the registration requirement is a "public offering" for which a seller is subject to Section 12 liability, a "private placement" can be the basis for such liability when, as here, the offering was not truly private. *See, e.g., Fisk v. SuperAnnuities, Inc.,* 927 F.Supp. 718, 729-31 (S.D.N.Y. 1996)(no dismissal where securities were offered via private placement memorandum but plaintiffs contended that offering was not truly private).

[39] *Howard* addressed control person liability under the Exchange Act, whereas Plaintiffs allege control person liability under the Securities Act, but the controlling person analysis is the same. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1578 (9th Cir. 1990) (citing *Buhler v. Audo Leasing Corp.,* 807 F.2d 833, 835 (9th Cir. 1987).

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plaintiff does not have the burden of establishing that person's scienter distinct from the controlled corporation's scienter." *Arthur Children's Trust v. Keim,* 994 F.2d 1390, 1398 (9th Cir. 1993). "But a defendant who is a controlling person of an issuer with scienter may assert a good faith defense by proving the absence of scienter and a failure to directly or indirectly induce the violations at issue." *Howard*, 228 F.3d at 1065 (quotations omitted). Obviously, Defendants' implicit assertion of such a defense is insufficient to merit dismissal.[40]

The FAC is replete with allegations that Defendants Iglesias and Moffly exercised control over Hygea. *See, e.g.*, ¶¶ 32, 36, 52, 61. They do not appear to dispute such control in their Motion. Nor can the Director Defendants credibly argue their control, for the same reasons that Defendant Gonzalez cannot. Plaintiffs' arguments on this point in response to his Motion are incorporated here by reference. *See* Pl. Opposition at § III(D)(1)(c).

4. Plaintiffs' Nevada Securities Act claims are adequately stated

a. Plaintiffs state a claim for violation of NRS 90.570

Pursuant to the Nevada Securities Act ("NSA"),"[i]n connection with the offer to sell, sale, offer to purchase or purchase of a security, a person shall not, directly or indirectly:

> 1. Employ any device, scheme or artifice to defraud;
> 2. Make an untrue statement of a material fact or omit to state material fact necessary in order to make the statements made not misleading in the light of the circumstances under which they are made; or
> 3. Engage in an act, practice or course of business which operates or would operate as a fraud or deceit upon a person."

NRS 90.570. *See also* NRS 90.580 (manipulation of sale prohibited). Defendants claim that the NSA is inapplicable to this transaction because, they say, there is no allegation that any offer to sell Hygea securities occurred in Nevada. Def's Br. at 28-29. However, the Act provides that an "offer to sell or to purchase is made in [Nevada], *whether or not either party is present in this State,* if the offer ... [o]riginates in this State." NRS 90.830(3) (emphasis added). Courts in jurisdictions that, like

[40] Plaintiffs have more than pled "actual participation in the corporation's operation or some influence" over the investment at issue. *In re Juniper Networks, Inc. Sec. Litig.*, 542 F. Supp. 2d 1037, 1053 (C.D. Cal. 2008) (quoting *Burgess v. Premier Corp.*, 727 F.2d 826, 832 (9th Cir. 1984)). If nothing else, all Defendants approved the SPA.

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Nevada, have adopted the Uniform Securities Act have held that an offer "originates" where the issuer is located. *See, e.g., In re Trade Partners, Inc.*, 627 F. Supp. 2d 772, 779-80 (W.D. Mich. 2008) (allegations that issuer was from Michigan and out-of-state defendants acted as its agents satisfied "originating in" requirement of Michigan Securities Act); *Rome v. Reyes*, 2017 COA 84, ¶ 20, 401 P.3d 75, 81 (Colo. App. 2017) (reasonable inference that out-of-state defendants had violated Colorado's Uniform Securities Act where it was alleged that the securities originated and were executed in Colorado.); *Cromeans v. Morgan Keegan & Co.*, 303 F.R.D. 543, 557 (W.D. Mo. 2014) (courts liberally and broadly construe a securities fraud statute). Hygea is a Nevada corporation that issued stock that was then sold through a transaction negotiated with another Nevada corporation. Nevada's securities law applies to this transaction. Indeed, the SPA applies Nevada law. **Exhibit 4** at § 8.10. Hygea, Moffly, and Iglesias all signed the SPA, and the Director Defendants approved it. Such choice of law clauses govern the application of a state's securities act. *See JP Morgan Chase Bank, N.A. v. McDonald*, No. 11 C 6902, 2015 WL 6784238, *4 (N.D. Ill. Nov. 6, 2015)(citing cases).

In fact, as discussed below, one of the leading cases on this issue is *Simms Inv. Co. v E.F. Hutton, infra.* The Court in *Simms* identified Louis Loss as a leading authority on the issue and viewed his commentary as authoritative. He concluded that the state of a corporation's incorporation – coincidentally in his example, Nevada – can obviously apply its Act to a transaction of the corporation's stock. Louis Loss, *The Conflict of Laws and the Blue Sky Laws*, 71 Harv. L. Rev. 209, 231 (1957)("incorporate[ion] in Nevada… should certainly make Nevada reasonably connected with the transaction" such that Nevada's statute or, at the time, lack thereof, would apply).

Moreover, even if, *arguendo*, it does not, then another state's analogous statute would apply. "[S]o long as there is some territorial nexus to a particular transaction, the [securities] laws of two or more states may simultaneously apply" to a transaction. *Lintz v. Carey Manor Ltd.*, 613 F. Supp. 543, 550-551 (W.D. Va. 1985) (if a portion of a securities transaction occurs in a state, even if aimed

only at non-residents, that state has a legitimate interest in applying its securities law to the transaction). In other words, Plaintiffs need not predicate their claims on the laws of one specific state in order to be entitled to relief. *See Simms Inv. Co. v. E.F. Hutton & Co. Inc.*, 699 F. Supp. 543, 545 (M.D.N.C. 1988) (again, "the securities laws of two or more states may be applicable to a single transaction without presenting a conflict of laws question" and further noting this "conclusion is in accord with persuasive authority and secondary sources," citing Unif. Securities Act § 414, Comment 2, 7B U.L.A. (1958) (noting the Act anticipates situation where more than one state statute will apply to any single transaction)). Moreover, the two other states to have any apparent relationship to the sale, Florida and Michigan, have also adopted the Uniform Securities Act, and their operative provisions are substantially similar to the NSA's. *See* Section 517.301 of the Florida Statutes; Mich. Comp. Laws Ann. § 451.2501. The conduct alleged in the FAC entitles the Plaintiffs to relief under *any* of these similar state provisions.

Furthermore, as Defendants concede, Plaintiffs have offered to tender back their shares. ¶ 79. This is more than sufficient under the NSA, which only requires that such tender "be made before entry of judgment." NRS 90.700. Given that Plaintiffs have until judgment to tender back, any purported imperfection in their tender-to-date is clearly not a basis for dismissal.

b. Plaintiffs state a claim for violation of NRS 90.460

NRS 90.460 makes it "unlawful for a person to offer to sell or sell any security in [Nevada] unless the security is registered or the security or transaction is exempt." Pursuant to 90.660(1)(b), if a security is not registered or otherwise exempt, the offeror or seller is "liable to the person purchasing the security." Even though the securities here were unregistered, Defendants ask the Court to dismiss the claim. But, again, "the burden of demonstrating the availability and applicability of . . . an exemption [to the registration requirement] is on the person claiming the exemption." NAC 90.495(3). Defendants claim that Hygea has qualified for an exemption pursuant to NRS 90.530(11). Once again, though, they fail to make any showing beyond this assertion.

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Furthermore, and as Defendants note, Nevada securities law is generally interpreted consistent with federal law. *See In re Stratosphere Corp.*, 1 F. Supp. 2d 1096, 1123 (D. Nev. 1998). As discussed above, Defendants bear the burden of proving the existence of an exemption from registration.

Moreover, while Defendants have not even tried to meet their burden in showing the exemption applies, it seems likely that, if they mount such an effort, it will fail. As just one example, the exemption does not apply if any "commission or other similar compensation is paid or given, directly or indirectly, to a person, other than a broker-dealer licensed or not required to be licensed under this chapter, for soliciting a prospective purchaser in this State." NRS 90.530(11)(c). Here, at least one investment bank was involved in soliciting Plaintiffs. ¶¶ 28, 37, 41a. Presumably, it was not working for free, and in fact it has sued Hygea for "commission or similar compensation." *See CEA Atlantic Advisors, LLC v. Hygea Holdings Corp.*, Hillsborough County Circuit Court Case No. 16-CA-11256 (filed December 9, 2016), attached hereto as **Exhibit 13**. The chance that, after discovery, Defendants will be able to show that all of these criteria were met is minimal at best.

c. Plaintiffs state a claim for Nevada control person liability

Defendants make two arguments on this issue, both of which fail. *First*, they claim that there is no primary liability. As discussed above, this is wrong. *Second*, they appear to claim that "there can be no control person liability" because the statute defines a control person as an "officer or director of the *person liable*." Defs' Br. at 33 (citing NRS 90.660(4))(emphasis in Defs' Br.). But Hygea is a "person." *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (corporations and natural persons are treated equivalently for purposes of First Amendment jurisprudence). Control person liability clearly adheres to its officers and directors.

C. The Economic Loss Doctrine does not bar any of Plaintiffs' Claims

The economic loss doctrine is simply inapplicable to Plaintiffs' claims. *First*, as discussed above, Nevada has recognized a tort claim for fraudulent inducement into a contract. Thus, the rule

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cannot apply to Plaintiffs' claims here.[41] *Second*, the cases that Defendants cite concern design and construction professionals, and explicitly disavow the doctrine's application to situations such as this, recognizing potential "exceptions to the economic loss doctrine for negligent misrepresentation claims ... when strong countervailing considerations weigh in favor of imposing liability." *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 400, 302 P.3d 1148, 1153 (Nev. 2013), *as corrected* (Aug. 14, 2013) (citation omitted). "These types of cases encompass economic losses sustained, for example, as a result of ... *negligent misstatements about financial matters*." *Id.* (emphasis added) (citation omitted)). That is precisely the case here. *Third*, as to the Director Defendants, they did not sign the SPA.

D. None of Plaintiffs' Claims should be dismissed as Improperly Derivative

1. Plaintiffs' claims are direct, not derivative

Directors owe a fiduciary duty to shareholders. Defendants' cited caselaw concurs. *See In re Amerco*, 127 Nev. 196, 223, 252 P.3d 681, 700 n. 11 (Nev. 2011) (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)) (directors owe "shareholders an uncompromising duty of loyalty"); *see also Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998) ("mere presence of an injury to the corporation does not necessarily negate the simultaneous presence of an individual injury"). Thus, "an injury may affect a substantial number of stockholders and still support a direct action if it is not incidental to an injury to the corporation. . . .the key requirement is an injury distinct from the injury to the corporation, rather than distinct from the injury to the other shareholders." 19 Am. Jur. 2d Corporations § 1927. *See also Parametric Sound Corp. v. Eighth Judicial Dist. Court in & for*

[41] Defendants argue that paragraphs 32 through 52 of the FAC, which concern events prior to October 5, 2016, cannot be considered on a breach of fiduciary duty claim, because Plaintiffs did not own any shares of Hygea stock at that time. Defs' Br. At 33. But the case they cite in support of this proposition, *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1169 (Del. Ch. 2002), stands only for the obvious proposition that one cannot breach a fiduciary duty to someone before that duty attaches. It does not go nearly so far as to say that events which occur prior to the existence of the duty are irrelevant. Indeed, the Delaware Supreme Court's rationale behind this rule—that allowing such claims would permit "the 'evil' of purchasing stock in order 'to attack a transaction which occurred prior to the purchase of the stock'"—is inapplicable to this matter. *Omnicare*, 809 A.2d at 1169–70 (noting that the rule is in support of the "policy against purchasing lawsuits involving the internal relations of Delaware corporations").

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Cty. of Clark, 401 P.3d 1100, 1102 (Nev. 2017) (citation omitted) (Court adopted the "direct harm test . . . which allows a direct claim when shareholder injury is independent from corporate injury").

Here, Plaintiffs were harmed when tricked into buying their shares, and again as shareholders. *First*, Defendants' continued failure to reveal Hygea's distress violated duties owed to Plaintiffs as shareholders. ¶ 60 (even partial "disclosure" of prior misstatement overstated performance by a factor of seven). *Second*, Defendants have breached or caused the breach of multiple contractual obligations owed to Plaintiffs as shareholders, such as the provision of certain financial information. ¶¶ 68-70. *Third*, Defendants' post-investment conduct imperils Plaintiffs' investment. ¶¶ 73, 142. Thus, just as Defendants violated their duties to Plaintiffs as prospective investors, they have continued to violate their duties to them as shareholders post-SPA.[42] It is no defense if they also violated their duties to Hygea itself.[43]

Here, in fact, Plaintiffs have specifically pled that they were uniquely injured as compared to the shareholders at large. *See, e.g.*, ¶¶ 76, 142, 147, 154. *First*, Hygea has violated Plaintiffs' rights as shareholders specifically. ¶¶ 76, 142. *Second*, any damage to Hygea from Defendants' conduct has a disproportionate impact on Plaintiffs. Hygea's shareholder roster is largely comprised of corporate insiders such as defendants and their affiliates. ¶ 30. These Defendants were faced with a failing company and the destruction of their shares' value. ¶ 57. Their answer was to induce Plaintiffs to postpone the Hygea's reckoning by giving it $30 million. ¶ 147. Since the time the proverbial check cleared, Defendants have comprehensively violated Plaintiffs' rights. ¶ 154. To the extent this injured Hygea as a whole, the injury disproportionately harmed Plaintiffs. *See, e.g., Notz v. Everett Smith Grp., Ltd.*, 764 N.W.2d 904, 912–13 (Wisc. 2009) (minority shareholder had direct claim based on transaction that disproportionately benefited majority shareholder); *Smith v.*

[42] For the same reasons Plaintiffs' breach of fiduciary duty allegations are direct claims, so are their claims of unjust enrichment against the Director Defendants, who did not sign the SPA. *See Leasepartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 756, 942 P.2d 182, 187-188 (Nev. 1997) (question of fact on unjust enrichment).

[43] Defendants' effort, at Page 35 of their Brief, to characterize the "fundamental theory of [Plaintiffs'] case" as one of mismanagement is more mischaracterization and cherry picking.

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Tele-Commc'n, Inc., 134 Cal. App. 3d 338, 345 (Ct. App. 1982) (shareholder had direct claim based on disproportionate allocation of tax benefits as between shareholders); *Jara v. Suprema Meats, Inc.*, 121 Cal. App. 4th 1238, 1257–58 (2004) (recognizing "a minority shareholder['s right] to bring a personal action alleging 'a majority stockholders' breach of a fiduciary duty to minority stockholders, which resulted in the majority stockholders retaining a disproportionate share of the corporation's ongoing value.'" (citations omitted).

Even if in some theoretical sense the shareholder Defendants are "harmed" by their own self-serving conduct, that harm is outweighed by the benefits they enjoy by virtue of their misconduct. Plaintiffs enjoy no such upside.

2. In the alternative, Plaintiffs have pled demand futility

When evaluating demand futility, Nevada courts examine whether: "(1) in those cases in which the directors approved the challenged transactions, a reasonable doubt that the directors were disinterested or that the business judgment rule otherwise protects the challenged decisions; or (2) in those cases in which the challenged transactions did not involve board action or the board of directors has changed since the transactions, a reasonable doubt that the board can impartially consider a demand." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 641, 137 P.3d 1171, 1184 (Nev. 2006) (citations omitted).[44] Thus, "[a] demand is futile when there is a reasonable doubt as to whether (1) a majority of the directors are disinterested and independent such that they can exercise independent reasoning when considering a demand, or (2) the challenged transaction was the product of a valid exercise of business judgment." *Kim v. MGM Mirage*, No. 61101, 2013 WL 7156106, *1 (Nev. Dec. 30, 2013)(citing *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000)).

[44] Likewise, Defendants have oriented themselves to a tooth-and-nail fight against Plaintiffs. The idea that they would cooperatively decide to sue themselves is implausible. Nor would they decide to sue Mr. Iglesias, towards whom they have shown continued deference. This is illustrated, again, by the fact that they have joined in his defense here – neither Plaintiffs nor the Court can expect that the Director Defendants will turn *en masse* against their co-Defendant.

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Demand would have been futile for multiple reasons. *First*, under *Kim*, mere "doubt" as to whether the business judgment rule applies is enough to excuse demand. *Id.* Here, as discussed below and in response to Defendant Gonzalez's Motion to Dismiss, the rule's protections are entirely unavailable. This conclusively excuses demand.

Second, as a practical matter, Defendants were not going to agree to direct Hygea to sue them. Their argument amounts to, "Plaintiffs should have asked us if we would sue ourselves." Courts have pervasively recognized this common-sense excuse for not making a demand. For example, when plaintiffs alleged that "a majority of the defendants . . . subjected themselves to potential personal liability and [thereby] removed the protective cloak of the business judgment rule," plaintiffs had "therefore made sufficient allegations to satisfy the test for demand futility." *In re Biopure Corp. Derivative Litig.*, 424 F. Supp. 2d 305, 308 (D. Mass. 2006). *See also Weiss v. Temporary Inv. Fund, Inc.*, 516 F. Supp. 665, 672 (D. Del. 1981) (interested director is one who engaged in self-dealing or "otherwise stood to obtain any personal advantage"), *aff'd,* 692 F.2d 928 (3d Cir.1982), *vacated on other grounds by* 465 U.S. 1001, 104 S. Ct. 989, 79 L.Ed.2d 224 (1984); *Pogostin v. Rice,* 480 A.2d 619, 624 (Del. 1984) ("[d]irectorial interest exists whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders"); *Stahn v. Catawba Mills,* 53 S.C. 519, 519, 31 S.E. 498, 498–99 (1898) ("refusal need not be alleged, if it be shown that the directors or managing board are themselves the wrong-doers in some alleged breach of trust or fraudulent misappropriation of the corporate property, and have control of a majority of the stock, so as to control corporate action"); *NECA–IBEW Pension Fund v. Cox,* No. 1:11cv451, 2011 WL 4383368, *4 (S.D. Ohio Sept. 20, 2011) (demand was futile where "director defendants are the very same people who approved the pay hikes and bonuses, and plaintiff has named all directors who approved the compensation as defendants" and "the directors did not merely

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approve the transaction, they also recommended to the shareholders that the shareholders approve the compensation").[45]

Third Defendants at the very least ignored multiple red flags in their mismanagement of Hygea. *See South v. Baker*, 62 A.3d 1, 14–15 (Del. Ch. 2012) (directors' failure to act on "red flags" excuses demand, citing *Stone,* 911 A.2d at 370). Here, that knowledge is clearly inferred from the allegations. The Board member Defendants approved Hygea's entry into the SPA and such approval explicitly referenced financial figures reflecting false representations. ¶ 45. Defendants did not correct these misrepresentations, and Plaintiffs only learned through a consultant that Hygea's financial performance figures for 2014 through 2016 "[were] not the same as the ones they gave" to Plaintiffs before investing. ¶ 62. Moreover, the Board represented an EBITDA figure that proved to be false; the actual EBIDTA fell far short of all indicated figures and reflected additional misleading valuation information as well. ¶ 41(k). Defendants conceded that Hygea's 2016 EBITDA was far less than claimed, ¶ 59 but even this correction turned out to be untrue: a consultant reported that even the purportedly "corrected" 2016 EBITDA was "fabricated," and that the actual number was about a seventh of the "corrected" figure. ¶ 60. And at least one EBITDA figure was based on a $130 million influx into Hygea that never materialized. ¶ 66. Defendants also misrepresented that Hygea would effectively issue shares on a public stock exchange via an RTO when soliciting Plaintiffs' investment. ¶ 34. The promised RTO never happened. ¶ 54. All Defendants – including the Board – knew or should have known that Hygea's then-existing financial situation made it impossible both at the time Plaintiffs invested, and up until the time it became revealed that there would be no RTO. ¶¶ 34, 56, 67. In short, Defendants oversaw the efforts to sell Plaintiffs their

[45] The *Shoen* Court indeed found that "[a]llegations of mere threats of liability through approval of the wrongdoing or other participation ... do not show sufficient interestedness to excuse the demand requirement. *Shoen*, 122 Nev. 639–40, 137 P.3d 1183–84. But the Court continued that "interestedness because of potential liability can be shown ... in those rare case[s]," such as here, "where defendants' actions were so egregious that a substantial likelihood of director liability exists." *Id.* (quotations omitted). In fact, Defendants undermine their argument, claiming they "really do not know how to respond... other than to say logic and reason dictate that the Board would defend themselves in an action in which they were accused of wrongdoing ..." Defs' Br at 38. Exactly—and "logic and reason" also dictate that Defendants will defend themselves instead of authorizing Hygea to sue them.

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stock; signed off on the bad EBITDA figures; found out that the numbers were bad and that there was no RTO as promised; but continued to allow the violation of N5HYG's rights and the corporation's gross mismanagement.

Fourth, the allegations here relate not to the routine management of the corporation or a challenge to a business transaction, both of which could in theory implicate the business judgment rule. Rather, they relate to misstatements made to Plaintiffs before their investment; the failure to candidly correct those misrepresentations; and the violation of N5HYG's rights as a minority shareholder, coupled with management's wholesale abandonment of responsible corporate stewardship. Regardless of whether or not Nevada recognizes this as "shareholder oppression," *see* Section F *infra*, the concept is apt. And "[t]he existence of [shareholder] oppression must be determined on a case-by-case basis." *Struckhoff v. Echo Ridge Farm, Inc.*, 833 S.W.2d 463, 467 (Mo. Ct. App. 1992). Thus, this is a fact issue and dismissal on the pleadings is inappropriate.

For all the reasons discussed above, Plaintiffs' claims are not derivative, and if they were, demand would be futile. In the alternative, while its futility is certain, Plaintiffs should have the opportunity to make a formal demand on the Board.

3. The business judgment rule and Nevada's exculpatory clause do not provide Defendants with a defense to Plaintiffs' claims

Defendants also argue that the business judgment rule and Nevada's exculpatory clause immunizes them from fraud claims. For all the reasons set forth in Plaintiffs' Response to Gonzalez's Motion to Dismiss, the business judgment rule does not apply here. *See* Pl. Opposition at § III(E). It is particularly irrelevant to fraud claims, which are an express exception to the rule. *See Weinfeld v. Minor*, No. 314CV00513RCJWGC, 2016 WL 4487844, *5 (D. Nev. Aug. 24, 2016) (*citing* Nev. Rev. Stat. § 78.138(7)(a)–(b)).[46] Nor does Nevada's exculpatory clause provide a

[46] "The business judgment rule . . . pertains only to directors whose conduct falls within its protections." *Shoen*, 122 Nev. 635–36, 137 P.3d 1181 (2006) (citation omitted). "Thus, it applies only in the context of valid interested director action, or the valid exercise of business judgment by disinterested directors in light of their fiduciary duties." *Id.*

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defense. As Defendants admit, this provision explicitly permits directors to be held liable where there are allegations that the director engaged in "a breach of his or her fiduciary duties as a director or officer" involving "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7). Once again, this at least presents a fact issue. *See Brinkerhoff v Foote*, No. 68851, 2016 WL 7439357, *4 (Nev. Sup. Ct. Dec. 22, 2016) ("*[a]fter hearing all the evidence*, the fact-finder must determine" culpability under NRS 78.138") (emphasis added). *See also Stewart v. Kroecker*, No. CV04-2130L, 2005 WL 3466543, *2 (W.D. Wash. Dec. 19, 2005) (denying motion for summary disposition as to NRS 78.138 argument due to factual inquiry into circumstances of stock issuance).

E. Plaintiffs have claims for Breach of Fiduciary Duty, Duty of Loyalty, and Waste

Defendants claim that they are free to breach their fiduciary duties towards Plaintiffs, because those duties ultimately stem from the contract through which Plaintiffs bought their shares. But this "proves too much." Stock is pervasively acquired through contracts. The existence of such agreements does not effectively abrogate management's fiduciary duties to shareholders.

Defendants also claim that "the Complaint is devoid of any allegations as to how any Individual Defendants exploited a corporate opportunity or diverted corporate assets for improper or unnecessary purposes ..." Defs' Br. at 40. This is simply untrue: just in the recitation of the claim alone, the FAC alleges such breach through "denying [Plaintiffs their] Board observation rights, withholding contractual payments, refusing information, threatening Plaintiffs' associates, mismanaging or allowing the mismanagement of Hygea's finances, operating a wide-ranging network of affiliated corporations to the detriment of Hygea-proper, placing themselves in a conflicted position, and prioritizing their personal interests over Hygea's." ¶ 166. As if these allegations were not enough (they are), the context renders them especially compelling. Defendants secured $30 million from Plaintiffs, yet somehow ended up dangerously low on cash within about a year. All the while Hygea's financial records were a mess. What happened to the money?

F. Plaintiffs have Stated a Claim for Minority Shareholder Oppression

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Nevada courts have recognized that a claim may be available to oppressed shareholders. "[C]ourts have recognized that 'dissolution statutes do not provide the exclusive remedies for oppressed shareholders.'" *Bedore v. Familian*, 122 Nev. 5, 11, 125 P.3d 1168, 1172 (Nev. 2006) (citing *Hollis v. Hill*, 232 F.3d 460, 468 (5th Cir. 2000)). In *Bedore*, the Nevada Supreme Court cited *Hollis*, which explains that "[t]he dissolution statutes do not provide the exclusive remedies for oppressed shareholders; courts have equitable powers to fashion appropriate remedies where the majority shareholders have breached their fiduciary duty to the minority by engaging in oppressive conduct." *Hollis*, 232 F.3d 468; *see also Clark v. Lubritz*, 944 P.2d 861, 865 (Nev. 1997) (Nevada Supreme Court upheld a breach of fiduciary duty award stemming from the oppressive conduct of majority shareholders over a minority shareholder). Defendants' request that this Court close the door to any such equitable relief, at the outset of the case and in derogation of the Nevada Supreme Court's contrary direction, is therefore misguided.

G. Plaintiffs have Stated a Claim for Breach of the Duty of Candor

Defendants claim that they do not have any duty of candor to their shareholder except in the event of a merger proposal. Defs' Br. at 41. This is incorrect. "It is well established that a person can breach a fiduciary duty by failing to disclose material information, even if not asked." *De La Fuente v. F.D.I.C.*, 332 F.3d 1208, 1222 (9th Cir. 2003) (citing *Harmon v. Kobrin,* 250 F.3d 1240, 1246 (9th Cir. 2001)). "A fiduciary's duty of candor is encompassed within the duty of loyalty. The duty of candor requires corporate fiduciaries to disclose *all* material information relevant to corporate decisions from which they may derive a personal benefit." *Id.* (citation and quotation omitted, emphasis in original). As discussed throughout, all of the Defendants served to benefit from having Plaintiffs' $30 million to keep their company afloat. In this context, Defendants cannot secure the money; deny Plaintiffs their observation and information rights; refuse to release information; and squander the money to the point that they are putting payroll on a credit card, all without disclosing to the shareholders what is going on.

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Defendants' breach of this duty illuminates their breaches of their fiduciary duties more generally. Defendants have effectively managed Hygea as a "black box," aggressively withholding information from Plaintiffs. *See* ¶¶ 73, 76-77. Something happened within this black box to make at least $30 million disappear. Yet, having concealed their conduct, Defendants complain that Plaintiffs cannot specify exactly what it is that Defendants did wrong. This is not only harshly inequitable; it also illustrates the importance of their lack of candor.

H. Plaintiffs have Stated a Claim for Negligent Misrepresentation

Defendants' primary argument is that they are immune from this claim under the economic loss rule. As explained above, the rule does not shield them from liability.

I. Plaintiffs have Stated a Claim for Tortious Interference

Defendants claim that they were free to interfere with Plaintiffs' commercial relationship with Hygea, but their argument fails. First, the Director Defendants' claim that they are indistinct from the corporation is incorrect, because directors are not agents of the corporation in their position as such. *See Arnold v. Soc'y for Savs. Bancorp, Inc.*, 678 A.2d 533, 539-40 (Del. 1996) ("Directors, in the ordinary course of their service as directors, do not act as agents of the corporation ... The board of directors of a corporation is charged with the ultimate responsibility to manage or direct the management of the business and affairs of the corporation.... It would be an analytical anomaly, therefore, to treat corporate directors as *agents* of the corporation when they are acting as *fiduciaries* of the stockholders in managing the business and affairs of the corporation") (emphasis in original) (citations omitted); *see also Paramount Communications Inc. v. Time Inc.*, 1989 WL 79880, *30 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

Even agents, representatives, and employees may be held liable for tortious interference with a contract to which that company is a party if they interfere with the contract by (1) acting outside the scope of their authority; (2) acting with malice; and/or (3) acting to serve their own interests. 72 A.L.R. 4th 492 (Originally published in 1989). Thus, while this Court has found that "agents acting

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within the scope of their employment, i.e. the principal's interest," cannot tortiously interfere with the principal's contracts, *Blanck v. Hager*, 360 F. Supp. 2d 1137, 1154 (D. Nev. 2005), it has by implication left open the door to tortious interference claims where the purported agents act outside the scope of any proper authority. Here, it might turn out to be the case that the Defendants interfered with Plaintiffs' rights "for their own purposes"—in other words, they were happy to cash the wildly inflated check for $30 million while precluding Plaintiffs from enjoying the benefits they were supposed to receive.[47] ¶ 181; *see also* ¶¶ 57, 69, 78-79 (Plaintiffs deprived of their rights under SPA). As such, Plaintiffs have stated a claim for tortious interference.[48,49,50]

J. Plaintiffs have Stated Claims for Conspiracy and Concert of Action

1. The intracorporate conspiracy doctrine does not apply

The doctrine does not apply when one of the underlying torts is a securities fraud claim. *See Solyom v. World Wide Child Care Corp.*, No. 14-80241-CIV, 2015 WL 6167411, *2 (S.D. Fla. Oct. 15, 2015) (citations omitted). Moreover, the doctrine only bars civil conspiracy and concert of action claims as to agents and representatives of a company who act in their official capacities on behalf of the corporation. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (Nev. 1983); *U-Haul Co. of Nev. v. United States*, No. 2:08-CV-729-KJD-RJJ, 2012 WL 3042908, *3 (D. Nev. July 25, 2012). Again, the Defendant directors are not agents or representatives of the company in their position as such, so the doctrine does not apply to them. *See Arnold*, 678 A.2d at

[47] When Defendants attached the SPA to their Motion, they excluded Schedule 4.5.1, which shows that the Director Defendants are largely shareholders of Hygea. Given the lack of a protective order, Plaintiffs refrain from filing it here as a confidential document, but can provide it to the Court if requested or as otherwise appropriate. It remains a fact question whether Campanella and Gonzalez own shares through one of the trust or corporate shareholders. As such, Defendants have self-interests that they served through their interference.

[48] Defendants also bizarrely suggest that it is a violation of Rule 11 to plead in the alternative as to whether or not Defendants' conduct fell within the scope of their duties. This is profoundly misguided. The knowledge as to the precise scope of those duties and their relationship to Defendants' misconduct is uniquely within Defendants' possession.

[49] Plaintiffs need not stake out a position at the pleading stage on the fact-sensitive issue of whether conduct was within the scope of an individual's position. *See* NRCP. 8(a) & (e)(2) (pleading in the alternative permitted).

[50] Defendants cite *Nat'l Right to Life P.A. Com. v. Friends of Bryan*, 741 F. Supp. 807, 813 (D. Nev. 1990) for the proposition that Plaintiffs must plead motive. This is false. The case cited by Defendants holds only that there must be an "intentional attainment of an unjust advantage . . . and *motive* or purpose is *usually an accurate measure* of . . . just or unjust character." *Id.* at 814 (quoting *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1348 (9th Cir. 1980)). Plaintiffs have adequately pled that Defendants intentionally interefered with the SPA.

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-41
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

539-540. As to the executives, "[t]he doctrine would not apply if the actionable conduct is outside the scope of employment." *Hoefer v. Fluor Daniel, Inc.*, 92 F. Supp. 2d 1055, 1059 (C.D. Cal. 2000). *See also Quinn v. Nassau Cty. Police Dep't*, 53 F. Supp. 2d 347, 360 (E.D.N.Y. 1999). Here, once more, discovery may show that the executive Defendants were acting outside of their employment when they misled prospective investors, or when they misled and oppressed investors after securing their funds. ¶¶ 73-76. *See Stanley Black & Decker, Inc. v. Gulian,* 70 F. Supp. 3d 719, 737 (D. Del. 2014) (executive's scope of employment is ordinarily a fact issue) (quotations and citations omitted).

2. Plaintiffs have stated a claim for concert of action

"For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876. States have pervasively recognized this cause of action. *See, e.g., Centrone v. C. Schmidt & Sons, Inc.*, 452 N.Y.S.2d 299, 302 (Sup. Ct. 1982) (citing Prosser, Law of Torts, 4th ed., § 46 at 292); *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1035 (D. Mass. 1981). The doctrine protects against defendants "spreading" the elements of a claim amongst themselves and seeking to escape liability because the victim cannot plead each count against each wrongdoer. *See El Camino Res., LTD. v. Huntington Nat. Bank,* 722 F. Supp. 2d 875, 900-901 (W.D. Mich. 2010), *aff'd*, 712 F.3d 917 (6th Cir. 2013). Defendants' own *GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (Nev. 2001) case shows that Nevada recognizes the doctrine.[51]

[51] Defendants cite *GES, Inc.* for the proposition that a concert of action claim must include an inherently dangerous act. However, *GES* only applied to the assertion of a concerted action theory in order to qualify for a joint and several liability exception to "action[s] to recover damages for death or injury to persons or for injury to property *in which comparative negligence* is asserted as a defense," NRS 41.141(1) (emphasis added), and is therefore inapplicable here.

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

K. Plaintiffs have Stated a Claim for Unjust Enrichment

Defendants were Hygea itself and insiders and directors at the time Plaintiffs paid $30 million to the company, even though it was probably worth less than that much in total. The inference that they benefitted from this windfall is clear. And although the Board approved the SPA, and although the SPA imputed the directors' knowledge, the Director Defendants were not signatories. This presents a strong occasion for application of the equitable unjust enrichment doctrine, and at the very least dismissal would be entirely premature. *See Leasepartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (Nev. 1997) (question of fact on unjust enrichment claim against non-party to contract).

L. Plaintiffs have Stated a Claim for Constructive Fraud

Defendants argue that they should be excused from this claim because the parties were "sophisticated" and negotiated at "arms-length," and, therefore, they could not have had a "confidential" relationship. Defs' Br. at 46. This argument fails for several reasons. *First*, Defendants themselves insisted on confidentiality during the pre-investment representations. *See, e.g.*, ¶ 41(a)(information memorandum was "confidential"); FAC n. 2 (Defendants continue to assert confidentiality obligations). *Second*, Defendants themselves argue that, not only was the relationship confidential, it was so confidential that the sale was not "public" under the Securities Act. *See* Defs Br. at 26. Of course, Defendants offer no authority for their implicit contention that a confidential sale cannot be public, and indeed that is not one of the factors, discussed above, for determining a "public offering" under the Securities Act. But the argument they make there is fatal to their argument here. Third, at the very least, the precise nature of the parties' relationship over the summer of 2016 is a fact issue. Defendants offer no authority for their radical assumption that sophisticated entities inherently cannot engage in a confidential relationship.

M. Plaintiffs have Stated Claims for Rescission of Contract and Accounting

As Defendants note, the Nevada courts have held that accounting and rescission are both available in Nevada. *See State v. Callahan*, 229 P. 702, 703-04 (Nev. 1924) (accounting an available

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

equitable remedy for payment on securities); *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (Nev. 1993) (citation omitted) ("Rescission is an equitable remedy which totally abrogates a contract and which seeks to place the parties in the position they occupied prior to executing the contract"). The fact that Plaintiffs also seek remedies of monetary damages does not require dismissal of these alternative claims at the pleading stage. For example, in *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 622, 173 P.3d 707, 713 (Nev. 2007), the plaintiff pursued both breach of contract damages and rescission, and his breach of contract claims were only dismissed after the Court granted him rescission of his contract.

CONCLUSION

For all the reasons set forth herein, Defendants' Motion should be denied.

DATED this 18th day of September, 2018.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

G. MARK ALBRIGHT, ESQ., #001394
D. CHRIS ALBRIGHT, ESQ., #004904
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
gma@albrightstoddard.com
dca@albrightstoddard.com

E. POWELL MILLER, ESQ. (P39487)
(*pro hac vice* application forthcoming)
CHRISTOPHER D. KAYE, ESQ. (P61918)
(*pro hac vice* application forthcoming)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, MI 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.com
Attorneys for Plaintiffs

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on the 18 day of September, 2018, I served a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND** upon upon all counsel of record by electronically serving the document using the Court's electronic filing system.

On the same date, September 18, 2018, I also placed a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND,** enclosed in a sealed envelope, in the United States Mail at Las Vegas, Nevada, with first class postage thereon prepaid, addressed to the following:

Richard Williams
8110 SW 78th Street
Miami, Florida 33143

On the same date, September 18, 2018, I also served a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND]** via email, to Richard Williams at the following email address:

rich1947@bellsouth.net

Sandra Clark

An employee of Albright, Stoddard,
Warnick & Albright

“Exhibit 10”

“Exhibit 10”

EXHS
G. MARK ALBRIGHT, ESQ., NBN 0013940
D. CHRIS ALBRIGHT, ESQ., NBN 004904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111 / Fax: (702) 384-0605
gma@albrightstoddard.com / dca@albrightstoddard.com

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (admitted pro hac vice)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, MI 48307
Tel: (248) 841-2200
epm@millerlawpc.com / cdk@millerlawpc.com

OGONNA M. BROWN, ESQ., NBN 007589
LEWIS ROCA ROTHGERBER CHRISTIE, LLP
3993 Howard Hughes Parkway #600
Las Vegas, Nevada 89169
Tel: (702) 949-8200 / Fax: (702) 949-8398
obrown@lrrc.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

N5HYG, LLC, a Michigan limited liability company; and NEVADA 5, INC., a Nevada corporation, Plaintiffs, vs. HYGEA HOLDINGS CORP., a Nevada corporation; MANUEL IGLESIAS; EDWARD MOFFLY; DANIEL T. MCGOWAN; FRANK KELLY; MARTHA MAIRENA CASTILLO; LACY LOAR; RICHARD WILLIAMS, ESQ.; GLENN MARICHI, M.D.; KEITH COLLINS, M.D.; JACK MANN, M.D.; THE ESTATE OF HOWARD SUSSMAN, M.D.; JOSEPH CAMPANELLA; CARL ROSENCRANTZ; and RAY GONZALEZ; DOES I-XXX; and ROES I-XXX, inclusive, Defendants.	CASE NO.: A-17-762664-B DEPT. NO.: 27 **EXHIBITS TO PLAINTIFFS' OPPOSITION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND** Date of hearing: October 3, 2018 Time of hearing: 10:30 a.m.

Attached are the Exhibits to Plaintiffs' Opposition to Motion to Dismiss the First Amended Complaint and to Strike Supplemental Pleadings and Jury Demand.

DATED this 18th day of September, 2018.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

G. MARK ALBRIGHT, ESQ., (NV Bar No. 001394)
D. CHRIS ALBRIGHT, ESQ., (NV Bar No. 004904)
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
gma@albrightstoddard.com / dca@albrightstoddard.com

E. POWELL MILLER, ESQ. (*pro hac vice pending*)
CHRISTOPHER D. KAYE, ESQ. (*admitted pro hac vice*)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, MI 48307
Tel: (248) 841-2200
epm@millerlawpc.com / cdk@millerlawpc.com

OGONNA M. BROWN, ESQ.
Nevada bar No. 007589
LEWIS ROCA ROTHGERBER CHRISTIE, LLP
3993 Howard Hughes Parkway #600
Las Vegas, Nevada 89169
Tel: (702) 949-8200
Fax: (702) 949-8398
obrown@nevadafirm.com

Attorneys for Plaintiffs

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-41
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on the 18 day of September, 2018, I served a true and correct copy of the foregoing **EXHIBITS TO PLAINTIFFS' OPPOSITION TO DISMISS THE COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND** upon all counsel of record by electronically serving the document using the Court's electronic filing system.

On the same date, September 18, 2018, I also placed a true and correct copy of the foregoing **EXHIBITS TO PLAINTIFFS' OPPOSITION TO DISMISS THE COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND,** enclosed in a sealed envelope, in the United States Mail at Las Vegas, Nevada, with first class postage thereon prepaid, addressed to the following:

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Barbara Clark
An employee of Albright, Stoddard, Warnick & Albright

EXHIBIT “1”

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CLAUDIO ARELLANO; et. al.,

Plaintiffs,

v.

HYGEA HOLDINGS CORP.; et. al.,

Defendants.

Case No. 18 OC 00071 1B
Dept No. II

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 14, 2018, the bench trial of this matter commenced, with the trial continuing through May 18, 2018. Plaintiffs Claudio Arellano, Crown Equities LLC; Fifth Avenue 2254 LLC; Halevi Enterprises LLC; Halevi SV 1 LLC; Halevi SV 2 LLC; Hillcrest Acquisitions LLC; Hillcrest Center SV I LLC; Ibh Capital LLC; Leonite Capital LLC; N5HYG LLC ("N5HYG"); and RYMSSG Group, LLC (collectively, the "Plaintiffs"), appeared at trial, by and through their counsel of record, Christopher D. Kaye, Esq., and David Viar, Esq., of the The Miller Law Firm, P.C., and Clark Vellis, Esq. of Holley, Driggs, Walch, Fine, Wray, Puzey, and Thompson. Defendants Hygea Holdings Corp. ("Hygea" or the "Company"), Manuel Iglesias, Edward Moffly, Daniel T. McGowan, Frank Kelly, Martha Mairena Castillo, Glenn Marrichi, Keith Collins, M.D., Jack Mann, M.D., and Joseph Campanella (collectively, the "Defendants" and, together with the Plaintiffs, the "Parties") also appeared at the trial, by and through their counsel of record, Maria A. Gall, Esq., and Kyle A. Ewing, Esq., of Ballard Spahr, LLP, and Severin A.

Carlson, Esq. and Tara C. Zimmerman, Esq. of Kaempfer Crowell.

The Court, having reviewed and considered the pleadings and papers on file herein and evidence admitted during the trial; having heard and considered the witnesses called to testify at the trial; having considered the oral and written arguments of counsel; and for good cause therefore, hereby enters the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PROCEDURAL BACKGROUND

This is an action in which Plaintiffs sought the appointment of a receiver over the Company pursuant to NRS 78.650, NRS 78.630, and NRS 32.010. Plaintiffs filed this action on January 26, 2018, in the Eighth Judicial District Court of Nevada, in and for Clark County by the filing of an Emergency Complaint (the "Complaint"). On the same day, Plaintiffs filed an Emergency Petition (the "Petition") for Appointment of Receiver, requesting preliminary injunctive relief and the appointment of a temporary receiver.

Hygea opposed that Petition on February 20, 2018. The Eighth Judicial District Court, specifically Department XXVII, heard oral argument on the Petition but reserved decision thereon pending a to-be-set evidentiary hearing. Prior to opposing the Petition, on February 16, 2018, Defendant Hygea filed a Motion for Change of Venue (the "Venue Motion") in the Eighth Judicial District Court. That court heard the Venue Motion on order shortening time on March 7, 2018, and granted the venue change by way of its March 8, 2018, Order. The case was subsequently transferred to this Court.

Upon transfer, this Court scheduled a status hearing for April 6, 2018, and asked the Parties to submit memoranda advising the Court of outstanding motions and any other matters each party wanted to discuss at the status hearing. Among other things, the Company in its memorandum requested that the Court combine the to-be-set evidentiary hearing with the trial on

the merits pursuant to N.R.C.P. 65(a)(2). At the April 6, 2018, status hearing, Hygea reiterated its request and moved orally to advance the trial of the action on the merits and consolidate the same with the hearing of Plaintiffs' Petition under N.R.C.P 65(a)(2) (the "Consolidation Motion"). After hearing argument from the Parties, the Court granted the Consolidation Motion

The Court offered the weeks of April 23, 2018, May 14, 2018, or a week in or after July 2018 for a consolidated trial of the matter. Hygea suggested a week in or after July 2018 so that the Court could first decide the Company's pending Motion to Dismiss, or alternatively, for Summary Judgment, but indicated that it would be prepared to proceed the week of May 14, 2018 if necessary; Plaintiffs requested the week of April 23, 2018. The Court set trial of the matter for five (5) calendar days beginning May 14, 2018.

Prior to the consolidated trial, the Parties conducted limited discovery pursuant to the Court's April 23, 2018, Order granting limited relief from N.R.C.P. 16 in light of the consolidated trial. Also pursuant to the April 23, 2018, Order and in preparation for the trial of the matter, on April 23, 2018, the Parties disclosed their witnesses and Plaintiffs scheduled the trial depositions of two witnesses. At a hearing on Defendants' Motion for a Protective Order to preclude the trial depositions of Norman Gaylis, M.D. and Dan Miller and Plaintiffs' Motion to Preclude the Testimony of Craig Greene, the Court offered to continue the trial of the matter. Defendants represented that they were not opposed to a continuance so that the Court could decide what Defendants believed to be threshold issues raised in their Motion to Dismiss, or alternatively, for Summary Judgment, but that if the Court declined to address the motion, Defendants were prepared to proceed on May 14, 2018. Plaintiffs represented that they did not want a continuance and were prepared to proceed on May 14, 2018. Based on the Parties' representations, the Court did not continue the trial, and a bench trial of this matter was held from May 14, 2018, through May 18, 2018.

On May 16, 2018, Defendants moved at the close of the evidence offered by Plaintiffs for judgment as a matter of law under N.R.C.P. 50(a) with respect to all claims. After hearing argument from both Parties, the Court denied Plaintiffs' request for a receiver under NRS 32.010 because, based on *State ex re. Nenzel*, 49 Nev. 145, 241 P. 317 (1925), NRS 32.010 requires that there be an action pending other than that for the request for a receivership, and in this case, there were no other claims pending. The Court also denied Plaintiffs' request for a receiver under NRS 78.630 after finding that there was not sufficient evidence that Hygea has been and is being conducted at a great loss and great loss and greatly prejudicial to the interest of its creditors and stockholders. The Court further denied Plaintiffs' request for a receiver in part under NRS 78.650 after finding that there was no evidence that Hygea had willfully violated its charter (NRS 78.650(1)(a)), that Hygea's directors had been guilty of fraud or collusion in its affairs (NRS 78.650(1)(b)), that Hygea abandoned its business (NRS 78.650(1)(f)), that Hygea had become insolvent (NRS 78.650(1)(h)), or that Hygea is not about to resume its business with safety to the public (NRS 78.650(1)(j)).

The Court, however, found that there was some evidence that Hygea's management's failure to be able to account for cash flow to the degree that an audited financial statement could be prepared, even though not required by the regulators, created a reasonable inference that the directors have been guilty of gross mismanagement (NRS 78.650(1)(b)), that the directors have been guilty of misfeasance, malfeasance, or nonfeasance (NRS 78.650(1)(c)), that Hygea is unable to conduct the business or conserve its assets by reason of the act, neglect or refusal to function of any of its directors (NRS 78.650(1)(d)), that the assets of Hygea are in danger of waste, sacrifice, or loss (NRS 78.650(1)(e)), and that Hygea, although solvent, is for cause not able to pay its debts or other obligations as they mature (NRS 78.650(1)(i)). Accordingly, the Court denied Hygea's motion for judgment as a matter of law with respect to the foregoing, and

the trial proceeded with Hygea's defense on those issues.

On May 17, 2018, during the fourth day of the trial, after Plaintiffs claimed that they were prejudiced by the late disclosure of a custodian of records affidavit authenticating a previously produced V Stock Transfer List Defendants proposed be admitted to demonstrate the Company's shares issued and outstanding, the Court again asked if the Parties wished to continue the trial. Neither Plaintiffs nor Defendants indicated that they wanted a continuance. Thus, after the trial concluded on May 18, 2018, the Court orally announced its preliminary findings of fact and conclusions of law on the record and rendered judgment on the matter in favor of Defendants. The Court now sets forth its final findings of fact and conclusions of law.

II. FINDINGS OF FACT

The Court finds that the following facts were proven by a preponderance of the evidence:

1. N5HYG entered a Stock Purchase Agreement (the "SPA") in October of 2016 in which it purchased 23,437,500 shares of Hygea Holdings Corp., which, at that time, represented 8.57% of the issued and outstanding stock of Hygea.

2. Section 6.4(a) of the SPA contains a provision providing for certain preemptive and anti-dilution rights, including the right to notice if Hygea issued stock that would dilute N5HYG's pro rata ownership of Hygea's shares.

3. Section 6.3(a) of the SPA contains a provision providing for certain post-closing monthly payments to N5HYG, including a payment in the amount equal to $175,000 until the occurrence of a "trigger event" as defined by the SPA. Hygea stopped paying the $175,000 post-closing payment after June of 2017 and has accrued $1,750,000 in missed payments to N5HYG.

4. Hygea has failed to adequately share financial information with its stockholders, and some information provided by the Company to its stockholders has not been accurate.

5. Hygea has not provided audited financial statements to its stockholders, including

N5HYG, and the last set of audited financial statements Hygea completed was for the year 2013.

6. Minutes from a January 27, 2017, meeting of Hygea's Board of Directors (the "Board") indicate that, at that time, Hygea's audited financial statements for the years 2014 and 2015 would be completed within a matter of weeks. However, the audited financial statements for 2014 and 2015 were never completed.

7. The failure to complete audited financial statements were material for a time, when Hygea sought to "go public" on the Canadian financial markets.

8. At the point that Hygea's Board decided that it would no longer be in the Company's best interests to "go public," the Board decided not to pursue audited financial statements, including those for the years 2014 and 2015.

9. Audited financial statements are not required by any regulatory agency for a private company such as Hygea, and the Board made a statutorily protected business decision not to incur the expense or otherwise spend the resources necessary to obtain audited financial statements.

10. In 2017 Hygea hired FTI Consulting, Inc. and specifically Mr. Timothy Dragelin of FTI, a testifying witness, to provide Hygea with certain management consulting. FTI's mission was to assist the Company in completing the financial statement audits for the years 2014 and 2015, with the hope that Hygea would go public, and to develop a work plan for the company and its proposed "RTO" or reverse takeover in Canada.

11. Mr. Dragelin testified that Hygea's books and records were not complete when Mr. Dragelin was working at Hygea and that there were no finalized financial statements, and, that being the case, no financial statements were in any shape to be audited.

12. Mr. Dragelin further testified that the combination of incomplete financial statements, lack of supporting documentation required to complete the audits, and significant

discord among management, posed significant impediments to Hygea's profitable operation.

13. Mr. Dragelin testified that prior to Mr. Sergey Savchenko being hired as the Company's director of finance, there was little financial management at Hygea but that once Mr. Savchenko did come on board, Mr. Savechenko was helpful in moving forward Hygea's ability to prepare timely financial documents.

14. Mr. Dragelin further testified that there remained, however, a lack of documentary support for large revenues and a lack of documentation regarding acquisitions and loans at the time that he left Hygea in June or July 2017.

15. Mr. Dragelin explained that FTI's role was that of a consultant and, accordingly, he and his team made certain proposals to Hygea, some of which Hygea accepted and some of which it declined to accept.

16. Mr. Dragelin also explained challenges to gathering and completing Hygea's financial data based on the nature of its business. For instance, Hygea would not have had real data on costs until the end of 2017, at which point the Centers for Medicare and Medicaid Services would make two annual adjustment payments going forward, a preliminary one in September of 2018 and a final in July of 2019; he explained that how Hygea would be paid in 2018 relates to data from as far back as 2016 and 2017.

17. In Mr. Dragelin's opinion, some of Hygea's stated financial numbers that were discussed with him lacked credibility and were outside the bounds of what he considered credible assumptions. Mr. Dragelin believes a number of proposals by Hygea relating to financial numbers that FTI thought could be supported.

18. Mr. Dragelin observed officers of Hygea ignoring issues, including financial issues, failing to value its acquisitions, and making assumptions that were not appropriate, possibly resulting in overvaluing of an acquisition or several acquisitions.

19. Mr. Dragelin observed that Hygea required only the signatory authority of its Chief Executive Officer, then Mr. Iglesias, with respect to which Hygea vendors were approved, who could pay those vendors, and general access to Hygea's cash accounts.

20. Mr. Dragelin witnessed an intentional misstatement of financial information by Mr. Iglesias when Mr. Igelsias told Mr. Dragelin that a loan-type transaction would be otherwise structured.

21. Based upon observations it appeared to Mr. Dragelin that Mr. Iglesias appeared to have a misunderstanding with respect to the relationship between Hygea's balance sheet and its EBITDA number (earnings before interest, taxes, depreciation, and amortization).

22. Exhibit 41-B, which are minutes memorializing an August 9, 2017, Board meeting (the "August 2017 Minutes"), explains that Mr. Iglesias, then the CEO of Hygea, reported to the Board that the focus would be to maximize the return on Hygea's own system and focus inward, slowing acquisitions and concentrating on Hygea's position in the current political climate.

23. The August 2017 Minutes also reported that one of the blemishes on Hygea's progress was cash flow and that there were substantial obligations soon coming due, including an approximately $9 million payment to the sellers of VRG Group MedPlan on August 24, which the Company would not be able to honor.

24. The August 2017 Minutes also report that the CEO wished to raise approximately $15 million to $20 million in equity financing through a private placement in case the Company's plans for going public were further delayed.

25. The August 2017 Minutes also reflect that Mr. Dragelin pointed out that numerous of the Company's processes were not formalized, that acquisitions were not properly and/or timely integrated into Hygea's system, that there was a lack of coordination among the

Company's departments, and that other matters contributed to the result that information flow at Hygea was not what it should be.

26. The August 2017 Minutes further state that Mr. Dragelin advised that various deficiencies in the Hygea organization were already being overcome at that point in time; he explained that Mr. Sergey Savchenko, also a testifying witness at the trial, had been retained by the Company as its director of finance for his expertise in both financial and more general accounting and that various trust issues within management were being addressed, but that the Company's liquidity challenges still required resolution.

27. The August 2017 Minutes further indicate that Mr. Dragelin said the company needed "real-time" financial statements on a monthly basis.

28. The August 2017 Minutes further state that Mr. Daniel McGowan, a Hygea director, opined that the Company could live or die on the audits.

29. Finally, the August 2017 Minutes reflect that Dr. Norman Gaylis stated that the Company needed to do a better job of integrating acquired practices to market to replace hospitals with Hygea's resources and to develop better contracts.

30. Exhibit 25 is an electronic mail message from Christopher Fowler, a testifying witness at the trial who is an employee of RIN Capital, LLC ("RIN") and the agent/representative of N5HYG, to Mr. McGowan, dated September 20, 2017 (the "September 20 E-Mail"). In the email Mr. Fowler lists items that he wants to see addressed or clarified, including that the Board never received the Bridging Finance, Inc. cash flow projections, which show negative monthly cash flow.

31. Mr. Fowler further stated in the September 20 E-Mail that the projections provided by the Board did not include acquisition payables of $16.4 million, which, in Mr. Fowler's view, indicated more than $5 million in negative cash flow.

32. Mr. Fowler further complained in the September 20 E-Mail that the Bridging Finance cash flow projections required a statement of written assumptions, and that, in his view, the Board was not being properly informed of outstanding legal matters, including a yet-to-be-filed lawsuit from N5HYG.

33. Mr. Fowler further indicated in the September 20 E-Mail that the Board should undertake to review all outstanding contracts, that Hygea's CEO (at that time, Mr. Iglesias) was mismanaging by, for instance, failing to provide accurate quarterly and annual audited financial statements to stockholders, by failing to inform the Board of current or pending defaults under multiple contractual agreements which could affect cash flow by significantly underperforming versus the plan, by failing to provide timely and accurate projections with written assumptions to the Board, and by failing to adhere to corporate policies and procedures.

34. Hygea was a rapidly growing corporation and that this rapid growth caused a lot of challenges for Hygea.

35. Hygea has issued stock as "currency" to buy medical practices since October of 2016.

36. Had Hygea used treasury stock to buy medical practices, which does not require the issuance of new shares, Hygea would not have diluted N5HYG's ownership share of Hygea; there is no evidence in the record, however, indicating whether Hygea possessed any treasury stock at any relevant time.

37. Hygea has a number of creditors, including Dr. Norman Gaylis, a testifying witness at the trial (approximately $2.3 million owing); CuraScript (between $2 million and $2.5 million owing); American Express (approximately $8.5 million owing); Bridging Finance (between approximately $60 million and $75 million owing with interest accruing at fifteen percent (15%) per annum).

38. For a period of time Hygea employed Mr. Dan Miller, another testifying witness, as the Company's Chief Operations Officer, but Mr. Miller left Hygea because it was failing to pay him; there was a time during which Hygea was also unable to pay other executives in a timely matter.

39. Hygea stopped (at least for some time) using a recognized payroll company and instead went to paper checks to pay its payroll; the checks were, at least for a time, received more sporadically by Hygea's employees, and Hygea provided no explanation as to why the change to paper checks was made.

40. In February of 2018, payroll checks issued to two Hygea employees working at the offices of Dr. Edward Persaud "bounced."

41. It had become evident that Hygea needed operational changes by the latter half of 2017; Hygea, for instance, had a history of not timely closing its financial statements, making it difficult for executives to manage the business.

42. Hygea offered Dr. Gaylis the position of President of Hygea in November of 2017, but Dr. Gaylis declined that position when he did not receive requested information demonstrating that Hygea was compliant in paying its payroll taxes, information showing that Hygea was dealing with other financial obligations, or information explaining how certain obligations would be met.

43. Dr. Gaylis is still affiliated with Hygea as an employee-physician and as a stockholder, and, on February 28, 2018, Dr. Gaylis communicated that he believed Hygea needed an immediate change of management and that the change in management needed to be "complete," or, alternatively, a receiver.

44. In Dr. Gaylis's opinion, if a receiver is appointed, it is likely Hygea's contracts with health management organizations ("HMO's") would be terminated.

45. The appointment of a receiver would put Hygea at increased risk for cancellation of the contracts it has with the HMOs, which account for approximately 70 percent (70%) of Hygea's gross revenue.

46. If the Company's HMO contracts were terminated, it would likely be the death knell for Hygea.

47. In 2017, Hygea prioritized maximizing revenue and, in so doing, failed to pay sufficient attention to operational inefficiencies that resulted in limited infrastructure, records, and processes to make, monitor, and manage Hygea's money.

48. Mr. Iglesias and his family members are, collectively, Hygea's largest stockholders.

49. Mr. Iglesias and his family are also creditors of Hygea, having loaned Hygea approximately $4 million to cover operational costs in 2017. In 2018, Mr. Iglesias and his family loaned additional amounts to Hygea, including after having secured a $3 million promissory note.

50. Mr. Iglesias acknowledged that he lacked the technical expertise to take Hygea to the next level.

51. Mr. Iglesias testified that the total number of Hygea shares issued and outstanding is approximately 432 million.

52. The relationship between Hygea and RIN, an agent of N5HYG that advised N5HYG to invest in Hygea, soured when the Board decided to pursue private equity financing rather than attempt to go public.

53. Liquidation of Hygea would result in a loss of all stockholder equity.

54. All Parties involved in the case have indicated that their goal is to have Hygea succeed so that Hygea will continue to have value for the stockholders.

55. Bridging Finance is currently funding Hygea's short-term cash shortfall.

56. Hygea's Board recently appointed a new Chief Executive Officer, Chief Operating Officer, and Chief Financial Officer.

57. After Mr. Iglesias resigned as Chief Executive Officer, the Board appointed Dr. Keith Collins, another testifying witness and a director of Hygea since 2013, as Chief Executive Officer, while Mr. Iglesias became the co-chair of the Board.

58. Other members of the Board include Mr. McGowan, currently the other co-chair of Hygea's Board and a longtime Hygea director, who was a leader in the New York state healthcare market, and Mr. Glenn Marrichi, who was at one point an executive of a national marketing company.

59. Dr. Keith Collins' education and experience include a term as Chief Medical Officer of an HMO with six smaller plans that evolved into a multibillion dollar, publicly traded organization with operations in sixteen states; Dr. Collins eventually served as a vice president for business development of said HMO, which role included acquisition turnaround and HMO plan start-ups.

60. Dr. Collins was the founding Chief Executive Officer of the fastest growing HMO in New York City for a time.

61. Dr. Collins was vice president to another health network operating in New York and New Jersey and that, all in, he has over twenty years of experience creating and/or operating physician networks, all of which were successful to at least some extent and none of which failed.

62. The Board also appointed Mr. Savchenko as Hygea's acting Chief Financial Officer; Mr. Savchenko has a very strong financial background, including in connection with absorbing acquisitions at other organizations.

63. Dr. Collins, since taking the helm at Hygea, has been very active in his interaction with the Board, meeting with the Board every week to ten days; ensuring that Hygea replaced all executives that are appointed by the Board; and championing the establishment of a Board governance committee to better steer management's oversight of practices and its governance of a larger organization with appropriate checks and balances.

64. Dr. Collins recommended and oversaw the Board's approval of Dr. Gaylis as the new vice president of medical affairs and, as referenced above, Mr. Savchenko as the new, acting Chief Financial Officer.

65. Dr. Collins also identified twelve key employees at Hygea, made changes to their roles and duties, interviewed those people and the people they interface with, and made further appropriate changes to those roles.

66. Dr. Collins testified that Hygea's new management forecasts cash surpluses from operations beginning in July.

67. Dr. Collins takes his new role as Chief Executive Officer extremely seriously, in part because federal regulations dictate that any person associated with a failed provider that takes money from Medicare, such as Hygea, is forbidden from working with another Medicare provider for two years and, as a practical matter, that person is forever tainted in the Medicare industry; Dr. Collins' reputation is extremely valuable to him and such a taint would be unacceptable.

68. Hygea made the decision not to pursue a public financing offering in the fall of 2017 and conceded that Hygea has not always been able to pay its debt timely, in part because Hygea has experienced projected income failing to materialize.

69. Hygea is not paying Bridging Finance, which has agreed to capitalize Hygea's monthly interest payment until Hygea either goes public or is sold to a private equity investor.

70. The Bridging Finance debt is accumulating interest at fourteen percent (14%), which results in approximately $1 million a month in interest debt, currently being capitalized to the principal of the loan; Hygea's operational cash flow projections for 2018 do not include this monthly amount and also do not provide for payments associated with an approximately $8.5 million balance associated with an American Express line of credit.

71. Hygea's projected operating cash flow through 2018 shows an operating loss through June of 2018 and then a relatively modest (compared to the size of the business) positive cash flow for the last six months of 2018.

72. When Hygea acquires a new medical practice, it takes anywhere from six to twelve to even twenty-four months before Hygea begins collecting cash revenue, but Hygea incurs the cash expenses associated with the acquisition immediately.

73. Bridging Finance is helping to finance the short-term critical debts and obligations of Hygea.

III. LEGAL PRINCIPLES

As stated above, Plaintiffs petitioned for a receiver pursuant to NRS 32.010, 78.630, and 78.650. Given the Court's decision on Defendants' motion for judgment as a matter of law, only subsections 1(b)–(j), (i), and (j) of NRS 78.650 remained at issue following closure of Plaintiffs' case.

With respect to those claims that remained at issue, NRS 78.650 provides in *relevant* part that:

> 1. Any holder or holders of one-tenth of the issued and outstanding stock may apply to the district court . . . for an order dissolving the corporation and appointing a receiver to wind up its affairs, and by injunction restrain the corporation from exercising any of its powers or doing business whatsoever, except by and through a receiver appointed by the court, whenever:
>
> . . .

(b) Its trustees or directors have been guilty of . . . gross mismanagement in the conduct or control of its affairs;

(c) Its trustees or directors have been guilty of misfeasance, malfeasance or nonfeasance;

(d) The corporation is unable to conduct the business or conserve its assets by reason of the act, neglect or refusal to function of any of the directors . . .;

(e) The assets of the corporation are in danger of waste, sacrifice or loss through attachment, foreclosure, litigation or otherwise;

. . .

(i) The corporation, although not insolvent, is for any cause not able to pay its debts or obligations as they mature . . . ;

. . .

4. The court may, if good cause exists therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty must be preferred in making the appointment. The court may at any time for sufficient cause make a decree terminating the receivership, or dissolving the corporation and terminating its existence, or both, as may be proper.

Among other things, NRS 78.650 demands that the stockholder(s) petitioning for the appointment of a receiver hold one-tenth of the corporation's issued and outstanding stock. In *Shelton v. Second Judicial Dist. Court in & for Washoe Cty.*, the Nevada Supreme Court held that "[w]here the statute provides for the appointment of receivers, the statutory requirements must be met or the appointment is *void and in excess of jurisdiction.*" 64 Nev. 487, 494, 185 P.2d 320, 323 (1947). Moreover, a district court must find that the applicant(s) for the receiver holds one-tenth of the issued and outstanding stock of the corporation at the time the court considers the application. *Searchlight Dev., Inc. v. Martello*, 84 Nev. 102, 109, 437 P.2d 86, 90 (1968) ("The district court does not have jurisdiction to appoint a corporate receiver, unless the applicant holder or holders of one-tenth of the issued and outstanding stock has legal title *at the*

time the court considers the application.") (emphasis added).

IV. ANALYSIS

A. Do Plaintiffs Hold One-Tenth of Hygea's Stock Issued and Outstanding?

As the Nevada Supreme Court stated in *Searchlight*, the time at which the Court must determine whether Plaintiffs hold the requisite one-tenth of the Company's shares issued and outstanding is the time at which the Court is considering the stockholders' application for the appointment of a receiver. *See Searchlight*, 84 Nev. at 109, 437 P.2d at 90. The Parties stipulated to the amount of shares that Plaintiffs own, so the Court has the numerator for the ten percent calculation, but the Court *does not* have any evidence of the total number of issued and outstanding shares as of today, this week, this month, or at *any time* during the last eighty-eight days since Mr. Edward Moffly, Hygea's former Chief Financial Officer and a Hygea director, made his declaration on February 19, 2018 or since even further back, to the time that Hygea and N5HYG executed the SPA in October of 2016. Neither of those—Mr. Moffly's declaration nor the SPA—inform the Court as to what the number of issued and outstanding shares is as of the beginning of the trial on Monday, May 14, 2018, or the end of trial on May 18, 2018.

Plaintiffs have argued that it would be unfair to hold them to their burden of proof on the ten percent stock ownership issue because that information is within the possession of either Hygea or its agent, V Stock Transfer ("V Stock"). That might be a plausible argument if Plaintiffs came to this Court with evidence of their efforts to obtain information from Hygea or V Stpcl Tramsfer as to what the current number of shares issued and outstanding is. There are discovery procedures to obtain that information. The Court acknowledges that this was an expedited process, but notes that—had Plaintiffs moved for such relief—the Court could have ordered production of documents or at least tried to get Hygea to produce information from V Stock, but the Plaintiffs appear to assume that any information they would have received

regarding the number of issued and outstanding shares would be inaccurate. That may or may not be true, but the Court cannot make such a determination because the Plaintiffs did not get or attempt to get issued and outstanding share information from Hygea or V Stock.

The question before the Court is then as follows: "is it fair to hold Plaintiffs to their burden?" In answering that question, the Court considers what Plaintiffs did to try to determine the actual number of shares issued and outstanding as of May 14, 2018 (the start of trial) and through May 18, 2018 (the time at which the Court considered appointment of a receiver), which the Court finds is hardly anything. There is no evidence that Defendants in any way interfered with Plaintiffs' ability to secure that information. Accordingly, Plaintiffs accepted the risk of bearing the burden of not knowing the number of shares issued and outstanding as they proceeded to trial without either obtaining the information or moving for a continuance to provide time to obtain the information. Had Plaintiffs come to Court with evidence that they had tried in good faith to secure the number of shares issued and outstanding and/or showed inaccuracies or an outright refusal or inability of Hygea or V Stock to produce the number, the Court could have made adverse inferences against Hygea and the individual Defendants, precluded Defendants from even arguing that the Plaintiffs owned less than ten percent, or other sanctions. The record, however, is devoid of any evidence of Plaintiffs' efforts.

With that being the case, the Court does not know the number of shares issued and outstanding. Accordingly, it lacks the denominator necessary to complete the calculation and analysis necessary to determine whether Plaintiffs in fact hold ten percent of Hygea shares issued and outstanding. As such, the Court finds that Plaintiffs have failed to demonstrate by a preponderance of the evidence whether they hold ten percent (or "one-tenth") of Hygea's issued and outstanding stock. Under *Searchlight*, the Court cannot consider appointment of a receiver under NRS 78.650. *See id.*

B. Even if Plaintiffs Held One-Tenth of Hygea's Stock Issued and Outstanding, Is There a Basis and Good Cause for the Appointment of a Receiver?

An appellate court may disagree with this Court's analysis on the 10% issue, therefore the Court also provides analysis and substantive conclusions of law consistent with the above findings of fact on the remaining grounds for appointment of a receiver. With respect to those remaining grounds, the Court finds as follows:

- Under subsection 1(b), the Court finds that Plaintiffs have failed to establish—by a preponderance of the evidence—that the directors have been guilty of gross mismanagement in the conduct or control of Hygea's affairs;

- Under subsection 1(c), the Court finds that Plaintiffs have failed to establish—by a preponderance of the evidence—that the directors have been guilty of misfeasance or malfeasance; however, the Court *does* find, that Plaintiffs have established by a preponderance of the evidence that the directors have been guilty of nonfeasance;

- Under subsection 1(d), 1(e), and (1)(i), that nonfeasance resulted in Hygea not being able to conserve its assets by reason of the directors' neglect, placed Hygea's assets in danger of waste, sacrifice, or loss, and caused Hygea to not be able to pay its debts or obligations as they mature except through costly agreements and/or loans.

While the Court acknowledges that it is easy for the Plaintiffs to come to Court (and for the Court now to sit) and pass judgment on the Board, the Court finds that the directors appear to have been sitting in the driver seat of Hygea, where they properly belong, but allowed themselves to be blinded by the huge success of the business's acquisitive model in early 2017 and failed to pay attention to what was going on in the back seat, the processes and procedures for accounting for and managing Hygea's income. The Board should have been paying attention to both, and in particular how Hygea's management was governing the Company's affairs. Accordingly, the Court finds that while Plaintiffs have not established that any director was guilty of any misfeasance or malfeasance by a preponderance of the evidence, Plaintiffs have shown that the Board *is* guilty of nonfeasance.

The fact that the Court finds that the Board was guilty of nonfeasance under NRS 78.650(1)(c) does not, however, mean that a receiver is automatically appointed or end the Court's analysis. The legislature could have chosen to word NRS 78.650 such that if a district court finds that any of the items listed in NRS 78.650(1) are found that a receiver *must* be appointed. Instead, though, NRS 78.650(4) provides that this Court *may*, if good cause exists, appoint a receiver, providing the Court with discretion to consider other factors. *See* NRS 78.650(4).

The Court considers first and foremost that Hygea's business model is both ingenious and successful and/or can be successful if properly managed going forward. The Court finds that Hygea currently appears to be in trouble because its infrastructure, records, and processes did not keep pace with its rapid acquisition of medical practices. Hygea's Board should have detected these issues earlier than it did and should have addressed the issues related to infrastructure, records, and processes before now. The Court also gives considerable weight in its considerations to the fact that all Parties profess the desire to have Hygea continue to operate. Further, the Court considers the fact that the appointment of a receiver will (in the best case) increase the risk that the HMO's will cancel the contracts they have with Hygea, which could very well cause the death of the Company. If that occurs, all Parties lose.

Finally, the Court finds that in addition to the increased risk of HMO's terminating their contracts with Hygea, the appointment of a receiver would heap additional confusion on the management of Hygea, which has just changed over its C-Suite executives for new leadership. Similarly, the time that would be required for a new receiver or other leader to get acquainted with Hygea and put positive change in motion would likely provide additional stress and detriment to Hygea. Accordingly, and in light of all of the foregoing, the Court concludes that

Dr. Collins, Hygea's new Chief Executive Officer, is at least as qualified to continue to guide Hygea as its CEO as would be the receiver proposed by the Plaintiffs.

V. CONCLUSIONS OF LAW

1. Plaintiffs have failed to establish by a preponderance of the evidence that they hold one-tenth of the issued and outstanding stock of Hygea and have thus failed to establish that this Court has jurisdiction to appoint a receiver under NRS 78.650(1) and the Nevada Supreme Court's decision in *Searchlight*. 84 Nev. at 109, 437 P.2d at 90.

2. Accordingly, the Amended Complaint and Petition for Appointment of a Receiver must be, and the same hereby are, **DENIED**, and judgment is entered in favor of Defendants.

Out of an abundance of caution, however, the Court makes the following conclusions on the substantive merits of Plaintiffs' Amended Complaint and Petition for Appointment of a Receiver under subsections (1)(b)–(e) and (i) of NRS 78.650:

3. Hygea's Board is guilty of nonfeasance as a whole under NRS 78.650(1)(c).

4. No good cause exists to appoint a receiver over Hygea.

5. Relatedly, and in light of this conclusion but also because the Court has found the Board generally guilty of nonfeasance.

6. Finally, the Court concludes that good cause does exist to instead allow Dr. Collins to continue to serve as the Chief Executive Officer of Hygea.

7. Accordingly, Plaintiffs' Amended Complaint and Petition for Appointment of a Receiver must be, and the same hereby are, **DENIED**, and judgment is entered in favor of Defendants.

Dated this 30 day of May, 2018.

THE HONORABLE JAMES WILSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of The First Judicial District Court, and I certify that on this 31 day of May 2018 I deposited for mailing at Carson City, Nevada, or caused to be delivered by messenger service, a true and correct copy of the foregoing order and addressed to the following:

Maria Gall, Esq.
1980 Festival Plaza Drive, Suite 900
Las Vegas, NV 89135
GallM@ballardspahr.com

Severin Carlson, Esq.
50 West Liberty ST., #700
Reno, NV 89501
scarlson@kcnvlaw.com

James Puzey, Esq.
800 South Meadows Parkway, #800
Reno, NV 89521
jpuzey@nevadafirm.com

G. Mark Albright, Esq.
801 S. Rancho Drive, Suite D-4
Las Vegas NV 89106
gma@albrightstoddard.com

Christopher D. Kaye, Esq.
950 W. University Dr. #300
Rochester, Michigan 48307
cdk@millerlawpc.com

for Baylie Hellman
Law Clerk

EXHIBIT “2”

Joel E. Tasca, Esq.
Nevada Bar No. 14124
Maria A. Gall, Esq.
Nevada Bar No. 14200
Kyle E. Ewing, Esq.
Nevada Bar No. 14051
BALLARD SPAHR LLP
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135
Telephone: (702) 471-7000
Fax: (702) 471-7070
tasca@ballardspahr.com
gallm@ballardspahr.com
ewingk@ballardspahr.com

Severin A. Carlson, Esq.
Nevada Bar No. 9373
Tara C. Zimmerman, Esq.
Nevada Bar No. 12146
KAEMPFER CROWELL
50 West Liberty St., Suite 700
Reno, Nevada 89501
Telephone: (775) 852-3900
Fax: (775) 327-2011
scarlson@kcnvlaw.com
tzimmerman@kcnvlaw.com

Attorneys for Defendants

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CLAUDIO ARELLANO, et al.,

Plaintiffs,

v.

HYGEA HOLDINGS CORP., et al.,

Defendants.

Case No. 18 OC 00071 1B
Dept. No. II

DEFENDANTS' TRIAL STATEMENT PURSUANT TO FJDCR 10

DEFENDANTS' TRIAL STATEMENT PURSUANT OT FJDCR 10

Defendants Hygea Holdings Corp. ("Hygea" or the "Company"), Manuel Iglesias, Edward Moffly, Daniel T. McGowan, Frank Kelly, Martha Mairena Castillo, Glenn Marrichi, Keith Collins, M.D., Jack Mann, M.D., and Joseph Campanella, by and through their counsel of record, hereby provide this Trial Statement Pursuant to FJDCR 10.

A. CONCISE STATEMENT OF THE CLAIMED FACTS SUPPORTING DEFENDANTS' DEFENSES

1. With respect to Hygea's issued and outstanding stock, as of the filing of this Trial Statement, Hygea had at least 432,107,293 issued and outstanding shares, and thus, Plaintiffs, at most, collectively hold 6.79% of Hygea's issued and outstanding stock, broken down as follows for each Plaintiff:

Plaintiff	Shares	%
Arellano	2,313,200	0.54%
Crown Equity's	250,000	0.06%
Fifth Avenue 2254	100,000	0.02%
Halevi Enterprises	500,000	0.12%
Halevi SV1	250,000	0.06%
Halevi SV2	250,000	0.06%
Hillcrest Acquisitions	250,000	0.06%
Hillcrest Center SV I	250,000	0.06%
Hillcrest Center SV II	250,000	0.06%
Hillcrest Center SV III	500,000	0.12%
IBH Capital	250,000	0.06%
Leonite Capital	500,000	0.12%
N5HYG	23,437,500	5.42%
RYMSSG Group	250,000	0.06%

a. Plaintiff N5HYG LLC ("N5HYG") alleges in the First Amended Complaint that it alone holds 8.57% of the Company's shares. To have 8.57% ownership of the Company's issued and outstanding stock *today*, Plaintiff N5HYG would need to hold 37,031,595 shares—8.57% being the non-fully diluted percentage of stock ownership reflected in the Stock

Purchase Agreement between N5HYG and the Company (the "SPA"). Even if N5HYG held 37,031,595 shares today, Plaintiffs would, at most, collectively hold 9.94% of the Company's issued and outstanding shares.

b. Plaintiff N5HYG knew that their shares as purchased in October 2016 were subject to dilution, given the SPA's exception for the issuance of warrants, options, or similar rights to acquire Hygea's common stock, and at least as early as January 2017, N5HYG knew that it held less than 8.57% of Hygea's issued and outstanding shares on a then-diluted basis.

2. With respect to unclean hands and waiver, Plaintiff N5HYG not only knew that its stock was subject to dilution, but N5HYG also relinquished the board seat on Hygea's Board of Directors provided for under the SPA.

3. With respect to management, Hygea is managed by its Board of Directors, the members of which consist of the individual Defendants. The Board of Directors has appointed certain officers, who are responsible for Hygea's day-to-day operations. Keith Collins, M.D. is the Company's interim Chief Executive Officer, Secretary, and Chief Transition Officer. David Hernandez is the Company's Chief Operations Officer. Sergey Savchenko is the Company's acting Chief Financial Officer.

a. Defendant Manuel Iglesias is not the Chief Executive Officer of Hygea, having resigned from that position. Although Mr. Iglesias remains a shareholder and director of the Company, he does not have operational authority over the Company. That said, Mr. Iglesias, as a co-founder of the Company, continues to consult with the Company's current executives on legacy and institutional issues, as well as in connection with the Company's current objective of affecting an asset sale.

b. Defendant Edward Moffly is not the Chief Financial Officer of Hygea,

having resigned from that position. Although Mr. Moffly remains a shareholder and director of the Company, he does not have operational authority over the Company. That said, Mr. Moffly, as a co-founder of the Company, continues to consult with the Company's current executives on legacy and institutional issues, as well as in connection with the Company's current objective of affecting an asset sale.

4. Although Hygea is solvent, the Company acknowledges that it currently faces a cash constraint. However, the Company is managing its debts, including by having entered into forbearances and/or payment plans for those debts that are not currently the subject of any *bona fide* disputes. The Company's remaining debts are the subject of *bona fide* disputes. Moreover, Bridging Finance has provided Hygea with interim financing in order to assist with its short-term cash flow constraints and has committed to provide additional financing, as the Company requires such funds to meet continuing medium-term obligations.

5. With respect to its other obligations, including payroll, Hygea pays its employees on a biweekly basis, every other Friday. Its payroll payments have not ceased, and with the exception of a handful of former C-Suite executives, all of Hygea's approximately 600 employees have always been paid.

6. Hygea has contracts with certain HMO plans, all of whom have a contractual right to terminate their contract with Hygea in the case that a receiver is appointed to manage the Company's affairs. If an HMO cancelled its contract with Hygea, the Medicare Advantage Patient Panel associated with that HMO would be immediately and automatically reassigned to another provider, and Hygea would permanently lose its ability to generate revenue by optimizing capitation for that particular Patient Panel. If the Patient Panel is reassigned, the new medical management service organization to which the Patient Panel would be automatically reassigned will have the right to receive all surpluses going forward, even those properly

attributable to the coding and services provided by Hygea from 2016, 2017, and 2018.

7. Hygea is exploring current financing opportunities with investors, one of whom has issued an outstanding Letter of Intent regarding its intention to invest in Hygea, contingent upon the provision of an audited Quality of Earnings Report for the fiscal year ended 2017. This particular suitor, as well as Hygea's other current financing opportunities, are the most straightforward way to solve Hygea's short-term cash flow challenges.

8. With respect to Plaintiffs' proposed receiver, Fredrick Waid, Esq., does not have any, or has very little, experience with managed care agreements or risk adjustment mechanisms, which constitutes Hygea's core competency. Moreover, Mr. Waid is not a member of the Nevada bar and does not have any, or has very little, experience with the mechanisms of Nevada corporate governance, including as set forth in NRS Chapter 78 and applicable Nevada law.

9. With respect to Hygea's proposed director receiver, Dr. Keith Collins already serves as Hygea's interim CEO. Dr. Collins is a physician, Board Certified in Internal Medicine, and has been the founder and CEO of several successful health care companies. He is the founder and Managing Partner of HealthExcel, an innovative physician-driven medical services company based in Miami, which over the last ten years has incubated a number of successful spinoffs. During his time at HealthExcel, Dr. Collins has been founder and CEO of Better Health, a Florida Medicaid plan that was acquired by Simply Health Care; founder and CEO of Access PSN, which is now Sunshine Health Plan, the second-largest Medicaid HMO in Florida; founder and CEO of PhyTrust of South Carolina, now Absolute Total Care, the second-largest Medicaid HMO in South Carolina; and founder and CEO of DataLoom, a health care data integration company, among others. Prior to starting HealthExcel, Dr. Collins was Senior Vice President at Healthsource, a NYSE-listed health maintenance organization with operations in 16 states, serving as Regional CEO for the health plans in New York, New Jersey, and Connecticut.

B. STATEMENT OF ADMITTED OR UNDISPUTED FACTS

The below represents what Defendants believe to be the parties' agreed-upon facts based on their FJDCR 10 meet and confer. The undersigned counsels understand that the parties are continuing to meet and confer and may be able to agree upon additional facts prior to the trial of the matter.

1. Hygea Holdings Corp. ("Hygea") is a Nevada corporation.

2. Hygea's registered office is in Carson City, Nevada.

3. N5HYG LLC is a stockholder of record of Hygea and holds 23,437,500 shares of Hygea.

4. Fifth Avenue 2254 LLC is a stockholder of record of Hygea and holds 100,000 shares of Hygea.

5. Hillcrest Acquisitions, LLC is a stockholder of record of Hygea and holds 250,000 shares of Hygea.

6. Hillcrest Center SV I is a stockholder of record of Hygea and holds 250,000 shares of Hygea.

7. Hillcrest Center SV II is a stockholder of record of Hygea and holds 250,000 shares of Hygea

8. Hillcrest Center SV III is a stockholder of record of Hygea and holds 500,000 shares of Hygea.

9. Leonite Capital LLC is a stockholder of record of Hygea and holds 500,000 shares of Hygea.

10. Crown Equities (not Crown Equity's) is a stockholder of record of Hygea and holds 250,000 shares of Hygea.

11. Halevi Enterprises, LLC is a stockholder of record of Hygea and holds 500,000 shares of Hygea.

12. Halevi SV I is a stockholder of record of Hygea and holds 250,000 shares of Hygea.

13. Halevi SV2 is a stockholder of record of Hygea and holds 250,000 shares of Hygea.

14. Ibh Capital is a stockholder of record of Hygea and holds 250,000 shares of Hygea.

15. RYMSSG Group is a stockholder of record of Hygea and holds 250,000 shares of Hygea.

C. STATEMENT OF ISSUES OF LAW

1. Do Plaintiffs have standing to maintain their claims for the appointment of a receiver under NRS 78.650 and/or 78.630, and in connection therewith, does the Court have jurisdiction to appoint a receiver under these statutes?

In *Shelton v. Second Judicial Dist. Court in & for Washoe Cty.*, the Nevada Supreme Court held in no uncertain terms that "[w]here the statute provides for the appointment of receivers, the statutory requirements must be met or the appointment is *void and in excess of jurisdiction.*" 64 Nev. 487, 494, 185 P.2d 320, 323 (1947). Among other things, NRS 78.650 and 78.630 demand that the stockholder(s) petitioning for the appointment of a receiver hold 10% of the corporation's issued and outstanding stock. Plaintiffs fail to meet this threshold requirement for standing and jurisdiction.

As of the filing of this Trial Statement, it is undisputed by way of the First Amended Complaint and Defendants' Answer thereto, that Plaintiffs hold 29,350,700 shares. However, also as of the filing of this Trial Statement, the Company has at least 432,107,293 issued and

outstanding shares, and thereby, Plaintiffs hold only 6.79% of the Company's issued and outstanding stock. Plaintiffs, therefore, lack standing to maintain this lawsuit, and the Court lacks jurisdiction to appoint a receiver.

2. Are Defendants estopped from asserting that Plaintiff N5HYG holds less than 8.57% of Hygea's issued and outstanding stock?

Plaintiffs have argued that Defendants are estopped from asserting that Plaintiff N5HYG holds less than 8.57% of Hygea's issued and outstanding stock. Plaintiffs base this argument on two things: (1) Hygea's representation in the SPA that "immediately following such issuance [N5HYG] shall own [23,437,500] shares of Common Stock, constituting 8.57% of all of the issued and outstanding Common Stock;" and (2) the SPA's pre-emptive rights/anti-dilution provision. Although Plaintiffs fail to identify whether they reference equitable or promissory estoppel, the elements to establish either are the same: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; he must have relied to his detriment on the conduct of the party to be estopped. *NGA # 2 Ltd. Liab. Co. v. Rains*, 946 P.2d 163, 169, 113 Nev. 1151, 1160 (1997) (stating elements for a claim of equitable estoppel); *Pink v. Busch*, 691 P.2d 456, 459, 100 Nev. 684, 689 (1984) (setting forth identical elements for a claim of promissory estoppel). Plaintiffs, however, cannot establish any of these elements, including reliance, with respect to which Plaintiffs have notably failed to claim that they relied on the 8.57% representation to maintain their ability to bring an action for a receiver, nor could they, given that this would be insufficient without joining other stockholders.

Moreover, Plaintiff N5HYG knew that its 8.57% ownership was on a non-fully-diluted

basis, and that such ownership was subject to dilution by way of the warrants, options, and similar rights to acquire Hygea's common stock. Indeed, N5HYG explicitly acknowledged that a fully diluted Hygea capital structure as represented to N5HYG would feature nearly 400,000,000 shares (not 273,483,081). That being the case, if anyone is estopped from making their argument, it is Plaintiffs, the largest stockholder of which explicitly represented that it received notice of and had been provided to its satisfaction with complete and correct copies of the warrants outstanding prior to execution of the SPA.

Finally, even if Hygea has violated the SPA's pre-emptive rights/anti-dilution provision—which Hygea *does not* admit that it has done—it matters not. NRS 78.650 and 78.630 say *nothing* about dilution, permissible or not. Thus, Defendants submit that they could have issued up to the entirety of Hygea's authorized shares for the express purpose of diluting Plaintiffs (which Defendants *did not do*), and the 10% standing requirement of NRS 78.650 and 78.630 would still apply.

3. For purposes of their claims under NRS 78.650(b), (c), (d), and (e), have Plaintiffs established by a preponderance of the evidence that the Company's directors (i) are guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs, (ii) are guilty of misfeasance, malfeasance or nonfeasance, (iii) have caused the Company to be unable to conduct its business or conserve its assets, or, (iv) have caused waste, sacrifice, or loss of the Company's assets? *See* NRS 78.650 & 78.630.

NRS 78.650(b)-(e) speak to breach of the directors' fiduciary duty, and in Nevada, the threshold for breach of fiduciary duty is significantly higher than negligence. *See Bedore v. Familian*, 122 Nev. 5, 12, 125 P.3d 1168, 1172 (2006) (analyzing violations of NRS 78.650(b) in terms of breach of fiduciary duty). Indeed, Nevada demands proof of intentional misconduct, fraud, or a knowing violation of the law before any breach of fiduciary duty may be found. NRS

78.138(7) (stating that directors and officers are not liable for any breach of fiduciary duty unless it is proven that "[t]he breach of those duties involved intentional misconduct, fraud or a knowing violation of the law"). Here, there are no allegations—let alone evidence—that the Company's directors breached their fiduciary duties by engaging in intentional misconduct, fraud, or a knowing violation of the law.

Indeed, the First Amended Complaint does not even speak to director negligence. Rather, Plaintiffs' First Amended Complaint speaks to alleged misconduct by Defendant Manuel Iglesias, the Company's *former* CEO, while acting in his capacity as CEO, and Defendant Edward Moffly, the Company's *former* CFO, while acting in his capacity as CFO, and even these allegations cannot be substantiated. Plaintiffs can only speculate that Messrs. Iglesias and Moffly will "likely" mismanage or divert the "substantial government reimbursements" the Company expects to receive.

In addition, to the extent Plaintiffs intend to make "surprise" allegations of breach of fiduciary duty *against the directors* at the trial of this matter, such should not be allowed as neither the Company nor the directors have notice of such allegations. Even if the Court allowed such allegations to go forward, the directors are entitled to a presumption that they acted in good faith and in the best interests of the Company pursuant to the business judgment rule. NRS 78.138(3); *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178-79 (2006). Under the business judgment rule, courts will not second guess the directors' decisions, unless it is shown that the directors are incapable of invoking its protections (e.g., because the directors are financially or otherwise interested in the challenged transaction.) *See* 122 Nev. at 635-36, 137 P.3d at 1181. Here, there are no allegations—let alone evidence—that Hygea's directors are not entitled to protections of the business judgment rule.

/././.

4. For purposes of their claim under NRS 78.650, have Plaintiffs established by a preponderance of the evidence that the Company (a) is insolvent, or (b) although not insolvent, is for any cause not able to pay its debts or other obligations as they mature? NRS 78.650(h) & (i).

NRS Chapter 78 does not define insolvency; however, the Court can find instruction from NRS 112.160, which states that "a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." This is consistent with the Federal Bankruptcy Code's definition of "insolvent." *See* 11 USC § 101(32)(A) (defining "insolvent" for entities such as corporations as the "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at fair valuation.") Hygea is not insolvent—and indeed, Plaintiffs have not alleged insolvency other than to argue that Hygea is purportedly *presumed* insolvent because it allegedly is not paying its debts as they become due. However—even if it was true that Hygea is not paying its debts as they become due—the Court cannot appoint a receiver on the *presumption* of insolvency.

Further, Hygea is managing its debts and is able to pay its *bona fide* debts and obligations as they mature. As an initial matter, Hygea has only one large, non-insider lender, Bridging Finance ("Bridging"). Hygea is not in default to Bridging. Further, Bridging has provided Hygea with interim financing in order to assist with Hygea's short-term cash flow constraints and has committed to provide additional financing as Hygea requires such funds to meet continuing medium-term obligations, including the legal fees and other costs associated with defending this action. Indeed, contrary to Plaintiffs' allegations, with the exception of a handful of *former* C-suite executives who have voluntarily foregone timely payment or with whom Hygea is negotiating a separation or attempting to bring current, Hygea has made all payroll payments to its approximately 600 employees.

Moreover, with respect to the payroll taxes, Hygea acknowledges that it continues to owe back-payroll taxes for the fourth quarter of 2017 and is incurring payroll tax liabilities for 2018. However, it is not unusual for a solvent company to voluntarily forego paying taxes temporarily during a period of tight cash flows, knowingly incurring a penalty to ensure that its employees and other creditors are timely paid. This is a strategic decision for management in its statutorily protected business judgment. *See* NRS 78.138(3); *Shoen*, 122 Nev. at 632, 137 P.3d at 1178-79. Moreover, Hygea expects, based on its 2018 cash flow analysis, to be cash flow positive by the end of the second quarter of 2018.

5. For purposes of their claim under NRS 78.630, have Plaintiffs established by a preponderance of the evidence that the Company is insolvent and is not about to resume its business in a short time thereafter? *See* NRS 78.630.

With respect to insolvency, Defendants refer the Court to the above. With respect to whether Hygea "is not about to resume its business in a short time thereafter," if Hygea is not insolvent, then it matters not whether Hygea is not about to resume its business. If, however, Hygea is insolvent, then Plaintiffs must demonstrate not only insolvency but also that Hygea "is not about to resume its business in a short time [after insolvency.]" Plaintiffs cannot make this showing because Hygea has not suspended its business and, *in fact*, continues to operate, including with the financing commitment provided by Bridging. If Hygea is *in fact operating* (which it is), then there is no business for it to resume.

6. For purposes of their claim under NRS 78.630, have Plaintiffs established by a preponderance of the evidence that the Company's business is being conducted at a great loss and greatly prejudicial to the interests of its creditors or stockholders, so that its business cannot be conducted with safety to the public?

Although Hygea has experienced negative cash-flow through growth related operating

activity, it is not at a "great loss . . . prejudicial to the interest of its creditors and shareholders." Indeed, experiencing negative cash-flow is not unusual for a young company during its growth phase because even though a company may be generating healthy streams of revenue and cash flows, it is expending an even greater amount on cash capital expenditures to fuel its growth. This is exactly the case with Hygea, whose EBITDA for 2017 will demonstrate that Hygea is in fact financially healthy.

For a Court to appoint a receiver under NRS 78.630, the Court must find that the corporation's "business cannot be conducted with safety to the public." NRS 78.630(3). It is unclear from Plaintiffs' Complaint why Hygea's "business cannot be conducted with safety to the public" in the absence of a receiver. To the extent Plaintiffs mean to argue that Hygea is jeopardizing patient care because doctors will abandon their Hygea-owned practices due to non-payment of payroll, Hygea has already addressed the fact that it has made all payroll payments to its physicians and other administrative staff.

7. Is there a "pending action" within the meaning of NRS 32.010 in which the Court could appoint a receiver?

NRS 32.010 demands the existence of a pending action in which to appoint a receiver. Stated differently, the appointment of a receiver under NRS 32.010 must be "ancillary to" or "in aid of" the action and not the sole claim for relief. *See Int'l Life Underwriters v. Second Judicial Dist. Court in & for Washoe Cty.*, 61 Nev. 42, 113 P.2d 616, 619 (1941) ("The *Nenzel* and *French Bank* and other cases cited by counsel for petitioners state that under [the identical predecessor to NRS 32.010] and similar statutes there must be an action pending before a receiver can be appointed"); *State ex rel. Nenzel* 49 Nev. 145, 241 P. 317, 320-21 (1925) (denying an application for a receiver because the complaint sought no relief other than the appointment and citing approvingly to *Vila v. Grand Island Elec. Light, Ice & Cold Storage Co.*,

68 Neb. 222, 97 N.W. 613, 616 (Neb. 1903)); *Vila*, 97 N.W. at 616 (1903) ("The law of receivership is peculiar in its nature in that it belongs to that class of remedies which are wholly ancillary or provisional, and the appointment of a receiver does not affect, either directly or indirectly, the nature of any primary right, but is simply a means by which primary rights may be more efficiently preserved, protected, and enforced in judicial proceedings. It adjudicates and determines the right of no party to the proceedings, and grants no final relief, directly or indirectly.") Here, Plaintiffs seek no relief other than the appointment of a receiver. Accordingly, the Court has no jurisdiction to appoint a receiver under NRS 32.010.

8. Does the affirmative defense of waiver and/or unclean hands bar Plaintiff N5HYG from seeking appointment of a receiver through the Court's equitable powers?

"A waiver is an intentional relinquishment of a known right. . . . To be effective, a waiver must occur with full knowledge of all material facts." *State v. Sutton*, 120 Nev. 972, 987, 103 P.3d 8, 18 (2004) (quoting *Thompson v. City of North Las Vegas*, 108 Nev. 435, 439, 833 P.2d 1132, 1134 (1992)). Meanwhile, "the doctrine of unclean hands derives from the equitable maxim that 'he who comes into equity must come with clean hands." *Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 637-638, 189 P.3d 656, 662 (2008) (internal quotations and citations omitted). "The doctrine bars relief to a party who has engaged in improper conduct in the matter in which that party is seeking relief." *Id.* "[T]he unclean hands doctrine precludes a party from attaining an equitable remedy when that party's connection with the subject-matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith." *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 276, 182 P.3d 764, 767 (2008) (internal quotations and citations omitted). "In determining whether a party's connection with an action is sufficiently offensive to bar equitable relief, two factors must be considered: (1) the egregiousness of the misconduct at issue, and (2) the seriousness of the harm

caused by the misconduct." *Id.*

Plaintiff N5HYG seeks to come into equity with unclean hands and having waived its right to complain of the things it now alleges. N5HYG systematically fails to acknowledge its role (or lack thereof) in the management it complains of, including by relinquishing the board seat provided for under the SPA. Stated differently, N5HYG had every opportunity to influence the management of the Company. Yet, N5HYG purposefully chose to not participate. Moreover, N5HYG knew as early as January 2017 that Hygea had issued enough stock that Plaintiffs' herein held less than 10% of Hygea's issued and outstanding stock. Accordingly, Plaintiffs' filing of a Complaint that pleads 10% stock ownership was in bad faith from the outset of this action.

Relatedly, when N5HYG feigned surprise when Hygea pointed out that Plaintiffs did not own 10% of Hygea's issued and outstanding stock and further feigned ignorance of the warrants that caused the issuance of additional stock, N5HYG was engaging in theatrics lacking any good faith. These theatrics were last ditch efforts to stretch these proceedings out for as long as possible, distracting Hygea's management, causing the management attrition Plaintiffs' declarants decried in a self-fulfilling prophecy, and causing Hygea to incur hundreds of thousands of dollars in legal fees to stave off a predatory investor and its legal team, all while knowing well that Plaintiffs do not hold the requisite shares to maintain this action.

9. Does ultimate justice require the appointment of a receiver, or, can the desired outcome be achieved by some other method?

As to the appointment of a receiver generally, the Nevada Supreme Court stated as follows:

> The appointment of a receiver *pendente lite* is a harsh and extreme remedy which should be used sparingly and only when the securing of ultimate justice requires it A corollary of this rule is that if the desired outcome may be achieved by some method other

> than appointing a receiver, then this course should be followed. The reasons for the above rules are fundamental: appointing a receiver to supervise the affairs of a business is potentially costly, as the receiver typically must be paid for his or her services. A receivership also significantly impinges on the right of individuals or corporations to conduct their business affairs as they see fit, and may endanger the viability of a business. The existence of a receivership can also impose a substantial administrative burden on the court.

Hines v. Plante, 99 Nev. 259, 261, 661 P.2d 880, 881-82 (1983) (citing, among other cases, *Bowler v. Leonard*, 70 Nev. 370, 269 P.2d 833 (1954)).

Justice, here, does not ultimately demand the appointment of a receiver. As set forth above, Hygea is solvent, managing its debts, and operating under the direction of its Board of Directors through a new slate of C-Suite executives. Indeed, the appointment of a receiver would not only add to Hygea's expenses during a time of cash-constraint, but it would almost certainly render an otherwise solvent corporation insolvent, achieving the exact opposite result that the Plaintiffs purport to seek. In short, if a receiver is appointed, Hygea would stand to risk losing its contracts with HMO plans, all of whom have a contractual right to terminate their contract with Hygea in the case that a receiver is appointed to manage the Company's affairs. If an HMO cancelled its contract with Hygea, the Medicare Advantage Patient Panel associated with that HMO would be immediately and automatically reassigned to another provider, and Hygea would permanently lose its ability to generate revenue by optimizing capitation for that particular Patient Panel.

Even more alarming, if the Patient Panel was reassigned, the new medical management service organization to which the Patient Panel would be automatically reassigned will have the right to receive all surpluses going forward, even those properly attributable to the coding and services provided by Hygea from 2016, 2017, and 2018. In other words, the free cash flows associated with revenue and accounts receivable already booked by Hygea would be

immediately and irrevocably assigned to a third-party—the money follows the Patient Panel.

In addition, Hygea would stand to lose current financing opportunities with non-RIN investors, one of whom has issued an outstanding Letter of Intent regarding its intention to invest in Hygea, contingent upon the provision of an audited Quality of Earnings Report for the fiscal year ended 2017 (the "2017 QOE Report")). This particular suitor, as well as Hygea's other current financing opportunities, are the most straightforward way to solve Hygea's short-term cash flow challenges, which are the only allegations in Plaintiffs' Complaint that have been substantiated by any party's admissible evidence. Appointment of a receiver would explode all negotiations.

Even if the Court determines that the interests of justice demand some remedy, the Court must first consider whether there exists an alternative and equally efficient method of achieving the purpose for which the receivership is sought. For instance, if the Court determines that certain of Hygea's *directors* have engaged in the misconduct contemplated by NRS 78.650, then the Court should first provide those directors an opportunity to resign. The point being that the appointment of a receiver is "harsh" and "extreme" remedy, and should be "used sparingly" and only if and as the ends of justice so require. *See Bowler v. Leonard*, 70 Nev. 370, 383, 269 P.2d 833 (1954).

10. Does Plaintiffs' proposed order appointing a receiver exceed a receiver's powers?

A receiver has broad but not unlimited powers. *See Fullerton v. Second Jud. Dist. Ct.*, 111 Nev. 391, 400, 892 P.2d 935, 941 (1995). The receiver's powers are derived from the purpose of the appointment, and he or she must act for the benefit of all persons interested in the property. *Id.* In these regards, Plaintiffs' proposed order appointing a receiver is problematic, including, without limitation, for the following reasons (and for the avoidance doubt, this list is

not exhaustive):

First, Plaintiffs' request that the "receiver oversee Hygea in place of Hygea's board of directors and to do all things that Hygea's Board is authorized to do in the absence of a receiver" but at the same time allowing the Board "to remain in place [but in an] inferior [position] to that of the Receiver, whose authority shall prevail over the Board's," is non-sensical, gives the receiver unfettered power, and purports to essentially enslave the Board of Directors. If a receiver is appointed, his or her authority must be specifically defined and be tied to the purpose of the appointment.

Second, Plaintiffs' request that the receiver "manage Hygea in the place of its officers; to do all things that Hygea's officers are authorized to do in the absence of a receiver; and to direct the officers as their superior," is likewise non-sensical, gives the receiver unfettered power, and purports to essentially enslave the Company's officers. Again, if a receiver is appointed, his or her authority must be specifically defined and tied to the purpose of the appointment. Moreover, the receiver cannot at the same time "manage Hygea in the place of its officers" and "direct the [displaced] officers as their superior."

Third, while it would not be unusual for a receiver "[t]o access all of Hygea's books, records, documents, and other materials, including all financial records," subject to the purpose of the receivership, an order requiring a receiver to "make the materials available to the shareholders" would exceed any basis for the appointment of a receiver." Plaintiffs request for this power demonstrates at least a part of their true intent in bringing this lawsuit. Plaintiffs are clearly upset that Hygea is not providing to them the unfettered access to the records Plaintiffs believe they entitled to review. However, this lawsuit is not the mechanism by which Plaintiffs should seek to enforce their purported rights to access such information.

Fourth, Plaintiffs' again reveal part of their true intent in bringing this lawsuit when they

request that the receiver "oversee, conduct, review, and verify audits for all periods of time from 2014 to the present, inclusive, so that there is a seamless period of time as to which audits have been conducted from the last audit in 2013 through the present and going forward." Hygea is not a public company and is not required by any state or federal law to conduct an audit. If Plaintiff N5HYG believes it has a contractual right to an audit, then it should seek to enforce that purported right through its breach of contract claim pending in federal court.

Fifth, while a receiver could be empowered to "otherwise investigate the past and current affairs of Hygea," Plaintiffs do not explain the purpose of this power. At least two Plaintiffs—N5HYG and Claudio Arellano—have separate lawsuits pending against Hygea and its former and current officers and directors. Plaintiffs cannot purport to use any receiver as a mechanism for seeking discovery to support their claims in such litigations when they purport that they seek the receiver only to maintain the status quo and protect Hygea's going concern status, as they have argued was the reason they brought this lawsuit since the outset of the case.

Sixth, and finally, Plaintiffs do not identify the cost of the receivership, and contrary to their representations at the first hearing in this lawsuit, Plaintiffs seek to impose these unidentified costs on Hygea. Thus, Defendants are left to speculate on the financial burden, although Defendants submit that it is not unreasonable to presume that the burden would be high. For instance, given that that proposed receiver will apparently be running the entirety of Hygea, it would not be unreasonable to assume that he or she will work at least 60 hours per week. At a rate of $500/hour, the receiver alone would cost $30,000/week. In addition, the receiver will undoubtedly be represented by counsel, which would impose yet another cost on the receivership.

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11. If the Court determines that the appointment of a receiver is appropriate under NRS 78.650, must the Court give preference to a non-negligent director in such appointment? NRS 78.650(4) ("The court may, if good cause exists therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty must be preferred in making the appointment.") *See also Peri-Gil Corp. v. Sutton*, 84 Nev. 406, 411, 442 P.2d 35, 38 (1968) ("By the terms of [NRS 78.650(4)] a non-negligent director is entitled to preferential consideration.")

Hygea submits that if the Court decides to appoint a receiver, that Dr. Keith Collins, its *interim CEO and a current director*, be so appointed, and requests an opportunity to present Dr. Collins's qualifications to the Court either at or after the trial of this matter (should the Court determine that it will bifurcate the trial from a proceeding to appoint a receiver.)

12. If the Court determines the appointment of a receiver is appropriate, must it require Plaintiffs to post a bond?

Should the Court appoint a temporary receiver and enjoin the corporation and its management from exercising their ordinary powers, the Court must require Plaintiffs to post a bond. See N.R.C.P. 65(c); *Shelton*, 185 P.2d at 323–24. Here, Hygea requests a bond in the amount between $350 million and $450 million, which represents the approximate, present value of Hygea. As set forth above, a receivership, in and of itself, would materially damage Hygea's ability to continue as a "going concern," including, without limitation, because (1) Hygea would stand to risk losing its contracts with HMO plans, and (2) if an HMO cancelled its contract with Hygea, the Medicare Advantage Patient Panel associated with that HMO would be immediately and automatically reassigned to another provider and Hygea would permanently lose its ability to generate revenue by optimizing capitation for that particular Patient Panel. Thus, if Hygea and its management are wrongfully enjoined from exercising their ordinary powers in favor of a

receiver, Hygea and its shareholders would stand to lose the entire value of Hygea. Thus, a bond securing its present value is appropriate.

D. LIST OF SUMMARIES OR SCHEDULES REFERRING TO ATTACHED ITEMIZED EXHIBITS CONCERNING THE DATA AND REASONS UPON WHICH THE EXPERT BASES HIS OPINION

Give the uniquely postured nature of this lawsuit, Defendants have not yet made a Rule 16.1 disclosure of their identified expert, Craig Greene. On May 4, 2018, the Court ordered Defendants to provide the disclosure by May 9, 2018. Plaintiffs will update and supplement this Trial Statement, if any supplement is necessary, subsequent to providing that disclosure.

E. NAMES AND ADDRESSES OF ALL WITNESSES, EXCEPT IMPEACHING WITNESSES

1. Dr. Keith Collins, 16430 NE 27th Place, North Miami Beach, FL 33160
2. Dr. Jack Mann, 27 Birchwood Lane, Kings Point, NY, 11024
3. Craig Greene, McGovern & Greene, 2831 St. Rose Pkwy., Suite 227, Henderson NV 89052
4. Sergey Savchenko, 3580 NW 85th Court, Apt 452, Doral, FL 33122
5. Kevin Moreau, Bridging Finance, 77 King St W, Suite 2925, Toronto, ON, M5K 1K7, Canada
6. Manuel Iglesias, 1408 Brickell Bay Drive, Unit 415, Miami, FL 33131
7. Edward Moffly, 185 SW 7th St, Apt 3301, Miami, FL 33130

F. OTHER COMMENTS, SUGGESTIONS, OR INFORMATION WHICH MAY ASSIST THE COURT IN THE TRIAL OR DISPOSITION OF THE CASE

None at this time.

[continued on the next page]

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

CERTIFICATION

Pursuant to FJDCR 10, the undersigned herby certifies that counsel for all parties met and stipulated to as many facts and issues as possible.

Dated this 7th day of May, 2018.

KAEMPFER CROWELL

By: _____

Severin A. Carlson, Esq.
Nevada Bar No. 9373
Tara C. Zimmerman, Esq.
Nevada Bar No. 12146
50 West Liberty St., Suite 700
Reno, Nevada 89501

Joel E. Tasca, Esq.
Nevada Bar No. 14124
Maria A. Gall, Esq.
Nevada Bar No. 14200
Kyle A. Ewing, Esq.
Nevada Bar No. 14051
BALLARD SPAHR LLP
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135

Attorneys for Defendants

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5, I hereby certify that on May 7, 2018, a true and correct copy of DEFENDANTS' TRIAL STATEMENT was served on the following counsel of record by U.S. Mail, postage-prepaid, with a courtesy copy sent by e-mail:

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106

Ogonna M. Brown, Esq.
HOLLY DRIGGS, WALCH FINE WRAY PUZEY THOMPSON
400 South Fourth Street
Las Vegas, Nevada 89101

James W. Puzey, Esq.
HOLLY DRIGGS, WALCH FINE WRAY PUZEY THOMPSON
800 South Meadows Parkway, #800
Reno, Nevada 89521

Christopher D. Kaye, Esq.
(admitted pro hac vice)
THE MILLER LAW FIRM, P.C.
950 W. University Drive, Suite 300
Rochester, Michigan 48307

Attorneys for Plaintiffs

An Employee of Kaempfer Crowell

EXHIBIT “3”

PETN
G. MARK ALBRIGHT, ESQ.
Nevada Bar 001394
D. CHRIS ALBRIGHT, ESQ.
Nevada Bar No. 004904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
dca@albrightstoddard.com

Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

CLAUDIO ARELLANO; CROWN EQUITY'S LLC; FIFTH AVENUE 2254 LLC; HALEVI ENTERPRISES LLC; HALEVI SV 1 LLC; HALEVI SV 2 LLC; HILLCREST ACQUISITIONS LLC; HILLCREST CENTER SV I LLC; IBH CAPITAL LLC; LEONITE CAPITAL LLC; N5HYG LLC; and RYMSSG GROUP, LLC, Plaintiffs, vs. HYGEA HOLDINGS CORP., Defendant	CASE NO.: A-18-768510-B DEPT. NO.: Department 13

EMERGENCY PETITION FOR APPOINTMENT OF RECEIVER

For their Emergency Petition for Appointment of a Receiver, Plaintiffs rely upon their Complaint, the attached Memorandum of Law, all authorities cited therein, all affidavits, and any other materials or information provided to this Honorable Court.

DATED this 26th day of January, 2018.

ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT

By _____
G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 1394
D. CHRIS ALBRIGHT., ESQ.
Nevada Bar No. 14466
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Attorneys for Plaintiffs

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR APPOINTMENT OF RECEIVER

INTRODUCTION

Hygea is on the brink of collapse, and if the Court does not protect it over the next few weeks, it will almost certainly fail. Hygea is a holding company for medical practices: basically, it buys doctors' offices; pays the doctors a salary; and – in theory – makes money through economies of scale and effective operations. Its promised strength is in its opportunity and capability (if managed correctly) to service its substantial network of patients, which Hygea has represented to be in excess of 100,000.

But over the last several months, it has missed payments to its lenders, employees, and other creditors. Now the substantial reimbursements from the government for Medicare/Medicaid patients are coming due. If the established pattern persists, any such funds paid to Hygea will disappear, lost to mismanagement or worse. If the ineffective management continues through this imminent reimbursement period, doctors will be unpaid, and abandon their Hygea-owned practices. The subsidiary practices rendered worthless, Hygea will collapse at a total loss to its shareholders and jeopardizing patient care. Only the Court can avert this scenario.

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ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

BACKGROUND

Defendant Hygea Holdings Corp. ("Hygea") is a Nevada corporation that buys and runs medical practices. It buys the practices from their doctor owners; the doctors go from being owners to employees, and receive a salary from Hygea. Hygea's value proposition is: let Hygea uses its economies of scale and operational expertise to effectively operate the practices from a business perspective, and let the doctors focus on medical care. Hygea's opportunity to service its substantial network of patients is perhaps its greatest asset.

The Plaintiffs are significant shareholders in Hygea, having collectively paid well in excess of $30 million for their shares. In a recent public filing, Hygea represented the 23,437,500 shares that N5HYG bought to represent 8.57 percent of the shares of Hygea. *See* **Exhibit "B"** attached to the Complaint on file herein. Based on those calculations, Plaintiff Arellano, Crown, Fifth Avenue, Halevi Enterprises, Hillcrest Acquisitions, Hillcrest SV I, Hillcrest SV II, Hillcrest SV III, Ibh, Leonite, and RYMSSG thus collectively own 5,663,200 shares – approximately 2.07 percent of the shares of Hygea. Together, based upon Hygea's calculations and representations set forth in the N5HYG Stock Purchase Agreement, the Plaintiffs herein currently own more than 10 percent of the shares of Hygea. Based on representations Hygea has made to Plaintiffs, Hygea has well over 30 shareholders, in addition to Plaintiffs.

Hygea's top executives are CEO Manuel Iglesias ("Iglesias") and CFO Ted Moffly ("Moffly"). Due to extensive mismanagement, Hygea is failing and running out of cash.

Given Hygea's apparent troubles, Hygea hired an outside consultant in 2017, FTI, to review its financial performance. FTI was met with constant "roadblocks," as Moffly and Iglesias refused to share information. Nonetheless, FTI concluded that certain financial information provided by Hygea's management to its shareholders was "fabricated"; determined that Hygea's performance was negatively impacted by severe operational deficiencies; and was told by Iglesias that Iglesias had "cooked the books" to avoid problems with a previous lender. **Exhibit "D"**

attached to the Complaint on file herein. This is consistent with Plaintiffs' experience with Hygea.[1]

As its financial position began to worsen, Hygea apparently paid its payroll through its American Express account for some time until it was apparently poised to fail to "make payroll" this past fall, until it ultimately was apparently able to do so. Upon information and belief, Hygea owes approximately $10 million to American Express. And now, based on the recent representations of Hygea representatives, Plaintiffs have since learned that the payroll payments have again ceased, including payments owed to physicians and some management-level and other administrative staff. **Exhibit "D."** attached to the Complaint on file herein. Indeed, Hygea is already defending at least one recent lawsuit filed by an employee to whom it failed to pay overtime. *See Espinoza v. Hygea Holdings Corp., et al*, Case 1:17-cv-24180 (N.D. Fla. 2017).

In short, Hygea has had problems making its primary payments – payroll – and this problem has reached a crisis level where the paychecks simply are not being paid. Further, Hygea has failed to pay payroll taxes and is delinquent in payments to one or more large lenders. **Exhibit "D,"** attached to the Complaint on file herein. These financial conditions suggest that the company is at or near the point of insolvency, which is consistent with what Plaintiffs have been able to learn about Hygea's finances.

The coming days and weeks are pivotal to Hygea's survival. Healthcare companies such as Hygea typically receive substantial Medicaid/Medicare reimbursement checks from state governments/the United States government. These payments come twice a year – the first of which is traditionally early in the calendar year – and are existentially significant for the company. If these funds or other income are mismanaged or, worse, improperly diverted by Moffly or

[1] It is also consistent with Hygea's failure to provide financial information required under the N5HYG Stock Purchase Agreement. Under Section 6.6, Hygea promised to provide accurate and complete 2014 and 2015 financials by November 30, 2016. This deadline is past, but Hygea has failed to provide the promised financials or the promised projections and assumptions.

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ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-1
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

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A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

Iglesias, then Hygea will continue to be unable to make payroll. If it fails to pay its physicians, they will abandon their Hygea-owned practices and Hygea will entirely collapse.

The impact of such a collapse would be felt among Hygea doctors and other employees, whose livelihoods would be greatly harmed; patients, whose treatment would suffer from the likely interruption in service; and Hygea's shareholders, including, but not limited to Plaintiffs, whose investments would be jeopardized if Hygea's greatest asset is wasted.

Moreover, Hygea has periodically, and again recently, represented to shareholders that one or more "white knight" investors would provide an influx of capital to assist the company. Of course, this has never come to fruition. Moreover, even if true, such an influx of cash would further heighten the need for a receiver to oversee any such transaction, given Hygea management's demonstrated inability to properly manage its finances.

ARGUMENT

I. The Court should appoint a receiver under NRS 78.650.

Fortunately, Nevada's Private Corporations statute gives the Court broad authority to rescue Hygea by appointing a receiver. Under NRS 78.650:

> 1. Any holder or holders of one-tenth of the issued and outstanding stock may apply to the district court in the county in which the corporation has its principal place of business or, if the principal place of business is not located in this State, to the district court in the county in which the corporation's registered office is located, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and by injunction restrain the corporation from exercising any of its powers or doing business whatsoever, except by and through a receiver appointed by the court, whenever:
>
> (a) The corporation has willfully violated its charter;
>
> (b) Its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs;
>
> (c) Its trustees or directors have been guilty of misfeasance, malfeasance or nonfeasance;
>
> (d) The corporation is unable to conduct the business or conserve its assets by reason of the act, neglect or refusal to function of any of the directors or trustees;

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QUAIL PARK, SUITE D-41
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

(e) The assets of the corporation are in danger of waste, sacrifice or loss through attachment, foreclosure, litigation or otherwise;

(f) The corporation has abandoned its business;

(g) The corporation has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time;

(h) The corporation has become insolvent;

(i) The corporation, although not insolvent, is for any cause not able to pay its debts or other obligations as they mature; or

(j) The corporation is not about to resume its business with safety to the public.

2. The application may be for the appointment of a receiver, without at the same time applying for the dissolution of the corporation, and notwithstanding the absence, if any there be, of any action or other proceeding in the premises pending in such court.

Thus, "[u]nder [this statute], the district court may appoint a temporary receiver in a number of instances, including, but not limited to, situations where corporate directors are guilty of fraud or gross mismanagement or where the assets of the corporation are in danger of waste." *Med. Device All., Inc. v. Ahr*, 116 Nev. 851, 862, 8 P.3d 135, 142 (2000), *abrogated on other grounds*, *Costello v. Casler*, 127 Nev. 436, 440 n.4, 254 P.3d 631, 634 (2011). This is exactly the sort of situation in which such an appointment is appropriate.

A. The Court has authority to appoint a receiver under NRS 78.650(1).

As set forth above, NRS 78.650(1) applies if the plaintiffs own between them at least ten percent of the corporation's stock. As described above, based upon Hygea's calculations and representations set forth in the N5HYG Stock Purchase Agreement, the Plaintiffs herein currently own more than 10 percent of the shares of Hygea, thus exceeding the statutory threshold.

Even if the statute applied only to non-closely held corporations, there is no doubt that Hygea is not a closely held corporation for purposes of the statute. First, in order to qualify as a closely held corporation exempt from the NRS 78.650, Hygea would need to have fewer than 30

shareholders: "[a]ll of the issued stock of the corporation of all classes, exclusive of treasury shares, must be represented by certificates and must be held of record by a specified number of persons, *not to exceed 30*." NRS 78A.0201)(a) (emphasis added). As of October 2016, Hygea represented that it had 275, **Exhibit "B,"** p. 2, attached to the Complaint on file herein, and there is no indication that number has since decreased.

Moreover, Hygea has not satisfied the manifold additional requirements to be considered a closely held corporation under Nevada law. For example, pursuant to NRS 78A.020(2), "[t]he articles of incorporation of a close corporation *must*:

> (a) Set forth the matters required by NRS 78.035 except that the articles *must* state that there will be *no board of directors if so agreed* pursuant to NRS 78A.070.
>
> (b) Contain a heading stating the name of the corporation and that it is a close corporation.

Id (emphasis added). Hygea's Articles of Incorporation ("Articles") do not satisfy either requirement. NRS 78A.020(2)(a) is not satisfied because the Articles clearly provide that "the number of directors shall not be reduced to less than one (1)" and there is no mention of NRS 78A.070 as required by the statute. **Exhibit "E,"** at 3. Furthermore, NRS 78A.020(2)(b) is not satisfied because nowhere do the Articles indicate that Hygea is a close corporation. *See generally,* **Exhibit "E."** In fact, the Articles clearly indicate that they are adopted "PURSUANT TO NRS 78" which governs ordinary corporations, and not NRS Chapter 78A, governing close corporations. *See, e.g.,* NRS 78A.020 *et. seq.*

In short, Hygea has failed to satisfy the many requirements of a close corporation under Nevada law, any one of which is sufficient to preclude Hygea from being considered closely held.[2]

B. Appointment of a receiver under NRS 78.650(1) is appropriate.

[2] Even if Hygea were a closely held corporation, this would not prevent the Plaintiffs from requesting dissolution. *See, e.g., Bedore v. Familian,* 125 P.3d 1168, 1171, 122 Nev. 5, 10 (2006) ("NRS 78A.140(1)(a) allows shareholders of a close corporation to request dissolution or appointment of a receiver when division among the shareholders threatens 'irreparable injury.'").

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

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ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
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QUAIL PARK, SUITE D-41
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

This is exactly the sort of case in which appointment of a receiver under NRS 78.650(1) is appropriate. First of all, the top executives Iglesias and Moffly have engaged in misconduct in mismanaging the business, and, at the very least, the Board has failed in its obligation to oversee them. Under the statute, a trustee for the corporation is warranted if:

> (a) Its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs; or
>
> (b) Its trustees or directors have been guilty of misfeasance, malfeasance or nonfeasance;

Misfeasance or nonfeasance equates to negligence. *See, e.g., Robertson v. Sichel,* 127 U.S. 507, 515–516, 8 S.Ct. 1286, 3 L.Ed. 203 (1888) ("A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties," quoted approvingly in *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009)). At the very least, Hygea's top management has been negligent. In fact, there is substantial evidence that the conduct has risen to the level of intentional culpability. The financial statements provided to shareholders were "fabricated," and Iglesias admitted to "cooking to books" in order to avoid "problems" with a lender.

Hygea's financial distress is an independent reason why a receiver should be appointed. Under NRS 78.650(1)(h), a receiver is warranted if "[t]he corporation has become insolvent." Here, Hygea is apparently presumably insolvent. "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." Nev. Rev. Stat. Ann. § 112.160(1). Here, there is no way to prove insolvency until a receiver is appointed and is able to review the company's books. But "[a] debtor who is generally not paying his or her debts as they become due is presumed to be insolvent." Nev. Rev. Stat. Ann. § 112.160(2). As discussed above, Hygea has missed its payment to its shareholders and lender, and is currently failing to make payroll. It is thus presumptively insolvent.

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801 SOUTH RANCHO DRIVE
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Even if Hygea is not presumptively insolvent, it falls within NRS 78.650(1)(i), which provides for a receiver if "[t]he corporation, although not insolvent, is for any cause not able to pay its debts or other obligations as they mature."

Of course, management's misconduct and the failure to pay obligations are related. If Hygea is not, in fact, facing insolvency-level distress, then disastrous mismanagement is the only explanation for why it is failing to make payments as rudimentary as payroll and payroll taxes. Conversely, if, *arguendo*, management was honest and competent, then the failure to make payroll and other required payments can only be explained by objectively dire financial circumstances that would themselves justify the appointment of a receiver. In truth, it is surely the case that management's misconduct has at the very least exacerbated the present desperate situation.

In any event, subsections (d) and (e) clearly apply as well. They provide for a receiver if:

> (d) The corporation is unable to conduct the business or conserve its assets by reason of the act, neglect or refusal to function of any of the directors or trustees;
>
> (e) The assets of the corporation are in danger of waste, sacrifice or loss through attachment, foreclosure, litigation or otherwise;

As discussed above, Hygea is scheduled to receive substantial government reimbursements over the next few days and weeks. If the pattern of mismanagement holds, these funds will likely be mismanaged or diverted. If that is allowed to happen, the funds needed to pay doctor, nurse, and clinical staff salaries will be unavailable. Doctors will abandon their Hygea practices and the corporation will collapse.

In short, a receiver would be appropriate if the corporation was mismanaged, *or* failing to pay its bills, *or* if there was a risk of future mismanagement. Here, there is mismanagement *and* missed critical payments *and* an imminent risk of corporate collapse from further mismanagement. Once again, this is exactly the sort of situation for which the statute was enacted.

II. Hygea's distress also warrants appointment of a receiver under additional statutes.

Several additional bases exist for the appointment of a receiver. For example, for many of the same reasons as explained above, a receiver would be warranted under NRS 78.630:

> 1. Whenever any corporation becomes insolvent or suspends its ordinary business for want of money to carry on the business, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, any creditors holding 10 percent of the outstanding indebtedness, or stockholders owning 10 percent of the outstanding stock entitled to vote, may, by petition setting forth the facts and circumstances of the case, apply to the district court of the county in which the principal office of the corporation is located or, if the principal office is not located in this State, to the district court in the county in which the corporation's registered office is located for a writ of injunction and the appointment of a receiver or receivers or trustee or trustees.
>
> 2. The court, being satisfied by affidavit or otherwise of the sufficiency of the application and of the truth of the allegations contained in the petition and upon hearing after such notice as the court by order may direct, shall proceed in a summary way to hear the affidavits, proofs and allegations which may be offered in behalf of the parties.
>
> 3. If upon such inquiry it appears to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interests of its creditors or stockholders, so that its business cannot be conducted with safety to the public, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, money, lands, tenements or effects, except to a receiver appointed by the court, until the court otherwise orders.

As explained above, the corporation is presumptively insolvent; it has "suspend[ed] its ordinary business for want of money to carry on the business" in that it has ceased to pay its doctors; and "its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders" as indicated by its severe financial distress and inability to pay obligations.

Additionally, it is also appropriate to appoint a receiver in this case pursuant to NRS 32.010, which provides that:

> "Cases in which receiver may be appointed. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:
>
> 1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to the creditor's claim, or between

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QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

> partners or others jointly owning or interested in any property or fund, on application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured.
> ...
> 6. In all other cases where receivers have heretofore been appointed by the usages of the courts of equity."

NRS 32.010. Plaintiffs clearly have demonstrated a property interest in Hygea that is in danger of materially injury, in light of Hygea's precarious financial position, its mismanagement, and the possible looting by management. Moreover, the appointment of a receiver under these circumstances is entirely consistent with the Court's equitable authority. For all of these reasons, the appointment of a receiver is undoubtedly warranted.

III. Plaintiffs propose Fredrick P. Waid to serve as receiver

Plaintiffs propose that the Court appoint Fredrick P. Waid, Esq. as receiver over Hygea. Mr. Waid has extensive experience and has been appointed by numerous state and federal courts to serve as a receiver, special servicer, successor trustee, and interim corporate officer. **Exhibit "F."** In addition, he has worked with the SEC and other regulatory agencies to investigate investment-related and other violations. *Id.* Over the last twenty years, Mr. Waid has also served as an officer and director at numerous healthcare companies, including Med Qual, HCR Net, Claimlogic, Nevada Cancer Center, and Sierra Health Affiliates, and he is currently an officer and director of Evincemed Corp., a healthcare information technology company. *Id.* He also spent twenty-one years as an officer and director of Farmers & Merchants Bank, Red Rock Community Bank, and Bank of Las Vegas. *Id.*

Mr. Waid's extensive experience in banking and finance, as a receiver, and as a regulatory investigator, combined with his extensive experience in the healthcare industry, make him an ideal candidate to serve as receiver over Hygea—a financially distressed healthcare company that has been mismanaged and defrauded by its officers. Mr. Waid has informed Plaintiffs that he is available to take on the role of receiver should the Court decide to appoint him.

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ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

CONCLUSION

For all of the reasons set forth throughout, the Court should appoint a receiver to manage the affairs of Hygea Holding Corp.

DATED this 26th day of January, 2018.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

By _____
G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 1394
D. CHRIS ALBRIGHT., ESQ.
Nevada Bar No. 14466
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Attorneys for Plaintiffs

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

EXHIBIT "E"

STATE OF NEVADA

BARBARA K. CEGAVSKE
Secretary of State

JEFFERY LANDERFELT
Deputy Secretary
for Commercial Recordings

OFFICE OF THE
SECRETARY OF STATE

Certified Copy

December 11, 2015

Job Number: C20151209-2075
Reference Number: 00010152027-48
Expedite:
Through Date:

The undersigned filing officer hereby certifies that the attached copies are true and exact copies of all requested statements and related subsequent documentation filed with the Secretary of State's Office, Commercial Recordings Division listed on the attached report.

Document Number(s)	Description	Number of Pages
20080570516-84	Articles of Incorporation	2 Pages/1 Copies
20110361332-02	Amendment	1 Pages/1 Copies

Respectfully,

Barbara K. Cegavske

BARBARA K. CEGAVSKE
Secretary of State

Certified By: Christine Rakow
Certificate Number: C20151209-2075
You may verify this certificate
online at **http://www.nvsos.gov/**

Commercial Recording Division
202 N. Carson Street
Carson City, Nevada 89701-4201
Telephone (775) 684-5708
Fax (775) 684-7138

DEAN HELLER
Secretary of State
206 North Carson Street
Carson City, Nevada 89701-4299
(775) 684 5708
Website: secretaryofstate.biz

Filed in the office of	Document Number
Ross Miller Secretary of State State of Nevada	20080570516-84
	Filing Date and Time 08/26/2008 9:45 AM
	Entity Number E0550162008-5

Articles of Incorporation
(PURSUANT TO NRS 78)

Important: Read attached instructions before completing form.

ABOVE SPACE IS FOR OFFICE USE ONLY

1. Name of Corporation:
Piper Acquisition II, Inc.

2. Resident Agent Name and Street Address:
(must be a Nevada address where process may be served)
VCorp Services, LLC
Name
1409 Bonita Avenue, Las Vegas, NEVADA 89104
Street Address City Zip Code
Optional Mailing Address City State Zip Code

3. Shares:
(number of shares corporation authorized to issue)
Number of shares with par value: 260,000,000 Par value: $ .0001 Number of shares without par value: -0-

4. Names & Addresses, of Board of Directors/Trustees:
(attach additional page if there is more than 3 directors/trustees)
1. Stephen M. Fleming, Esq.
Name
c/o Fleming PLLC 403 Merrick Ave, 2nd Fl, E. Meadow, NY 11554
Street Address City State Zip Code
2.
Name
Street Address City State Zip Code
3.
Name
Street Address City State Zip Code

5. Purpose:
(optional - see instructions)
The purpose of this Corporation shall be:
To engage in any lawful activity

6. Names, Address and Signature of Incorporator:
(attach additional page if there is more than 1 incorporator)
Stephen M. Fleming, Esq.
Name
Signature
c/o Fleming PLLC 403 Merrick Ave, 2nd Fl, E. Meadow, NY 11554
Address City State Zip Code

7. Certificate of Acceptance of Appointment of Resident Agent:
I hereby accept appointment as Resident Agent for the above named corporation.
Authorized Signature of R.A. or On Behalf of R.A. Company Date 8/26/08

This form must be accompanied by appropriate fees. See attached fee schedule.

Exhibit A

EIGHT: The corporation is authorized to issue two classes of stock. One class of stock shall be common stock, par value $0.0001, of which the Corporation shall have the authority to issue 250,000,000 shares. The second class of stock shall be preferred stock, par value $0.0001, of which the corporation shall have the authority to issue 10,000,000 shares. The preferred stock, or any series thereof, shall have such designations, preferences and relative, participating, optional or other special rights and qualifications, limitations or restrictions thereof as shall be expressed in the resolution or resolutions providing for the issue of such stock adopted by the board of directors and may be made dependent upon facts ascertainable outside such resolution or resolutions of the board of directors, provided that the matter in which such facts shall operate upon such designations, preferences, rights and qualifications; limitations or restrictions of such class or series of stock is clearly and expressly set forth in the resolution or resolutions providing for the issuance of such stock by the board of directors.

NINTH: The governing board of this corporation shall be known as the Board of Directors, and the number of directors may from time to time be increased or decreased in such manner as shall be provided by the bylaws of this corporation, providing that the number of directors shall not be reduced to less than one (1).

TENTH: After the amount of the subscription price, the purchase price, of the par value of the stock of any class or series is paid into the corporation, owners or holders of shares of any stock in the corporation may never be assessed to pay the debts of the corporation.

ELEVENTH: The corporation is to have a perpetual existence.

TWELFTH: No director or officer of the corporation shall be personally liable to the corporation or any of its stockholders for damages for breach of fiduciary duty as a director or officer of for any act or omission of any such director or officer; however, the foregoing provision shall not eliminate or limit the liability of a director or officer for (a) acts or omissions which involve intentional misconduct, fraud or a knowing violation of law; or (b) the payment of dividends in violation of Section 78.300 of the Nevada Revised Statutes. Any repeal or modification of this Article by the stockholders of this corporation shall be prospective only and shall not adversely affect any limitation on the personal liability of a director or officer of the corporation for acts or omissions prior to such repeal or modification.

THIRTEENTH: No shareholder shall be entitled as a matter of right to subscribe for or receive additional shares of any class of stock of the corporation, whether now or hereafter authorized, or any bonds, debentures or securities convertible into stock, but such additional shares of stock or other securities convertible into stock may be issued or disposed of by the Board of Directors to such persons and on such terms as in its discretion it shall deem advisable.

FOURTEENTH: This corporation reserves the right to amend, alter, change or repeal and provision contained in the Articles of Incorporation, in the manner now or hereafter prescribed by statute, or by the Articles of Incorporation, and all rights conferred upon the Stockholders herein are granted subject to this reservation.

ROSS MILLER
Secretary of State
204 North Carson Street, Suite 1
Carson City, Nevada 89701-4520
(775) 684 5708
Website: www.nvsos.gov

Filed in the office of	Document Number
Ross Miller Secretary of State State of Nevada	20110361332-02
	Filing Date and Time 05/16/2011 8:00 AM
	Entity Number E0550162008-5

Certificate of Amendment
(PURSUANT TO NRS 78.385 AND 78.390)

USE BLACK INK ONLY - DO NOT HIGHLIGHT

ABOVE SPACE IS FOR OFFICE USE ONLY

Certificate of Amendment to Articles of Incorporation For Nevada Profit Corporations (Pursuant to NRS 78.385 and 78.390 - After Issuance of Stock)

1. Name of corporation:

PIPER ACQUISITION II, INC.

2. The articles have been amended as follows: (provide article numbers, if available)

Article ONE NAME: The complete name of the Corporation shall be Hygea Holdings Corp.

3. The vote by which the stockholders holding shares in the corporation entitling them to exercise a least a majority of the voting power, or such greater proportion of the voting power as may be required in the case of a vote by classes or series, or as may be required by the provisions of the articles of incorporation* have voted in favor of the amendment is: 64.4%

4. Effective date of filing: (optional) 5/16/11
(must not be later than 90 days after the certificate is filed)

5. Signature: (required)

X _____
Signature of Officer

*If any proposed amendment would alter or change any preference or any relative or other right given to any class or series of outstanding shares, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of shares representing a majority of the voting power of each class or series affected by the amendment regardless to limitations or restrictions on the voting power thereof.

IMPORTANT: Failure to include any of the above information and submit with the proper fees may cause this filing to be rejected.

This form must be accompanied by appropriate fees.

Nevada Secretary of State Amend Profit-After
Revised: 3-6-09

EXHIBIT "F"

FREDRICK P. WAID, ESQ.

10080 W. Alta Drive, Suite 200, Las Vegas, Nevada 89145
(702) 385-2500 office (702) 280-5759 mobile
fwaid@hutchlegal.com

Fred is an Of Counsel member of the law firm of Hutchison & Steffen. He is also an officer and director of Evincemed Corp., a healthcare information technology company. Since 1997, Fred has served as an officer, director, general counsel and advisor to various healthcare companies including Med Qual, HCR Net, Claimlogic, Nevada Cancer Center and Sierra Health Affiliates.

Fred has been appointed by state and federal courts as a receiver, special servicer, successor trustee and interim corporate officer. He has led and worked on investigative teams with the Securities and Exchange Commission and other regulatory agencies.

From 1994 until 2015, Fred served as an officer and director of Farmers & Merchants Bank, Red Rock Community Bank and Bank of Las Vegas.

A graduate of Baylor Law School and Brigham Young University, Fred has served on a number of charitable boards and foundations.

Fred and his wife are the parents of six children.

EXHIBIT “4”

STRICTLY CONFIDENTIAL

EXECUTION VERSION

STOCK PURCHASE AGREEMENT

by and among

N5HYG LLC,

HYGEA HOLDINGS CORP.,

and

THE SELLER PRINCIPALS NAMED HEREIN,

Dated as of October 5, 2016

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EXHIBITS

STOCK PURCHASE AGREEMENT

This Stock Purchase Agreement (as amended or otherwise modified in accordance with the terms hereof, this "Agreement"), dated as of October 5, 2016 (the "Effective Date"), is entered into by and among **N5HYG LLC**, a Michigan limited liability company ("Buyer"), **HYGEA HOLDINGS CORP.**, a Nevada corporation ("Seller"), and the Seller Principals (defined below). Buyer, Seller and the Seller Principals are sometimes referred to in this Agreement collectively as the "Parties" or individually as a "Party." Any reference to "Seller" herein shall include any predecessor of Seller. Unless the context otherwise requires, terms used in this Agreement that are capitalized and not otherwise defined in context will have the meanings set forth or cross-referenced in Article 1.

RECITALS

WHEREAS, the Seller Principals each own (directly and indirectly, as applicable) common stock of Seller ("Common Stock") which in the aggregate constitutes 30.36% of the issued and outstanding Common Stock (not taking into account the exercise of any warrants, options or similar rights to acquire Common Stock, and prior to taking into account the Contemplated Transactions);

WHEREAS, Seller owns (directly and indirectly, as applicable) 100% of the issued and outstanding capital stock or other equity interests of each of the entities listed on Exhibit A hereto (collectively, the "Subsidiaries," and each, a "Subsidiary");

WHEREAS, through the Subsidiaries, Seller owns and operates a health care business focused primarily on the delivery of primary-care-based health care to patients (currently numbering approximately 175,000 patients) through its integrated group practices and through the Palm Network, Seller's independent practice association and managed services organization (collectively, the "Business") throughout Florida and Georgia;

WHEREAS, Seller and the Seller Principals have determined it is in their collective best interest that Seller issue to Buyer an amount of Common Stock such that immediately following such issuance Buyer shall own Twenty-Three Million Four Hundred Thirty-Seven Thousand Five Hundred (23,437,500) shares of Common Stock, constituting 8.57% of all of the issued and outstanding Common Stock, not taking into account the exercise of any warrants, options or similar rights to acquire Common Stock, but taking into account the Contemplated Transactions (the "Acquired Stock");

WHEREAS, as payment for the Acquired Stock, Buyer shall contribute the Consideration to Seller;

WHEREAS, Buyer, Seller and Seller Principals have determined that the Consideration, which reflects a price per share of Acquired Stock equal to $1.28 (the "Per-Share Price"), is consistent with the fair market value of the Acquired Stock and includes a payment for the goodwill inherent in the Acquired Stock;

WHEREAS, Seller Principals will receive an indirect financial benefit from the Contemplated Transactions; and

WHEREAS, the Buyer, Seller and Seller Principals desire to make certain representations, warranties, covenants and agreements in connection with this Agreement.

AGREEMENT

NOW THEREFORE, in consideration of the premises and mutual promises herein made, and in consideration of the representations, warranties, covenants and agreements herein contained, the Parties, intending to be legally bound, hereby agree as follows:

1. **DEFINITIONS**.

As used herein, the following terms shall have the following meanings:

"1934 Act" is defined in Section 4.26.

"2013 Yearly Financials" is defined in Section 4.6.1.

"2014 & 2015 Yearly Financials" is defined in Section 4.6.1.

"409A Plan" is defined in Section 4.17.8.

"Acquired Stock" is defined in the Recitals.

"Action" means any claim, action, cause of action, law suit (whether in contract or tort or otherwise) or audit, litigation (whether at law or in equity and whether civil or criminal), assessment, grievance, arbitration, investigation, hearing, mediation, charge, complaint, inquiry, demand, notice or proceeding to, from, by or before any Governmental Authority or any mediator.

"Affiliate" means, with respect to any specified Person at any time, (a) each Person directly or indirectly controlling, controlled by or under direct or indirect common control with such specified Person at such time, (b) each Person who is at such time an officer, manager (with respect to a limited liability company), or a member of a board of directors of, or direct or indirect beneficial holder of at least 5% of any class of the capital stock of, such specified Person, (c) if such specified Person is an individual, the Family Members of such Person and (d) the Family Members of each officer, manager, director, or holder described in clause (b) above.

"Agreement" is defined in the Preamble.

"AJCA" is defined in Section 4.17.8.

"Ancillary Agreements" means each agreement, document, instrument or certificate contemplated by this Agreement or to be executed by Buyer, Seller, or any Seller Principal in connection with the consummation of the Contemplated Transactions, in each case only as applicable to the relevant party or parties to such Ancillary Agreement, as indicated by the context in which such term is used.

"Business" is defined in the Recitals.

"Business Day" means any day, other than a Saturday, Sunday or any other day on which banks located in New York are authorized or required by applicable Legal Requirement to be closed.

"Business Employee" is defined in Section 4.21.3.

"Buyer" is defined in the Preamble.

"Buyer Indemnified Persons" is defined in Section 7.1.

"Buyer Investor Protections" is defined in Section 6.4.

"Center" is defined in Section 4.15.1.

"Closing" is defined in Section 3.2.

"Closing Date" is defined in Section 3.2.

"Code" means the U.S. Internal Revenue Code of 1986, as amended.

"Common Stock" is defined in the Recitals.

"Compensation" means, with respect to any Person, all wages, earnings, salaries, commissions, compensation, remuneration, incentives, bonuses, or benefits of any kind or character whatsoever (including issuances or grants of equity interests or the right to acquire equity interests or compensation based on the value or increase in value of equity interests), required to be made or that have been made directly or indirectly by any Seller to such Person or Affiliates of such Person.

"Consideration" is defined in Section 3.3.

"Contemplated Transactions" means, collectively, the transactions contemplated by this Agreement, including (a) the transfer by Seller of the Acquired Stock to Buyer in exchange for the Consideration and (b) the execution, delivery, and performance of this Agreement and the Ancillary Agreements.

"Contractual Obligation" means, with respect to any Person, any contract, agreement, deed, mortgage, lease, sublease, license, sublicense or other legally enforceable commitment, promise, undertaking, obligation, arrangement, instrument or understanding, whether written or oral, to which or by which such Person is a party or otherwise subject or bound or to which or by which any property, business, operation or right of such Person is subject or bound.

"Data Room" means that certain virtual data room hosted by Seller in connection with the Contemplated Transactions using Sharepoint Online/Microsoft Office 365 under the folder name "Investors."

"Debt" means, with respect to any Person, all Liabilities of such Person, without duplication (a) for borrowed money (including overdraft facilities) or in respect of loans or advances (including, in any case, any prepayment premiums due or arising as a result of the consummation of the Contemplated Transactions), (b) evidenced by notes, bonds, debentures, or similar Contractual Obligations, (c) for deferred rent or the deferred purchase price of property, goods, or services (other than trade payables or accruals incurred in the Ordinary Course of Business, but in any case including any deferred purchase price Liabilities, earnouts, contingency payments, installment payments, deferred revenue, customer deposits, seller notes, promissory notes, or similar Liabilities, in each case related to past acquisitions and whether or not contingent), (d) under capital leases or synthetic obligations which would be required to be capitalized in accordance with GAAP, (e) in respect of letters of credit and bankers' acceptances (in each case whether or not drawn, contingent, or otherwise), (f) for obligations arising under any interest rate, commodity, or other similar swap, cap, collar, futures contract, or other hedging arrangement, (g) for any credit card payables with respect to charges having a transaction date of 30 days or more prior to the Closing Date or related to non-business related activities, (h) all accrued interest expense, (i) accounts payable over 60 days, (j) accounts payable to any of such Person's Affiliates, directors, shareholders, officers, employees, or Representatives, (k) overdrawn or negative balance cash accounts, (l) all

obligations of the type referred to in clauses (a) through (k) above of other Persons secured by any Encumbrance on any property or asset of such Person, whether or not such obligation is assumed by such Person all obligations of the type referred to in clauses (a) through (k) above of any other Person the payment of which such Person has Guaranteed, and (n) accrued but unpaid interest, fees, penalties, premiums (including in respect of prepayment) arising with respect to any of the items described in clauses (a) through (l) above).

"Direct Owners" is defined in Section 4.5.1.

"Disclosed Contract" is defined in Section 4.19.2.

"Disclosure Schedules" is defined in Section 2.2.

"Effective Date" is defined in the Recitals.

"Encumbrance" means any charge, claim, community or other marital property interest, condition, equitable interest, lien, lease, license, option, pledge, security interest, mortgage, deed of trust, right of way, easement, encroachment, servitude, preemptive right, anti-dilution right, right of first offer or first refusal, or buy/sell agreement and any other restriction, encumbrance, or covenant with respect to, or condition governing the use, construction, voting (in the case of any security or equity interest), transfer or exercise of or receipt of income from, any other attribute of ownership.

"Environment" means soil, surface waters, groundwater, land, stream sediments, surface or subsurface strata, ambient air, or indoor air, including any material or substance used in the physical structure of any building or improvement.

"Environmental Laws" means any Legal Requirement relating to (a) releases or threatened releases of Hazardous Substances, (b) pollution or protection of health or the environment or natural resources, or (c) the manufacture, handling, transport, use, treatment, storage, recycling or disposal of or exposure to Hazardous Substances.

"Equity Value" means the enterprise value of Seller (including all of its subsidiaries) less Debt, all calculated in accordance with GAAP.

ERISA" is defined in Section 4.17.1.

"ERISA Affiliate" is defined in Section 4.17.1.

"ERISA Employer" is defined in Section 4.17.1.

"Family Member" means, with respect to any individual, (a) such Person's spouse, (b) each parent, brother, sister or natural or adopted child of such Person or such Person's spouse, (c) each trust created for the benefit of one or more of the Persons described in clauses (a) and (b) above and (d) each custodian or guardian of any property of one or more of the Persons described in clauses (a) through (c) above in his or her capacity as such custodian or guardian.

"Federal Health Care Program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government or a state health care program, including, but not limited to, the Medicare and Medicaid programs.

"Financials" is defined in Section 4.6.1.

"Fundamental Representations" means the representations and warranties of Seller set forth in Section 4.1 (Organization), Section 4.2 (Power and Authorization), Section 4.5 (Capitalization; Subsidiaries), Section 4.10 (Ownership of Assets), Section 4.14 (Legal Compliance; Illegal Payments; Permits), Section 4.15 (Compliance with Healthcare Laws), Section 4.16 (Tax Matters), Section 4.17 (Employee Benefit Plans), Section 4.21 (Employees) and Section 4.24 (No Brokers).

"GAAP" means generally accepted accounting principles in the United States, as in effect on the Closing Date or as of the period(s) indicated.

"Government Order" means any order, writ, judgment, injunction, decree, stipulation, ruling, determination, or award entered by or with any Governmental Authority.

"Governmental Authority" means any United States federal, state, or local or any foreign government, or political subdivision thereof, or foreign state, or any multinational organization or authority or any authority, agency, or commission entitled to exercise any administrative, executive, judicial, legislative, police, or regulatory power, any court or tribunal (or any department, bureau or division thereof), or any arbitrator or arbitral body.

"Guarantee" by any Person means any obligation, contingent or otherwise, of such Person directly or indirectly guaranteeing or otherwise supporting in whole or in part the payment of any Debt or other obligation of any other Person and, without limiting the generality of the foregoing, any obligation, direct or indirect, contingent or otherwise, of such Person (a) to purchase or pay (or advance or supply funds for the purchase or payment of) such Debt or other obligation of such other Person (whether arising by virtue of partnership arrangements, by agreement to keep well, to purchase assets, goods, securities or services, to take or pay, or to maintain financial statement conditions or otherwise) or (b) entered into for the purpose of assuring in any other manner the obligee of such Debt or other obligations of the payment of such Debt or to protect such obligee against loss in respect of such Debt (in whole or in part). The term "Guarantee" used as a verb has a correlative meaning.

"Hazardous Substance" means and includes each substance designated as a hazardous waste, hazardous substance, hazardous material, pollutant, contaminant or toxic substance or as designated with words of similar meaning and regulatory effect under any Environmental Law, petroleum and petroleum products or derivatives, asbestos and urea formaldehyde, polychlorinated biphenyls, Medical Waste, and any other substance for which liability or standards of conduct may be imposed under Environmental Law.

"Healthcare Laws" means all federal and state laws, rules or regulations, and published program instructions relating to the regulation, provision or administration of, or payment for, healthcare products or services, including, but not limited to (a) the federal Anti-Kickback Statute (42 U.S.C. §1320a-7b(b)), the Physician Self-Referral Law, commonly known as the "Stark Law" (42 U.S.C. §1395nn), the criminal health care fraud statute (18 U.S. Code § 1347, the civil False Claims Act (31 U.S.C. §3729 et seq.), the Federal Food, Drug, and Cosmetics Act (21 U.S. Code §301 et. seq.), the Federal Controlled Substances Act (21 U.S. Code §801 et. seq.), the Clinical Laboratory Improvement Amendments of 1988 (42 U.S. Code §263a et. seq.), TRICARE (10 U.S.C. Section 1071 et seq.), Sections 1320a-7, 1320a-7a and 1320a-7b of Title 42 of the United States Code and the regulations promulgated pursuant to such statutes; (b) the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) and the regulations promulgated thereunder; (c) Medicare (Title XVIII of the Social Security Act) and the regulations and program instructions and other legally enforceable requirements promulgated thereunder; (d) Medicaid (Title XIX of the Social Security Act) and the regulations and other legally enforceable

requirements promulgated thereunder; (e) quality, safety and medical necessity laws, rules or regulations relating to the regulation, provision or administration of, or payment for, healthcare products or services; (f) rules governing the provision of services to employees with workers compensation coverage or licensure or certification as a healthcare organization to provide such services; and (g) licensure laws, rules or regulations relating to the regulation, provision or administration of, or payment for, healthcare products or services, including laws relating to the so-called "corporate practice of medicine" and fee splitting, each of (a) through (g) as amended from time to time.

"Indemnified Person" means, with respect to any Indemnity Claim, each Buyer Indemnified Person or Seller Indemnified Party asserting the Indemnity Claim (or on whose behalf the Indemnity Claim is asserted) under Article 7.

"Indemnifying Party" means, with respect to any Indemnity Claim, the party or parties against whom such Indemnity Claim may be or has been asserted.

"Indemnity Claim" means a claim for indemnity Article 7.

"Indirect Owners" is defined in Section 4.5.1.

"Intellectual Property Rights" means the entire right, title, and interest in and to all proprietary rights of every kind and nature however denominated, throughout the world, including (a) patents, patent applications, industrial designs, industrial design applications, and patent disclosures, together with all reissues, continuations, continuations-in-part, revisions, divisionals, extensions, reviews and reexaminations in connection therewith, (b) confidential information, trade secrets, database rights, and all other proprietary rights in Technology, (c) trademarks, trade names, service marks, service names, brands, trade dress and logos, and all other indicia of origin, all applications, registrations, and renewals in connection therewith, and the goodwill and activities associated therewith, (d) domain names, rights of privacy and publicity, and moral rights, including all rights of authorship, use, publication, reproduction, distribution, performance transformation, moral rights and rights of ownership of copyrightable works, copyrights and registrations and applications associated therewith, mask work rights (e) any and all registrations, applications, recordings, licenses, common-law rights, and contractual rights relating to any of the foregoing, and (e) all rights of privacy and publicity, including rights to the use of names, likenesses, images, voices, signatures and biographical information of real persons, as well as all Actions and rights to sue at law or in equity for any past or future infringement or other impairment of any of the foregoing, including the right to receive all proceeds and damages therefrom, and all rights to obtain renewals, continuations, divisions, or other extensions of legal protections pertaining thereto, and (f) all copies and tangible embodiments or descriptions of any of the foregoing (in whatever form or medium).

"IRS" means the Internal Revenue Service.

"Legal Requirement" or "Law" means any constitution, law (including common law), statute, standard, ordinance, code, rule, regulation, resolution, or promulgation, or any Government Order, or any license, franchise, permit, or similar right granted under any of the foregoing, or any similar provision or duty or obligation having the force or effect of law, including, and for the avoidance of doubt, any Healthcare Law.

"Liability" means, with respect to any Person, any liability or obligation of such Person, whether known or unknown, whether asserted or unasserted, whether determined, determinable or otherwise, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, whether incurred or consequential, whether due or to become due.

"Litigation Conditions" is defined in Section 7.6.2.

"Losses" is defined in Section 7.1.

"Material Adverse Effect" means any event, circumstance, development, condition, occurrence, state of facts, change or effect that, when considered individually or in the aggregate has been, or would be reasonably likely to be, materially adverse to (a) the business condition (financial or otherwise), or the business, assets, liabilities of Seller, or (b) the ability of Seller or either Seller Principal to perform their respective obligations under this Agreement or to consummate the Contemplated Transactions, in either case, other than any event, circumstance, development, condition, occurrence, state of facts, change or effect arising out of: (i) general business, financial, credit or economic conditions in the United States; (ii) acts of war (whether or not declared), sabotage or terrorism, military actions or the escalation thereof; (iii) any change in or adoption of any applicable Legal Requirement or GAAP, and (iv) natural disasters, acts of nature or acts of god such as landslides, floods, fires, explosions, lightning and induction caused by lightning causing damage to equipment, earthquakes subsidence, storms, cyclones, typhoons, hurricanes, tornados, tsunamis, perils of sea, volcanic activity, and other extreme weather conditions and any other extraordinary operation of the forces of nature; except, in the case of subparts (i), (ii), (iii) or (iv) of this definition, only to the extent that such events, circumstances, developments, conditions, occurrences, states of facts, changes or effects do not have a disproportionate effect on Seller relative to other participants in the industries in which Seller operates.

"Most Recent Balance Sheets" is defined in Section 4.6.1.

"Most Recent Balance Sheet Date" is defined in Section 4.6.1.

"Most Recent Financials" is defined in Section 4.6.1.

"Ordinary Course of Business" means an action taken by any Person in the ordinary course of such Person's business which is consistent with the past customs and practices of such Person.

"Party" is defined in the Preamble.

"Payment Date" is defined in Section 6.3.

"Payor" means any insurer, health maintenance organization, third party administrator, employer, union, trust, governmental program (including but not limited to any Third Party Payor Program), or other consumer or customer of health care services that has authorized Seller as a provider of health care services to the members, beneficiaries, participants or the like, thereof or to whom Seller has submitted a claim for services.

"Per-Share Price" is defined in the Recitals.

"Permits" means, with respect to any Person, any license, accreditation, bond, franchise, permit, consent, approval, right, privilege, certificate, registration, accreditation or other similar authorization issued by, or otherwise granted by, any Governmental Authority or any other Person to which or by which such Person is subject or bound or to which or by which any property, business, operation, or right of such Person is subject or bound.

"Person" means any individual or corporation, association, partnership, limited liability company, joint venture, joint stock, or other company, business trust, trust, organization, labor union, Governmental Authority, or other entity of any kind.

"Physician Owner" is defined in Section 4.5.1.

"Plan" is defined in Section 4.17.1.

"Post-Closing Monthly Payment" is defined in Section 6.3.

"Procedure" shall mean any procedure or procedures on the list of Medicare-covered procedures for ambulatory surgical centers in accordance with regulations issued by the U.S. Department of Health and Human Services.

"Pro Rata Share" is defined in Section 7.4.2.

"Put Notice" is defined in Section 6.3.

"Put Option" is defined in Section 6.3.

"Put Price" is defined in Section 6.3.

"Real Property" is defined in Section 4.12.

"Real Property Leases" is defined in Section 4.12.

"Reimbursed Transaction Expenses" is defined in Section 6.2.

"Release" means any releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, migrating, disposing or dumping of a Hazardous Substance into the Environment (including the abandonment or discarding of barrels, containers and other closed receptacles containing any Hazardous Substance) and any condition that results in the exposure of a person to a Hazardous Substance.

"Representative" means, with respect to any Person, any director, manager, officer, employee, agent, consultant, advisor, or other representative of such Person, including legal counsel, accountants, and financial advisors.

"SEC" is defined in Section 4.26.

"SEC Documents" is defined in Section 4.26.

"Seller" is defined in the Preamble.

"Seller Indemnification Obligations" is defined in Section 7.4.

"Seller Indemnified Parties" is defined in Section 7.2.

"Seller Intellectual Property Rights" means all Intellectual Property Rights owned by Seller or used by Seller in connection with each of the Business as currently conducted, including all Intellectual Property Rights in and to Seller Technology.

"Seller Owners" is defined in Section 4.5.1.

"Seller Principals" means the following Seller Owners: (a) Manuel Iglesias (Co-Founder, Director and Chief Executive Officer of Seller) and (b) Edward Moffly (Co-Founder, Director and Chief Financial Officer of Seller).

"Seller Technology" means any and all Technology used in connection with the Business as currently conducted.

"Seller's Knowledge" shall mean the knowledge of each of the Seller Principals, Richard Williams (the Chief Legal Officer and General Counsel of Seller), and each officer, manager or member of the board of directors (or equivalent governing body) of Seller and each Subsidiary. For purposes of this Agreement, any such individual shall be deemed to have knowledge of a particular fact or other matter if (a) such individual is actually aware of such fact or other matter or (b) a prudent individual could be expected to discover or otherwise become aware of such fact or other matter after reasonable investigation.

"Subsidiary" is defined in the Recitals.

"Subsidiary Equity Interests" is defined in Section 4.5.2.

"Tax" or "Taxes" means (a) any and all federal, state, local, or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental, customs, duties, capital stock, franchise, profits, built-in gain, withholding, social security (or similar taxes, including FICA), unemployment, disability, real property, intangible property, personal property, escheat, abandoned or unclaimed property obligation, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated, or other tax of any kind or any charge or fee of any kind in the nature of (or similar to) taxes imposed by any Governmental Authority or any Legal Requirement, including any interest, penalty, or addition thereto, in each case whether disputed or not and (b) any Liability for the payment of any amounts of the type described in clause (a) of this definition as a result of (i) being a member of an affiliated, consolidated, combined or unitary group or being a party to any agreement or arrangement whereby liability for payment of such amounts was determined or taken into account with reference to the Liability of another Person, in each case, for any period, (ii) as a result of any tax sharing, tax indemnification or tax allocation agreement, arrangement or understanding (other than commercial contracts (A) a principal subject matter of which is not Taxes, (B) containing customary Tax indemnification provisions, and (C) entered into in the ordinary course of business), (iii) or as a result of being liable for the payment of another Person's taxes as a transferee or successor, by contract or otherwise.

"Tax Return" means any return, statement, election, form, declaration, report, claim for refund or information return or statement relating to Taxes, including any schedule, supplement or attachment thereto, and including any amendment thereof.

"Technology" means all inventions, works, discoveries, innovations, know-how, information (including ideas, research and development, formulas, algorithms, compositions, processes and techniques, data, designs, drawings, specifications, graphics, illustrations, artwork, documentation, and manuals), databases, computer software, firmware, computer hardware, integrated circuits and integrated circuit masks, electronic, electrical, and mechanical equipment, and all other forms of technology, including improvements, modifications, works in process, derivatives, or changes, whether tangible or intangible, embodied in any form, whether or not protectable or protected by patent, copyright, mask work right, trade secret law, or otherwise, and all documents and other materials recording any of the foregoing.

"Third Party Claim" is defined in Section 7.6.1.

"Third Party Payor Programs" means all Third Party Payor Programs (including but not limited to, Federal Health Care Programs, workers compensation, or any other state health care programs, as well as Blue Cross and/or Blue Shield, managed care plans, or any other private insurance program).

"Treasury Regulations" means the regulations promulgated under the Code.

"Trigger Event" is defined in Section 6.3.

"Yearly Financials" is defined in Section 4.6.1.

2. GENERAL RULES OF INTERPRETATION; SCHEDULES.

2.1. General Rules. Except as otherwise explicitly specified to the contrary, (a) references to a Section, Article, Exhibit or Schedule means a Section or Article of, or Exhibit or Schedule to, this Agreement, unless another agreement is specified, (b) the word "including" shall be construed as "including without limitation", (c) references to a particular statute or regulation include all rules and regulations thereunder and any predecessor or successor statute, rules or regulation, in each case as amended or otherwise modified from time to time, (d) words in the singular or plural form include the plural and singular form, respectively, (e) words expressed in the masculine shall include the feminine and neuter genders and vice versa, (f) the word "will" shall have the same meaning as the word "shall", (g) the word "extent" in the phrase "to the extent" means the degree to which a subject or other thing extends and shall not simply mean "if", (h) references to "day" or "days" in the lower case means calendar days, (i) references to the "date hereof" are to the date of this Agreement, (j) the words "hereof", "herein", "hereto", and "hereunder", and words of similar import, shall refer to this Agreement as a whole and not any particular provisions of this Agreement, (k) references to dollars or "$" are to United States dollars, and (l) references to a particular Person include such Person's successors and assigns to the extent not prohibited by this Agreement.

2.2. Disclosure Schedules. Disclosure in any section of the Schedules to this Agreement (the "Disclosure Schedules") shall apply only to the indicated section of this Agreement except to the extent that it is readily apparent from the face of such disclosure that such disclosure is relevant to another section of this Agreement. The inclusion of any information in the Schedules shall not be deemed to be an admission or acknowledgment, in and of itself that such information is required by the terms hereof to be disclosed, is material or has resulted in or is reasonably likely to result in a Material Adverse Effect. Complete and correct copies of all documents referred to in the Disclosure Schedules were made available to Buyer in the Data Room or sent via electronic mail to Dan Miller (Managing Director of Buyer's parent company) at DMiller@RINCapital.com prior to the Closing Date.

3. STOCK PURCHASE.

3.1. The Stock Purchase. Upon the Closing, in exchange for the Consideration contributed by Buyer to Seller, Buyer shall purchase from Seller and Seller shall sell, issue, transfer, assign, convey and deliver to Buyer the Acquired Stock free and clear of any and all liens, mortgages, liens, pledges, security interests, conditional sales agreements, right of first refusals, options, restrictions, liabilities, encumbrances, or charges.

3.2. Closing. The closing of the Contemplated Transactions hereby (the "Closing") will take place remotely via the electronic exchange of documents and signature pages on the Effective Date (the "Closing Date"), or in such other manner as the Parties agree in writing. For accounting and

computational purposes (other than for Tax purposes), the Closing will be deemed to have occurred at 12:01 a.m. (Eastern Time) on the Closing Date.

3.3. Consideration. The consideration to be paid for the Acquired Stock shall be Thirty Million and no/100 Dollars ($30,000,000.00) (the "Consideration"). The Consideration shall be paid as of the Closing effected by wire transfer of immediately available funds to an account provided to Buyer by Seller in writing prior to the Closing.

3.4. Deliverables by Seller. At the Closing, Seller shall deliver (or cause to be delivered) to Buyer the following items:

3.4.1. all documents that are necessary to transfer to Buyer good and valid title to the Acquired Stock free and clear of any lien, with any necessary transfer tax stamps affixed or accompanied by evidence that all equity transfer taxes have been paid;

3.4.2. a certificate of incumbency verifying the authority of the respective officers of Seller executing this Agreement, and any other agreements contemplated hereby, or making certifications for Closing;

3.4.3. a certificate from the Secretary of Seller certifying that all board of directors and shareholder approvals necessary to consummate the transactions contemplated by this Agreement and the Ancillary Agreements to which Seller is a party have been obtained and attaching thereto: (i) a copy of the articles of organization of Seller, and (ii) a copy of the resolutions of the board of directors of Seller, evidencing the approval of this Agreement and the Ancillary Agreements to which each is a party and the transactions contemplated hereby and thereby;

3.4.4. a certificate signed by Seller certifying the satisfaction of the conditions set forth in Sections 3.7(b) and 3.7(c);

3.4.5. duly executed counterparts of each Ancillary Agreement to which a Seller or a Seller Principal is a party;

3.4.6. all of the consents, waivers and similar instruments that are set forth on Schedule 4.3, each in form and substance reasonably satisfactory to Buyer; and

3.4.7. such other documents and certificates as Buyer may reasonably request or as may be required pursuant to this Agreement.

3.5. Deliverables by Buyer. At the Closing, Buyer shall deliver (or cause to be delivered) to or on behalf of Seller the following items:

3.5.1. payment of the Consideration in accordance with Section 3.3;

3.5.2. a certificate of incumbency verifying the authority of the respective officer(s), manager(s) and/or director(s) of Buyer executing this Agreement, or any other agreements contemplated hereby, or making certifications for Closing;

3.5.3. a certificate from the Secretary of Buyer certifying that all governance approvals necessary to consummate the transactions contemplated by this Agreement, and the Ancillary Agreements to which it is a party have been obtained;

3.5.4. a certificate signed by Buyer certifying the satisfaction of the conditions set forth in Sections 3.6(b) and 3.6(c);

3.5.5. duly executed counterparts of each Ancillary Agreement to which a Buyer is a party; and

3.5.6. such other documents and certificates as Seller may reasonably request or as may be required pursuant to this Agreement.

3.6. Seller Closing Conditions. Seller's obligations to consummate the transactions contemplated hereunder are expressly conditioned upon the satisfaction of the following conditions (unless the same are expressly waived by Seller):

(a) receipt by Seller of the various documents and items set forth at Section 3.5 hereof;

(b) the representations and warranties of Buyer will be true and correct in all respects at and as of the Closing with the same force and effect as if made as of the Closing; and

(c) Buyer will have performed and complied in all material respects with all agreements, obligations and covenants contained in this Agreement that are required to be performed or complied with by them at or prior to the Closing.

3.7. Buyer Closing Conditions. Buyer's obligations to consummate the transactions contemplated hereunder are expressly conditioned upon the satisfaction of the following conditions (unless the same are expressly waived by Buyer):

(a) receipt by Buyer of the various documents and items set forth in Section 3.4 hereof;

(b) the representations and warranties of Seller will be true and correct in all respects at and as of the Closing with the same force and effect as if made as of the Closing;

(c) Seller and each Seller Principal (as applicable) will have performed and complied in all material respects with all agreements, obligations and covenants contained in this Agreement that are required to be performed or complied with by them at or prior to the Closing; and

(d) since the date hereof, there will have occurred no event, change, fact, or condition, nor will there exist any circumstance which, singly or in the aggregate with all other events, changes, facts, conditions and circumstances, has resulted or would reasonably be expected to result in a Material Adverse Effect.

4. **REPRESENTATIONS AND WARRANTIES OF SELLER**.

In order to induce Buyer to enter into and perform this Agreement and to consummate the Contemplated Transactions, Seller hereby represents and warrants to Buyer, as of the date hereof as follows:

4.1. Organization;. Each of Seller and each Subsidiary is (a) duly organized, validly existing and in good standing under the laws of the state of its incorporation or formation and (b) duly qualified to do business and in good standing in each other jurisdiction where such qualification is required. Seller has delivered to Buyer true, accurate and complete copies of the organizational documents of Seller and each Subsidiary. Schedule 4.1 sets forth a true and correct list of the current directors, managers, officers and

stockholders or other equity holders of Seller and each Seller Subsidiary, as applicable. No earn-out payments, and no payments for referrals to Seller or any Subsidiary of Medicare or Medicaid patients, have been made or promised by Seller, any Subsidiary, or any Affiliate, officer, director, manager or agent thereof in connection with the acquisition of any Subsidiary or the acquisition of the business or assets of any other entity.

4.2. Power and Authorization. Seller has the requisite capacity to execute and deliver this Agreement and to perform its obligations hereunder. The execution, delivery and performance by Seller of this Agreement and each Ancillary Agreement to which Seller is a party and the consummation of the Contemplated Transactions are within the power and authority of Seller and have been duly authorized by all necessary action on the part of Seller. This Agreement and each Ancillary Agreement to which Seller is a party (a) have been duly executed and delivered by Seller and (b) are the legal, valid and binding obligations of Seller, enforceable against Seller in accordance with their respective terms subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar Laws affecting the enforceability of creditors' rights generally, and, other than with respect to any restrictive covenant contained in this Agreement or any Ancillary Agreement, general equitable principles and the discretion of courts in granting equitable relief. Seller and each Subsidiary has the full corporate or limited liability company power and authority necessary to own and use its properties and assets and carry on its business as currently conducted.

4.3. Authorization of Governmental Authorities. Except as disclosed on Schedule 4.3, no action by (including any authorization, consent or approval), or in respect of, or filing with, or notice to, any Governmental Authority is required for, or in connection with, the valid and lawful (a) authorization, execution, delivery and performance by Seller and each Ancillary Agreement to which Seller is a party or (b) consummation of the Contemplated Transactions by Seller.

4.4. Non-contravention. Except as disclosed on Schedule 4.4, neither the execution, delivery and performance by Seller of this Agreement nor the execution, delivery and performance by Seller of any Ancillary Agreement nor the consummation of the Contemplated Transactions will: (a) assuming the taking of any action by (including any authorization, consent or approval), or in respect of, or any filing with, any Governmental Authority, in each case, as disclosed on Schedule 4.3, violate any Legal Requirement applicable to Seller, any Subsidiary or the Business; (b) result in the modification, acceleration, termination, breach or violation of, or default under, any Contractual Obligation to which Seller or any Subsidiary is a party; (c) require any action by (including any authorization, consent or approval) or in respect of (including notice to), any Person under any Contractual Obligation of Seller or any Subsidiary; (d) result in the creation or imposition of an Encumbrance upon, or the forfeiture of, the Common Stock or any asset owned or held by Seller or any Subsidiary; or (e) result in a breach or violation of, or default under, the organizational documents of Seller or any Subsidiary.

4.5. Capitalization; Subsidiaries.

4.5.1. Capitalization of Seller. Except for those warrants to purchase Common Stock listed on Schedule 4.5.1, complete and correct copies of which have been made available by Seller to Buyer, other than the Common Stock, Seller has not issued, nor has agreed to issue, any equity interest of any kind (including any preferred stock, warrants, options, "phantom equity," or other equity interests of any kind whatsoever, including any security or other instrument convertible into an equity security of Seller, or any derivative right of any of the foregoing). None of the Common Stock (including, for the avoidance of doubt, the Acquired Stock) is subject to, and none of Seller, either Seller Principal or, to Seller's Knowledge, any of the Seller Owners is a party to, any shareholders' agreement or similar agreement, any voting agreement, any pre-emptive rights, any rights of first offer or rights of first refusal, or any

similar Encumbrance of any kind with respect to the Common Stock. All of the issued and outstanding shares of Common Stock have been duly authorized, validly issued, and are fully paid and non-assessable, as applicable. Seller has complied in all material respects with all federal and state securities Laws and exemptions (including all applicable rules and regulations promulgated by the SEC, any applicable state securities regulators, and/or any exchange upon which any Common Stock is traded) in connection with the issuance and sale of all of the Common Stock (including the Acquired Stock). All of the issued and outstanding Common Stock is held of record and beneficially owned by the Persons set forth on Schedule 4.5.1 (the "Direct Owners") in the respective amounts set forth on Schedule 4.5.1. When used in this Agreement: (a) the term "Indirect Owner" means each Person that has a direct or indirect beneficial ownership interest in a Direct Owner; (b) the term "Seller Owners" means, collectively, all of the Direct Owners and the Indirect Owners; and (c) the term "Physician Owner" means each Seller Owner who is a physician (including any medical doctors, doctors of osteopathy, physiatrists, chiropractors or dentists). Schedule 4.5.1 sets forth a list of all Physician Owners, as well as the respective approximate percentages of direct or indirect beneficial ownership interest held by each such Physician Owner in one or more Direct Owners. The Acquired Stock has been duly authorized, validly issued and, upon payment of the Consideration, will be fully paid and non-assessable and, upon the Closing, Buyer shall have sole and exclusive, good and valid title to the Acquired Stock, not subject to any Encumbrance.

4.5.2. Capitalization of Subsidiaries; Affiliates. Seller has no subsidiaries or Affiliates other than the Subsidiaries. Exhibit A sets forth a complete list of all of the Subsidiaries. Seller owns, either directly or indirectly, 100% of the issued and outstanding capital stock, membership interests or other equity interests of each Subsidiary (including any preferred stock, warrants, options, "phantom equity," or other equity interests of any kind whatsoever, including any derivative rights thereto) (the "Subsidiary Equity Interests"). None of the Subsidiary Equity Interests is subject to, and none of Seller, either Seller Principal, any Subsidiary or, to Seller's Knowledge, any of the Seller Owners is a party to, any shareholders' agreement or similar agreement, any voting agreement, any pre-emptive rights, any rights of first offer or rights of first refusal, or any similar Encumbrance of any kind with respect to any Subsidiary Equity Interests. All of the issued and outstanding Subsidiary Equity Interests have been duly authorized, validly issued, and are fully paid and non-assessable, as applicable. Seller and each Subsidiary, as applicable, have complied in all material respects with all federal and state securities Laws and exemptions (including all applicable rules and regulations promulgated by the SEC, any applicable state securities regulators, and/or any exchange upon which any Common Stock is traded) in connection with the issuance and sale of all of the Subsidiary Equity Interests. All of the issued and outstanding Subsidiary Equity Interests are held of record and beneficially owned by the Persons designated on Exhibit A in the respective amounts set forth on Exhibit A.

4.6. Financial Matters.

4.6.1. Financial Statements. Attached to Schedule 4.6.1 are true, correct and complete copies of each of the following: (a) the consolidated audited balance sheets of Seller and the Subsidiaries as of December 31, 2013 and the related statements of profit and loss and changes in equity for the fiscal year then ended (the "2013 Yearly Financials"); and (b) that certain "Hydrea Holdings Corp. Quality of Earnings Report Update – TTM June 30, 2016" prepared by independent accounting firm CliftonLarsonAllen LLP, dated as of October 3, 2016, including an unaudited consolidated balance sheet of Seller and the Subsidiaries as of June 30, 2016 (respectively, the "Most Recent Balance Sheet," and the "Most Recent Balance Sheet

Date") and the related unaudited consolidated statement of profit and loss and changes in equity of Seller and the Subsidiaries for the 6-month period then ended (collectively, the "Most Recent Financials"). Seller, together with CPA firm RT&C (Rodriguez, Trueba & Co) is in the process of completing the preparation of the consolidated audited balance sheets of Seller and the Subsidiaries as of December 31, 2014 and December 31, 2015 and the related statements of profit and loss and changes in equity for the fiscal years then ended (the "2014 & 2015 Yearly Financials" and, collectively with the Audited Financials, the "Yearly Financials"), true and correct copies of which shall be provided to Buyer promptly upon completion, but in any event no later than November 30, 2016, which 2014 & 2015 Yearly Financials (together with the Most Recent Financials), when completed and provided to Buyer, shall reflect shareholders' equity as of June 30, 2016 that is no less than $95,000,000. The Most Recent Financials and the Yearly Financials are referred to herein collectively as the "Financials."

4.6.2. Except for the absence of footnote disclosure and any customary year-end adjustments that would not, individually or in the aggregate, be reasonably expected to be material, solely with respect to the Most Recent Financials, each of the Financials has been (or, with respect to the 2014 & 2015 Yearly Financials, will be) prepared in accordance with GAAP (except as set forth on Schedule 4.6.2) and presents (or, with respect to the 2014 & 2015 Yearly Financials, will present) fairly in all material respects the financial position and results of operations of Seller as at the dates and for the periods indicated therein. The Financials were (or, with respect to the 2014 & 2015 Yearly Financials, will be) derived from the books and records of Seller and the Subsidiaries.

4.7. Absence of Undisclosed Liabilities. Neither Seller nor any Subsidiary has any Liability of the type that would otherwise be required to be set forth on a balance sheet prepared in accordance with GAAP, except for (a) Liabilities set forth on the face of the Most Recent Balance Sheets, (b) Liabilities incurred in the Ordinary Course of Business since the Most Recent Balance Sheet Date, none of which can reasonably be expected to be material to Seller and applicable (none of which relate to (i) a breach of a Contractual Obligation, (ii) breach of warranty, (iii) a tort, (iv) an infringement of Intellectual Property rights, (v) violation of any Legal Requirement or (vi) an environmental liability), and (c) Liabilities listed on Schedule 4.7.

4.8. Absence of Certain Developments. Since the Most Recent Balance Sheet Date, the Business has been conducted only in the Ordinary Course of Business, except in connection with the transactions contemplated by, or entered into in connection with, this Agreement (and otherwise disclosed to Buyer). Without limiting the foregoing, except as set forth on Schedule 4.8:

4.8.1. Neither Seller nor any Subsidiary has (a) amended its organizational documents, (b) amended any term of its Common Stock or Subsidiary Equity Interests, (c) issued, sold, granted, or otherwise disposed of, any Common Stock or Subsidiary Equity Interests or (d) issued, granted or awarded any rights to acquire Common Stock, Subsidiary Equity Interests or other equity interests of any kind (including any preferred stock, warrants, options, "phantom equity," or other equity interests of any kind whatsoever, including any derivative rights thereto);

4.8.2. Neither Seller nor any Subsidiary has become liable in respect of any Guarantee and has not incurred, assumed or otherwise become liable in respect of any Debt, except for borrowings in the Ordinary Course of Business under credit facilities in existence on the Most Recent Balance Sheet Date;

4.8.3. Neither Seller nor any Subsidiary has permitted any of its assets to become subject to an Encumbrance or sold, leased, licensed, transferred, abandoned, forfeited, or otherwise disposed of or lost the use of any of its assets (except for (i) inventory and supplies consumed in the Ordinary Course of Business, and (ii) assets sold, transferred or disposed of in the Ordinary Course of Business and replaced with items of like kind and value);

4.8.4. Neither Seller nor any Subsidiary has (a) made any declaration, setting aside or payment of any dividend or other distribution with respect to, or any repurchase, redemption or other acquisition of, any of its Common Stock or Subsidiary Equity Interests other than Tax distributions in the Ordinary Course of Business, or (b) purchased, redeemed, or otherwise acquired any of its Common Stock or Subsidiary Equity Interests;

4.8.5. there has been no loss, destruction, damage, or eminent domain taking (in each case, whether or not insured) affecting the Business or assets of Seller or any Subsidiary;

4.8.6. other than as required by applicable Legal Requirements, neither Seller nor any Subsidiary has directly or indirectly increased, made any change in, or accelerated the vesting of, any Compensation payable or paid, whether conditionally or otherwise, to (a) any current or former non-executive employee, consultant, independent contractor, partner, or agent other than in the Ordinary Course of Business or (b) any current or former executive officer or director;

4.8.7. Neither Seller nor any Subsidiary has made any loan or advance to, Guarantee for the benefit of, or made any investment in, any Person;

4.8.8. Neither Seller nor any Subsidiary has made any change in any of its methods of accounting or accounting practices or policies;

4.8.9. Neither Seller nor any Subsidiary has executed, adopted, amended, or terminated any collective bargaining agreement or other agreement with a labor union or other labor organization;

4.8.10. Neither Seller nor any Subsidiary has paid, discharged, settled, or satisfied any Action or any Liability, other than the payment of trade payables in the Ordinary Course of Business;

4.8.11. Neither Seller nor any Subsidiary has entered into any agreement or commitment relating to capital expenditures exceeding One Hundred Thousand Dollars ($100,000) individually or Two Hundred Fifty Thousand Dollars ($250,000) in the aggregate (and Schedule 4.8 includes a complete and detailed listing of all such agreements or commitments, regardless of value (excluding acquisitions outside the Ordinary Course of Business), for the past 2 years);

4.8.12. Neither Seller nor any Subsidiary has made, changed or revoked any Tax election, elected or changed any method of accounting for Tax purposes, filed any amended Tax Return, settled any claim or Action in respect of Taxes, or entered into any Contractual Obligation in respect of Taxes with any Governmental Authority;

4.8.13. Neither Seller nor any Subsidiary has waived any right of value or suffered any loss;

4.8.14. Neither Seller nor any Subsidiary has made any write off or write down of or made any determination to write off or write down any asset or property;

4.8.15. Neither Seller nor any Subsidiary has settled any Action, pending or threatened, or had any judgment or lien entered against it, in each case in excess of $5,000;

4.8.16. Neither Seller nor any Subsidiary has canceled or terminated any insurance policy;

4.8.17. Neither Seller nor any Subsidiary has acquired (by merger, consolidation or acquisition of stock or assets) any corporation, partnership or other business organization or division thereof or collection of assets;

4.8.18. Neither Seller nor any Subsidiary has commenced or terminated any line of business;

4.8.19. Neither Seller nor any Subsidiary has entered into any commitment, whether orally or in writing, to do any of the things referred to elsewhere in this Section 4.8; and

4.8.20. no other event or circumstance has occurred which has had, or would reasonably be expected to have, a Material Adverse Effect.

4.9. Debt. Seller and the Subsidiaries have no Liabilities in respect of Debt totaling more than Five Hundred Thousand Dollars ($500,000) in the aggregate except as set forth on Schedule 4.9. Schedule 4.9 sets forth a true, correct and complete list of the individual components (indicating the amount and the Person to whom such Debt is owned) of all Debt outstanding with respect to the Business.

4.10. Ownership of Assets. Except as disclosed on Schedule 4.10, either Seller or a Subsidiary has sole and exclusive, good and valid title to, or, in the case of property held under a lease or other Contractual Obligation, a sole and exclusive, enforceable leasehold interest in, or right to use and otherwise commercially exploit, all of the properties, rights, and assets, whether real or personal property and whether tangible or intangible, that are owned or purported to be owned by Seller or such Subsidiary or that are used or exploited in the business of Seller and the Subsidiaries as currently conducted. Except as disclosed on Schedule 4.10, none of the real or personal property of Seller or any Subsidiary is subject to any Encumbrance.

4.11. Accounts Receivable. All accounts and notes receivable reflected on the Most Recent Balance Sheets or that arise following such date and prior to the Closing have arisen, or will arise, in the Ordinary Course of Business, represent, or will represent, claims for bona fide services rendered by Seller, a Subsidiary, or the employees or contractors of Seller or a Subsidiary. Except as reflected on the Most Recent Balance Sheets, neither Seller nor any Subsidiary has received written notice or, to the Seller's Knowledge, oral notice from or on behalf of any obligor of any such accounts receivable that such obligor is unwilling or unable to pay any material portion of such accounts receivable.

4.12. Real Property. Schedule 4.12 sets forth a true, correct and complete list, including addresses, of each leasehold interest in real property leased, subleased, or licensed to or by, or for which a right to use or occupy has been granted to, Seller and/or any Subsidiary (the "Real Property"), and the Real Property listed on such schedule is all of the real property used by Seller and the Subsidiaries in connection with the Business. Schedule 4.12 identifies each document or instrument pursuant to which any Real Property is leased, subleased, or licensed (each a "Real Property Lease") and except for the

foregoing, there are no written or oral subleases, licenses, concessions, occupancy agreements, or other Contractual Obligations granting to any Person (other than Seller or a Subsidiary) the right of use or occupancy of the Real Property. Neither Seller nor any Subsidiary currently owns, nor has Seller or any Subsidiary previously owned, any real property whatsoever. Except as set forth in Schedule 4.12, either Seller or a Subsidiary has a valid leasehold interest in and to each of the Real Properties. There are no defaults by Seller or any Subsidiary under any Real Property Lease, and to Seller's Knowledge, no other party thereto is in default. Except as set forth in Schedule 4.12, no Affiliate of Seller is the owner, lessor, sublessor, or licensor under any Real Property Lease. Seller has delivered to Buyer accurate and complete copies of the Real Property Leases, in each case as amended or otherwise modified and in effect. To Seller's Knowledge, there is no pending or threatened appropriation, condemnation or similar Action affecting the Real Property. Since the Most Recent Balance Sheet Date, there has been no material destruction, damage or casualty with respect to any of the Real Property. The Real Property is (i) in good condition and repair (subject to normal wear and tear) and (ii) sufficient for the operation of the Business conducted therein as it is currently conducted and as it is presently proposed to be conducted. The condition and use of the Real Property conforms to each applicable certificate of occupancy and all other permits required to be issued in connection with the Real Property.

4.13. Intellectual Property. Except as disclosed on Schedule 4.13, Seller owns all rights, title and interest in and to, or will be licensed or otherwise possess, a valid and enforceable right to use all Seller Technology and all Seller Intellectual Property Rights free and clear of any Encumbrance, and without any known conflict with, or infringement of, the rights of any third parties. Except as disclosed on Schedule 4.13, Seller Intellectual Property Rights and Seller Technology includes all of the Intellectual Property Rights and Technology used in or necessary for the conduct of the Business of Seller as currently conducted.

4.14. Legal Compliance; Illegal Payments; Permits.

4.14.1. Neither Seller nor any Subsidiary is in breach or violation, in any respect of, or in default under, nor has Seller or any Subsidiary at any time during the previous ten (10) years been in breach or violation in any respect of, or default under, any Legal Requirement nor is there any circumstance or set of circumstances which could, with notice, the passage of time or otherwise, constitute such a breach, violation or default. All compensation paid, and to be paid, to Seller's and any Subsidiary's employees (inclusive of physicians, clinicians and other providers) is and at all times has been, (i) set in advance, (ii) commercially reasonable, (iii) determined in a manner that has not taken into account, directly or indirectly, the volume or value of referrals (as defined in 42 CFR 411.351) for designated health services (as defined at 42 CFR 411.351), (iv) reflective of fair market value, and (v) compliant with all of the requirements of each of the federal Anti-Kickback Statute (42 U.S.C. §1320a-7b(b)), and the Physician Self-Referral Law, commonly known as the "Stark Law" (42 U.S.C. §1395nn). Neither Seller nor any Subsidiary pays, or at any time has paid, or is bound by any contractual obligation to pay in the future, to any employee (inclusive of physicians, clinicians and other providers) any bonuses or other incentive payments. During the previous ten (10) years, no written notice has been received by, and no oral notices have been made or other claims been filed against, Seller or any Subsidiary alleging a violation of any Legal Requirement, and neither Seller nor any Subsidiary has been subject to any adverse inspection, finding, investigation, penalty assessment, audit or other compliance or enforcement action. Neither Seller, nor any Subsidiary, nor any Physician Owner, nor any of their respective directors, managers, officers, other employees or agents, has during the previous ten (10) years (i) directly or indirectly given or made, or agreed to give or make, any illegal gift, contribution, payment, incentive, or similar benefit to any supplier, customer (other than promotional gifts of nominal value), governmental official, provider or employee or other Person who was, is or

may be in a position to help or hinder Seller or any Subsidiary (or assist in connection with any actual or proposed transaction) or made, or agreed to make, any illegal contribution, or reimbursed any illegal political gift or contribution made by any other Person, to any candidate for federal, state, local, or foreign public office or (ii) caused Seller or any Subsidiary to establish or maintain any unrecorded fund or asset or made any false entries on any books or records for any purpose.

4.14.2. Seller and each Subsidiary have been duly granted all Permits under all Legal Requirements necessary for the conduct, in all respects, of the Business as currently conducted and the lawful occupancy, use, and operation of the Real Property by Seller and/or one or more Subsidiaries, as applicable. Schedule 4.14.2 describes each such Permit, including each such Permit related to Healthcare Laws. Except as set forth on Schedule 4.14.2, such Permits are valid and in full force and effect, neither Seller nor any Subsidiary is in breach or violation of, or default under, in any material respect, any such Permit, and no basis exists which, with notice or lapse of time or both, would constitute any such breach, violation or default.

4.15. Compliance with Healthcare Laws.

4.15.1. Schedule 4.15.1 sets forth a complete and comprehensive list of all ambulatory surgical centers, clinics, practices and other facilities where medical services are provided that, in each case, are operated by Seller or any Subsidiary (collectively, the "Centers"), including, with respect to each Center: (a) the physical address of such Center; (b) the types of services provided at such Center; and (c) the name of the Subsidiary that operates such Center.

4.15.2. Except as set forth on Schedule 4.15.2, neither Seller nor any Subsidiary, nor any manager, director, officer, employee or agent of Seller or any Subsidiary, has (a) violated, conducted the Business or operated any Center in violation of or noncompliance with, or used or occupied Seller's properties or assets in violation of or noncompliance with, any Healthcare Laws in any respect, or (b) received any written notice of any alleged breach, violation of or non-compliance with, default under or any citation for violation of or noncompliance with, any Healthcare Laws nor, is there a fact, arrangement, operation, circumstance or set of circumstances which could, with the passage of time or otherwise, constitute such a breach, violation, default or noncompliance. Each Center is structured (including with respect to the ownership structure) and operated, and the business at each Center is conducted, in full and complete compliance with all applicable Healthcare Laws. Each Subsidiary that is an integrated group practice (if any) meets the definition of "group practice" as defined at 42 CFR 411.352.

4.15.3. Except as set forth on Schedule 4.15.3: (a) Seller, each Subsidiary, each Physician Owner, and each other clinical employee of Seller, a Subsidiary or a Physician Owner who provides professional medical services at any Center, has the requisite Permits and provider or supplier number(s) to bill all Third Party Payor Programs that it currently bills, (b) neither Seller, any Subsidiary, any Physician Owner, nor any clinical employee of Seller, a Subsidiary or a Physician Owner who provides professional medical services at any Center, has received any written notice that there is any investigation, audit, claim review, or other action pending or threatened that could result in a revocation, suspension, termination, probation, restriction, limitation, or non-renewal of such Person's Permit, supplier or provider number, or such Person's disqualification or exclusion from any Third Party Payor Program; (c) all claims for all items, services and goods provided at or by a Center and submitted by or on behalf of

Seller, any Subsidiary, any Physician Owner, or any clinical employee of Seller, a Subsidiary or a Physician Owner who provides professional medical services at any Center to Third Party Payor Programs represent claims for medically necessary items, services or goods actually provided by such Person; (d) all claims for all items, services and goods provided at or by any Center that have been submitted by or on behalf of Seller, any Subsidiary, any Physician Owner, or any clinical employee of Seller, a Subsidiary or a Physician Owner who provides professional medical services at a Center, have been submitted in compliance with applicable Laws, including any Healthcare Laws, and all rules, regulations, agreements, policies, and procedures of the Third Party Payor Programs; (e) neither Seller, any Subsidiary, any Physician Owner, nor any clinical employee of Seller, a Subsidiary or a Physician Owner who provides professional medical services at any Center, has received any written notice that there are any pending or threatened audits, investigations or claims for or relating to its claims for any items, services and goods provided at or by any Center; (f) all billing practices relating to items, services and goods provided at or by a Center, and all billing practices of, Seller, the Subsidiaries, all Physician Owners, and all clinical employees of Seller, any Subsidiary or any Physician Owner who provides professional medical services at any Center are and have been in compliance with all applicable Healthcare Laws, regulations, agreements and policies of all applicable Third Party Payor Programs, and neither Seller, any Subsidiary, nor any Physician Owner, nor any clinical employee of Seller, any Subsidiary or any Physician Owner who provides professional medical services at any Center, has billed or received any payment or reimbursement for any items, services and goods provided at or by any Center in excess of amounts allowed by any Healthcare Law, except to the extent any such amounts are immaterial and have been repaid in full as required by, and in compliance with, all applicable Healthcare Laws and Third Party Payor Program agreements; (g) neither Seller, any Subsidiary, any Seller Owner, nor any employee of Seller, any Subsidiary or any Seller Owner who provides professional medical services at any Center, or any officer, director, manager or employee or clinical contractor of Seller or any Subsidiary, has been excluded, debarred or suspended from participation in any Federal Health Care Program or had its/his/her billing privileges revoked, nor is any such exclusion, debarment, suspension, or billing privileges revocation threatened; (h) based upon and in reliance upon Seller's monthly review of (1) the "list of Excluded Individuals/Entities" on the website of the United States Health and Human Services Office of Inspector General (http://oig.hhs.gov/fraud/exclusions.html), and the similar lists of Medicaid program exclusion by the States of Florida, Georgia or any other states that reimburse for services associated with Seller, any Subsidiary and/or any Physician Owner and (2) the "List of Parties Excluded From Federal Procurement and Non-procurement Programs" on the website of the United States General Services Administration (http://www.arnet.gov/epls/ and https://www.sam.gov), none of the shareholders, members, Seller Owners (including Physician Owners), managers, officers, directors, employees or clinical contractors of Seller or any Subsidiary has been excluded from participation in any Federal Health Care Program. None of Seller, any Subsidiary, any Physician Owner, or any officer, director or employee or clinical contractor of Seller, any Subsidiary or any Physician Owner has received any written notice from any Third Party Payor Programs of any pending or threatened investigations, audits, inquiries or surveys; and (i) Seller, the Subsidiaries, all Physician Owners, and all clinical employees of Seller, any Subsidiary or any Physician Owner who provides professional medical services at any Center are in compliance with all Medicare enrollment requirements as contained in 42 C.F.R. part 424 and program instructions issued pursuant thereto, and all information on the CMS enrollment forms (the various iterations of the CMS 855, such as the 855A , 855B, 855I and 855S) that have been filed by or on behalf of such entities or individuals is complete, current, and accurate.

4.15.4. Schedule 4.15.4 lists each current physician, physician assistant and other clinical employees and clinical contractors required to be licensed, certified and/or registered to perform services at the Centers along with their respective state(s) of licensure, certification or registration (including the licensure, certification or registration number). All such licensures, certifications and registrations are valid and contain no restrictions, and all such physicians, physician assistants and clinical employees or contractors required to be licensed, certified or registered to perform services at the Centers are so licensed, certified or registered without restriction. Seller, each Subsidiary and each physician providing services at the Center have current and valid provider contracts with the Third Party Payor Programs as set forth (or required to be set forth) on Schedule 4.15.4, and are in compliance in all respects with the conditions of participation of any Federal Healthcare Program and the various agreements and conditions necessary for reimbursement under all other applicable Third Party Payor Programs. All services furnished at the Centers have been and are being performed by personnel acting within the scope of their practice as determined by State law and who otherwise met all State requirements for performing the services at the time the services were performed. Neither the execution of this Agreement nor the consummation of the Contemplated Transactions will result in the breach or default under, or grant the ability of the counterparty to terminate, any Third Party Payor Agreement listed (or required to be listed) on Schedule 4.15.4.

4.15.5. Seller and each Subsidiary have been duly granted all Permits under all Healthcare Laws necessary for the conduct, in all respects, of the Business as currently conducted. Schedule 4.15.5 describes each such Permit. Except as set forth on Schedule 4.15.5, (a) each such Permit is valid and in full force and effect, and (b) neither Seller nor any Subsidiary is in breach or violation of, or default under, in any respect, any such Permit, and, to Seller's Knowledge, no circumstance or set of circumstances exists which, with notice or lapse of time or both, would constitute any such breach, violation nor default.

4.15.6. Except as set forth on Schedule 4.15.6, each Physician Owner (a) has paid fair market value for Common Stock of Seller, and no portion of any such payments were to reward or induce referrals of any items or services reimbursable by any Third Party Payor Program; (b) has at all times received distributions proportionate with his/her ownership of Common Stock and has not received any remuneration, in cash or in kind, in exchange for referrals of items or services that are reimbursable, in whole or in part, by any Third Party Payor Programs, including any Federal Healthcare Programs; (c) with respect to any physician-owned ambulatory surgical centers, has at all times while a Physician Owner generated at least one-third (1/3) of his/her medical practice income from all sources for the previous fiscal year or 12-month period from the performance of any Procedure; (d) has at all times while a Physician Owner used one or more of the Centers as an extension of his/her medical practice and has at all times while a Physician Owner regularly performed Procedures at one or more of the Centers; and (e) has not knowingly referred a Procedure to another Physician Owner, or to any physician, owner, or employee of Seller, a Subsidiary or another Physician Owner, for performance of such Procedure at any Center nor used any Center as a passive source of income in exchange for referrals of Procedures.

4.15.7. None of Seller, any Subsidiary or any Center has experienced a data breach or disclosure of information that would constitute a data or security incident as defined by HIPAA or any other applicable Healthcare Law.

4.15.8. No Seller Owner (i) has been convicted of a criminal offense or violation under any provision of a Healthcare Law; or related to the delivery of an item or service under a Federal health care program; or related to fraud, theft, embezzlement, breach of fiduciary

responsibility, or other financial misconduct; or related to patient abuse; or a felony of any kind, (ii) has had any civil monetary penalty, assessment or sanction imposed against him or her under any provision of a Healthcare Law or in relation to a violation of a Healthcare Law, and/or (iii) has been debarred, excluded or suspended at any time from participation in any Federal Health Care Programs.

4.16. Tax Matters. Except as set forth on Schedule 4.16:

4.16.1. Seller is, and at all times since its formation has been, a C Corporation for federal and state income tax purposes. Each of Seller's Subsidiaries is, and since its formation has been, disregarded as an entity separate from Seller. No Governmental Authority has ever challenged, disputed, or contested the classification of any Subsidiary as a disregarded entity.

4.16.2. Seller, except as noted in Schedule 4.16.2, has duly and timely filed, or has caused to be duly timely filed on its behalf or on behalf of the applicable Subsidiary, with the appropriate Governmental Authority, all Tax Returns required to be filed by it and/or each Subsidiary in accordance with all applicable Legal Requirements. All such Tax Returns are true, correct and complete in all material respects. All Taxes owed by Seller (whether or not shown on any Tax Return) have been timely paid in full to the appropriate Governmental Authority. No claim has ever been made by a Governmental Authority in a jurisdiction where Seller does not file Tax Returns that Seller is or may be subject to taxation by or required to file Tax Returns in that jurisdiction. There are no liens with respect to Taxes upon any asset of Seller.

4.16.3. Seller and each Subsidiary has deducted, withheld, and timely paid to the appropriate Governmental Authority all Taxes required by applicable Law to be deducted, withheld and paid in connection with amounts paid or owing to any employee, independent contractor, creditor, stockholder or other third party. Seller and each Subsidiary has timely filed or provided all information, returns or reports, including Forms 1099 and W-2 (and foreign state and local equivalents) that are required to have been filed or provided and has accurately reported all information required to be included on such returns or reports.

4.16.4. There is no foreign, federal, state or local dispute, audit, investigation, proceeding or claim concerning any Tax Return or Tax Liability of Seller pending, being conducted, claimed or raised by a Governmental Authority. Seller has provided to Buyer true and complete copies of all Tax Returns, examination reports, and statements of deficiencies filed, assessed against, or agreed to by Seller or any Subsidiary since January 1, 2010. All Tax deficiencies assessed against Seller has been fully paid or finally settled. No Tax Return of Seller has ever been audited by any Governmental Authority. Neither Seller nor any Subsidiary has received from any Governmental Authority (including from jurisdictions where Seller does not file Tax Returns) notification of intention to open an audit or review, a request for information related to any Tax matters or written notice of proposed assessment, adjustment or deficiency for any amount of Taxes proposed, asserted or assessed against Seller or any Subsidiary. To Seller's Knowledge, no such notification, request for information, or written notice of proposed assessment, adjustment or deficiency is forthcoming.

4.16.5. There are no Liens for Taxes upon any assets of Seller or any Subsidiary, except for Taxes not yet due and payable or being contested in good faith and for which adequate reserves in accordance with GAAP have been provided in the Financials.

4.16.6. Neither Seller nor any Subsidiary has waived any statute of limitations for the assessment or collection of Taxes or is the beneficiary of any extension of time within which to file any Tax Return which has not since been filed. Neither Seller nor any Subsidiary has t executed any power of attorney with respect to any Tax, other than powers of attorney that are no longer in force. Neither Seller nor any Subsidiary (a) is a party to any closing agreement with any Governmental Authority in respect of Taxes or (b) has received or requested from any Governmental Authority any private letter rulings, technical advice memoranda or similar agreements or rulings relating to Taxes.

4.16.7. Neither Seller nor any Subsidiary has any Liability for the Taxes of any other Person under Treasury Regulation § 1.1502-6 (or any similar provision of state, local or foreign law), as a transferee or successor, by contract (other than Liabilities for Taxes arising under customary Tax indemnification provisions contained in commercial contracts entered into in the ordinary course of business, a principal subject matter of which is not Taxes), or otherwise by law.

4.16.8. Neither Seller nor any Subsidiary is a party to any Tax allocation, sharing, indemnification, or similar agreement, arrangement or similar contract (other than commercial contracts (i) a principal subject matter of which is not Taxes, (ii) containing customary Tax indemnification provisions, and (iii) entered into in the ordinary course of business).

4.16.9. Neither Seller nor any Subsidiary will be required to include any item of income in or exclude any item of deduction from, taxable income for any period or portion thereof ending after the Closing Date as a result of (i) any change in method of accounting for a Pre-Closing Tax Period, (ii) any "closing agreement" as described in Section 7121 of the Code (or any corresponding or similar provision of state, local or foreign law) executed on or prior to the Closing Date, (iii) any intercompany transactions or any excess loss account described in Treasury Regulation § 1.1502 19 (or any corresponding or similar provision of state, local or foreign law), (iv) the installment method of accounting, the completed contract method of accounting or the cash method of accounting with respect to a transaction that occurred prior to the Closing Date, (v) any prepaid amount received on or prior to the Closing Date, (vi) the discharge of any Debt on or prior to the Closing date under Section 108(i) of the Code (or any corresponding or similar provision of state, local or foreign law), (vii) as a result of amounts earned on or before the Closing Date pursuant to Section 951 of the Code (or any corresponding or similar provision of state, local or foreign law), or (viii) as a result of any debt instrument held prior to the Closing that was acquired with "original issue discount" as defined in Section 1273(a) of the Code or subject to the rules set forth in Section 1276 of the Code.

4.16.10. Neither Seller nor any Subsidiary has not participated in a "reportable transaction" as defined in Section 6707A of the Code or Treasury Regulation § 1.6011-4 (or any predecessor provision thereto) or any corresponding or similar provision of state or local law.

4.16.11. Seller and each Subsidiary has disclosed on its federal state and local income Tax Returns all positions taken in such Tax Returns that could give rise to a substantial understatement of federal income Tax within the meaning of Section 6662 of the Code (or any corresponding or similar provision of state or local law).

4.16.12. Neither Seller nor any Subsidiary is the beneficiary of any Tax incentive, Tax rebate, Tax holiday or similar arrangement or agreement with any Governmental Authority.

4.16.13. Seller does not have a permanent establishment in any foreign country and does not and has not engaged in a trade or business in any foreign country.

4.16.14. The provisions of Section 197(f)(9) of the Code will not apply to any intangible asset owned by Seller or any Subsidiary after the Closing Date.

4.17. Employee Benefit Plans.

4.17.1. For purposes of this Agreement, the term "Plan" shall mean any employee benefit plan (as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), whether or not subject to ERISA, any other bonus, profit sharing, compensation, pension, retirement, "401(k)," "SERP," severance, savings, deferred compensation, fringe benefit, insurance, welfare, post-retirement health or welfare benefit, health, life, stock option, stock appreciation right, stock purchase, restricted stock, phantom stock, restricted stock unit, performance shares, tuition refund, service award, company car or car allowance, scholarship, housing or living allowances, relocation, disability, accident, sick pay, sick leave, accrued leave, vacation, holiday, termination, unemployment, individual employment, consulting, executive compensation, incentive, commission, retention, change in control, other material plan, agreement, policy, trust fund or arrangement (whether written or unwritten, insured or self-insured), and any plan subject to Sections 125, 127, 129, 137 or 423 of the Code, maintained, sponsored or contributed to (or required to be maintained, sponsored or contributed to) by Seller or any trade or business, whether or not incorporated, that together with Seller would be deemed to be a "single employer" within the meaning of Section 4001(b) of ERISA or Sections 414(b), 414(c), or 414(m) of the Code (an "ERISA Affiliate" and, together with Seller, the "ERISA Employers") or to which any ERISA Employer is a party or with respect to which any ERISA Employer has or may have any Liability, in each case for the benefit of any current or former director, consultant or employee of any ERISA Employer or any dependent or beneficiary thereof.

4.17.2. Schedule 4.17 sets forth an accurate and complete list of all Plans, and no ERISA Employer has any current or contingent obligation to contribute to, or Liability under, any Plan sponsored by any Person other than an ERISA Employer.

4.17.3. No Plan is, and no ERISA Employer has ever participated in or made contributions to: (a) a "multiemployer plan," as defined in Section 4001(a)(3) of ERISA or (b) a plan that has two or more contributing sponsors at least two of whom are not under common control within the meaning of Section 4063 of ERISA.

4.17.4. No Plan is a "single employer plan," as defined in Section 4001(a)(15) of ERISA, that is subject to Title IV of ERISA. No ERISA Employer has incurred any outstanding Liability under Section 4062, 4063 or 4064 of ERISA to the Pension Benefit Guaranty Corporation or to a trustee appointed under Section 4042 of ERISA.

4.17.5. The IRS has issued a currently effective favorable determination letter with respect to each Plan that is intended to be a "qualified plan" within the meaning of Section 401 of the Code, or an opinion or advisory opinion or letter as to each such Plan which is a prototype or volume submitter plan, and each trust maintained pursuant thereto has been determined to be exempt from federal income taxation under Section 501 of the Code by the IRS. Each such Plan has been timely amended since the date of the latest favorable determination letter in accordance with all applicable Laws. Nothing has occurred with respect to the operation of any such Plan that is reasonably likely to cause the loss of such qualification

or exemption or the corresponding imposition of any Liability, penalty or tax under ERISA or the Code or the assertion of claims by "participants" (as that term is defined in Section 3(7) of ERISA) other than routine benefit claims. No ERISA Employer has utilized the Employee Plans Compliance Resolution System to remedy any qualification failure of any Plan.

4.17.6. None of the ERISA Employers, the managers, officers or directors of the ERISA Employers, nor any Plan has engaged in a "prohibited transaction" (as such term is defined in Section 406 of ERISA or Section 4975 of the Code) or any other breach of fiduciary responsibility that could subject any ERISA Employer, or any manager, officer or director of any ERISA Employer to any tax or penalty on prohibited transactions imposed by such Section 4975 or to any Liability under Sections 409 or 502 of ERISA. There has not been any "reportable event" (as such term is defined in Section 4043 of ERISA) for which the 30-day reporting requirement has not been waived with to any Plan in the last five (5) years, and no notice of reportable event will be required to be filed in connection with the transactions contemplated under this Agreement. No ERISA Employer has utilized the U.S. Department of Labor's Voluntary Fiduciary Correction Program to correct any fiduciary violations under any Plan.

4.17.7. All Plans have been established, maintained and administered in accordance with their terms and with all provisions of applicable Laws, including ERISA and the Code, except for instances of noncompliance where neither the costs to comply nor the failure to comply, individually or in the aggregate, could have a material and adverse effect on any ERISA Employer. All reports and information required to be filed with any Authority or provided to participants or their beneficiaries have been timely filed or disclosed and, when filed or disclosed were accurate and complete. No ERISA Employer has any Liability for excise taxes under Section 4980D or 4980H of the Code.

4.17.8. Each Plan that is a "non-qualified deferred compensation plan" (within the meaning of Section 409A(d)(1) of the Code) that is subject to Section 409A of the Code ("409A Plan") has been operated in full compliance with Section 409A of the Code since January 1, 2005 and, if necessary, was, prior to January 1, 2009, amended to fully comply with the requirements of the final regulations promulgated under Section 409A of the Code. No Plan that would be a 409A Plan but for the effective date provisions applicable to Section 409A of the Code as set forth in Section 885(d) of the American Jobs Creation Act of 2004, as amended ("AJCA") has been "materially modified" within the meaning of Section 885(d)(2)(B) of AJCA after October 3, 2004 or has been operated in violation of Section 409A. No ERISA Employer has utilized any formally sanctioned correction program with respect to any 409A Plan.

4.17.9. None of the Plans promise or provide retiree or post-service medical or other retiree or post-service welfare benefits to any Person except as required by applicable Law and no ERISA Employer has represented, promised, or contracted to provide such retiree benefits to any employee, former employee, director, consultant or other Person, except as required by applicable Law.

4.17.10. Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby (either alone or in conjunction with any other event) will: (i) increase any benefits otherwise payable under any Plan; (ii) result in any acceleration of the time of payment or vesting of any such benefits; (iii) limit or prohibit the ability to amend or terminate any Plan; (iv) require the funding of any trust or other funding vehicle; or (v) renew or extend the term of any agreement in respect of compensation for an employee of

any ERISA Employer that would create any Liability to any ERISA Employer after the Closing.

4.17.11. No employee of any ERISA Employer is entitled to any gross-up, make-whole, or other additional payment from any ERISA Employer with respect to taxes, interests or penalties imposed under Section 409A of the Code.

4.17.12. No ERISA Employer has communicated to any current or former employee, manager or director any intention or commitment to establish or implement any additional Plan or to amend or modify, in any material respect, any existing Plan.

4.17.13. No Plan is subject to the Law of any jurisdiction other than the United States.

4.18. Environmental Matters. Except as set forth in Schedule 4.18, (a) Seller and each Subsidiary is and has been for the past seven (7) years in compliance in all material respects with all Environmental Laws, (b) there has been no Release or threatened Release of any Hazardous Substances on, upon, into or from any site currently or heretofore owned, leased or otherwise operated or used by Seller or any Subsidiary, including the Centers, (c) there have been no Hazardous Substances generated by Seller or any Subsidiary that have been disposed of or come to rest at any site that has been included in any published U.S. federal, state or local "superfund" site list or any other similar list of hazardous or toxic waste sites published by any Governmental Authority in the United States, and (d) there have been no underground storage tanks located on, no PCBs (polychlorinated biphenyls) or PCB-containing Equipment or asbestos-containing materials used, stored or present on, and no hazardous waste as defined by the Resource Conservation and Recovery Act stored or present on, any site owned or operated by Seller or any Subsidiary, except for the storage of hazardous waste by Seller or a Subsidiary in the Ordinary Course of Business and in compliance, in all material respects, with Environmental Laws. Seller has delivered, or caused to be delivered, to Buyer copies of all documents, records and information in its possession or control reasonably related to any actual or potential material liability of Seller or a Subsidiary under Environmental Laws, including previously conducted environmental site assessments, compliance audits, asbestos surveys and documents regarding any Releases at, upon, under or from any property currently or formerly owned, leased or operated by Seller or any Subsidiary.

4.19. Contracts.

4.19.1. Contracts. Except as disclosed on Schedule 4.19, neither Seller nor any Subsidiary is bound by or a party to any of the following Contractual Obligations:

(a) any Contractual Obligation relating to the acquisition or disposition of (i) any business of Seller or a Subsidiary or any portion thereof (whether by merger, consolidation, or other business combination, sale of securities, sale of assets, or otherwise) or (ii) any asset other than in the Ordinary Course of Business;

(b) any Contractual Obligation concerning or consisting of a partnership, limited liability company or joint venture agreement;

(c) any Contractual Obligation (or group of related Contractual Obligations) (i) under which Seller or any Subsidiary has created, incurred, assumed, or guaranteed any Debt (including any Debt owed to Seller or any Subsidiary from any other Person for any advance of loan of funds), or (ii) under which an Encumbrance has been placed on any of its assets;

(d) any Contractual Obligation relating to confidentiality, non-solicit or non-competition restrictions or that restricts, in any respect, the conduct of the Business by Seller or any Subsidiary;

(e) any Contractual Obligation relating to employment, personal services, consulting, an independent contractor arrangement, or similar matters;

(f) any Contractual Obligation under which Seller or any Subsidiary is, or would reasonably be expected to become, obligated to pay any investment bank, broker, financial advisor, finder, or other similar Person (including an obligation to pay any legal, accounting, brokerage, finder's, or similar fees or expenses) in connection with this Agreement or the Contemplated Transactions;

(g) any Contractual Obligation arising pursuant to a Third Party Payor Program;

(h) any other Contractual Obligation (or group of related Contractual Obligations) the performance of which involves remaining consideration to be paid or received by Seller and/or any Subsidiary in excess of Two Hundred Fifty Thousand Dollars ($250,000);

(i) any Contractual Obligation under which Seller or any Subsidiary has engaged in any promotional sale, discount, rebate or other activity with any customer (other than in the Ordinary Course of Business);

(j) any Contractual Obligation with any health care provider or facility;

(k) any Contractual Obligation under which Seller or any Subsidiary is obligated to minimum purchase requirements or commitments or exclusive dealing or "most favored nation" provisions; and

(l) any Contractual Obligation under which Seller or any Subsidiary is obligated to indemnify any Person.

4.19.2. Enforceability; Breach. Each Contractual Obligation required to be disclosed on Schedule 4.9 (Debt), Schedule 4.12 (Real Property), Schedule 4.13 (IP Contracts), Schedule 4.15 (Compliance with Healthcare Laws), Schedule 4.19 (Contracts), or Schedule 4.23 (Insurance) (each, a "Disclosed Contract") is enforceable against Seller and/or the applicable Subsidiary or Subsidiaries and, to Seller's Knowledge, each other party to such Contractual Obligation, and is in full force and effect, and will continue to be so enforceable and in full force and effect on identical terms following the consummation of the Contemplated Transactions, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar Laws affecting the enforceability of creditors' rights generally, general equitable principles, and the discretion of courts in granting equitable relief. Neither Seller nor any Subsidiary has been, nor, to Seller's Knowledge, has any other party to any Disclosed Contract been, during the thirty-six (36) month period ending on the date hereof, nor is any such Person currently, in breach or violation in any material respect of, or default in any material respect under, any Disclosed Contract, nor to Seller's Knowledge has any circumstance or set of circumstances occurred that, with the lapse of time, or the giving of notice, or both, would constitute such a breach or violation. Seller has delivered to Buyer true, accurate and complete copies of each written Disclosed Contract, in each case, as amended or otherwise modified and in effect. Seller has delivered to Buyer a written summary setting forth the terms and conditions of each oral Disclosed Contract, if any.

4.20. Affiliate Transactions. Except as disclosed on Schedule 4.20, and except with respect to holdings of less than five percent (5%) of entities that are traded on a public exchange, such as the NASDAQ or the New York Stock Exchange, neither Seller nor any Subsidiary nor any shareholder, member, current or former director, manager, officer or employee, or Affiliate of Seller or any Subsidiary, is or was in the last three years a consultant, competitor, creditor, debtor, customer, client, lessor, lessee, distributor, service provider, supplier, or vendor of, or is or was in the last three years a party to any Contractual Obligation with, Seller or any Subsidiary or has or had in the last three years any interest in any of the assets used in, or necessary to, the Business as currently conducted.

4.21. Employees.

4.21.1. Except as disclosed on Schedule 4.21.1, within the last five (5) years, neither Seller nor any Subsidiary has, in connection with the operation of the Business:

(a) been subject to any material labor dispute including, but not limited to, a work slowdown, lockout, work stoppage, picketing, strike, handbilling, bannering, or other concerted activity due to any organizational activities (and, to Seller's Knowledge, there are no organizational efforts with respect to the formation of a collective bargaining unit or a workers' council presently being made or threatened with respect to Seller or any Subsidiary);

(b) recognized any labor organization or group of employees as the representative of any employees, received any written demand for recognition from any labor organization or workers' council, or been party to any petition for recognition or representation right with any Governmental Authority with respect to any employees of Seller or any Subsidiary; been involved in negotiations with any labor organization or workers' council regarding terms for a collective bargaining agreement covering any employees, or any effects bargaining agreement, neutrality or card-check recognition agreement, or other labor agreement; or been a party to any collective bargaining agreement, contract or other agreement or understanding with a labor union or other employee bargaining representative, and no such agreement is being negotiated by Seller or any Subsidiary;

(c) committed any violation of Section 8 of the National Labor Relations Act as amended, 29 U.S.C. § 158, or any other labor Law of any jurisdiction where Seller or any Subsidiary employs employees;

(d) materially violated any applicable Legal Requirements pertaining to labor and employment, employment practices, terms and conditions of employment, compensation and wages and hours in connection with the employment of any employees, including any such Laws relating to labor relations, fair employment practices, immigration, wages, hours, the classification and payment of employees and independent contractors, child labor, hiring, working conditions, meal and break periods, plant shutdown and mass layoff, privacy, health and safety, workers' compensation, leaves of absence, family and medical leave, access to facilities and employment opportunities for disabled persons, employment discrimination (including discrimination based upon sex, pregnancy, marital status, age, race, color, national origin, ethnicity, sexual orientation, disability, veteran status, religion or other classification protected by law or retaliation for exercise of rights under applicable Law), equal employment opportunities and affirmative action, employee privacy, the collection and payment of all taxes and other withholdings, and unemployment insurance and is in material compliance with each of these laws and is not subject to any consent decree or continuing reporting obligations to the United States Equal Employment Opportunity Commission, any branch of the U.S. Department of Labor or any similar state or local Governmental Authority;

(e) misclassified any individuals as consultants or independent contractors rather than as employees or as exempt rather than non-exempt for purposes of the Fair Labor Standards Act or similar state Legal Requirements or violated any term and condition of any employment contract or independent contractor agreement and is not liable for any payment to any trust or other fund or to any Governmental Authority, with respect to unemployment compensation benefits, social security, employment insurance premiums, or other benefits or obligations for employees (other than routine payments made in the Ordinary Course of Business);

(f) participated in or made contributions to: (a) a "multiemployer plan," as defined in Section 4001(a)(3) of ERISA or (b) a plan that has two or more contributing sponsors at least two of whom are not under common control within the meaning of Section 4063 of ERISA;

(g) employed any employee who is not legally eligible for employment under applicable immigration Laws, violated any applicable Laws pertaining to immigration and work authorization, or received notice from any Governmental Authority of any investigation by any Governmental Authority regarding noncompliance with applicable immigration laws, including but not limited to U.S. Social Security Administration "No-Match" letters, or failed to maintain in its files a current and valid Form I-9 for each of its active employees;

(h) been delinquent in payments to any employees for any wages (including overtime compensation), salaries, commissions, bonuses or other direct compensation for any services performed by them or any amounts required to be reimbursed to such employees; or

(i) implemented any plant closing, mass layoff or redundancy of employees that could require notice and/or consultation (without regard to any actions that could be taken by Buyer following the Closing) under applicable Laws (including the Worker Adjustment and Retraining Notification Act of 1988, as amended, 29 U.S.C. §§ 2101, et seq., or any similar state Laws).

4.21.2. Except as disclosed on Schedule 4.21.2, there are no Actions against Seller or any Subsidiary pending, or to the Seller's Knowledge, threatened to be brought or filed, by or before any Governmental Authority by or concerning any current or former applicant, employee or independent contractor of Seller or any Subsidiary, and there have been no such Actions pending, or to the Seller's Knowledge, threatened, in the thirty-six (36) month period ending on the date hereof.

4.21.3. Schedule 4.21.3 sets forth a true and complete list, as of the date hereof, of (i) all current directors, executive officers, managers, employees, providers (including, but not limited to, physicians, physician assistants, and surgeons) relating to the respective businesses of Seller and the Subsidiaries (the "Business Employees"), including any Business Employees who are on leaves of absence for any purpose, and (ii) their work location, title, date of hire, active or inactive status, current annual base salary or hourly wage compensation and incentive or bonus compensation, vacation eligibility, and exempt or non-exempt status. As of the date hereof, no Business Employee has given written or, to Seller's Knowledge, oral notice to Seller or any Subsidiary of termination of employment with Seller or any Subsidiary. No Business Employee of Seller or any Subsidiary is employed pursuant to a visa, work permit or other work authorization.

4.21.4. To the Seller's Knowledge, no petition has been filed or proceedings instituted by any labor union, workers' council or other labor organization with any Governmental Authority seeking recognition or certification as a bargaining representative of

any employee or group of employees of Seller or any Subsidiary; there is no organizational effort currently being made or threatened by, or on behalf of, any labor union workers' council or other labor organization to organize any employees of Seller or any Subsidiary, and, to the Seller's Knowledge, there have been no such efforts for the past five (5) years; and no demand for recognition as the bargaining representative of any employee or group of employees of Seller or any Subsidiary has been made to Seller or any Subsidiary at any time during the past five (5) years.

4.21.5. There are no pending or, to the Seller's Knowledge, threatened unfair labor practice charges against Seller or any Subsidiary before the National Labor Relations Board or any analogous state or foreign Governmental Authority. Neither Seller nor any Subsidiary has, or is currently, engaged in any unfair labor practice as defined in the National Labor Relations Act.

4.21.6. Neither Seller nor any Subsidiary is subject to or has been subject to at any time in the past three (3) years, United States Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, or Section 503 of The Rehabilitation Act of 1973, in each case as amended and including all rules and regulations promulgated thereunder.

4.22. Litigation; Government Orders. Except as set forth on Schedule 4.22, there is no, and, during the thirty-six (36) month period ending on the date hereof, there have been no, Actions (a) pending, or, to Seller's Knowledge, threatened against of affecting Seller or any Subsidiary, or (b) pending, or, to Seller's Knowledge, threatened against or affecting, any officers, managers, or employees (including physician employees, physician's assistants and other clinical employees) of Seller or any Subsidiary with respect to the business of Seller or any Subsidiary. Except as set forth on Schedule 4.22, Seller is not the subject of any Government Order.

4.23. Insurance. Schedule 4.23(a) sets forth a true and complete list of all insurance policies currently in force with respect to Seller. All such policies are in full force and effect, all premiums with respect thereto covering all periods up to and including the Closing have or will have been paid, Seller is in default in any material respect thereunder, and no notice of cancellation or termination has been received by Seller with respect to any such insurance policy. Schedule 4.23(a) also describes any self-insurance or co-insurance arrangements by Seller, including any reserves established thereunder. In addition, Schedule 4.23(a) contains a list of all pending claims and all claims submitted during the thirty-six (36) month period ending on the date hereof under any insurance policy maintained by Seller. Except as disclosed on Schedule 4.23(b), no insurer has (i) denied or disputed (or otherwise reserved its rights with respect to) the coverage of any such claim pending under any insurance policy or (ii) to Seller' Knowledge, threatened to cancel any such insurance policy. There is no claim which, individually or in the aggregate with other claims, could reasonably be expected to impair any current or historical limits of insurance available to Seller.

4.24. No Brokers. Neither Seller nor any Subsidiary has any Liability of any kind to, nor is Seller or any Subsidiary subject to any claim of, any broker, finder or agent in connection with the Contemplated Transactions other than those which are described on Schedule 4.24, all of which will be paid by Seller prior to the Closing.

4.25. Books and Records. All of the books and records of Seller and each Subsidiary have been maintained in the Ordinary Course of Business and fairly reflect, in all material respects, all transactions of the Business.

4.26. SEC Documents. Seller has NOT timely filed all reports, schedules, forms, statements and other documents required to be filed by it with the Securities and Exchange Commission ("SEC") pursuant to the reporting requirements of the Securities Exchange Act of 1934, as amended (the "1934 Act") (all of the foregoing filed prior to the date hereof and all exhibits included therein and financial statements and schedules thereto and documents (other than exhibits to such documents) incorporated by reference therein, being hereinafter referred to herein as the "SEC Documents"). Upon written request, Seller will deliver to Buyer true and complete copies of the SEC Documents, except for such exhibits and incorporated documents. As of their respective dates, the SEC Documents complied in all material respects with the requirements of the 1934 Act and the rules and regulations of the SEC promulgated thereunder applicable to the SEC Documents, and none of the SEC Documents, at the time they were filed with the SEC, contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. None of the statements made in any such SEC Documents is, or has been, required to be amended or updated under applicable law (except for such statements as have been amended or updated in subsequent filings prior the date hereof).

5. REPRESENTATIONS AND WARRANTIES OF BUYER.

In order to induce Seller to enter into and perform this Agreement and to consummate the Contemplated Transactions, Buyer represents and warrants to Seller, as of the date hereof, as follows:

5.1. Organization. Buyer is duly organized, validly existing and in good standing under the laws of the State of Michigan.

5.2. Power and Authorization. The execution, delivery and performance by Buyer of this Agreement and each Ancillary Agreement to which it is a party and the consummation of the Contemplated Transactions are within the power and authority of Buyer and have been duly authorized by all necessary action on the part of Buyer. This Agreement and each Ancillary Agreement to which Buyer is a party (a) have been duly executed and delivered by such party and (b) is and will be a legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar Laws affecting the enforceability of creditors' rights generally, and, other than with respect to any restrictive covenant contained in this Agreement or any Ancillary Agreement, general equitable principles and the discretion of courts in granting equitable relief.

5.3. Authorization of Governmental Authorities. No action by (including any authorization, consent or approval), or in respect of, or filing with, any Governmental Authority is required for, or in connection with, the valid and lawful (a) authorization, execution, delivery and performance by Buyer of this Agreement and each Ancillary Agreement to which it is a party or (b) consummation of the Contemplated Transactions by Buyer.

5.4. Non-contravention. Neither the execution, delivery and performance by Buyer of this Agreement or any Ancillary Agreement to which it is a party, nor the consummation of the Contemplated Transactions, will: (a) assuming the taking of any action required by (including any authorization, consent or approval) or in respect of, or any filing with, any Governmental Authority, violate any provision of any Legal Requirement applicable to Buyer, (b) result in a breach or violation of, or default under, Buyer's organizational documents, or (c) result in the creation or imposition of an Encumbrance upon, or the forfeiture of, any asset of Buyer, including the Acquired Stock.

5.5. No Brokers. Buyer has no Liability of any kind to any broker, finder or agent with respect to the Contemplated Transactions for which Seller or any of its Affiliates could be liable.

6. **COVENANTS**.

6.1. Publicity. After the Closing, Buyer will be entitled to issue any press release or make any other public announcement without obtaining Seller's prior approval so long as such press release or other public announcement does not disclose any of the specific pricing terms hereof; provided, however, that the foregoing limitation will not apply to any communications with Buyer's limited partners, members, investors, Representatives or prospective investors, if applicable. Neither Seller nor Seller Principal shall be entitled to issue any press release or make any other public announcement of any kind whatsoever with respect to this Agreement or the Contemplated Transactions without obtaining Buyer's prior approval, which shall not be unreasonably withheld or delayed.

6.2. Fees and Expenses. Seller shall be responsible for the following transaction expenses of Buyer and/or Buyer's Affiliates incurred or to be incurred by any of them or any of their respective Representatives in connection with the negotiation, execution, or performance of this Agreement or the Contemplated Transactions: (1) $150,000 for legal fees and expenses; and (2) $6,000 for the cost of certain background investigations (collectively, the "Reimbursed Transaction Expenses"). Seller shall pay the full amount of the Reimbursed Transaction Expenses to Buyer as promptly as practicable after the Closing, but in no event later than 2 Business Days after the Closing, by means of a wire transfer of immediately available funds pursuant to wire instructions provided by Buyer to Seller. Except as otherwise provided in the preceding sentence or elsewhere in this Agreement, all costs, expenses, and fees incurred in connection with the negotiation, execution, or performance of this Agreement or the Contemplated Transactions by Buyer shall be paid by Buyer, and all costs, expenses, and fees incurred in connection with the negotiation, execution, or performance of this Agreement or the Contemplated Transactions by Seller or a Seller Principal shall be paid by Seller.

6.3. Post-Closing Monthly Payments to Buyer. From and after the Closing Date, on each Payment Date prior to the occurrence of a Trigger Event, Seller shall make a payment to Buyer (each, a "Post-Closing Monthly Payment") in an amount equal to $175,000.00. For purposes of this Agreement: (a) the term "Payment Date" shall mean (i) January 1, 2017 and (ii) the first day of each subsequent calendar month thereafter and (b) the term "Trigger Event" shall mean the earlier to occur of (a) the consummation of an initial public offering of Seller's common stock on an established and internationally recognized stock exchange (such as the New York Stock Exchange, NASDAQ, or the Toronto Stock Exchange); and (b) such time as Buyer shall no longer hold any of the Acquired Stock or other equity interest in Seller (or a successor to Seller). In the event that Seller fails to make any payment when due pursuant to this Section 6.3, then after a grace period of 10 days, such missed payment will be subject to a default interest rate of 7.0% annually, accrued on a daily basis starting on the first day of the month immediately prior to the Payment Date with respect to the delinquent payment. (For example, if Seller fails to make its required Post-Closing Monthly Payment on January 1, 2017, then it has a grace period of up to January 10, 2017 to make such payment. If the payment remains unpaid as of January 10 and is not made until January 12, 2017, then the amount due will be $175,000.00 plus default interest at an annual rate of 7.0%, accrued for 43 days (31 days in December, plus 12 days in January).

6.4. Buyer Investor Protections. Notwithstanding any contrary provision in the organizational documents of Seller or any successor to Seller, from and after the Closing Date and for so long as Buyer holds any amount of Common Stock (or any analogous equity security in the event of any stock split, reverse stock split, reverse or forward merger, consolidation, recapitalization, redomestication, conversion, or other restructuring transaction of any kind), Seller and each Seller Principal shall ensure that Buyer always has the rights set forth in this Section 6.4 below (the "Buyer Investor Protections"), including, as applicable: (i) by voting such Seller Principal's shares of Common Stock in favor of the Buyer Investor Protections, (ii) by voting in such Seller Principal's capacity as a director in favor of the Buyer Investor Protections, (iii) by encouraging other Seller Owners and directors of Seller to similarly

vote in favor of the Buyer Investor Protections, (iv) by requiring each transferee of any portion of a Seller Principal's Common Stock (and each transferee of such transferee, *ad infinitum*) to be bound by all of the obligations of the Seller Principals set forth in this Section 6.4 as a condition to the transfer of such Common Stock; and (v) upon the request of Buyer, by doing, executing, acknowledging, and/or delivering all such further agreements, resolutions, amendments to organizational documents, acts, assurances, deeds, assignments, transfers, conveyances, and other instruments and papers as may be reasonably required or appropriate to carry out, evidence, and/or more fully implement the Buyer Investor Protections):

(a) Preemptive Rights/Anti-Dilution Rights. From and after the Closing and at all times until a Trigger Event has occurred: (i) neither Seller nor, for the avoidance of doubt, any successor to Seller in the event of any merger, consolidation, recapitalization, redomestication, conversion, or other restructuring transaction of any kind, shall issue or sell any new equity securities of any kind (including any security or other instrument convertible into an equity security) unless it first provides Buyer a preemptive right (with sufficient notice of at least 60 days and sufficient time to close a transaction) that allows Buyer to purchase Buyer's pro rata portion of such equity securities, at a price (taking into account the total post-issuance Equity Value reflected in such transaction) equal to that paid by new subscribers in such proposed new issuance, so as to maintain Buyer's pro rata ownership of Seller's equity securities and, in the event that other Seller shareholders are offered a similar preemptive right but do not exercise it, to increase Buyer's pro rata ownership; and (ii) without limiting the foregoing, neither Seller nor, for the avoidance of doubt, any successor to Seller in the event of any merger, consolidation, recapitalization, redomestication, conversion, or other restructuring transaction of any kind, shall issue any equity securities of any kind (including any security or other instrument convertible into an equity security) or otherwise enter into any transaction, if such issuance or transaction would result in a total post-transaction Equity Value that is lower than $493,256,955 unless: (A) it provides Buyer notice of such proposed issuance or transaction no later than 30 days prior to the consummation of such transaction; and (B) contemporaneously with the consummation of such issuance or transaction, Seller issues to Buyer, at no cost, equity securities sufficient to ensure that Buyer's post-issuance equity ownership of Seller (or such successor) is equal to or greater than the Consideration, which equity securities shall be, upon issuance, fully paid, non-assessable and free and clear of all Encumbrances.

(b) Board Representation and Observation Rights. At all times while Buyer holds any portion of the Acquired Stock, Buyer shall have the right to appoint a designee to serve as a member of Seller's Board of Directors and another designee to serve as a non-voting observer of Seller's Board of Directors.

(c) Required Reports. In addition to any reports, communication and information Buyer is entitled to receive or review in its capacity as a stockholder, and in addition to any reports, communication and information Buyer's board representatives and observers are entitled to receive or review in their capacity as such (all of which shall be provided at the same time that they are provided to other stockholders and board members and observers, as applicable), no later than 45 days after the end of each fiscal quarter of Seller and no later than 120 days after the end of each fiscal year of Seller, as applicable, Seller shall deliver to Buyer the following financial, operating and management reports with respect to the business of Seller (including the Subsidiaries), in each case including such information and in such manner as reasonably requested by Buyer from time to time: (i) consolidated Financials, including management commentary (quarterly); (ii) annual budget, including management commentary (annually); (iii) management reports on recent acquisitions, pending acquisitions, and acquisition pipeline (quarterly, or more frequently as needed); and (iv) management reports on any other business

activity likely to cause material variations in budget (quarterly, or more frequently as needed).

6.5. Revised Physician Compensation Arrangements; Billing & Coding Audit. As promptly as practicable after the Closing Date, but in no event later than December 31, 2016, Seller shall (or shall cause the applicable Subsidiary to) enter into new or amended employment agreements with all of its contracted physicians and medical service providers (and shall promptly make available to Buyer true and correct copies of all such agreements), which new or amended employment agreements (x) shall reflect a revised "best practices" bonus compensation structure in full compliance with all Healthcare Laws, but (y) shall otherwise remain substantially unchanged from the current agreements with such contracted physicians and medical service providers. Without limiting any of Buyer's rights pursuant to Section 6.4, upon Buyer's request at any time and from time to time, Seller shall (and/or shall cause the Subsidiaries to, as appropriate) promptly direct an independent third-party auditor to conduct a billing and coding audit of Seller and/or any of its Subsidiaries (at Buyer's expense) and shall fully cooperate with the auditor in conducting such an audit. In the event of any such audit (whether directed by Buyer or otherwise), Seller shall keep Buyer reasonably informed of the progress of any such audit, shall promptly provide Buyer with the results and reports of any such audit, and shall consult with Buyer on the findings of any such audit and take any actions as reasonably requested by Buyer to ensure continued "best practices" compliance with all Healthcare Laws.

6.6. 2014 & 2015 Financials. As promptly as practicable upon their completion, but in no event later than November 30, 2016, Seller shall deliver true, correct and complete copies of the 2014 & 2015 Financials to Buyer, which 2014 & 2015 Financials shall comport in all respects with the provisions set forth in Section 4.6.

6.7. SEC Compliance. As promptly as practicable after the Closing Date, but in no event later than December 31, 2016, Seller shall take all necessary actions and file all necessary documents to ensure that it is compliant in all material respects with the 1934 Act.

6.8. Stock Certificate. As promptly as practicable after the Closing, but in no event later than five (5) Business Days after the Closing, Seller shall deliver to Buyer (or cause Seller's transfer agent to deliver to Buyer) a stock certificate evidencing Buyer's ownership of the Acquired Stock, duly issued and executed by the appropriate officers of Seller and otherwise in accordance with Seller's Articles of Incorporation and Bylaws.

6.9. Compliance with Laws. At all times from and after the Closing Date, Seller and each Seller Principal shall, and shall cause the business of Seller (including the Business) and each of the subsidiaries of Seller (including the Subsidiaries) to, comply with all Laws.

6.10. Further Assurances. From and after the Closing Date, upon the request of either Seller or Buyer, each of the Parties shall do, execute, acknowledge, and deliver all such further acts, assurances, deeds, assignments, transfers, conveyances, and other instruments and papers as may be reasonably required or appropriate to carry out and/or evidence the Contemplated Transactions.

7. **INDEMNIFICATION**.

7.1. Indemnification by Seller. Subject to the provisions of this Article 7, Seller shall indemnify and hold harmless Buyer and its Affiliates, and each of the directors, officers, stockholders, partners, members, managers, employees, agents, consultants, advisors, and Representatives of each of the foregoing Persons (the "Buyer Indemnified Persons,") from, against, and in respect of any and all Actions, Liabilities, Government Orders, Encumbrances, losses, damages, bonds, assessments, fines, penalties, Taxes, fees, costs (including reasonable costs of investigation, defense, and enforcement of this

Agreement), expenses (including actual and reasonable attorneys' and experts fees and expenses), or amounts paid in settlement (collectively referred to as "Losses") that any Buyer Indemnified Person may suffer, incur, sustain, or become subject to as a result of, arising out of, or directly or indirectly relating to:

7.1.1. any breach of, or inaccuracy in, any representation or warranty made by Seller in this Agreement, in any Ancillary Agreement, or in any certificate delivered pursuant to this Agreement;

7.1.2. any breach or violation of, or any failure to perform, any covenant or agreement of Seller or any Seller Principal in this Agreement, the Ancillary Agreements, or in any certificate delivered pursuant to this Agreement, but excluding any such covenant or other agreement that by its nature is required to be performed at, by or prior to the Closing;

7.1.3. any Losses attributable to (i) Taxes of Seller for any period ending on or before the Closing Date; (ii) Taxes of any other Person imposed on Seller (A) pursuant to Treasury Regulation § 1.1502-6 or any analogous or similar state, local, or foreign Law or regulation, with respect to any group of which Seller is or was a member on or prior to the Closing Date, or (B) as a result of any Tax sharing, Tax indemnification or Tax allocation agreement, arrangement, or understanding (other than customary Tax indemnification provisions contained in commercial contracts entered into in the ordinary course of business, a principal subject matter of which is not Taxes), or (iii) Taxes of any Person, which Taxes relate to an event or transaction occurring before the Closing, imposed on Seller as a transferee or successor or otherwise pursuant to any Law; or

7.1.4. any Losses related to any Liabilities that arise out of or relate to (in whole or in part) Seller, any subsidiary of Seller (including any Subsidiary), any business of Seller or its subsidiaries (including the Business) and/or the operation of any Center, in each case on or prior to the Closing, including but not limited to any Losses arising out of any failure to get any consent and approval of, or any failure to file any required notice with, any Person as may be necessary for Seller or any Seller Owner to consummate any of the Contemplated Transactions (and in all cases including, for the avoidance of doubt, all such Losses or Liabilities that arise out of or relate to, in whole or in part, matters, circumstances, information or documentation set forth, described or referenced on any of the Disclosure Schedules or otherwise disclosed or made available to Buyer prior to the Closing).

7.2. Indemnification by Buyer. Subject to the provisions of this Article 7, Buyer shall indemnify and hold harmless Seller and its Affiliates, and the directors, officers, stockholders, partners, members, managers, employees, agents, consultants, advisors, and Representatives of each of the foregoing Persons (the "Seller Indemnified Parties") from, against, and in respect of any and all Losses which any of them may suffer, incur, sustain, or become subject to as a result of, arising out of, or directly or indirectly relating to:

7.2.1. any breach of, or inaccuracy in, any representation or warranty made by Buyer in this Agreement, the Ancillary Agreements, or in any certificate delivered pursuant to this Agreement; or

7.2.2. any breach or violation of, or any failure to perform, any covenant or agreement of Buyer in this Agreement, or in any certificate delivered pursuant to this Agreement, but excluding any such covenant or other agreement that by its nature is required to be performed at, by or prior to the Closing.

7.3. Certain Limitations. The indemnification provided for in Section 7.1 and Section 7.2 shall be subject to the following limitations:

7.3.1. For purposes of this Article 7, any inaccuracy in or breach of any representation or warranty (and the amount of any Losses) shall be determined without regard to any materiality, Material Adverse Effect or other similar qualification contained in or otherwise applicable to such representation or warranty; and

7.3.2. With respect to Buyer Indemnified Persons, Losses shall specifically include diminution in value of the Acquired Units, including any diminution in value of the Acquired Units as a result of Seller being required to satisfy any indemnification obligation hereunder.

7.4. Personal Guarantees of Seller Principals.

7.4.1. Guarantee of Post-Closing Monthly Payments. Notwithstanding anything herein to the contrary, each Seller Principal hereby absolutely and unconditionally guarantees, jointly and severally with all other Seller Principals, the prompt and punctual payment by Seller of 100% of Seller's payment obligations under Section 6.3. Each Seller Principal's liability under this Section 7.4.1 is primary, direct and unconditional and shall not require Buyer to resort to any other Person, including Seller, or any other right, remedy or collateral, whether held as collateral for satisfaction of obligations set forth herein.

7.4.2. Guarantee of Seller Indemnification Obligations. Each Seller Principal hereby absolutely and unconditionally guarantees, jointly and severally with all other Seller Principals, the prompt and punctual payment by Seller of each indemnification obligation of Seller pursuant to Section 7.1 (a "Seller Indemnification Obligation"); provided, however, that in no event shall any Seller Principal's liability with respect to any Seller Indemnification Obligation exceed such Seller Principal's pro-rata portion thereof, determined in accordance with the percentage set forth for such Seller Principal on Exhibit B, which reflects such Seller Principal's approximate pro rata percentage share of the Common Stock immediately prior to the Contemplated Transactions ("Pro Rata Share"). Each Seller Principal's liability under this Section 7.4.2 is primary, direct and unconditional and shall not require Buyer to resort to any other Person, including Seller, or any other right, remedy or collateral, whether held as collateral for satisfaction of obligations set forth herein.

7.5. Survival. No claim may be made or suit instituted seeking indemnification pursuant to Section 7.1.1 or Section 7.2.1 for any breach of, or inaccuracy in, any representation or warranty (and no indemnity obligation shall arise with respect to any such claim) unless a written notice describing such breach or inaccuracy in reasonable detail in light of the circumstances then known to the Indemnified Party is provided to the Indemnifying Party: (a) at any time, in the case of any breach of, or inaccuracy in, the Fundamental Representations, the representations and warranties set forth in Section 5.1 (Organization), Section 5.2 (Power and Authorization), Section 5.5 (No Brokers), and/or in the case of any claim or suit based upon fraud, intentional misrepresentation or willful misconduct; and (b) at any time prior to the sixty (60) month anniversary of the Closing Date, in the case of any breach of, or inaccuracy in, any other representation and warranty in this Agreement. For clarity, all of the other covenants and agreements of the Parties set forth in this Agreement shall survive the Closing in accordance with their respective terms or, if no such term is specified, indefinitely; provided that no claim may be made or suit instituted seeking indemnification pursuant to Section 7.1 or Section 7.2 unless a written notice describing such claim in reasonable detail in light of the circumstances then known to the Indemnified Party, is provided to the Indemnifying Party at any time prior to the sixtieth (60^{th}) day after

such claim is barred by the statute of limitations under applicable Law (taking into account the survival periods set forth in this Section 7.5, any tolling periods and other extensions).

7.6. Third Party Claims.

7.6.1. Notice of Third Party Claims. Promptly after receipt by an Indemnified Person of written notice of the assertion of a claim by any Person who is not a party to this Agreement (a "Third Party Claim") that may give rise to an Indemnity Claim against an Indemnifying Party under this Article 7, the Indemnified Person shall give written notice thereof to the Indemnifying Party; provided that, no delay on the part of the Indemnified Person in notifying the Indemnifying Party will relieve the Indemnifying Party from any obligation under this Article 7, except to the extent such delay actually and materially prejudices the Indemnifying Party.

7.6.2. Assumption of Defense, etc. The Indemnifying Party will be entitled to participate in the defense at its sole cost and expense of any Third Party Claim that is the subject of a notice given by or on behalf of any Indemnified Person pursuant to Section 7.6.1. In addition, the Indemnifying Party will have the right to defend the Indemnified Person against the Third Party Claim with counsel of its choice reasonably satisfactory to the Indemnified Person so long as (i) the Indemnifying Party gives written notice that they or it will defend the Third Party Claim to the Indemnified Person within thirty (30) days after the Indemnified Person has given notice of the Third Party Claim under Section 7.6.1 stating that the Indemnifying Party will, and thereby covenants to, indemnify, defend and hold harmless the Indemnified Person from and against the entirety of any and all Losses the Indemnified Person may suffer resulting from, arising out of, relating to, in the nature of, or caused by the Third Party Claim, (ii) the Third Party Claim involves only money damages and does not seek an injunction or other equitable relief against the Indemnified Person, (iii) counsel to the Indemnified Person does not determine in good faith that an actual or potential conflict exists between the Indemnified Person and the Indemnifying Party in connection with the defense of the Third Party Claim that would make separate counsel advisable, (iv) the Third Party Claim does not relate to or otherwise arise in connection with Taxes or any criminal or regulatory enforcement Action, (v) defense of the Third Party Claim by the Indemnifying Party will not, in the reasonable judgment of the Indemnified Person, have a material adverse effect on the Indemnified Person, and (vi) Indemnifying Party has sufficient financial resources, in the reasonable judgment of the Indemnified Person, to satisfy the amount of any adverse monetary judgment that is reasonably likely to result ((i) through (vi) are collectively referred to as the "Litigation Conditions"). If (i) any of the Litigation Conditions ceases to be met or (ii) the Indemnifying Party fails to take reasonable steps necessary to defend diligently the Third Party Claim, the Indemnified Person may assume its own defense, and the Indemnifying Party will be liable for all reasonable costs or expenses paid or incurred in connection with such defense. The Indemnified Person may retain separate co-counsel at its sole cost and expense and participate in the defense of the Third Party Claim; provided that, the Indemnifying Party will pay the fees and expenses of separate counsel retained by the Indemnified Person that are incurred prior to the Indemnifying Party's assumption of control of the defense of the Third Party Claim. The Indemnified Person shall make available to the Indemnifying Party or its agents, upon the reasonable request of the Indemnifying Party, all records and other materials in the Indemnified Person's possession at the time of such request, as may be reasonably required by the Indemnifying Party for its use in contesting any Third Party Claim and shall otherwise reasonably cooperate.

7.6.3. Limitations on Indemnifying Party Control. The Indemnifying Party will not consent to the entry of any judgment or enter into any compromise or settlement with respect to the Third Party Claim without the prior written consent of the Indemnified Person unless such judgment, compromise or settlement (i) provides for the payment by the Indemnifying Party of money as sole relief for the claimant, (ii) results in the full and general release of all Indemnified Persons from all Liabilities arising out of or relating to, or in connection with, the Third Party Claim and (iii) involves no finding or admission of any violation of Legal Requirements or the rights of any Person and no effect on any other claims that may be made against the Indemnified Person. If (w) a firm written offer is made to settle any Third Party Claim for which the sole relief provided is monetary damages, (x) the amount of such monetary damages (plus all indemnifiable expenses of the Indemnified Party related to such Third Party Claim) would not exceed any of the limitations on the Indemnifying Party's indemnification obligations set forth in Article 7, (y) the Indemnifying Party agrees in writing to accept such settlement and pay all such monetary damages (plus all indemnifiable expenses of the Indemnified Party related to such Third Party Claim), and (z) the Indemnified Party refuses to consent to such settlement, then: (I) the Indemnifying Party shall be excused from, and the Indemnified Party shall be solely responsible for, all further defense of such Third Party Claim (but no party shall be excused from its indemnification obligations hereunder until the maximum liability set forth in the immediately succeeding subsection (II) has been satisfied); and (II) the maximum liability of the Indemnifying Party relating to such Third Party Claim shall be the amount of the proposed settlement (plus indemnifiable expenses of the Indemnified Party related to such Third Party Claim to the date of such refusal to consent to settlement), if the amount thereafter recovered from the Indemnified Party on such Third Party Claim is greater than the amount of the proposed settlement.

7.6.4. Indemnified Person's Control. If the Indemnifying Party does not deliver the notice contemplated by clause (i) of Section 7.6.2 within thirty (30) days after the Indemnified Person has given notice of the Third Party Claim pursuant to Section 7.6.1 (or is not permitted to assume control), the Indemnified Person may defend, and may consent to the entry of any judgment or enter into any compromise or settlement with respect to, the Third Party Claim in any manner it may deem appropriate (and the Indemnified Person need not consult with, or obtain any consent from, the Indemnifying Party in connection therewith) provided, however, that in such circumstance the Indemnifying Person may retain separate co-counsel at its sole cost and expense and participate in the defense of the Third Party Claims and have access to all information from the Indemnified Party related thereto. If such notice and evidence is given on a timely basis and the Indemnifying Party conducts the defense of the Third Party Claim but any of the other conditions in Section 7.6.2 is or becomes unsatisfied, the Indemnified Person may defend, and may consent to the entry of any judgment or enter into any compromise or settlement with respect to, the Third Party Claim; provided that, the Indemnifying Party will not be bound by the entry of any such judgment consented to, or any such compromise or settlement effected, without its prior written consent (which consent will not be unreasonably withheld, conditioned or delayed). In the event that the Indemnified Person conducts the defense of the Third Party Claim pursuant to this Section 7.6.4, the Indemnifying Party will (i) advance the Indemnified Person promptly and periodically for the costs of defending against the Third Party Claim (including reasonable attorneys' fees and expenses) and (ii) remain responsible for any and all other Losses that the Indemnified Person may incur or suffer resulting from, arising out of, relating to, in the nature of or caused by the Third Party Claim to the fullest extent provided in this Article 7.

7.6.5. Consent to Jurisdiction Regarding Third Party Claim. Each of the Parties hereby consents to the non-exclusive jurisdiction of any court in which any Third Party Claim