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 VI)

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 12”

“Exhibit 12”

RIS

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
Facsimile: (702) 471-7070
tasca@ballardspahr.com
gallm@ballardspahr.com
ewingk@ballardspahr.com

Julian W. Friedman
New York Registration No. 1110220
BALLARD SPAHR LLP
919 3rd Avenue, Floor 37
New York, New York 10022
Telephone: (212) 223-0200
Facsimile: (212) 223-1942
friedmanj@ballardspahr.com

Attorneys for Defendants Hygea Holdings Corp., Manuel Iglesias, Edward Moffly, Daniel T. McGowan, Martha Mairena Castillo, Lacy Loar, Glenn Marrichi, Keith Collins, M.D., Jack Mann, M.D., Joseph Campanella, and Carl Rosenkrantz

DISTRICT COURT

CLARK COUNTY, NEVADA

N5HYG, LLC, a Michigan limited liability company, et al., Plaintiffs, v. HYGEA HOLDINGS CORP., a Nevada corporation, et al., Defendants.	CASE NO.: A-17-762664-B DEPT NO.: 27 Hearing Date: October 3, 2018 Hearing Time: 10:30 a.m.

REPLY IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND

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One Summerlin
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135-2958

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs' Opposition does nothing to save this case from dismissal. Simply put: Plaintiffs' claims are barred by the doctrine of claim preclusion. As Plaintiffs themselves argue, they are the masters of their complaint. That mastery includes control of the causes of action Plaintiffs set forth in one court and the causes of action they choose to set forth in another based on the same facts as the first. Plaintiffs must face the preclusive consequences of taking one of those lawsuits to judgment while claims pend in the other. Plaintiffs seek to avoid the consequences of their actions by arguing (i) the Receivership Court lacked jurisdiction to enter judgment in favor of Defendants; (ii) that because the causes of action are different, Plaintiffs' claims are different too; and (iii) Defendants somehow consented to Plaintiffs' claim splitting notwithstanding Defendants' assertion of an affirmative defense on that very basis. Each of these arguments fail, and Plaintiffs have no one to blame but themselves for failing to bring all claims arising from the same facts in one lawsuit.

Even if claim preclusion did not bar the entirety of this action, Plaintiffs' claims against the Non-Guarantor Defendants fail for lack of personal jurisdiction. Plaintiffs have not pled any facts by which this Court can connect the Non-Guarantor Defendants to an activity or occurrence that took place in Nevada and at issue in the Amended Complaint. In addition, other than Plaintiff N5HYG's claim for breach of contract against Hygea and the Guarantor Defendants, Plaintiffs' non-contract-based claims against all Defendants fail as a matter of law or pleading. As set forth in the Motion and reiterated herein, Plaintiffs have not pled their Claims in Fraud with the particularity demanded by Rule 9(b). Nor have Plaintiffs pled the existence of a public offering of securities as required for their securities claims or that Plaintiffs had the requisite stock ownership or properly made demand upon the board to maintain their derivative claims. Accordingly, for the reasons set forth in the Motion and herein, Defendants respectfully request that this Court dismiss

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One Summerlin
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this case in its entirety.

I. PLAINTIFFS' CLAIMS ARE PRECLUDED AS A RESULT OF THE RECEIVERSHIP ACTION

A. The Receivership Court Rendered A Valid, Final Judgment

Plaintiffs argue that because the Receivership Court determined it lacked jurisdiction to *appoint* a receiver in its judgment, the judgment has no preclusive effect, because a "valid final judgment . . . 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." Opp., 8:10–18 (emphasis in Opp.) (quoting *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054 n. 27, 194 P.3d 709, 713 n. 27 (2008)). Opp., 8:9–9:20; *see also* Mot., Ex. A, Receivership Findings of Fact & Conclusions of Law (the "FFCL"), 21:4–7. There are two problems, however: the court reached the merits of the action and denied, rather than dismissed, Plaintiffs' claims in rendering its Findings of Fact and Conclusions of Law.

Indeed, the Receivership Court exercised substantial jurisdiction over Plaintiffs' claims. Here, the Receivership Court heard a week-long trial on the merits, in which the court heard from well over ten witnesses, including two experts. The Court then rendered two judgments: (1) judgment as a matter of law for lack of evidence at the conclusion of the plaintiffs' case-in-chief, in which the court found in the defendants' favor on the entirety of the plaintiffs' claims under NRS 78.630 and 32.010 and a portion of the plaintiffs' claims under NRS 78.650, *see* Mot., Ex C, FFCL, 4:1–5:1 and (2) findings of fact and conclusions of law at the end of trial in which the court rendered a nearly-hour-long oral ruling and judgment in the defendants' favor. *See generally* Mot., Ex C, FFCL. There is no doubt that the entirety of the plaintiffs' claims were resolved on the merits, both when the Receivership Court granted the motion for judgment as a matter of law on certain of the plaintiffs' claims at the conclusion of their case-in-chief and when it denied the

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plaintiffs' petition for the appointment of a receiver on the remaining claims at the conclusion of trial. *See id.*

In fact, the Receivership Court very carefully chose its language when it *entered judgment* in Defendants' favor following the trial of the matter, after first *denying*—not dismissing—Plaintiffs' request for appointment of a receiver. *See id.*, 21:4–9 (Plaintiffs have failed to establish . . . that this Court has jurisdiction *to appoint* a receiver . . . [, so] the Amended Complaint and Petition for Appointment of a Receiver must be . . . *denied*, and judgment is entered in favor of Defendants.") (emphasis added).[1] Thus, properly understood, the Receivership Court found that it lacked jurisdiction *to appoint* a receiver based on the plaintiffs' unsatisfactory stockholdings, not that the Court lacked jurisdiction *to hear* the plaintiffs' claims and decide whether they had established all the requirements for appointment of a receiver under NRS 78.630 and 78.650. Indeed, the Receivership Court expressly entered judgment in Defendants' favor, rather than dismissing the action, because it had resolved all of the plaintiffs' claims on the merits.

To the extent this Court determines that the Receivership Court did not decide the Receivership Action on the merits (including with respect to its judgment as a matter of law), the Court may still bar this action under the doctrine of claim preclusion, because, as held by the Fourth Circuit, "[i]t would clearly be unfair to burden [the defendant] with a second action when the fact that the first action was not decided on the merits is due solely to [the plaintiff's] *intentional* disregard of the statutory precondition." *Stebbins v. Nationwide Mut. Ins. Co.*, 528 F.2d 934, 938 (4th Cir. 1975) (emphasis added), *cert. denied* 424 U.S. 946, 96 S. Ct. 1417, 47 L.

[1] As this Court likely recalls, two of the receivership statutes under which Plaintiffs proceeded, NRS 78.650 and 78.630, demanded that the petitioning stockholder own at least 10% of the company's stock issued and outstanding.

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Ed. 2d 353 (1976).[2] In applying claim preclusion to bar the second action, the Fourth Circuit explained that "the unfairness that would result to [the defendant] from a new trial is substantial and manifest. [The defendant] not only prepared to litigate the merits of the first suit, but actually participated in a hearing on the merits." *Id.* at 937.

Here, Plaintiffs cannot dispute that they knew of the 10% stockholding precondition to appointment of a receiver under NRS 78.630 and 78.650 yet *intentionally* continued to trial without evidence that they met that precondition. Thus, any lack of jurisdiction of the Receivership Court to enter the FFCL was "due solely to [Plaintiffs'] intentional disregard of the statutory precondition." *Id.*; *see also* Mot., Ex. C, FFCL, at 17:3–18:24 (before proceeding to rule on the merits of Plaintiffs' claims, the court discussed at length how Plaintiffs failed to present evidence demonstrating that they met the stockholding requirement and proceeded to trial without doing "hardly anything" to investigate whether they met the requirement). Plaintiffs, nevertheless, forced Defendants to both prepare to litigate the merits of the Receivership Action and to participate in a full-blown, week-long trial on the merits of their claims. Plaintiffs should not get to reap the benefits of

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[2] The Fourth Circuit's decision in *Stebbins* stems from the policy pronounced by the U.S. Supreme Court in *Costello v. United States*, 365 U.S. 265 (1961) concerning the common-law principles underlying claim preclusion. Therein, the U.S. Supreme Court explained as follows:

> All of the dismissals enumerated in Rule 41 (b) which operate as adjudications on the merits -- failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law -- primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them.

Id. at 286 (1961).

their misconduct by engaging in serial litigation.

In addition, Plaintiffs do not now have standing to attack the Receivership Court's jurisdiction collaterally as they would if that court had dismissed the Receivership Action without a trial on the merits. Indeed, the United States Supreme Court has held that "[e]very court in *rendering a judgment*, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter." *Stoll v. Gottlieb*, 305 U.S. 165, 171-72, 59 S. Ct. 134, 137 (1938) (emphasis added).[3] The Receivership Court thus could not have entered judgment in Defendants' favor without at least implicitly finding that it had jurisdiction to hear Plaintiffs' claims. Had that court found that it lacked jurisdiction to hear Plaintiffs' claims, it would have simply dismissed the claims and claim preclusion would not attach.[4] Instead, the Receivership Court entered judgment denying the petition for a receiver after holding only that it did not have jurisdiction to *appoint* a receiver (as opposed to hearing a claim for appointment of a receiver), and entered a binding, final judgment in Defendants' favor.

Finally, Plaintiffs are only now arguing for the first time that the Receivership Court lacked jurisdiction to enter a judgment in Defendants' favor.

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[3] *See also Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1052-53 (5th Cir. 1987) ("A court by necessity has the authority to determine its own jurisdiction over the parties and subject matter, and does so either tacitly or expressly, *by rendering a judgment*") (emphasis added); *Hooks v. Hooks*, 771 F.2d 935, 950 (6th Cir. 1985) ("While the Dallas County court may have erred in determining that it retained continuing jurisdiction . . . , this error would merely render the order in question voidable, but not void."); *Jones v. Giles*, 741 F.2d 245, 248 (9th Cir. 1984) ("An error in interpreting a statutory grant of jurisdiction is not . . . equivalent to acting with total want of jurisdiction and does not render the judgment a complete nullity.")

[4] In fact, Hygea made both a motion to dismiss and a motion for summary judgment asking that the Receivership Court dismiss the Receivership Action based on the plaintiffs' insufficient stockholdings. The Receivership Court declined Hygea's request for dismissal and allowed the case to proceed to trial, at the conclusion of which, the court entered judgment.

Plaintiffs never argued as much before the Receivership Court. In fact, they actively argued that the Receivership Court *did* have jurisdiction.[5] Even following judgment in Defendants' favor, Plaintiffs filed a Motion to Amend the Court's Findings of Fact and Conclusions of Law, *see* Mot. at 5 n. 5., and did not raise the issue of whether the Receivership Court had jurisdiction to enter judgment instead of dismissing Plaintiffs' claims.

The U.S. Supreme Court has rejected Plaintiffs "remain quiet" and collaterally attack later approach. *See Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378, 60 S. Ct. 317, 320 (1940). The Court held that:

> The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, "but also as respects any other available matter which might have been presented to that end."

Id. (quoting *Grubb v. Pub. Utils. Com.*, 281 U.S. 470, 479, 50 S. Ct. 374, 378 (1930)).[6] Plaintiffs—who objected neither when the trial court announced its decision to enter judgment (and not dismiss for lack of jurisdiction), nor when Defendants submitted their proposed FFCL, nor in Plaintiffs' Motion to Amend the FFCL—cannot now enjoy the fruits of their silence by attempting to litigate that issue in this Court.

Rather, Plaintiffs should have brought all their claims—those for which they

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[5] *See* n. 4, above.

[6] *See also Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9, 102 S. Ct. 2099, 2104 n. 9 (1982) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment.")

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met all statutory requirements and those for which they did not—in one action. Plaintiffs cannot serially sue Defendants by picking and choosing causes of action, remedies, fora, and parties until they get a result they like. When N5HYG lost the Receivership Action following judgment as a matter of law and a full trial on the merits, the judgment therein became a bar to the claims it and its corporate parent assert herein. Plaintiffs do not (and cannot) reasonably argue that the Receivership Court—a court of general jurisdiction—would not have had jurisdiction to hear each and every claim asserted in *this* action alongside the claims over which it exercised jurisdiction in the Receivership Action.[7] Accordingly, those claims could have been brought there, and the Receivership Court could (and would) have exercised jurisdiction over the claims herein.

B. This Action Presents The Same Claims That Were Or Could Have Been Brought In The Receivership Action

1. The Amended Complaint And Receivership Complaint Are Based On The Same Facts And Alleged Wrongful Conduct

Plaintiffs suggest that for res judicata to apply, Plaintiffs must assert in the subsequent action the *exact* same grounds for recovery and seek the *exact* same relief as they did in the prior action. *See* Opp., 11:6–21. In *Five Star Capital*, however, the Nevada Supreme Court explicitly rejected this approach when it held that claim preclusion applies when "the subsequent action is based on the same

[7] Indeed, Plaintiffs ignore that they also sought appointment of a receiver under a third statutory provision in the Receivership Action: NRS 32.010. It is clear the Receivership Court had subject matter jurisdiction to hear Plaintiffs' claims because the Court resolved Plaintiffs' NRS 32.010 claim, which has no 10% stockholding requirement, on Defendants' motion for judgment as a matter of law, prior to finding it lacked jurisdiction to appoint a receiver under NRS 78.630 and 78.650. *See* Mot., Ex. C, FFCL, 4:1–6 ("[T]he Court denied Plaintiffs' request for a receiver under NRS 32.010 because . . . 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.") Again, Plaintiffs could have remedied this situation by simply bringing the claims pending before this Court as part of the Receivership Action.

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One Summerlin
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Las Vegas, Nevada 89135-2958

claims or any part of them that were or could have been brought in the first case" because "claim preclusion applies to preclude an entire second suit that is based on the same set of facts and circumstances as the first suit." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713–14 (2008).[8] In so doing, [the court] expressed [its] belief that th[e *Five Star*] test would sufficiently maintain[] the well-established principle that claim preclusion applies to *all grounds of recovery* that were or could have been brought in the first case." *Weddell v. Sharp*, 350 P.3d 80, 82 (Nev. 2015) (quoting *id.* at 1054–55, 713) (internal quotation marks omitted) (emphasis added).

Plaintiffs do not seriously dispute that the same allegations and circumstances are pled here as in the Receivership Action.[9] That is because they cannot. Indeed, Plaintiffs' counsel admitted that the Receivership Action was based, at least in part, on the same set of facts at issue here—the communications

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[8] Specifically, the *Five Star* court rejected a prior test that appeared to leave room for litigants to assert subsequent claims for different forms of relief: "[i]n light of this purpose, we considered this court's previous four-factor test for claim preclusion, and we concluded that the test was "overly rigid," as one of the factors required that the "same relief" be sought in both complaints, thereby making the test susceptible to manipulation by litigious plaintiffs. *Weddell*, 350 P.3d at 82 (quoting *Five Star*, 124 Nev. at 1053–54, 194 P.3d at 712–13). The Plaintiffs here are the very litigious types whose machinations the *Weddell* court sought to bar.

[9] Plaintiffs argue without explanation that Defendants' table of substantively identical allegations from the two actions, *see* Mot. at 8–10, is "meaningless" because Defendants identified background and context allegations. *See* Opp. This is not the case—Defendants took *every* substantive allegation in the Receivership complaint and listed at least one substantively indistinguishable allegation contained in the First Amended Complaint herein. Defendants could not identify a single substantive Receivership Allegations that is not pled here as well. Nor did Plaintiffs identify a single such substantive allegation in their Opposition. If the allegations from the two lawsuits were displayed as a Venn diagram, it would merely be one smaller circle—the Receivership Action allegations—within a larger circle—the First Amended Complaint allegations. In other words, the Receivership Action allegations are entirely subsumed by the allegations in the First Amended Complaint.

between N5HYG (or its agents) and Hygea, as well as the information provided to N5HYG by Hygea, leading up to the time at which the SPA was executed:

> I do think that the *fact of* ***the representations and the information provided in 2016*** does have some ***probative value here*** because if there were ***inaccuracies*** or if there was ***anything misleading*** about that information, that gets to the misfeasance, malfeasance, and nonfeasance criteria.

Mot., Ex. H, Condensed Tr. Transcr., 289:2–7.

Because Plaintiffs cannot meaningfully dispute that the claims herein are based on the same set of facts, Plaintiffs instead misapply the *Five Star* test, arguing that "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." Opp., 11:8–12. The test, however, is simply whether the grounds for recovery asserted here "*could have been* brought in the first case." *Five Star*, 124 Nev. at 1053–54, 194 P.3d at 712–13 (emphasis added). The problem, of course, is that Plaintiffs never convincingly explain why they could not have brought the claims asserted herein within the Receivership Action.

2. Defendants Are Not Estopped From Arguing That All Claims Could Have Been Brought In the Receivership Action

Plaintiffs make a variety of arguments as to why Defendants are estopped from arguing that Plaintiffs could have brought the Receivership Action in this case. First, Plaintiffs claim they could not have brought their claims for appointment of a receiver under NRS 78.650 and 78.630 in federal court because those statutes vest jurisdiction exclusively in Nevada state court. This argument, however, is immaterial because Defendants are not arguing that Plaintiffs should have sought the appointment of a receiver in this case as it pended in federal court. Defendants are arguing that Plaintiffs could have brought the claims herein in the Receivership Action. Thus, it matters not whether the federal court could have appointed a

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receiver under NRS 78.650 or 78.630.

However, to the extent this issue matters, the Ninth Circuit has long-opined that a federal court sitting in diversity can take jurisdiction of an action grounded in NRS 78.650 and 78.630. *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 273 (9th Cir. 1964). Indeed, in *Backman v. Goggin*, No. 2:16-CV-1108 JCM (PAL), 2017 U.S. Dist. LEXIS 37342, at *10-11 (D. Nev. Mar. 15, 2017), the U.S. District Court for the District of Nevada dismissed a claim made under NRS 78.650, not because the court was without authority to hear the claim, but because the company at issue was a Massachusetts corporation with a Massachusetts principal place of business, and therefore, NRS 78.650 did not govern.[10]

Plaintiffs also argue that because Hygea insisted that the Receivership Action be transferred to the First Judicial District, Defendants cannot now argue that Plaintiffs could have brought the claims herein in the Receivership Action, particularly in light of the parties' contractual forum selection clause, which requires that claims arising under the SPA be brought in the courts of Clark County, Nevada. This argument makes no sense and merits little response. Forum selection clauses are not an absolute bar to litigating in fora other than the contractually chosen forum. If a forum selection clause leads to an unreasonable result, such as claim-splitting, a court may decline to enforce the clause. *See Tandy Comput. Leasing, Div. of Tandy Elecs. v. Terina's Pizza*, 105 Nev. 841, 844, 784 P.2d 7, 8 (1989) (declining to enforce a forum selection clause where doing so would be

[10] Even if these federal courts were wrong about their authority to hear claims made under NRS 78.650 and 78.630, Plaintiffs could have moved for the appointment of a receiver in federal court under NRS 32.010, which does not have a locality requirement, and/or sought a receiver under the federal common law of receiverships.

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1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135-2958

unreasonable and unjust).[11]

Accordingly, if Plaintiffs were worried that Defendants would have sought to enforce the forum selection clause, Plaintiffs could have asked the Receivership Court to decline to enforce the provision. Plaintiffs did not. Instead, Plaintiffs now ask this Court to speculate about what might have happened, even though Plaintiffs did "hardly anything" to ensure that their claims were protected from preclusive consequences they now face. This Court, however, is not in the business of speculation. It should therefore apply the doctrine of claim preclusion based on the facts before it, those being: (1) Plaintiffs filed this action based on the same facts and circumstances giving rise to the Receivership Action; (2) Plaintiffs could have brought the claims herein in the Receivership Action (or vice versa); but (3) Plaintiffs chose to proceed in two different fora.

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3. A Receivership Action Precludes A Second Action Based On The Same Facts And Circumstances

Plaintiffs also argue that 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). Plaintiffs, however, misconstrue and misapply *Johnson*. Therein, the plaintiff sought the appointment of a receiver under count one of his complaint

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[11] *See also The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16, 92 S. Ct. 1907, 1916 (1972) (explaining that "a forum clause, even though it is freely bargained for and contravenes no important public policy of the forum, may nevertheless be 'unreasonable' and unenforceable"); *Bronstein v. United States Customs & Border Prot.*, No. 15-cv-02399-JST, 2016 U.S. Dist. LEXIS 28998, at *34 (N.D. Cal. Mar. 7, 2016) (declining a motion to transfer venue based on a forum selection clause that would lead to the court to split claims arising out of the same facts); *Curwood Inc. v. Prodo-Pak Corp.*, No. 07-C-544, 2008 U.S. Dist. LEXIS 18295, 2008 WL 644884, at *6-7 (E.D. Wis. Mar. 7, 2008) (explaining that in considering a motion to transfer pursuant to 28 U.S.C. § 1404, the court found that even though the forum selection clause applied to some of the plaintiff's claims, it didn't apply to others, and in the interests of judicial economy, the court declined to split the claims and kept the entire suit); *Vetter v. Rust Consulting, Inc.*, 2013 Minn. Dist. LEXIS 141, *19 (same).

and lodged a derivative claim under count three of his complaint. *See id.* at 677–78. The plaintiff then made a motion for the appointment of a *temporary* receiver, which the lower court denied. *See id.* The defendant then used the order denying the interlocutory appointment of a *preliminary* receiver to argue that the plaintiff could not proceed to trial with her *permanent* receivership claim, convincing the district court to grant summary judgment on the receivership claim based on the Court's prior denial of the plaintiff's motion for preliminary relief in the form of a receiver "pendente lite."[12] *See id.*

Here, N5HYG brought its case for the appointment of a receiver not "pendente lite" as an ancillary remedy to this instant action but as a separate and independent case under NRS 78.650 and 78.630. Indeed, N5HYG reiterated in its Opposition what it repeatedly argued in the Receivership Action: that the Receivership Action was distinct from the instant action. *See* Opp., 16, n. 13. Thus, if anyone is now estopped, it is N5HYG from claiming that the Receivership Action was merely ancillary to this lawsuit.

Moreover, and most distinguishable from *Johnson*, is the fact that the *trial on the merits* in the Receivership Action was advanced and consolidated with the hearing on N5HYG's petition for appointment of a receiver. *See* Mot., 6:9–7:9 (setting forth procedural history of the Receivership Action). The ground for *res judicata* in *Johnson* was based on an interlocutory denial of a motion for a receiver *pending litigation*, and not a trial on the merits for appointment of a receiver, and, therefore, could not have acted as a final adjudication on the merits. The same circumstance existed in *C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 597 P.2d 1190 (N.M. App. 1979), on which *Johnson* relies.

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[12] "Pendente lite" means "while the action is pending." Black's Law Dictionary 1248 (6th Ed. 1991).

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Stated differently, the orders granting summary judgment in both *Johnson* and *C & H Constr.* were merely incidental to the progress of the receivership. Indeed, the court in *SAO Realty, Inc. v. Second St. Realty, LLC*, No.: 00-3643, 2006 R.I. Super. LEXIS 153, at *10 (Super. Ct. Nov. 2, 2006), recognized this distinction and distinguished *C & H Constr.*, explaining that "[a]ssuming, arguendo, that the assignment of a receiver is not a final judgment, it does not automatically follow that the outcome of receivership proceedings is not either." *Id.* at *10. Here, Defendants obtained a final judgment on the merits in the Receivership Action, which necessarily determined the merits of Plaintiffs' claim for the appointment of a receiver based on the same facts presented here.

Also, if this Court took Plaintiffs' argument regarding *Johnson* and receivership actions to its logical conclusion, it would not only mean Plaintiffs could avoid the rule demanding that all claims based on the same facts be brought in one action; it would also mean Plaintiffs could file successive actions under NRS 78.650 and 78.630, whereby no subsequent action for the appointment of a receiver would be barred by a prior action for the same. This is precisely what claim preclusion is designed to prevent. Indeed, there are numerous cases in which claim preclusion worked to preclude a second lawsuit that asserted different claims arising from the same facts as a first-decided receivership action. *See, e.g., McAllen N. Imaging, Inc. v. Hernandez (In re Hernandez)*, Nos. 10-70844, 11-07010, 2013 Bankr. LEXIS 2340, at *16-19 (Bankr. S.D. Tex. May 30, 2013) (precluding plaintiff's second action seeking damages for fraud given that plaintiff's first action seeking the appointment of a receiver on the same facts was dismissed with prejudice); *Thayer v. Diver*, No. CI05-1011, 2007 Ohio Misc. LEXIS 5483, at *29 (Ct. Com. Pl. Nov. 20, 2007) (finding plaintiff's claims in the instant action were barred by res judicata because he had an opportunity to litigate his claims during the pendency of his prior receivership action but chose not to do so); *Gunn v. James*, 120 Ga. 482, 48 S.E. 148

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(1904) ("Where an equitable petition was filed, praying for an injunction and the appointment of a receiver, and at the trial term a general demurrer was sustained and the petition dismissed, and thereafter the plaintiff filed another equitable petition, setting up the same cause of action but elaborating the details, and praying, besides the relief sought in the first, other and additional relief, a plea of res judicata, filed in bar of the second petition, should have been sustained.")

Finally, Plaintiffs argue that bringing the claims herein in the Receivership Action would have made that lawsuit unwieldy because there were multiple plaintiffs in that action. Opp., 11:14–21. This argument not only fails to explain why Nevada courts are unable to adjudicate "unwieldy" litigation, it also flies in the face of N.R.C.P. 18, which expressly provides that "[a] party asserting a claim . . . may join . . . *as many claims, legal or equitable or both* as the party has against an opposing party. *Id.* (emphasis added.)[13] In short, Plaintiffs could have brought the claims they make herein in the Receivership Action but chose not to. They must now face the preclusive consequences of that decision.

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4. Defendants Did Not Acquiesce or Consent to Claim Splitting

Plaintiffs argue that Defendants acquiesced to claim splitting during the course of the Receivership Action. However, Defendants' acquiescence or lack thereof is immaterial because a plaintiff may freely split a cause of action between federal and state courts, ***albeit at the risk of claim preclusion***. *See Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) (explaining that a pending state-court action "is no bar to proceedings concerning the same matter in the

[13] Beyond the apparent irony of Plaintiffs expressing new-found concern about initiating "unwieldy litigation," complexity in litigation is not a basis for splitting claims. Plaintiffs provide no authority for the proposition that the potential for complex litigation somehow suspends application of claim preclusion, particularly when the rules of civil procedure have long encouraged permissive joinder of parties and claims, with the specific goal of *promoting* judicial efficiency.

Federal court having jurisdiction"); [14] *Carter v. City of Emporia*, 815 F.2d 617, 621 (10th Cir. 1987) (explaining that a plaintiff "may freely split a cause of action between federal and state courts and pursue both actions," though noting the risk of claim preclusion); *Klane v. Mayhew*, No. 1:12-cv-00203-NT, 2013 U.S. Dist. LEXIS 42053, at *17-18 (D. Me. Mar. 26, 2013) (same). Thus, Defendants had no vehicle to stop Plaintiffs from splitting their own claims, but at the same time, had no obligation to save Plaintiffs from themselves.

Even if acquiescence mattered, Defendants did not acquiesce. Indeed, in case Defendants were wrong about the law on claim splitting, Defendants expressly objected to such in their answer to the amended complaint. **Ex. 1**, Receivership Action, Answer to First Amended Complaint at 11-12, Fifth Affirmative Defense ("Defendants assert that this action constitutes impermissible claim splitting given the first filed lawsuit by Plaintiff N5HYG LLC . . . .") Plaintiffs ignore the fact of that objection and instead present a bullet list of statements by Defendants or their counsel, *see* Opp., 14–15, that purportedly reflect Defendants' consent. Such statements, however, in no way signaled acquiescence to claim splitting.

Those statements merely pointed out to the Receivership Court that N5HYG could not enforce a claim for breach of contract when it had made no such claim in the Receivership Action, and, for the same reason, N5HYG should not be permitted discovery for its claim for breach of contract. *See* N.R.C.P. 26 (allowing discovery only of information relevant to *claims made* in the lawsuit). Courts in other jurisdictions have found that this does not equal consent to claim splitting. *Cf. Riel*

[14] *See also Rutledge v. Arizona Board of Regents*, 859 F.2d 732, 736 (9th Cir. 1988) ("[W]here there is concurrent jurisdiction . . . it is permissible for a plaintiff to file parallel state and federal actions simultaneously"); *Steinberg v. Nationwide Mut. Ins. Co.*, 418 F. Supp. 2d 215, 223 (E.D.N.Y. 2006) ("[C]laim-splitting does not apply to parallel state and federal actions").

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v. Stanley, No. 06 CV 5801 (TPG), 2009 U.S. Dist. LEXIS 68767, at *16 (S.D.N.Y. Aug. 5, 2009) (explaining that a defendant does not consent to claim splitting where he "(1) raises an objection to claim splitting prior to the entry of a final judgment in either of the related cases and (2) does not affirmatively represent that he consents to the actions proceeding separately . . . because an objection raised prior to the entry of any final judgment puts the plaintiff on notice of the claim splitting problem and potential res judicata implications of inviting judgment against himself in one of the parallel actions.")

C. The Parties Between The Receivership Action And This Action Are The Same Or In Privity With One Another

Plaintiffs argue that because there is not a complete mutuality of parties between this action and the Receivership Action, claim preclusion does not apply.[15] This is the incorrect inquiry. The correct inquiry is whether (i) the parties *or their privies* are the same in the instant lawsuit as they were in the previous lawsuit, or (ii) the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a good reason for not having done so. *Weddell v. Sharp*, 350 P.3d at 85. There is no doubt that N5HYG was a party to the first action, and Plaintiffs have conceded that N5HYG and Nevada 5 share privity because N5HYG is a wholly-owned subsidiary of Nevada 5. *See* Mot., 13:4–23; *Mendenhall v. Tassinari*, 403 P.3d 364, 369, 133 Nev. Adv. Rep.

[15] This policy would result in absurd results and nefarious litigation strategies. Any plaintiff could ensure she got multiple shots at litigation by simply joining with other plaintiffs. If the desired result is not obtained in the first multi-plaintiff lawsuit, the plaintiff could just find a few more plaintiffs, file a second action, then argue in the second lawsuit that claim preclusion did not apply because those plaintiffs present in the first action were no longer parties to the second action. This could go on for as long as the litigant could find other plaintiffs to join her.

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78 (2017).[16] Plaintiffs also argue that there are three additional defendants here who were not named in the Receivership Action. Plaintiffs, however, ignore that these defendants are in privity with Hygea and/or are subject to non-mutual claim preclusion, both as further set forth in the Motion. Mot., 14.

D. N5HYG Improperly Used The Receivership Trial To Seek Evidence Relevant To The Claims In This Action

Finally, Plaintiffs argue that because they did not seek discovery on all topics relevant to this action, they did not use the Receivership Action to end-run discovery here. That argument, however, is belied by the Amended Complaint and by Plaintiffs' Opposition, both of which rely on Defendants' conduct and testimony in the Receivership Action. *See* Mot., 16:11–17:2 (setting forth supplemental allegations based on evidence ascertained in the Receivership Action);[17] see also Opp., 22:9–23:26 (arguing that "Defendants' conduct *in the Receivership Action* precludes their argument [regarding personal jurisdiction] here") (emphasis added); Opp., 19:10–16 (arguing that the supplemental allegations in Plaintiffs' First Amended Complaint are not supplemental because they set forth testimony from the Receivership Action substantiating allegations from prior to the filing of this lawsuit). Plaintiffs' motivation for proceeding in two different fora is clear: to seek discovery in the state forum while their claims were stayed by the court in the

[16] Plaintiffs suggest that the other plaintiffs to the Receivership Action could also assert their own damages claims related to the same facts that supported the complaint in the Receivership Action. This is not true. They too are barred from re-litigating those facts, just as Plaintiffs are here. This argument actually demonstrates why Plaintiffs should be claim precluded. Under Plaintiffs' position, each of the fourteen plaintiffs to the Receivership Action could bring a separate twenty-one cause-of-action complaint against Defendants.

[17] Because they are not addressed in the Opposition, Plaintiffs appear to have conceded that these allegations are based on evidence from the Receivership Action, as argued in Defendants' Motion. *See id.*; *see also* Am. Compl., ¶¶ 29, 66, 70, 76(b), & 76(c) (setting forth allegations derived from evidence in the Receivership Action).

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federal forum. They did so, however, at the risk of claim preclusion. Plaintiffs should not now get a second bite at the apple with the benefit of the evidence and hindsight obtained from taking the first bite.

II. NEVADA 5 LACKS STANDING AND IS NOT THE REAL PARTY IN INTEREST

Plaintiffs argue that Nevada 5 is a proper party-plaintiff for five reasons: (1) Defendants' purported misrepresentations were made to Nevada 5, through its agent RIN, and not N5HYG; (2) Nevada 5 formed N5HYG to purchase Hygea stock based on Plaintiffs' misrepresentations; (3) Nevada 5 should be considered to have purchased Hygea stock if the term "buyer" is expanded to include anyone involved in the selling process; (4) Hygea conceded in its insurance coverage action that Nevada 5 has claims against Hygea and is now estopped from arguing otherwise; and (5) Defendants have not argued that Nevada 5 failed to plead its claims. As explained below, all five arguments fail.

As to Plaintiffs' first argument, if it is Plaintiffs' contention that Defendants made their purported misrepresentations to Nevada 5, and not N5HYG, then the claims for or grounded in fraud brought by N5HYG must be dismissed. Plaintiffs cannot have it both ways: Defendants made the misrepresentations to either Nevada 5 or N5HYG, but not both.[18] Relatedly, and as to Plaintiffs' second argument, if it is Plaintiffs' contention that Nevada 5, and not N5HYG, suffered the consequences of Defendants' alleged misrepresentations, then Plaintiffs must clearly identify those purported consequences and the damages thereof. However,

[18] In fact, Plaintiffs' Amended Complaint alleges that "[t]hese representations were made to personnel of RIN Capital[, and] RIN Capital served at all relevant times as Plaintiffs' agent." Am. Compl., ¶ 35, p. 6:19–20. Accordingly, if Plaintiffs' theory is that only the entity/individual to which/whom the alleged misrepresentation was made has standing, then neither N5HYG nor Nevada 5 has standing—in theory, it is only RIN Capital who *might* have standing to assert the claims.

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Plaintiffs' allegations concern the damages *N5HYG* purportedly suffered as a result the stock it purchased based on Defendants' purported misrepresentations. If Nevada 5 has been harmed *by virtue of* its subsidiary's purchase, then Nevada 5's damages are merely derivative and duplicative of those purportedly suffered by N5HYG. As set forth in the Motion, courts in other jurisdictions have specifically found that alleged wrongdoing to a subsidiary does not confer standing upon the parent corporation, even where the parent is the sole shareholder of the subsidiary. *See* Mot., 17:21–18:6 (citing cases in support).

As to Plaintiffs' third argument, Plaintiffs ask this Court to expand the logical meaning of "buyer" to include a stockholder's parent corporation because neither the federal nor state securities laws define "buyer." The Court should not be persuaded by Plaintiffs' ill-founded argument that belies the plain meaning of "buyer." As set forth by the SPA, only one party-plaintiff purchased Hygea stock, that being N5HYG. There is no allegation that Nevada 5 purchased or ever owned or possessed Hygea stock. *See generally* Am. Compl.

As to Plaintiffs' fourth argument, the fact that Hygea, in an action to enforce insurance coverage, pointed out the existence of Nevada 5's claims in this lawsuit, does not mean that Hygea concurrently took the position that Nevada 5 has standing to bring such claims, as would be required for estoppel to apply. *Cf. NOLM, Ltd. Liab. Co. v. Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) ("The doctrine generally applies when (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.") Indeed, Hygea stated no more than the following facts in the coverage action: (i) Hygea has been sued by Nevada 5, and as a result (ii) Hygea faces exposure to

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Nevada 5's claims. As all litigants know, liability is never fully foreclosed in litigation because attorneys and courts make mistakes. This is true even when a plaintiff's claims are wholly without merit—like Nevada 5's claims here.

As to Plaintiffs' fifth argument, Defendants are confused as to how Plaintiffs can assert that Defendants did not argue Nevada 5's failure to plead its claims. Defendants argued throughout their Motion that such claims failed as a matter of law or as a matter of pleading. *See generally* Mot.

III. THIS COURT LACKS PERSONAL JURSIDICTION OVER THE NON-GUARANTOR DEFENDANTS

Plaintiffs ignore the over-arching requirement for specific jurisdiction,[19] that being "an affiliatio[n] between the forum and the underlying controversy (i.e., an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation)." *Walden v. Fiore*, 571 U.S. 277, 283 n.6, 134 S. Ct. 1115, 1121 (2014) (internal quotations omitted). Instead of identifying what activity at issue took place *in Nevada* and how the Non-Guarantor Defendants were involved in such activity, Plaintiffs make three arguments that have been rejected by the U.S. and/or Nevada Supreme Courts or are factually incorrect.

First, Plaintiffs argue that the Non-Guarantor Defendants' relationship with Nevada 5 confers specific jurisdiction upon this Court. Opp., 21:11–16. More particularly, Plaintiffs argue that the Non-Guarantors approved the sale of stock to Nevada 5 and continue to violate their duties to Nevada 5, and therefore, this Court has specific jurisdiction over the Non-Guarantor Defendants given that Nevada 5 is a Nevada corporation. This argument, however, ignores that Nevada 5 never owned Hygea stock, and thus, does not have standing to maintain its claims (as argued

[19] Plaintiffs concede that this Court lacks general personal jurisdiction over the Non-Guarantor Defendants by not addressing the matter in the Opposition.

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above). Even if Nevada 5 had standing, it is well-settled that:

> [T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is *the defendant's conduct* that must form the necessary connection with the forum State that is the basis for its jurisdiction over him. . . . To be sure, a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction. Due process requires that a defendant be haled into court in a forum State *based on his own affiliation with the State*, not based on the "random, fortuitous, or attenuated" contacts he makes by interacting with other persons affiliated with the State.

Walden v. Fiore, 571 U.S. 277, 285-86, 134 S. Ct. 1115, 1122-23 (2014) (emphasis added.) Thus, even accepting all of the allegations in the Amended Complaint as true, Defendants (*at most*) injured N5HYG, an entity that is indisputably a citizen of Michigan. *See, e.g.*, Am. Compl., ¶ 24. Any harm suffered by Nevada 5 as a result of its membership in N5HYG is derivative of the direct injury to N5HYG. Nevada 5's fraudulent joinder to this lawsuit is nothing more than a transparent attempt to confer personal jurisdiction on this Court over the Non-Guarantor Defendants by way of Nevada 5's status as a Nevada citizen.

Second, Plaintiffs argue that specific jurisdiction exists over all Non-Guarantor Defendants because some Non-Guarantor Defendants are or were officers of the Company. To support this argument, Plaintiffs misquote a decision rendered by the U.S. District Court for the District of Arizona, in which the federal court held that "[h]olding one's self out as an officer in an *Arizona* corporation is sufficient to subject an individual to specific jurisdiction in *Arizona* for torts allegedly committed in connection with the *Arizona* corporation." *R. Prasad Indus. v. Flat Irons Envtl. Sols. Corp.*, No. CV-12-08261-PCT-JAT, 2017 U.S. Dist. LEXIS 164541, at *4 (D. Ariz. Oct. 4, 2017) (emphasis added). Stated differently, the court's holding was limited to *Arizona* corporations. However, in their Opposition,

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see Opp., 22:3–8, Plaintiffs replaced "Arizona" with "Nevada," in an attempt to avoid the Nevada Supreme Court's plain directive that "a [nonresident] individual's position as a *Nevada* corporation's director does not automatically subject that individual to [specific] jurisdiction in *Nevada*." *Consipio Holding, BV v. Carlberg*, 128 Nev. 461, 282 P.3d 751, 757 (2012) (emphasis).

Third, Plaintiffs argue that this Court has personal jurisdiction over the Non-Guarantor Defendants because they were effectively served in Nevada. This is patently untrue, as evidenced by Plaintiffs' proofs of service filed with this Court. *See* **Ex. 2**, Compilation of Proofs of Service (showing process server for each individual defendant attesting to making personal service of the complaint and summons on each defendant in a state other than Nevada). Defendants are thus confused by Plaintiffs' factually incorrect assertion. It seems that Plaintiffs may be trying to imprint N5HYG's service upon Hygea's current directors in the Receivership Action to the Non-Guarantor Defendants in this action when Plaintiffs suggest that certain of the Non-Guarantor Defendants consented to personal jurisdiction *in this action* when they participated in the Receivership Action. But this argument also fails. In *this* action, no individual defendant was served with the summons and/or complaint either (i) personally in the state of Nevada or (ii) through Hygea's registered agent under NRS 75.160. *See id.*

It is not enough to confer personal jurisdiction on this Court with respect to *this* action that certain of the Director Defendants happened to be served under NRS 75.160[20] in a separate, later-filed action. It is instead well settled that "[w]hen

[20] Even if Plaintiffs had properly served the Non-Guarantor Defendants in this case under NRS 75.160, that statute alone is not sufficient to confer personal jurisdiction over a Nevada corporation's directors or officers, as it only provides for a method of service. A statute cannot in and of itself confer personal jurisdiction, which is controlled by the U.S. Constitution and federal law interpreting the Constitution.

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a court is exercising specific jurisdiction over a defendant, arising out of or related to the defendant's contacts with the forum, the fair warning that due process requires arises not at the time of the suit, but when the events that gave rise to the suit occurred." *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987) (emphasis added) (internal quotation marks and citations omitted). Indeed, "[o]nly contacts occurring prior to the event causing the litigation may be considered." *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913 (9th Cir. 1990). Plaintiffs filed their original complaint in this action on October 5, 2017. As a practical matter, then, any event "causing the litigation" must have occurred prior to October 5, 2017. *Cf. id.*

Hygea agreed that N5HYG could amend the complaint in the Receivership Action so as to add Hygea's current directors as defendants on April 17, 2018. **Ex. 3**, Receivership Action, Stipulation and Order. Moreover, the current directors first participated in the Receivership Action by joining in an answer to the amended complaint on April 30, 2018. **Ex. 1**, Receivership Action, Answer to First Amended Complaint. Accordingly, the contacts Plaintiffs seek to rely on for purposes of personal jurisdiction took place, at earliest, more than six months after any event(s) underlying Plaintiffs' complaint herein. These later contacts have no bearing on the Court's jurisdictional analysis for purposes of this lawsuit.

Indeed, this Court must decide for itself—based on the conduct alleged *in this case*—whether any Non-Guarantor Defendant has maintained sufficient minimum contacts with the State of Nevada to support the Court's jurisdiction. This is consistent with the long-standing rule that determination of due process associated with specific jurisdiction is performed on a case-by-case basis. *See Forsythe v. Overmyer*, 576 F.2d 779, 783 (9th Cir. 1978) (holding that "it must be cautioned that questions of personal jurisdiction admit of no simple solutions and that ultimately due process issues of reasonableness and fairness must be decided

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on a case-by-case basis"). Plaintiffs, however, have failed to put forth any facts by which this Court can connect the Non-Guarantor Defendants to a relevant occurrence alleged to have taken place in this State. Accordingly, this Court must dismiss the Non-Guarantor Defendants from this lawsuit for lack of personal jurisdiction.

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One Summerlin
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135-2958

IV. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. The SPA's Integration Clause And The Parol Evidence Rule Bar Plaintiffs' Causes of Action For and Grounded in Fraud

Plaintiffs do not dispute that the SPA contains a valid and binding integration clause. Rather, Plaintiffs argue that the SPA's integration clause does not bar their Claims in Fraud[21] because courts allow parol evidence to prove fraudulent inducement. Opp., 25:5—26:13. Plaintiffs, however, ignore the Nevada Supreme Court's unambiguous holding that "when a fraudulent inducement claim contradicts the express terms of the parties' integrated contract, it fails as a matter of law." *Rd. & Highway Builders, Ltd. Liab. Co. v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 386, 284 P.3d 377, 378 (2012).

Plaintiffs' base their Claims in Fraud on alleged pre-SPA representations that contradict the terms of the SPA. *See* Am. Compl. ¶¶ 33–44. Specifically, Plaintiffs' allegations about Defendants' misrepresentations regarding the

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[21] Plaintiffs make the following Claims in Fraud:

- Violation of NRS 90.570 and 15 U.S.C. § 77q (First and Second Causes of Action);
- Common Law Fraud (Seventh Cause of Action);
- Negligent Misrepresentation (Eighth Cause of Action);
- Silent Fraud/Material Omission (Ninth Cause of Action);
- Breach of Fiduciary Duty (Twelfth Cause of Action);
- Breach of Duty of Candor (Thirteenth Cause of Action);
- Breach of Duty of Loyalty (Fourteenth Cause of Action);
- Minority Shareholder Oppression (Fifteenth Cause of Action);
- Civil Conspiracy (Seventeenth Cause of Action);
- Concert of Action (Eighteenth Cause of Action); and
- Constructive Fraud (Twentieth Cause of Action)
- Breach of Duty of Loyalty (Fourteenth Cause of Action);
- Minority Shareholder Oppression (Fifteenth Cause of Action);
- Civil Conspiracy (Seventeenth Cause of Action);
- Concert of Action (Eighteenth Cause of Action); and
- Constructive Fraud (Twentieth Cause of Action)

See Mot., Ex. G, Table 1 (setting forth all of Plaintiffs' twenty-one causes of action, which Plaintiffs assert each cause of action, and which Defendants are Defendants to each cause of action)

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"financial strength" of the Company or any intent to "go public" contradict the SPA's indications that Plaintiffs were relying on their own due diligence in making a financial assessment regarding the Company, including its potential to "go public" after Plaintiffs' investment. *See* Mot., Ex. A, SPA, § 2.2, § 4.6, § 8.4. Accordingly, the Claims in Fraud must be dismissed, as both the Integration Clause and the parol evidence rule bar Plaintiffs from introducing any evidence, including that of representations or intent, outside the SPA.

Further, even if the Court ignored Plaintiffs' representation that they relied on their own due diligence, Plaintiffs allege and admit that the SPA incorporated all of Defendants' alleged financial misrepresentations.[22] *See, e.g.*, Am. Compl., ¶¶ 47 & 50 (setting forth all of the financial statements that Hygea warranted were true and accurate, which financial statements would include all of the purportedly inaccurate information Hygea provided to N5HYG or its agents). That being the case, Plaintiffs do not have a fraud in the inducement claim.

B. Plaintiffs Failed to State Their Claims For and Grounded in Fraud With the Particularity Demanded by N.R.C.P. 9(b)

Plaintiffs do not dispute Rule 9(b)'s applicability to their Claims in Fraud.[23] Rather, Plaintiffs claim that they satisfied the Rule's heightened pleading burden as to each Claim in Fraud. Plaintiffs are mistaken and ignore longstanding law on what is required to satisfy Rule 9(b)'s pleading obligations when asserting fraud-

[22] Plaintiffs' "fraud" claims based on Hygea's failure to "go public," are, by Plaintiffs' own pleadings, forward-looking statements that cannot form the basis for fraud. Defendants did not pretend to predict the future. That being the case, the only purported misstatements that could form the basis for fraud claims are statements related to Hygea's financial condition.

[23] Plaintiffs claim that Defendants do not substantively dispute their common law fraud liability. Plaintiffs are wrong: Defendants vehemently dispute their liability. However, a motion to dismiss is not the proper vehicle to make fact-based arguments.

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based claims.

As Plaintiffs concede in their Opposition, a complaint alleging fraud must not only state what is false but also *why it is false*.[24] Opp., 27:26–27. Plaintiffs provide a bullet list of purported pre-SPA misrepresentations[25] in their Opposition, *see* Opp., 29–31, and therein attempt to identify the particulars of the "who, what, and when" of fraud. However, glaringly absent from Plaintiffs' list is the "*why.*" For instance, Plaintiffs repeatedly allege that Defendants made misrepresentations regarding Hygea's "favorable financial performance," *see* Am. Compl. ¶ 41(a)–(n), but neither identify the purportedly inaccurate financial figures with any specificity nor explain how such (unidentified) figures turned out to be inaccurate.

Moreover, Plaintiffs continue to rely on impermissible group pleading with regard to the Non-Guarantor Defendants, lumping them with the Guarantor Defendants. *See Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (discussing the federal counterpart to N.R.C.P. 9(b) and dismissing plaintiff's fraud claims because plaintiff "lumped" the defendant at issue with the other defendants.) In fact, Plaintiffs fail to identify any representation made by any Non-Guarantor, much less any *mis*-representation. *See generally* Am. Compl.

Rather, Plaintiffs attempt to save their Claims in Fraud against the Non-Guarantor Defendants by pointing to conclusory allegations that such defendants knew or should have known that the information Plaintiffs received from Hygea and/or the Guarantor Defendants was false. *See* Opp., 30. Such allegations,

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[24] *See Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874, 874 (1981) ("The circumstances that must be detailed include averments to the time, the place, the identity of the parties involved, and the nature of the fraud or mistake.")

[25] Again, given the SPA's integration clause, Plaintiffs cannot introduce misrepresentations allegedly made outside the SPA for purposes of establishing their Claims in Fraud. See Mot., 21:13–23:14; Section IV.A above.

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however, *at best* set forth that element of fraud demanding that defendants have knowledge that the misrepresentation was false.[26] Such allegations do not set forth that element of fraud demanding that there first be a misrepresentation, or that requirement of Rule 9(b) demanding that Plaintiff attribute the misrepresentation to a particular defendant. In short, Plaintiffs' allegations do not provide any Defendant with the notice needed to defend him-, her-, or itself against the Claims in Fraud.

C. Plaintiffs Do Not Have Any Viable Claim for Violation of the Federal Securities Laws

1. Plaintiffs Do Not Have Any Viable Claim for Federal Statutory Securities Fraud (Second Cause of Action)

Plaintiffs concede that Section 12(a)(2) of the Securities Act demands a public offering but argue that the SPA constitutes a public offering because they alleged as much in the Amended Complaint. Opp., 32:1–2 ("The FAC alleges at length that the shares at issue were issued as part of a public offering.") However, Plaintiffs' conclusory allegations of "public offering" are contradicted by the reality of the transaction, as evidenced by the SPA and Plaintiffs' other allegations reflecting a privately negotiated transaction. *See* Mot., Ex. A, SPA; Am. Compl. ¶¶ 41 n.1 & 41(a).

Indeed, Plaintiffs' contention that the SPA constituted a private offering is belied by the very test they cite for determining an offering's nature. As Plaintiffs

[26] Plaintiffs assert that the Non-Guarantor Defendants knew that the representations made by Hygea and/or the Guarantor Defendants were false because the SPA contractually imputed their knowledge upon the Non-Guarantor Defendants. However, a contracting party, such as Hygea and/or the Guarantor Defendants, cannot bind non-contracting parties, such as the Non-Guarantor Defendants.

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point out, courts employ a multi-factor test to determine whether a transaction involves a public offering in the context of the Securities Act. Courts consider: "(1) the number of offerees; (2) the sophistication of the offeree; (3) the size and manner of the offering; and (4) the relationship of the offerees to the issuer." *S.E.C. v. Murphy*, 626 F.2d 633, 644-45 (9th Cir. 1980). These factors aid courts in determining whether the offeree needs the protection of the Securities Act. *Id.* at 644. However, an examination of these factors with respect to N5HYG reveals that it did not, and does not, need any such protection.

With respect to the number of offerees, "the more offerees, the more likelihood that the offering is public." *Id.* at 645. Here, Plaintiffs alleged only one offeree: N5HYG. *See generally* Am. Compl. (failing to set forth the existence of—let alone identify of—any other offeree).

With respect to the sophistication of the offeree, Plaintiffs do not allege that they were inexperienced investors. On the contrary, Plaintiffs make a series of allegations from which N5HYG's sophistication is apparent, such as its use of RIN Capital, a private equity firm, as its agent. *See, e.g.*, Am. Compl., ¶¶ 35 & 41 (setting forth the immense amount of financial data requested by and reviewed by RIN Capital).

With respect to the size and manner of the offering, "if an offering is small and is made directly to the offerees rather than through the facilities of public distribution such as investment bankers or the securities exchanges, a court is more likely to find that it is private." *Murphy*, 626 F.2d at 646 (internal quotations omitted). Plaintiffs' allegations indicate that Hygea and/or the Guarantor Defendants made the offering directly to N5HYG (via RIN), and not through Defendants' investment banker or by way of a securities exchange.

With respect to the relationship between the issuer and the offeree, "[a] court may only conclude that the investors do not need the protection of the Act if all the

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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 647. Plaintiffs allege that this factor alone is dispositive because Plaintiffs purportedly withheld information. Opp., 32:20–33:8. But, even if Defendants withheld information (they did not), that is not the relevant enquiry. The inquiry is whether Plaintiffs had *access to* information typically contained within a registration statement.[27] Here, Plaintiffs do not specify what registration information Defendants withheld, much less how Plaintiffs as sophisticated as themselves who bargained at arms-length with the assistance of counsel, did not have *access to* such information. *See generally* Mot., Ex. A, SPA and at § 8.1 (identifying the Oakland Law Group as counsel for N5HYG).[28]

2. Plaintiffs Do Not Have Any Viable Claim for Failure to Comply with Federal Registration Requirements (Fourth Cause of Action)

Plaintiffs concede that "the exclusive federal cause of action for failure to register public or private securities lies under Section 12(a)(1) of the 1933 Securities Act . . . ." *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 916 (6th Cir. 2007). Opp., 31:22–33:8 (failing to address Defendants' argument regarding § 12(a)(1)). That being the case, Plaintiffs have no viable cause of action against Defendants for failure to register because Section 4(a)(2) of the Securities Act provides a safe harbor exemption for "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(a)(2). As set forth in the Motion and reiterated above, Hygea sold

[27] 15 U.S.C. § 77aa sets forth thirty-two (32) categories of information required in an registration statement.

[28] Plaintiffs also allegedly bargained for a board seat. *See* Am. Compl., ¶ 76(c). No corporation invites the "general public" to join its board.

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the securities at issue to Plaintiff N5HYG pursuant to a private offering, i.e., the SPA. *See* Am. Compl. ¶ 44; Mot., Ex. A, SPA.

3. Plaintiffs Do Not Have Any Viable Claim for Federal Control Person Liability (Sixth Cause of Action)

Plaintiffs offer nothing in Opposition that saves their claim for control person liability. As further set forth in the Motion, for there to be control person liability, there must first be a primary violation of Section 11 or 12 of the Securities Act. 15 U.S.C. § 77o. However, as reiterated above, Plaintiffs have failed to plead any primary violation of Section 11 or 12 of the Securities Act, whether by Hygea or any of the Director Defendants. Even if Plaintiffs have pled a primary violation, Plaintiffs do not set forth "*specific* factual allegations indicating how [the alleged] control was manifested" by, for instance, including facts "supporting that the defendant was either involved in the day-to-day business of the primary violator or connected to the fraudulent act in some way." *Richardson v. Oppenheimer & Co. Inc.*, No. 2:11-cv-02078-GMN-PAL, 2014 U.S. Dist. LEXIS 43419, at *34 (D. Nev. Mar. 31, 2014) (emphasis added). In fact, there is a presumption that the Director Defendants are *not* involved in Hygea's day-to-day management, and nothing Plaintiffs allege suggests otherwise. *See* NRS 78.115 (recognizing that "[t]he business of the corporation must be managed *under* the direction of a board of directors" and not "*by*" a board of directors); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 943 (Del. 1985) ("The realities of modern corporate life are such that directors cannot be expected to manage the day-to-day activities of a company.")

D. Plaintiffs Do Not Have Any Viable Claim for Violation of the Nevada Securities Laws

1. Plaintiffs Do Not Have Any Viable Claim for Violation of NRS 90.570 (First Cause of Action)

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With respect to the Hygea and/or the Guarantor Defendants,[29] Plaintiffs concentrate their Opposition by attempting to establish that the offer to sell securities originated in Nevada because Hygea is a Nevada corporation. In support of this argument, Plaintiffs point to *In re Trade Partners, Inc.*, 627 F.Supp.2d 772 (W.D. Mich. 2008), in which a Michigan federal court purportedly held that "allegations that [the] issuer was from Michigan . . . satisfied [the] 'originating in' requirement of [the] Michigan Securities Act." Opp, 35:1–4. Plaintiffs cite to a Colorado Court of Appeals decision for the same proposition. *See id.*; *Rome v. Reyes*, 2017 COA 84, ¶ 20, 401 P.3d 75, 81. Plaintiffs leave out a key fact from both cases, however: the issuing corporation in both cases maintained its principal place of business in the state under whose securities laws the plaintiffs sought protection. *See In re Trade Partners*, 627 F.Supp.2d at 780 ("TPI was a Michigan corporation and *it operated from Michigan*") (emphasis added); *Reyes*, 401 P.3d at 79 ("Reyes and Kahler directed out-of-state investors to Kelly Schnorenberg or KJS *in Colorado* to complete the transactions. The investors, in exchange for their investments, received promissory notes executed by Kelly Schnorenberg and/or KJS *in Colorado*.") (emphasis added).[30]

[29] By not addressing Defendants' arguments in the Opposition, Plaintiffs concede that (1) Nevada 5 has no claim for violation of NRS 90.570 since it did not purchase any securities; and (2) any claims against the Non-Guarantor Defendants for violation of NRS 90.570 fail given that Plaintiffs have not alleged any such defendant offered to sell securities. Accordingly, in so far as Plaintiffs' claims for violation of NRS 90.570 are made by Nevada 5 and/or against the Non-Guarantor Defendants, such claims should be dismissed.

[30] Further, the decisions of Colorado and Michigan are not binding. To the extent the cases do stand for the proposition Plaintiffs' suggest, the Court should not follow those courts' decisions, as doing so would render NRS 90.830(3)(a) meaningless. Indeed, had the Nevada Legislature intended the Nevada Securities Laws to automatically apply to any offer or sale of securities issued by a Nevada corporation, it could have stated so in very plain terms. The Legislature, however, did not. Instead, it very specifically stated that for an offer to be made in Nevada, the offer must have originated from Nevada. *See* NRS 90.830(3)(a) ("For the purpose of this

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Here, the Amended Complaint establishes that Hygea's principal place of business is in Florida and fails to allege the communication of any offer from the state of Nevada. *See* Mot., 28:20–29:7 (describing allegations demonstrating that the offer to sell Hygea stock originated outside of Nevada, in Miami, Florida). Further, there is no allegation that Hygea or any of its agents, directors, or officers executed anything *in Nevada*. Indeed, federal courts have consistently interpreted a state's blue sky laws to apply only to offers and sales originating in that state—and not to offers or sales of securities that were *merely issued* in the state. *See In re Nat'l Century Fin. Enters., Inc.*, 755 F. Supp. 2d 857, 880 (S.D. Ohio 2010). Those courts employ the so-called "transactional approach." *See Nuveen Premium Income Municipal Fund 4, Inc. v. Morgan Keegan & Co., Inc.*, 200 F.Supp.2d 1313, 1318 (W.D. Okla. 2002) (later vacated as to one defendant as part of a settlement agreement); *see also Johnston v. Norton*, No. 92 Civ. 6844, 1993 U.S. Dist. LEXIS 16000, 1993 WL 465333, at *22-23 (S.D.N.Y. Nov. 19, 1993) (holding that the anti-fraud provisions of New Jersey's blue sky law *did not apply* to out-of-state sale of partnership interests in New Jersey limited partnership because there was no *"transactional connection"* to the state); *Allen v. Oakbrook Secs. Corp.*, 763 So.2d 1099, 1100-01 (Fla. Dist. Ct. App. 1999) (*per curiam*) (holding that anti-fraud provisions of Florida's blue sky law *did not apply* to out-of-state sales of securities *issued from* Florida).[31]

(...continued)
section, an offer to sell or to purchase is made in this State, whether or not either party is present in this State, if the offer . . . [o]riginates in this State")

[31] The *In re Nat'l Century* court, after surveying an expansive body of federal law, found that state securities regulation of *any* security *issued* within a state, regardless of where the to-be-regulated sale or offer occurred, would violate the extraterritoriality principle of the Commerce Clause of United States Constitution. *See* 755 F. Supp. 2d at 888 ("[T]hus, applying Ohio Revised Code § 1707.43 to the

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2. Plaintiffs Have No Claim Against Any Defendant Under NRS 90.460 (Third Cause Of Action)

Hygea had no obligation to register its securities pursuant to NRS 90.460. First, Liability under 90.460 for failure to register a security is limited by NRS 90.660, which unambiguously states that liability by a "person who offers or sells a security" is limited to "the person purchasing the security." *See* NRS 90.660(1)(b). Accordingly, Plaintiff Nevada 5 (which did not purchase any securities) has no right to recovery, and the Non-Guarantor Defendants (who are not alleged to have made any misrepresentations) cannot be directly liable. Second, because the Complaint contains no allegation of a *currently* valid notice of willingness to tender, the claim must be dismissed with respect to all parties until such tender can be and/or is alleged. *See* Mot., 30:12–31:7; Black's Law Dictionary 1467 (6th Ed. 1991) ("Tender" is an "unconditional offer to perform.")

Finally, Plaintiffs effectively concede that the Hygea-N5HYG "offering" falls outside Nevada's statutory requirements for a "public offering."[32] *See* Mot., 32:3–19. The Motion explains that NRS 90.530(1)–(12) sets forth a long list of exempt offerings. Plaintiffs have not alleged facts to demonstrate that Hygea falls outside one of these exceptions—that found in subsection 11. *See* NRS 90.530(11)(a)-(d) (exempting from registration offerings that involve less than 34 in-state purchasers, no general solicitations, no commissions except to licensed broker-dealers, and belief by the issuer that the purchaser plans to use the securities for investment).

(...continued)
[out-of-state] transactions would violate the extraterritoriality principle of the Commerce Clause.") Thus, even to the extent the Nevada Legislature intended to regulate the offer or sale of any security issued in Nevada, regardless of where the offer originated, such a provision would violate the U.S. Constitution. The Court should not adopt an unconstitutional construction of NRS 90.830.

[32] The Hygea-N5HYG stock sale was a private placement—not an offering.

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Plaintiffs do not (and cannot) explain how the sale of Hygea stock to N5HYG falls outside of the NRS 90.530(11) exemption. Plaintiffs allege that N5HYG purchased the stock as an investment, satisfying one factor. Plaintiffs fail to allege: (i) that Hygea or N5HYG paid a commission to a non-licensed broker-dealer, (ii) that more than 34 Nevada purchasers participated in the "offering," or (iii) that Hygea made general solicitations for Hygea stock. That is because those things did not happen, and there was no public "offering" of Hygea's stock.

3. Plaintiffs Cannot Establish Control Person Liability Under NUSA (Fifth Cause of Action)

Plaintiffs offer nothing in their Opposition that saves their claim for control person liability under NRS 90.660(4). As further set forth in the Motion, for there to be control person liability, there must first be primary liability under NRS 90.660(1) or (3). As reiterated above, Plaintiffs have failed to plead any primary violation of NUSA, including NRS 90.660(1) and (3).[33]

E. Plaintiffs Do Not Have Any Viable Claim for Breach of Fiduciary Duty (Twelfth through Fifteenth Causes of Action)

1. Plaintiffs, including N5HYG, Lack Standing to Assert the Fiduciary Claims in Their Complaint

Plaintiffs fail to address how either Plaintiff has standing to maintain a claim for breach of fiduciary duty based on conduct that purportedly occurred prior to October 5, 2016, the date on which N5HYG entered into the SPA and became a Hygea stockholder. *See Omnicare, Inc. v. NCS Healthcare*, 809 A.2d 1163, 1169 (Del. Ch. 2002) (noting that "a breach of fiduciary duty claim must be based on an actual, existing fiduciary relationship"). Under Nevada law, a plaintiff seeking to

[33] Plaintiffs argue that Defendants incorrectly claimed in their Motion that there can be no control person liability because Hygea is not a "person" to be controlled. Defendants made no such argument in their Motion.

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maintain a fiduciary action must specifically aver in its complaint that it was "a shareholder at the time of the transaction of which the plaintiff complaints." NRS 41.520(2); *Pompei v. Clarkson*, 2016 WL 3486375, at *2 n.4 (unpublished disposition) (Nev. Dk. #66459 June 23, 2016) ("[T]he 'contemporaneous ownership' requirement generally requires the plaintiff to be a shareholder at the time of the transaction alleged in the complaint") (citing NRS 41.520(2)). Because Plaintiffs cannot meet the contemporaneous ownership requirement, they lack standing to pursue any fiduciary duty claim arising out of those allegations that concern actions prior to October 5, 2016. *See* Am. Compl. ¶¶ 32–52.

2. Plaintiffs' Allegations for Breach of Fiduciary Duty are Subsumed By Their Claim for Breach of Contract

Plaintiffs also fail to address how paragraphs 53 through 76 of the Amended Complaint, which contain allegations for conduct that purportedly occurred after October 5, 2016, are not subsumed by Plaintiffs' claim for breach of contract.[34] It is well-settled that claims for breach of fiduciary duty cannot "proceed in parallel with breach of contract claims unless there is an independent basis for the fiduciary duty claims apart from the contractual claims." *CIM Urban Lending GP, LLC v. Cantor Commer. Real Estate Sponsor, L.P.*, No. 11060-VCN, 2016 Del. Ch. LEXIS 47, at *7 (Ch. Feb. 26, 2016). Thus, any allegations that depend upon the SPA must give way to the contract claim. *See CIM Urban Lending*, 2016 Del. Ch. LEXIS 47, at *8.

3. Plaintiffs' Allegations for Breach of Fiduciary Duty are Derivative, Not Direct, in Nature

To the extent any allegations set forth in paragraphs 53 through 76 of the

[34] *See, e.g.*, Am. Compl. ¶ 54 (alleging failure to go public as purportedly promised by the SPA); ¶¶ 68–69 (alleging failure to provide financials or make payments as purportedly promised by the SPA); ¶ 76 (alleging failure to fulfill other obligations purporedly promised by the SPA).

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Amended Complaint exist independent of the SPA, such allegations describe claims that are necessarily derivative, not direct. In fact, Plaintiffs admit in their Opposition that it is Hygea that would be damaged by Defendants' alleged conduct, *see* Opp., 39:15–19, and that Plaintiffs would only be disproportionately harmed. Plaintiffs do not explain why they would be disproportionately harmed, but that is of no moment, because disproportionate harm is not the test for whether a claim is direct or derivative in nature.

As further set forth in the Motion, in determining whether a claim is direct or derivative the court considers "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)." *Parametric Sound Corp. v. Eighth Jud. Dist. Ct.*, 401 P.3d 1100, 1107 (Nev. 2017). Plaintiffs claim they have been directly harmed by Defendants' alleged breach of the SPA, *see* Opp., 39:6–9, but this argument only confirms that Plaintiffs base their fiduciary duty claim on the purported breach of contract, and, as reiterated above, the two cannot proceed in parallel.

Plaintiffs also claim that they have been directly harmed because the Director Defendants' mismanagement destroyed share value. Opp., 39:18–19. However, any decrease in the value of Plaintiffs' shares as a result of purported mismanagement is merely the unavoidable result of the reduction in value of the entire corporate entity. *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008) (where, as here, "all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature.")[35] In such case, the

[35] Indeed, Plaintiffs do not—and cannot—allege that only N5HYG's shares decreased in value.

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corporation suffered the alleged harm, and the corporation would receive the benefit of any recovery. Accordingly, any claim for breach of fiduciary duty set forth by the Complaint would be derivative in nature and result in direct harm to Hygea only, not to its stockholders.

4. Plaintiffs Failed to Make a Pre-Suit Demand or Sufficiently Plead Demand Futility

Plaintiffs argue that if their fiduciary duty claims are derivative in nature, then they have pled demand futility because the Director Defendants would not have agreed to sue themselves and otherwise ignored red flags. Opp., 42:3–43:4. Plaintiffs also argue that demand would have been futile because the business judgment rule is inapplicable to this case given that Plaintiffs' allegations do not challenge a business decision. Opp., 41:1–42:3. By such arguments, Plaintiffs reveal their failure to grasp the business judgment rule.

The business judgment rule is a rule of procedural presumption, pursuant to which a court will not second-guess a board's business decision so long as such decision was made "in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). That presumption applies not only to the underlying transaction a plaintiff challenges, but also to a board's ability to consider demand. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632-33, 137 P.3d 1171, 1179 (2006). Thus, whether the underlying transaction is or is not subject to the business judgment rule as a "business decision" is immaterial to the question of demand futility, for which two tests exist.

In the case of claims involving a contested transaction, i.e., where it is alleged that the director made a conscious business decision in breach of their fiduciary duties, Nevada courts apply the test first set forth in *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Pursuant to this test, the court examines the complaint to determine "whether, under the particularized facts alleged, a reasonable doubt is

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created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 637, 137 P.3d 1171, 1182 (2006).

In the case of claims not involving a contested transaction but rather a violation of the board's oversight duties, Nevada courts apply the test set forth in *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993). Pursuant to this test, the court considers whether, under the particularized facts alleged, a reasonable doubt is created that the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. *Id.* at 638-39. A plaintiff might do this, for instance, by showing that the directors would face a "substantial likelihood" of personal liability by complying with a shareholder's demand to pursue litigation. *Id.* at 639. Plaintiffs fail to establish demand futility under both tests.[36]

Plaintiffs argue in their Opposition that the board was neither disinterested nor independent because no director would have agreed to sue him-or-herself. As further set forth in Defendants' Motion, courts have repeatedly rejected this argument as a basis for establishing demand futility. *Shoen*, 122 Nev. at 639-40, 137 P.3d at 1183 ("Allegations of mere threats of liability through approval of the wrongdoing or other participation, however, do not show sufficient interestedness to excuse the demand requirement.")

Plaintiffs next argue that demand is excused because the board faces a substantial likelihood of liability because it ignored multiple "red flags." The

[36] It is not clear which test the Court should apply given that Plaintiffs, for the first time in their Opposition, suggest that they may be pursuing a claim for failure of oversight. *See* Opp., 42:3. Plaintiffs make this suggestion despite the utter lack of facts setting forth such a claim. *See generally* Am. Compl.

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concept of "red flags" inures to a *Caremark* claim, i.e., a claim that directors breached their duty of oversight. *See In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996), *aff'd sub nom Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362 (Del. 2006). To establish a *Caremark* claim at the pleadings stage, a plaintiff must allege particularized facts that satisfy one of the necessary conditions for director oversight liability: either that (1) "the directors utterly failed to implement any reporting or information system or controls"; or (2) "having implemented such a system or controls, [the directors] consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention." *Id.*

Here, by their "red flags" argument, it appears that Plaintiffs may be arguing that the second prong applies. However, "[t]o establish demand futility under *Caremark's* second prong, the Complaint must 'plead [particularized facts] that the board knew of evidence of corporate misconduct—the proverbial "red flag"—yet acted in bad faith by consciously disregarding its duty to address that misconduct." *Horman v. Abney*, No. 12290-VCS, 2017 Del. Ch. LEXIS 13, at *26 (Ch. Jan. 19, 2017). Plaintiffs have pled no facts, much less particularized facts, that identify the purported "red flags;" that Hygea's directors were informed of the red flags; or that Hygea's directors consciously ignored the red flags. Indeed, what is most notable about Plaintiffs' "red flags" arguments, and the Amended Complaint generally, is what is lacking.[37]

[37] Plaintiffs also argue that they have pled demand futility because their allegations relate "to misstatements made to Plaintiffs before their investment . . . ." Opp., 43:4–14. Defendants are confused by this argument because it is nothing more than a concession that Plaintiffs did not own stock in Hygea at the time of the complained-of transactions. As explained in the Motion and reiterated above, a plaintiff must own stock both (i) at the time of the complained-of conduct and (ii) during the pendency of the lawsuit to maintain a derivative claim for breach of fiduciary duty in Nevada. *See* N.R.C.P. 23.1; NRS 41.520(2). Thus, by their own admission, Plaintiffs cannot state derivative claims.

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5. Plaintiffs Fail to Overcome Both the Business Judgment Rule and Nevada's Exculpatory Clause

Plaintiffs argue that they have not only overcome the business judgment rule for purposes of Rule 23.1 and demand futility, but that they have also successfully rebutted its presumption for purposes of Rule 12(b)(5), because (1) the Director Defendants have breached their fiduciary duties; (2) a breach of fiduciary duty is not a "business decision" to which the business judgment rule applies; and (3) the Director Defendants did not engage an informed decision making process, because an informed process would have revealed Hygea's true financial position. Gonzalez Opp., 29:15—30:28 (incorporated by reference at Opp., 43:21–22.) These arguments fail.

Even at the Rule 12(b)(5) stage, Plaintiffs cannot rest on a conclusory allegation that the Director Defendants are not entitled to the protections of the business judgment rule because they breached their fiduciary duty. Such argument merely begs the question. Rather, to rebut the rule's presumption where a transaction is at issue, Plaintiffs must show "'either that the decision was the product of fraud or self-interest or that the director failed to exercise due care in reaching the decision.'" *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.*, 399 P.3d 334, 343 (Nev. 2017) (quoting Joseph F. Troy & William D. Gould, Advising & Defending Corporate Directors and Officers § 3,15 (Cal CEB rev. ed, 2007)).[38]

[38] Plaintiffs also fail to allege facts that allow the Court to draw an inference that the Director Defendants' actions constituted intentional misconduct, fraud, or a knowing violation of the law, as is required to impose liability under NRS 78.138(7)(a)–(b). Rather, Plaintiffs allege that this inquiry presents a factual issue, and thereby suggest that the matter must be presented to the fact-finder. Opp., 44:4–9. However, all claims present issues of fact, and Plaintiffs do not get past the motion to dismiss stage where, as here, they have not provided any well-pleaded facts from which the Court can draw an inference in their favor on this point. *See* NRS 78.138(7)(a)–(b)(2) ("a director or officer is not individually liable to the

(continued...)

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Las Vegas, Nevada 89135-2958

Here, Plaintiffs allege the Director Defendants are not entitled to the presumption of the business judgment rule because they violated their duty of care to act in good faith on an informed basis in approving the SPA. Plaintiffs, thus, must plead enough facts to allows the court to inquire "into the procedural indicia of whether the directors resorted in good faith to an informed decision making process." *Wynn Resorts*, 399 P.3d at 343 (internal quotations omitted). For instance, Plaintiffs must present facts regarding "the identity and qualifications of any sources of information or advice sought which bear on the decision reached, the circumstances surrounding selection of these sources, the general topics (but not the substance) of the information sought or imparted, whether advice was actually given, whether it was followed, and if not, what sources of information and advice were consulted to reach the decision in issue." *Id.* Plaintiffs have pled no such facts, but still ask this Court to draw an inference that the Director Defendants violated their duty of care. The Court cannot draw an inference out of thin air.

6. Plaintiffs Fail to Plead Any Allegations to Support a Claim for Breach of the Duty of Loyalty or Waste (Twelfth and Fourteenth Causes of Action)

Plaintiffs argue that they have sufficiently pled a claim for usurpation of corporate opportunity and waste because the Director Defendants engaged in such acts by "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-

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(...continued)
corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless . . . [i]t is proven that . . . [the director breached his or her fiduciary duties and s]uch breach involved intentional misconduct, fraud or a knowing violation of law.") Plaintiffs have not pled facts that support liability under NRS 78.138's exculpatory provision.

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network of affiliated corporations to the detriment of Hygea-proper, placing themselves in conflicted position, and propritizing their personal interests over Hygea's." Opp., 44:15–26. Such allegations, however, do not constitute either an usurpation of corporate opportunity or waste.

The basic framework of the corporate opportunity doctrine was laid down by the Delaware Supreme Court in *Guth v. Loft, Inc.*, as follows:

> if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.

Guth v. Loft, Inc., Del. Supr., 23 Del. Ch. 255, 5 A.2d 503, 511 (1939). *See also Leavitt v. Leisure Sports Inc.*, 103 Nev. 81, 87, 734 P.2d 1221, 1225 (1987). Plaintiffs do not identify what corporate opportunity the Director Defendants took for themselves. In the meantime, "[t]he essence of waste is the diversion of corporate assets for improper or unnecessary purposes." *Patrick v. Allen*, 355 F. Supp. 2d 704, 714-15 (S.D.N.Y. 2005). Plaintiffs, however, make no allegation as to what assets were diverted, much less that such assets were diverted for an improper or unnecessary purpose.

7. Nevada Does Not Recognize Claims for Minority Shareholder Oppression or Breach of the Duty of Candor (Thirteenth and Fifteenth Causes of Action)

Plaintiffs cite to *De La Fuente v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003), for the proposition that the Director Defendants were required to "disclose all material information relevant to corporate decisions from which they may derive a personal benefit." Opp., 45:21–22. *De La Fuente*, however, is inapposite. It concerned a related-party transaction, and the requirement that an interested

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director divulge all information in connection with seeking approval for that transaction. Here, there is no related-party—or any other transaction—that demanded disclosure. *See Kahn ex rel DeKalb Genetics Corp. v. Roberts*, C.A. No. 12324, 1995 Del. Ch. LEXIS 151, at *21 (Ch. Dec. 6, 1995) (explaining that board is not required "to divulge material developments with respect to the company's business if the board does not seek the vote of the shareholders.") *Accord Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 17-18, 62 P.3d 720, 731 (2003).

Plaintiffs' argument for why this Court should recognize their claim for "minority shareholder oppression" fares no better. Plaintiffs ignore that the Nevada Supreme Court rejected such claim in *In re Amerco Deriv. Litig.*, 252 P.3d 681, 700 n.11 (Nev. 2011). Plaintiffs instead cite to the Supreme Court's approval of *Hollis v. Hill*, 232 F.3d 460 (5th Cir. 2000), in *Bedore v. Familian*, 122 Nev. 5, 125 P.3d 1168 (Nev. 2006), to argue that this Court can fashion remedies when minority shareholders have been oppressed. Opp., 45:1-13. *Bedore*, however, was decided years before *In re Amerco* and concerned the equitable remedy of dissolution in the context of a claim to appoint a receiver, wherein the court stated that it could fashion equitable remedies short of a receivership where minority shareholders have been oppressed. Moreover, it concerned a close corporation. Plaintiffs do not seek an equitable remedy for breach of fiduciary duty (whether through receivership or otherwise); they seek damages. Nor is Hygea a close corporation. *Compare* Mot., Ex. E, Receivership Complaint, ¶ 43 ("Hygea has well more than 30 shareholders") *with* NRS 78A.020 (providing that a Nevada close corporation's must be "held of record by a specified number of persons, not to exceed 30").

F. Plaintiffs Do Not Have Any Viable Claim For Negligent Misrepresentation (Eighth Cause of Action)

Plaintiffs argue that the economic loss rule does not bar their claim for negligent misrepresentation because the Nevada Supreme Court has noted that

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courts of other jurisdiction have recognized an exception to the doctrine in cases involving "negligent misrepresentations about financial matters." Opp., 38:1–10 (citing *Halcrow Inc. v. Eighth Jud. Dist. Ct.*, 302 P.3d 1148, 1152 (Nev. 2013)). The court, however, to which the Nevada Supreme Court referred was the U.S. Court of Appeals for the First Circuit. In *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 56 (1st Cir. 1985), the First Circuit noted that in *Hedley Byrne Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465 (1964), the House of Lords permitted a claim for negligent misrepresentation to proceed when that claim involved misrepresentations regarding financial matters. Even if this Court was inclined to find instruction from a case rendered by a foreign tribunal, the case is inapposite, as it concerned parties who were in a "trust" relationship by virtue of the defendant having rendered professional services to the claimant. No such facts exist here.[39]

G. Plaintiffs' Claim for Tortious Interference Against the Director Defendants Fails as a Matter of Law (Sixteenth Cause of Action)

Plaintiffs argue that directors are not agents of their corporation, and therefore, can tortiously interfere with the corporation's contract. Opp., 46:12–23. Nevada, however, has held on multiple occasions that directors *are* agents of the corporation. *Kendall v. Henry Mountains Mines*, 78 Nev. 408, 411, 374 P.2d 889, 890 (1962) ("A director is an agent of the corporation."); *Foster v. Arata*, 74 Nev. 143, 154, 325 P.2d 759, 764 (1958) ("The directors of a company still are the agents and trustees of a corporation, and have the control and management of its affairs for the benefit of the stockholders . . . .")

Plaintiffs, recognizing this, alternatively argue that the Non-Guarantor

[39] Plaintiffs also allege that their claim for negligent misrepresentation should survive as to the Non-Guarantor Defendants, given that such defendants did not sign the contract. Plaintiffs, however, do not identify what misrepresentations, negligent or otherwise, any Non-Guarantor Defendant made.

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Las Vegas, Nevada 89135-2958

Defendants acted outside the scope of their authority because "it *might* be the case that the Defendants interfered with Plaintiffs' rights 'for their own purposes,'" such as by cashing Plaintiffs' $30 million check.[40] Plaintiffs, however, plead *no facts* to support this argument. Even under the standard of notice pleading, Plaintiffs must plead *some* facts to support their legal theory. *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).[41]

H. Plaintiffs' Claims for Conspiracy and Concert of Action Fail as a Matter of Law (Seventeenth and Eighteenth Causes of Action)

Plaintiffs reiterate that directors are not agents of the corporation in an attempt to save their claims for conspiracy and concert of action. Again, Nevada recognizes directors as agents of the corporation. Plaintiffs also argue that the intracorporate conspiracy doctrine does not apply when one of the underlying torts is a claim for securities fraud. In support of this argument, Plaintiffs cite to *Solyom v. World Wide Child Care Copr.*, No. 14-80241-CIV-COHN/SELTZER, 2015 U.S. Dist. LEXIS 144051, at *2 (S.D. Fla. Oct. 15, 2015). That cite, however, concerns a motion for an extension of time, and Plaintiffs cannot locate any decision in *Solyom* addressing the applicability of the intracorporate conspiracy doctrine.

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[40] It is unclear how the Non-Guarantor Defendants could "serve their own interests" by causing Hygea to cash a check. This would seem to serve Hygea's interests. Similarly, it is unclear how cashing a check that Plaintiffs delivered consistent with the terms of the SPA would constitute interference with the SPA—if Plaintiff's "might be the case" argument is correct, this would likely constitute performance of the SPA—not interference with the SPA. Finally, Plaintiffs have not alleged that they delivered a check for their stock (nor did they deliver such a check), and it is unclear what check they are even referring to. *See* Mot., Ex. A, SPA, ¶ 3.1 ("The Consideration shall be paid . . . by wire transfer . . . .")

[41] In determining a motion to dismiss, a court must draw all reasonable inferences in a plaintiff's favor after accepting the allegations in the plaintiff's complaint as true. A court is not required—and, in fact, cannot—draw inferences from a plaintiff's mere speculation about what "*might* be the case." *Cf.* N.R.C.P. 11(b)(3). This is particularly true where Plaintiffs are required to prove intent.

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One Summerlin
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135-2958

I. Plaintiffs' Claim for Unjust Enrichment Fails as a Matter of Law (Nineteenth Cause of Action)

Plaintiffs argue that the Court should apply the doctrine of unjust enrichment against the Director Defendants because there is an inference that they benefited from the $30 million N5HYG paid for its stock. Plaintiffs, however, have not alleged any facts by which the Court could draw any inference that the Director Defendants are unjustly retaining the $30 million or any part thereof. *See McFarland v. Long*, No. 2:16-cv-00930-RFB-PAL, 2017 U.S. Dist. LEXIS 168998, at *20 (D. Nev. Oct. 6, 2017) (a claim for unjust enrichment cannot lie where no money or property of another is being retained by defendants or where the claim is merely duplicative of a claim for breach of fiduciary duty).

J. Plaintiffs Have Failed to Plead a Viable Claim for Constructive Fraud Against Defendants (Twentieth Cause of Action)

Plaintiffs claim that they have pled a case for constructive fraud because Defendants insisted on the "confidentiality" of the parties' negotiations. Even if this was correct, it is not what "confidential" means in the context of the "confidential relationship" needed to set forth a claim for constructive fraud. As explained by *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982), "[a] 'confidential or fiduciary relationship' exists when one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Id.* at 529-30. Plaintiffs have not pled any facts by which this Court could infer that such a relationship existed during the parties' negotiations. Indeed, Plaintiffs have pled the opposite by way of facts indicating that the parties negotiated at arms-length.

K. Plaintiffs Have Failed to Plead a Viable Claim for Accounting Against the Director Defendants (Twenty-First Cause of Action)

Plaintiffs argue that they have pled a claim for accounting because in *State v.*

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One Summerlin
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135-2958

Callahan, 48 Nev. 265, 229 P. 702 (Nev. 1924), Nevada recognized accounting as an available remedy for payment on securities. *Callahan*, however, concerned monies the defendants collected on the plaintiff's behalf in connection with the sale of securities. Indeed, Plaintiffs skip over that part of *Callahan* that demands a "trust" relationship whereby the trustee "receive[d] money to be paid to another or to be applied to a particular purpose to which he does not apply it." *Id.* at 702. Plaintiffs have not pled any such facts in this action.

V. THE COURT SHOULD TO STRIKE PLAINTIFFS' SUPPLEMENTAL ALLEGATIONS

Defendants do not disagree that Rule 15(d) permits supplemental pleading; however, it allows supplemental pleading only upon *motion and leave of court.* Plaintiffs have not made a motion to supplement; Defendants have not had an opportunity to oppose any such motion; and the Court has not had occasion to rule upon the motion. The supplemental allegations—contained in ¶¶ 29, 66, 70, 76(b), 76(c)—should thus be stricken until such time as Plaintiffs obtain the Court's leave to supplement the Amended Complaint. *Cf.* N.R.C.P. 15(d).

VI. CONCLUSION

For the reasons set forth herein, Defendants respectfully request that this Court dismiss this case in its entirety as to all Defendants on the basis of claim preclusion. Should the Court decide that some or all of Plaintiffs' claims are not precluded as a result of the Receivership Action, Defendants respectfully request that the Court dismiss Nevada 5 as a Plaintiff from this lawsuit and dismiss all claims against all Defendants, with the exception of N5HYG's claim for breach of contract against Hygea, Iglesias, and Moffly.

[Signature On Following Page]

Ballard Spahr LLP
One Summerlin
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135-2958

Dated: September 26, 2018

BALLARD SPAHR LLP

By: /s/ Maria A. Gall
Joel E. Tasca, Esq.
Nevada Bar No. 14124
Maria A. Gall, Esq.
Nevada Bar No. 14200
Kyle A. Ewing, Esq.
Nevada Bar No. 14051
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135

Julian W. Friedman
New York Registration No. 1110220
919 3rd Avenue, Floor 37
New York, New York 10022

Attorneys for Defendants Hygea Holdings Corp., Manuel Iglesias, Edward Moffly, Daniel T. McGowan, Martha Mairena Castillo, Lacy Loar, Glenn Marrichi, Keith Collins, M.D., Jack Mann, M.D., Joseph Campanella, and Carl Rosenkrantz

Ballard Spahr LLP
One Summerlin
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135-2958

Ballard Spahr LLP
One Summerlin
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135-2958

CERTIFICATE OF SERVICE

I certify that on September 26, 2018, and pursuant to N.R.C.P. 5(b), a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND** was served on the following parties via the Court's electronic service system:

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Ste D-4
Las Vegas, Nevada 89106

Christopher D. Kaye, Esq.
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Suite 300
Rochester, Michigan 48307

Attorneys for Plaintiffs

Robert Cassity, Esq.
Sydney R. Gambee, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Jeffrey T. Kucera
K&L Gates LLP
200 South Biscayne Boulevard
Miami, Florida 33131
Jeffrey.kucera@klgates.com (by e-mail only)

Stravroula E. Lambrakopoulos, Esq.
Theodore L. Kornobis, Esq.
K&L Gates LLP
1601 K Street, NW
Washington, D.C. 20006
Stavroula.lambrakopoulos@klgates.com
(by e-mail only)
Ted.kornobis@klgates.com (by e-mail only)

Attorneys for Defendant Ray Gonzalez

I further certify that on September 26, 2018, and pursuant to N.R.C.P. 5(b), a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND** was served on the following parties by e-mail:

Richard Williams Esq.
8110 SW 78th Street
Miami, Florida 33143
rlwilliams.law@gmail.com

Defendant Pro Per

/s/ C. Wells
An Employee of BALLARD SPAHR LLP

EXHIBIT 1

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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' ANSWER TO FIRST AMENDED COMPLAINT FOR APPOINTMENT OF RECEIVER

Defendants Hygea Holdings Corp. ("Hygea"), Manuel Iglesias, Edward Moffly, Daniel

T. McGowan, Frank Kelly, Martha Mairena Castillo, Glenn Marrichi, M.D., Keith Collins, M.D., Jack Mann, M.D., and Joseph Campanella, by and through their counsel of record, hereby Answer the First Amended Complaint for Appointment of Receiver as set forth below. Any allegation that is not specifically admitted is denied. Moreover, by answering the First Amended Complaint prior to any ruling on Hygea's Motion to Dismiss, or in the Alternative for Summary Judgment (filed March 23, 2018), Hygea does not waive any arguments set forth therein.

1. Defendants admit the allegations set forth in Paragraph 1 of the First Amended Complaint.

2. Defendants admit the allegations set forth in Paragraph 2 of the First Amended Complaint.

3. Defendants admit the allegations set forth in Paragraph 3 of the First Amended Complaint.

4. Defendants admit the allegations set forth in Paragraph 4 of the First Amended Complaint.

5. Defendants admit the allegations set forth in Paragraph 5 of the First Amended Complaint.

6. Defendants admit the allegations set forth in Paragraph 6 of the First Amended Complaint.

7. Defendants deny the allegations set forth in Paragraph 7 of the First Amended Complaint

8. Defendants admit the allegations set forth in Paragraph 8 of the First Amended Complaint.

9. Defendants admit the allegations set forth in Paragraph 9 of the First Amended Complaint.

10. Defendants admit the allegations set forth in Paragraph 10 of the First Amended Complaint.

11. Defendants admit that Claudio Arellano is an individual but are without sufficient information or knowledge to admit or deny the remaining allegations set forth in Paragraph 11 of the First Amended Complaint, and therefore, deny these allegations.

12. The Arellano Stock Purchase Agreement as appended to the First Amended Complaint speaks for itself, and Defendants deny any allegations inconsistent with the Agreement.

13. The N5HYG Stock Purchase Agreement as appended to the First Amended Complaint speaks for itself, and Defendants deny any allegation inconsistent with the Agreement.

14. Defendants admit only that the lawsuit styled *N5HYG LLC, et al. v. Hygea Holdings Corp., et al.*, Case No. 2:17-cv-02870-JCM-PAL was removed from the Eighth Judicial District Court, Clark County, Nevada to the U.S. District Court for the District of Nevada. Defendants are without sufficient information or knowledge to admit or deny the remaining allegations set forth in first Paragraph 14 of the First Amended Complaint, and therefore, deny these allegations.

15. Defendants admit only that in the lawsuit styled *N5HYG LLC, et al. v. Hygea Holdings Corp., et al.*, Case No. 2:17-cv-02870-JCM-PAL, Hygea filed a motion to dismiss, which is docketed as ECF No. 11. Defendants further state that the motion to dismiss, which is a publicly filed document, speaks for itself and deny any allegation inconsistent with the motion.

16. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 16 of the First Amended Complaint, and therefore, deny these allegations.

17. Defendants admit only that Fifth Avenue 2254 LLC is a stockholder of record of Hygea and holds 100,000 shares of Hygea. Defendants deny the remaining allegations set forth in Paragraph 17 of the First Amended Complaint.

18. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 18 of the First Amended Complaint, and therefore, deny these allegations.

19. Defendants admit only that Hillcrest Acquisitions, LLC is a stockholder of record of Hygea and holds 250,000 shares of Hygea. Defendants deny the remaining allegations set forth in Paragraph 19 of the First Amended Complaint.

20. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 20 of the First Amended Complaint, and therefore, deny these allegations.

21. Defendants admit only that Hillcrest Center SV I is a stockholder of record of Hygea and holds 250,000 shares of Hygea. Defendants are without sufficient information or knowledge to admit or deny whether Hillcrest Center SV I paid $125,000 for these shares, and therefore, deny this allegation. Defendants also deny the remaining allegations set forth in Paragraph 21 of the First Amended Complaint.

22. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 22 of the First Amended Complaint, and therefore, deny these allegations.

23. Defendants admit only that Hillcrest Center SV II is a stockholder of record of Hygea and holds 250,000 shares of Hygea. Defendants are without sufficient information or knowledge to admit or deny whether Hillcrest Center SV II paid $125,000 for these shares, and therefore, deny this allegation. Defendants also deny the remaining allegations set forth in

Paragraph 23 of the First Amended Complaint.

24. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 24 of the First Amended Complaint, and therefore, deny these allegations.

25. Defendants admit only that Hillcrest Center SV III is a stockholder of record of Hygea and holds 500,000 shares of Hygea. Defendants are without sufficient information or knowledge to admit or deny whether Hillcrest Center SV I paid $125,000 for these shares, and therefore, deny this allegation. Defendants also deny the remaining allegations set forth in Paragraph 25 of the First Amended Complaint.

26. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 26 of the First Amended Complaint, and therefore, deny these allegations.

27. Defendants admit only that Leonite Capital LLC is a stockholder of record of Hygea and holds 500,000 shares of Hygea. Defendants are without sufficient information or knowledge to admit or deny whether Leonite Capital paid $125,000 for these shares, and therefore, deny this allegation. Defendants also deny the remaining allegations set forth in Paragraph 27 of the First Amended Complaint.

28. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 28 of the First Amended Complaint, and therefore, deny these allegations.

29. Defendants admit only that Crown Equities (and not Crown Equity's) is a stockholder of record of Hygea and holds 250,000 shares of Hygea. Defendants deny the remaining allegations set forth in Paragraph 29 of the First Amended Complaint.

30. Defendants are without sufficient information or knowledge to admit or deny the

allegations set forth in Paragraph 30 of the First Amended Complaint, and therefore, deny these allegations.

31. Defendants admit only that Halevi Enterprises, LLC is a stockholder of record of Hygea and holds 500,000 shares of Hygea. Defendants deny the remaining allegations set forth in Paragraph 31 of the First Amended Complaint.

32. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 32 of the First Amended Complaint, and therefore, deny these allegations.

33. Defendants admit only that Halevi SV I is a stockholder of record of Hygea and holds 250,000 shares of Hygea. Defendants deny the remaining allegations set forth in Paragraph 33 of the First Amended Complaint.

34. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 34 of the First Amended Complaint, and therefore, deny these allegations.

35. Defendants admit only that Halevi SV2 is a stockholder of record of Hygea and holds 250,000 shares of Hygea. Defendants deny the remaining allegations set forth in Paragraph 35 of the First Amended Complaint.

36. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 36 of the First Amended Complaint, and therefore, deny these allegations.

37. Defendants admit only that Ibh Capital is a stockholder of record of Hygea and holds 250,000 shares of Hygea. Defendants deny the remaining allegations set forth in Paragraph 37 of the First Amended Complaint.

38. Defendants are without sufficient information or knowledge to admit or deny the

allegations set forth in Paragraph 38 of the First Amended Complaint, and therefore, deny these allegations.

39. Defendants admit only that RYMSSG Group is a stockholder of record of Hygea and holds 250,000 shares of Hygea. Defendants are without sufficient information or knowledge to admit or deny the remaining allegations set forth in Paragraph 39 of the First Amended Complaint, and therefore, deny these allegations.

40. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 11 of the First Amended Complaint, and therefore, deny these allegations.

41. Defendants deny the allegations set forth in Paragraph 41 of the First Amended Complaint.

42. Defendants deny the allegations set forth in Paragraph 42 of the First Amended Complaint.

43. Defendants admit only that Hygea has more than 30 stockholders of record. Defendants deny the remaining allegations set forth in Paragraph 43 of the First Amended Complaint.

44. Defendants admit only that venue is proper in the First Judicial District Court. Defendants deny the remaining allegations set forth in Paragraph 44 of the First Amended Complaint.

45. Defendants admit only that Hygea is managed by its Board of Directors. Defendants deny the remaining allegations set forth in Paragraph 45 of the First Amended Complaint.

46. Defendants admit only that Hygea's business model includes the acquisition and management of independent medical practices, primarily doctors' practices, focusing on the

Southeastern United States and Florida and that Hygea acquires such practices from their doctor owners, after which the doctors go from being owners to employees and are paid a salary by Hygea or its subsidiary. Defendants deny any suggestion that Hygea's business model is limited to the acquisition of practices from their doctor owners. Defendants further admit that Hygea's fundamental value proposition includes the statement: let the doctors focus on medical care, while Hygea uses its economies of scale and operational expertise to effectively operate the practices from a business perspective. Defendants, however, deny any suggestion the foregoing accurately represents the entirety of Hygea's value proposition or any of Hygea's core competencies.

47. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 47 of the First Amended Complaint, including because the allegation appears to be styled as Plaintiffs' opinion given the phrase "is perhaps its greatest asset," and therefore, deny these allegations.

48. Defendants deny the allegations set forth in Paragraph 48 of the First Amended Complaint.

49. Defendants admit only that for a certain period of time Hygea paid its payroll through an American Express-sponsored payroll program. Defendants deny the remaining allegations set forth in Paragraph 49 of the First Amended Complaint.

50. Defendants admit only that it retained FTI Consulting to provide outside consulting services. Defendants deny the remaining allegations set forth in Paragraph 50 of the Complaint.

51. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 51 of the First Amended Complaint, and therefore, deny these allegations.

52. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 52 of the First Amended Complaint, and therefore, deny these allegations, including because Plaintiffs have not identified the alleged "large lenders."

53. Defendants deny the allegations set forth in Paragraph 53 of the First Amended Complaint.

54. Defendants deny the allegations set forth in Paragraph 54 of the First Amended Complaint.

55. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in Paragraph 55 of the First Amended Complaint, and therefore, deny these allegations.

56. Defendants are without sufficient information or knowledge to admit or deny the allegations set forth in the first and second sentences of Paragraph 56 of the First Amended Complaint, including because the term "white knight" is vague and ambiguous, and therefore, deny these allegations. Defendants deny the remaining allegations of Paragraph 56 of the First Amended Complaint.

57. Defendants admit only that Claudio Arellano filed a lawsuit against Hygea, Manuel Iglesias, and Lacy Loar styled as *Claudio Arellano v. Hygea Holdings Corp., et al.*, Case No. 2017-019495 CA in the Circuit Court of the 11th Judicial District Circuit, in and for Miami-Dade County, Florida. Defendants deny the remaining allegations set forth in Paragraph 57 of the First Amended Complaint.

58. Defendants admits only that N5HYG filed a lawsuit against Hygea, Manuel Iglesias, and Hygea's Board of Directors styled as *N5HYG LLC, et al. v. Hygea Holdings Corp., et al.*, and that it was initially assigned to Department 25 of the Eighth Judicial District Court, Clark County, Nevada before being removed to the U.S. District Court for the District of

Nevada. Defendants deny that the lawsuit was filed in the First Judicial District Court on October 5, 2017 or any other date. Defendants further deny any suggestion that the defendants to the lawsuit are limited to Hygea, Manuel Iglesias, and Hygea's Board of Directors. Defendants also deny the remaining allegations set forth in Paragraph 58 of the First Amended Complaint.

59. Defendants restate each of their answers as if fully set forth here.

60. Defendants deny the allegations set forth in Paragraph 60 of the First Amended Complaint.

61. Defendants deny the allegations set forth in Paragraph 61 of the First Amended Complaint.

62. Defendants deny the allegations set forth in Paragraph 62 of the First Amended Complaint.

63. Defendants deny the allegations set forth in Paragraph 63 of the First Amended Complaint.

AFFIRMATIVE DEFENSES

1. Defendants assert that Plaintiffs have failed to state any claims upon which relief can be granted.

2. Defendants assert that Plaintiffs have through representations or actions waived their right to sue, and therefore, cannot sustain this lawsuit.

3. Defendants assert that Plaintiffs come to this Court with unclean hands, and therefore, are not entitled to the remedies they seek in this lawsuit.

4. Defendants assert that Plaintiffs lack standing to maintain this lawsuit—and thus the Court is without jurisdiction to appoint a receiver—because Plaintiffs do not hold at least 10% of Hygea's issued and outstanding stock.

5. Defendants assert that this action constitutes impermissible claim splitting given

the first filed lawsuit by Plaintiff N5HYG LLC styled *N5HYG LLC, et al. v. Hygea Holdings Corp., et al.*, Case No. 2:17-cv-02870-JCM-PAL pending in the U.S. District Court for the District of Nevada and/or the first filed lawsuit by Plaintiff Claudio Arellano styled *Claudio Arellano v. Hygea Holdings Corp., et al.*, Case No. 2017-019495 CA in the Circuit Court of the 11th Judicial District Circuit, in and for Miami-Dade County, Florida.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

Dated this 30th day of April, 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 Nofe. 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 April 30, 2018, a true and correct copy of **DEFENDANTS' ANSWER TO FIRST AMENDED COMPLAINT FOR APPOINTMENT OF RECEIVER** was served on the following counsel of record by U.S. Mail, postage-prepaid, and 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 2

EXHIBIT 2

AOS
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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (EDWARD MOFFLY)**

AFFIDAVIT OF SERVICE

Summons and Complaint and Jury Demand

Case Number: A-17-762664-B

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

vs.

Defendant:
HYGEA HOLDINGS CORP., a Nevada corporation, et al.

Received by E.P.I. Bureau, Inc. on the 16th day of October, 2017 at 10:00 pm to be served on **EDWARD MOFFLY, 8750 NW 36th Street, Suite 300, Miami, FL 33178.**

I, Miguel Marino, being duly sworn, depose and say that on the **1st day of November, 2017 at 9:59 pm,** I:

SUBSTITUTE served by delivering a true copy of the **Summons and Complaint and Jury Demand** with the date and hour of service endorsed thereon by me, to: **JASON ZAPATA as CONCIERGE (SECURITY GUARD)** at the address of: **185 SW 7th St., APT 3301, Miami, FL 33130**, the within named person's usual place of **Abode**, who resides therein, who is fifteen (15) years of age or older and informed said person of the contents therein, in compliance with state statutes.

Description of Person Served: Age: 21, Sex: M, Race/Skin Color: HISPANIC, Height: 5'8", Weight: 180, Hair: BRW, Glasses: Y

I certify that I have no interest in the above named action, I am of legal age and I am a certified appointed process server in good standing in the judicial circuit in which the process was served. Under Penalty of perjury, I declare the forgoing to be true.

Miguel Marino
CPS# 1613

E.P.I. Bureau, Inc.
P.O. Box 161208
Hialeah, FL 33016
(305) 639-2599

Subscribed and Sworn to before me on the 2nd day of November, 2017 by the affiant who is personally known to me.

NOTARY PUBLIC

M. MOLLER
MY COMMISSION # FF 177353
EXPIRES: March 15, 2019
Bonded Thru Notary Public Underwriters

Our Job Serial Number: EIB-2017000255

AOS
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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (HYGEA HOLDINGS CORP.)**

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

DECLARATION OF SERVICE

Robert Deale, declares and says: That at all times herein declarant was and is a citizen of the United States, over 18 years of age, not a party to nor interested in the proceedings in which this declaration is made. That declarant received 1 copy(ies) of the SUMMONS; COMPLAINT AND JURY DEMAND in Case No. A-17-762664-B on the 26th day of October, 2017 and served the same at 2:02 PM on the 26th day of October, 2017 by:

(Declarant must complete the appropriate paragraph)

1. delivering and leaving a copy with the defendant _____ at _____

2. serve the defendant _____ by personally delivering and leaving a copy with _____, a person of suitable age and discretion residing at the defendant's usual place of abode located at _____

(Use paragraph 3 for serve upon agent, completing A or B)

3. serving the defendant HYGEA HOLDINGS CORP by personally delivering and leaving a copy at Vcorp Services, LLC, Registered Agent, 701 S. Carson St, Ste 200, Carson City, Nevada 89701

a. With _____ as _____, an agent lawfully designated by statute to accept service of process;

b. With Macie Tuell, pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the registered agent as shown on the current certificate of designation filed with the Secretary of State.

4. personally depositing a copy in a mail box of the United States Post Office, enclosed in a sealed envelope postage prepaid (check appropriate method):

_____ ordinary mail
_____ certified mail, return receipt requested
_____ registered mail, return receipt requested

addressed to the defendant _____ at the defendant's last known address which is _____

Per NRS 53.045: I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 28, 2017.

Signature of Declarant

American Process Service
10580 N. McCarran Blvd., Suite 115-130
Reno, Nevada 89503
775-337-1117
Nevada License 1088A

AOS

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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (MANUEL E. IGLESIAS)**

AFFIDAVIT OF SERVICE

Summons and Complaint and Jury Demand

Case Number: A-17-762664-B

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

vs.

Defendant:
HYGEA HOLDINGS CORP., a Nevada corporation, et al.

Received by E.P.I. Bureau, Inc. on the 16th day of October, 2017 at 10:00 pm to be served on **Manuel E. Iglesias, 8750 Nw 36th Street, Suite 300, Miami, FL 33178.**

I, Miguel Marino, being duly sworn, depose and say that on the **26th day of October, 2017** at **11:40 am, I:**

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the **Summons and Complaint and Jury Demand** with the date and hour of service endorsed thereon by me, to: **Manuel E. Iglesias** at the address of: **8750 Nw 36th Street, Suite 300, Miami, FL 33178**, and informed said person of the contents therein, in compliance with state statutes.

Description of Person Served: Age: 50+, Sex: M, Race/Skin Color: HISPANIC, Height: 5'9", Weight: 200, Hair: GRAY, Glasses: Y

I certify that I have no interest in the above named action, I am of legal age and I am a certified appointed process server in good standing in the judicial circuit in which the process was served. Under Penalty of perjury, I declare the forgoing to be true.

Miguel Marino
CPS#1613

E.P.I. Bureau, Inc.
P.O. Box 161208
Hialeah, FL 33016
(305) 639-2599

Our Job Serial Number: EIB-2017000253

Subscribed and Sworn to before me on the 2nd day of November, 2017 by the affiant who is personally known to me.

NOTARY PUBLIC

M. MOLLER
MY COMMISSION # FF 177353
EXPIRES: March 15, 2019
Bonded Thru Troy Fain-Insurance

AOS

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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (RAY GONZALEZ)**

AFFIDAVIT OF SERVICE

Summons and Complaint and Jury Demand

Case Number: A-17-762664-B

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

vs.

Defendant:
HYGEA HOLDINGS CORP., a Nevada corporation, et al.

Received by E.P.I. Bureau, Inc. on the 16th day of October, 2017 at 10:00 pm to be served on **RAY GONZALEZ, 2766 NW 62ND STREET, Miami, FL 33147.**

I, Miguel Marino, being duly sworn, depose and say that on the **25th day of October, 2017** at **8:05 pm**, I:

SUBSTITUTE served by delivering a true copy of the **Summons and Complaint and Jury Demand** with the date and hour of service endorsed thereon by me, to: **SANDRA VELOZ** as **CO-RESIDENT (LIVE-IN NANNY)** at the address of: **12350 SW 47TH STREET, Miami, FL 33175**, the within named person's usual place of **Abode**, who resides therein, who is fifteen (15) years of age or older and informed said person of the contents therein, in compliance with state statutes.

Description of Person Served: Age: 47, Sex: F, Race/Skin Color: HISPANIC, Height: 5'3", Weight: 115, Hair: BRW, Glasses: N

I certify that I have no interest in the above named action, I am of legal age and I am a certified appointed process server in good standing in the judicial circuit in which the process was served. Under Penalty of perjury, I declare the forgoing to be true.

Miguel Marino
CPS#1613

E.P.I. Bureau, Inc.
P.O. Box 161208
Hialeah, FL 33016
(305) 639-2699

Our Job Serial Number: EIB-2017000256

Subscribed and Sworn to before me on the 2nd day of November, 2017 by the affiant who is personally known to me.

NOTARY PUBLIC

AOS
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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (CARL ROSENCRANTZ)**

AFFIDAVIT OF SERVICE

Summons and Complaint and Jury Demand

Case Number: A-17-762664-B

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

vs.

Defendant:
HYGEA HOLDINGS CORP., a Nevada corporation, et al.

Received by E.P.I. Bureau, Inc. on the 16th day of October, 2017 at 10:00 pm to be served on **CARL ROSENCRANTZ, 6661 NW 23RD WAY, BOCA RATON, FL 33496.**

I, WAYNE POLLICK, being duly sworn, depose and say that on the **2nd day of November, 2017 at 11:20 am, I:**

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the **Summons and Complaint and Jury Demand** with the date and hour of service endorsed thereon by me, to: **CARL ROSENCRANTZ** at the address of: **21644 Florida 7, BOCA RATON, FL 33428**, and informed said person of the contents therein, in compliance with state statutes.

Description of Person Served: Age: 60+, Sex: M, Race/Skin Color: WHITE, Height: 6'0", Weight: 300, Hair: GRAY, Glasses: N

I certify that I have no interest in the above named action, I am of legal age and I am a certified appointed process server in good standing in the judicial circuit in which the process was served. Under Penalty of perjury, I declare the forgoing to be true.

JORGE LOPEZ
MY COMMISSION # GG 052743
EXPIRES: February 7, 2021
Bonded Thru Notary Public Underwriters

Subscribed and Sworn to before me on the 2nd day of November, 2017 by the affiant who is personally known to me.

NOTARY PUBLIC

WAYNE POLLICK
Process Server CPS# 856 PBC

E.P.I. Bureau, Inc.
P.O. Box 161208
Hialeah, FL 33016
(305) 639-2599

Our Job Serial Number: EIB-2017000261

AOS

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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (JOSEPH CAMPANELLA)**

AFFIDAVIT/DECLARATION OF SERVICE

I, Kimm Allen, being duly sworn or under penalty of perjury, state as follows:

1. At all times relevant, I was an adult over 18 years of age and not a party to the above captioned case.
2. On October 16, 2017, at 7:21 a.m., I served a copy of the Summons (Joseph Campanella), together with a copy of the Complaint in this action, upon Defendant Joseph Campanella.
3. Service was completed by handing a copy to Defendant at his home address of 13206 Admiral Ave., Unit G, Marina Del Ray, California 90292.
4. Joseph Campanella is a white male, approximately 50 years of age, 6'3" tall, and approximately 200 lbs. with black and gray hair.
5. I am a licensed process server or an employee of a licensed process server; my registration number information is: Los Angeles Co. Reg. No. 2016308707.

Date: 10/20/17 Signature: Kimm Allen

Kimm Allen

Subscribed and Sworn to me before this

____ day of _____, 20____.

_____

Notary Public in and for the

County of _____, State of _____.

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT **CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of LOS ANGELES)

On 10/19/2017 before me, DAINA D SUPSTIKS, NOTARY PUBLIC,
Date *Here Insert Name and Title of the Officer*

personally appeared KIMMBERLY ALLEN
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____
Signature of Notary Public

DAINA D. SUPSTIKS
COMM. #2102211
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires 03/05/2019

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____ Document Date: _____

Number of Pages: _____ Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____	Signer's Name: _____
☐ Corporate Officer — Title(s): _____	☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General	☐ Partner — ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact	☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator	☐ Trustee ☐ Guardian or Conservator
☐ Other: _____	☐ Other: _____
Signer is Representing: _____	Signer is Representing: _____

AOS
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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (FRANK KELLY)**

Client Ref.:

AFFIDAVIT OF SERVICE

DISTRICT COURT
CLARK COUNTY, NEVADA

N5HYG and NEVADA 5

Plaintiff(s),

vs.

HYGEA HOLDINGS CORP et al

Defendant(s).

Case Number: A-17-762664-B

Frank James, being duly sworn deposes and says deponent is not a party to this action and is over the age of eighteen years and resides in the State of Georgia.

That on **10/18/2017** at **8:38 PM** at **2660 Peachtree Road, NW; 27G, Atlanta , GA 30305**, deponent served the within **Summons and Complaint**
On **FRANK KELLY**

SUITABLE AGE PERSON: By delivering a true copy of each to **EARNELL LEWIS**, the **Concierge** of **FRANK KELLY**, a person of suitable age and discretion. Said premises is intended recipient's Home within the state.

Description:
Gender: **Male** Race/Skin: **Black** Age: **50** Weight: **161-200 Lbs.** Height: **5' 9" - 6' 0"** Hair: **Bald**
Glasses:**No** Other:

COMMENTS:
This location is a 5 star prominent condo residence. It has high security. The only way to access the residences is to have a key for the elevator. The elevators cannot be accessed unless you go through security. The concierge would not allow access to the unit. The concierge phoned Mr. Kelly and made him aware of the reason for my visit. Mr. Kelly told him to leave the papers with the concierge.

Subscribed and Sworn to before me on
by the affiant who is personally known to me.

NOTARY PUBLIC

William A Acree
Notary Public
Gwinnett County, Georgia
My Commission Expires
November 3, 2020

X

FRANK JAMES
Job # 171698

AOS

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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (GLENN MARICHI)**

AFFIDAVIT OF SERVICE

STATE OF NEVADA
COUNTY OF CLARK
DISTRICT COURT
N5HYG LLC AND NEVEDA 5 INC vs Glenn Marichi
CASE NO: **117762664B**

On Monday, October 16, 2017, at 4:11 PM, I served the within described Summons Together With A Copy Of The Complaint In This Action In the manner described below;

I served the within Summons Together With A Copy Of The Complaint In This Action upon the within named Glenn Marichi by giving a true copy to Glenn Marichi personally. Documents were placed in hand.

Said service was effected at 370 Belle Foret Dr, Lake Bluff, IL 60044.

Glenn Marichi is a White Male approximately 70 years of age, 5' 11" Tall and approximately 190-200 pounds with White hair.

I know the person I served was Glenn Marichi because he so stated it and he also matched a photo provided by client.

I Mark R. Schneider, swear that I am an adult over the age of 18 years, and I am not a party to the above entitled action. Furthermore, I am employed as a private detective under Illinois Agency License #117-000870.

Mark R. Schneider, Licensed Private Detective

MDS INVESTIGATIONS, INC.
P.O. Box 309
McHenry, IL, 60051
(815) 344-4657 (800) 988-6374 , (815) 344-4831

Subscribed and Sworn to before me, October 17, 2017,

Notary Public, State of Illinois
My Commission Expires :

PAULA A SCHNEIDER
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
February 20, 2019

Our Job Serial Number: 72029

AOS
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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (HYGEA HOLDINGS CORP.)**

AFFIDAVIT OF SERVICE

Summons and Complaint and Jury Demand

Case Number: A-17-762664-B

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

vs.

Defendant:
HYGEA HOLDINGS CORP., a Nevada corporation, et al.

Received by E.P.I. Bureau, Inc. on the 16th day of October, 2017 at 10:00 pm to be served on **HYGEA HOLDINGS CORP., 8750 NW 36th Street, Suite 300, Miami, FL 33178.**

I, Miguel Marino, being duly sworn, depose and say that on the **17th day of October, 2017** at **11:35 am**, I:

served a **REGISTERED AGENT** by delivering a true copy of the **Summons and Complaint and Jury Demand** with the date and hour of service endorsed thereon by me, to: **ALEJANDRA MENDOZA** as **Registered Agent** at the address of: **8750 NW 36th Street, Suite 300, Miami, FL 33178** on behalf of **HYGEA HOLDINGS CORP.**, and informed said person of the contents therein, in compliance with state statutes.

Additional Information pertaining to this Service:
10/17/2017 11:20 am Attempted Service. THE REGISTERED (LUCY LOAR) AGENT WAS NOT AVAILABLE.

Description of Person Served: Age: 27, Sex: F, Race/Skin Color: HISPANIC, Height: 5'2", Weight: 120, Hair: BLACK, Glasses: N

I certify that I have no interest in the above named action, I am of legal age and I am a certified appointed process server in good standing in the judicial circuit in which the process was served. Under Penalty of perjury, I declare the forgoing to be true.

Miguel Marino
CPS# 1613

Subscribed and Sworn to before me on the 18th day of October, 2017 by the affiant who is personally known to me.

NOTARY PUBLIC

E.P.I. Bureau, Inc.
P.O. Box 161208
Hialeah, FL 33016
(305) 639-2699

Our Job Serial Number: EIB-2017000254

M. MOLLER
MY COMMISSION # FF 177353
EXPIRES March 15, 2019
Bonded Thru Notary Public Underwriters

AOS
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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (MARTHA MIRENA CASTILLO)**

AFFIDAVIT OF SERVICE

Summons and Complaint and Jury Demand

Case Number: A-17-762664-B

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

vs.

Defendant:
HYGEA HOLDINGS CORP., a Nevada corporation, et al.

Received by E.P.I. Bureau, Inc. on the 16th day of October, 2017 at 10:00 pm to be served on **MARTHA MIRENA CASTILLO, 7275 SW 90TH STREET, APT 610, Miami, FL 33156.**

I, Miguel Marino, being duly sworn, depose and say that on the **21st day of October, 2017** at **7:48 pm**, I:

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the **Summons and Complaint and Jury Demand** with the date and hour of service endorsed thereon by me, to: **MARTHA MIRENA CASTILLO** at the address of: **7275 SW 90TH STREET, APT 610, Miami, FL 33156**, and informed said person of the contents therein, in compliance with state statutes.

Description of Person Served: Age: 43, Sex: F, Race/Skin Color: HISPANIC, Height: 5'3", Weight: 115, Hair: RED, Glasses: N

I certify that I have no interest in the above named action, I am of legal age and I am a certified appointed process server in good standing in the judicial circuit in which the process was served. Under Penalty of perjury, I declare the forgoing to be true.

Subscribed and Sworn to before me on the 23rd day of October, 2017 by the affiant who is personally known to me.

NOTARY PUBLIC

M. MOLLER
MY COMMISSION # FF 177353
EXPIRES: March 15, 2019
Bonded thru Notary Public Underwriters

Miguel Marino
OPS# 1613

E.P.I. Bureau, Inc.
P.O. Box 161208
Hialeah, FL 33016
(305) 639-2599

Our Job Serial Number: EIB-2017000259

AOS
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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (RICHARD WILLIAMS, ESQ.)**

AFFIDAVIT OF SERVICE

Summons and Complaint and Jury Demand

Case Number: A-17-762664-B

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

vs.

Defendant:
HYGEA HOLDINGS CORP., a Nevada corporation, et al.

Received by E.P.I. Bureau, Inc. on the 16th day of October, 2017 at 10:00 pm to be served on **RICHARD WILLIAMS, ESQ., 8110 SW 78TH STREET, Miami, FL 33143.**

I, Miguel Marino, being duly sworn, depose and say that on the **21st day of October, 2017** at **7:31 pm, I:**

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the **Summons and Complaint and Jury Demand** with the date and hour of service endorsed thereon by me, to: **RICHARD WILLIAMS, ESQ.** at the address of: **8110 SW 78TH STREET, Miami, FL 33143**, and informed said person of the contents therein, in compliance with state statutes.

I certify that I have no interest in the above named action, I am of legal age and I am a certified appointed process server in good standing in the judicial circuit in which the process was served. Under Penalty of perjury, I declare the forgoing to be true.

Miguel Marino
CPS# 1613

E.P.I. Bureau, Inc.
P.O. Box 161208
Hialeah, FL 33016
(305) 639-2599

Our Job Serial Number: EIB-2017000258

Subscribed and Sworn to before me on the 23rd day of October, 2017 by the affiant who is personally known to me.

NOTARY PUBLIC

M. MOLLER
MY COMMISSION # FF 177353
EXPIRES: March 15, 2019
Bonded Thru Notary Public Underwriters

AOS
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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (LACY LOAR)**

AFFIDAVIT OF SERVICE

State of Nevada **County of Clark** **District Court**

Case Number: A-17-762664-B

Plaintiff:
N5HYG, LLC and NEVADA 5, INC.

vs.

Defendant:
HYGEA HOLDINGS CORP et al.

For:
MILLER LAW FIRM
ROCHESTER, MI 48307

Received by E.P.I BUREAU, INC. on the 25th day of October, 2017 at 4:34 pm to be served on **LACY LOAR, 2060 Dartmouth Ave N, St.Petersburg, FL 33713.**

I, Matthew Pinelli Jr, being duly sworn, depose and say that on the **26th day of October, 2017 at 8:17 am, I:**

INDIVIDUALLY/PERSONALLY served by delivering a true copy of the **SUMMONS, COMPLAINT AND JURY DEMAND** with the date and hour of service endorsed thereon by me, to: **LACY LOAR** at the address of: **2060 Dartmouth Ave N, St.Petersburg, FL 33713**, and informed said person of the contents therein, in compliance with state statutes.

Military Status: Based upon inquiry of party served, Defendant is not in the military service of the United States of America.

Marital Status: Based upon inquiry of party served, Defendant is not married.

I certify that I am over the age of 18, have no interest in the above action, and am a Special Process Server, in good standing, in the judicial circuit in which the process was served. Under penalties of perjury, I declare that I have read the foregoing (document) and that the facts stated are true. No notary required pursuant to Florida State Statutes 92.525 (B)(2).

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document Subscribed and Sworn to (or affirmed) to before me on the 30 day of OCT, 2017 by affiant, who proved to me on the basis of satisfactory evidence to be the person who appeared before me. Notary Signature:

DOLORES ANN TEDESCO
Notary Public - State of Florida
Commission # GG 130452
My Comm. Expires Sep 1, 2021
Bonded through National Notary Assn.

Matthew Pinelli Jr
58948

E.P.I BUREAU, INC.
P.O. BOX 161206
HIALEAH, FL 33016
(305) 639-2599

Our Job Serial Number: DAT-2017003054

AOS

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

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (JACK MANN)**

AFFIDAVIT OF SERVICE

State of Nevada **County of Clark** **District Court**

Case Number: A-17-762664-B

Plaintiff:
N5HYG, LLC AND NEVADA 5, INC.,

vs.

Defendant:
HYGEA HOLDINGS CORP.; MANUEL IGLESIAS; EDWARD MOFFLY; DANIEL T. MCGOWAN; FRANK KELLY; MARTHA MAIRENA CASTILLLO; 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-X; AND ROES 1-X,

For:
THE MILLER LAW FIRM, P.C.
950 W. UNIVERISTY DR.,
SUITE 300
ROCHESTER, MI 48307

Received by Direct Process Server LLC on the 27th day of October, 2017 at 12:53 pm to be served on **JACK MANN, 27 BIRCHWOOD LANE, GREAT NECK, NY 11024-1718.**

I, Leslie Nielsen, being duly sworn, depose and say that on the **30th day of October, 2017 at 8:49 pm, I:**

Served JACK MANN INDIVIDUALLY/PERSONALLY by delivering a true copy of the **SUMMONS AND COMPLAINT AND JURY DEMAND,** at the date and hour of service endorsed above thereon by me, to: **JACK MANN** at the address of: **27 BIRCHWOOD LANE, GREAT NECK, NY 11024-1718,** and informed said person of the contents therein, in compliance with state statutes.

Military Status: Based upon inquiry of party served, Defendant is not in the military service of the United States of America.

Marital Status: Based upon inquiry of party served, Defendant is not married.

Description of Person Served: Age: 65, Sex: M, Race/Skin Color: White, Height: 5'10", Weight: 170, Hair: Grey, Glasses: N

AFFIDAVIT OF SERVICE For A-17-762664-B

I certify that I am over the age of 18, have no interest in the above action. Under penalties of perjury, I declare I have read the foregoing document and the facts stated are true.

Leslie R. Nielsen

Leslie Nielsen

Direct Process Server LLC
22 Southern Blvd
Suite 103
Nesconset, NY 11767
(631) 406-6989

Our Job Serial Number: DPR-2017002692

Subscribed and Sworn to before me on the 31 day of OCT, 2017 by the affiant who is personally known to me.

NOTARY PUBLIC

DIANE SMID
Notary Public, State of New York
No. 01SM6211141
Qualified in Suffolk County
Commission Expires Sept. 14, 2021

AOS

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
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Tel: (702) 384-7111
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dca@albrightstoddard.com

E. POWELL MILLER, ESQ. (pro hac vice pending)
CHRISTOPHER D. KAYE, ESQ. (pro hac vice pending)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, Michigan 48307
Tel: (248) 595-3332
epm@millerlawpc.com
cdk@millerlawpc.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.: 25 **AFFIDAVIT OF SERVICE (DANIEL T. McGOWAN)**

DISTRICT COURT OF THE STATE OF NEVADA
COUNTY OF CLARK

ATTORNEY: The Miller Law Firm

---x

N5HYG, LLC and NEVADA 5, INC.,

Plaintiff(s),

Index No. A-17-762664-B

-against-

Filed: October 5, 2017

HYGEA HOLDINGS CORP.; 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-X; and ROES I-X,

AFFIDVIT OF SERVICE

Defendant(s),

---x

STATE OF NEW YORK, COUNTY OF **SUFFOLK** *ss:* The undersigned, being duly sworn, deposes and says: Deponent is not a party to this action, is over eighteen (18) years of age and resides at **NORTHPORT, NY**
That on **October 14, 2017** at **3:24 p.m.** at **14 GINA DRIVE, CENTERPORT, NY 11721**
deponent served the within **SUMMONS & COMPLAINT and JURY DEMAND** bearing Case # **A-17-762664-B** and filing date of **October 5, 2017** on **DANIEL T. McGOWAN** the above defendant therein named,

INDIVIDUAL

1 ☒ by delivering thereat a true copy [*of each*] to said defendant personally; deponent knew the person served to be the person described as said defendant therein.

CORPORATION

2 ☐ a corporation, by delivering thereat a true copy [*of each*] to personally. Deponent knew said corporation so served to be the corporation described in said summons as said defendant and knew said individual to be and a person authorized to accept service thereof.

DESCRIPTION - *USE WITH 1 OR 2*

☒	☒ Male	☒White Skin	☐Black Hair	☐White Hair	☐14-20 yrs.	☐Under 5'0"	☐Under 100 lbs.
	☐ Female	☐Black Skin	☐Brown Hair	☐Balding	☐21-35 yrs.	☐5'0"-5'3"	☐100-130 lbs.
		☐Yellow Skin	☐Blonde Hair	☒Mustache	☐36-50 yrs.	☐5'4"-5'8"	☐131-160 lbs.
		☐Brown Skin	☒Gray Hair	☒Beard	☐51-65 yrs.	☒5'9"-6'0"	☐161-200 lbs.
		☐Red Skin	☐Red Hair	☐Glasses	☒Over 65 yrs.	☐Over 6'0"	☒Over 200 lbs.

Other Identifying Features: **FULL GRAY BEARD WITH MUSTACHE**

☒ MILITARY SERVICE – *USE WITH 1*

I asked the defendant personally whether he / ~~she~~ was in the active military service or a dependent of anyone in the active military service of the United States or of the State of New York in any capacity and received a negative reply. Defendant wore ordinary civilian clothes and no military uniform. The source of my information and the grounds of my belief are the conversations and observations above narrated. Upon information and belief I aver that the defendant is not in the military service or a dependent of anyone in the military service of New York State or of the United States as that term is defined in either the State or Federal statutes.

Sworn to before me;

This 28th day of October 2017

NOTARY

LUZ MARIA ACEVEDO
NOTARY PUBLIC, State of New York
No. 01AC6046191
Qualified in Suffolk County
Commission Expires August 7, 2018

PRINT NAME BENEATH SIGNATURE
Timothy G. Westhall

CPS-001407

EXHIBIT 3

EXHIBIT 3

HOLLEY, DRIGGS, WALCH,
FINE, WRAY, PUZEY & THOMPSON
James W. Puzey, Esq. (NV Bar No. 5745)
jpuzey@nevadafirm.com
Clark V. Vellis, Esq. (NV Bar No. 5533)
cvellis@nevadafirm.com
Ogonna M. Brown, Esq. (NV Bar No. 7589)
obrown@nevadafirm.com
800 South Meadows Parkway, #800
Reno, Nevada 89521
Telephone: 775-851-8700
Facsimile: 702-851-7681

ALBRIGHT, STODDARD, WARNICK
& ALBRIGHT
G. Mark Albright, Esq. (NV Bar No. 1394)
gma@albrightstoddard.com
D. Chris Albright, Esq., (NV Bar No. 4904)
dca@albrightstoddard.com
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Telephone: 702-384-7111
Facsimile: 702-384-0605
Attorneys for Plaintiffs

THE MILLER LAW FIRM, P.C.
Christopher D. Kaye, Esq.
(Admitted *pro hac vice*)
cdk@millerlawpc.com
950 W. University Drive, Suite 300
Rochester, Michigan 48307
Telephone: 248-841-2200
Attorneys for Plaintiff N5HYG, LLC

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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; HILLCREST CENTER SV II LLC; HILLCREST CENTER SV III LLC; IBH CAPITAL LLC; LEONITE CAPITAL LLC; N5HYG LLC; and RYMSSG GROUP, LLC, Plaintiffs, v. HYGEA HOLDINGS CORP.; MANUEL IGLESIAS, an individual; EDWARD	Case No.: 18 OC 00071 1B Dept. No.: II **NOTICE OF ENTRY OF ORDER APPROVING STIPULATION FOR PLAINTIFFS TO FILE FIRST AMNEDED COMPLAINT**

MOFFLY, an individual; DANIEL T. MCGOWAN, an individual; FRANK KELLY; MARTHA MAIRENA CASTILLO, an individual; GLENN MARRICHI, M.D., an individual; KEITH COLLINS, M.D., an individual; JACK MANN, M.D., an individual; and JOSEPH CAMPANELLA, an individual,

Defendants.

TO: Defendants above-named and to their counsel of record.

PLEASE TAKE NOTICE that on April 19, 2018, the Court entered its Order Approving Stipulation for Plaintiffs to File First Amended Complaint in this matter. A copy of the Order is attached hereto as Exhibit 1.

DATED this 20th day of April, 2018.

HOLLEY, DRIGGS, WALCH,
FINE, WRAY, PUZEY & THOMPSON

JAMES W. PUZEY, ESQ.
NV Bar #5745
CLARK V. VELLIS, ESQ.
NV Bar #5533
OGONNA M. BROWN, ESQ.
NV BAR #007589
800 South Meadows Parkway, #800
Reno, Nevada 89521

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
G. Mark Albright, Esq. (NV Bar No. 1394)
D. Chris Albright, Esq., (NV Bar No. 4904)
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Attorneys for Plaintiffs

THE MILLER LAW FIRM, P.C.
Christopher D. Kaye,Esq.
(Admitted *pro hac vice*)
950 W. University Drive, Suite 300
Rochester, Michigan 48307
Attorneys for Plaintiff N5HYG, LLC

HOLLEY•DRIGGS•WALCH | FINE•WRAY•PUZEY•THOMPSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 20th day of APRIL, 2018, and pursuant to NRCP 5(b), I caused to be delivered by U.S. Mail a true copy of the foregoing document addressed as follows:

Joel E. Tasca, Esq.
Maria A. Gall, Esq.
Kyle E. Ewing, Esq.
BALLARD SPAHR LLP
1980 Festival Plaza Dr., Ste. 900
Las Vegas, NV 89135
Attorneys for Defendant

Severin A. Carlson, Esq.
Tara C. Zimmerman, Esq.
KAEMPFER CROWELL
50 W. Liberty St., Ste. 700
Reno, NV 89501
Attorneys for Defendant

An employee of Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson

HDW | HOLLEY•DRIGGS•WALCH FINE•WRAY•PUZEY•THOMPSON

INDEX OF EXHIBITS

Exhibit No.	Exhibit Description	No. of Pages
1	Order Approving Stipulation for Plaintiffs to File First Amended Complaint	2

EXHIBIT 1

EXHIBIT 1

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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, v. HYGEA HOLDINGS CORP., Defendant.	Case No.: 18 OC 00071 1B Dept. No.: II **ORDER APPROVING STIPULATION FOR PLAINTIFFS TO FILE FIRST AMENDED COMPLAINT**

Plaintiffs 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; HILLCREST CENTER SV II LLC; HILLCREST CENTER SV III LLC; IBH CAPITAL LLC; LEONITE CAPITAL LLC; N5HYG LLC; and RYMSSG GROUP, LLC, by and through their counsel of record, and Defendant HYGEA HOLDINGS CORP., by and through its counsel, having submitted their Stipulation for Plaintiffs to File First Amended Complaint, and the Court having considered the papers and pleadings on file herein,

IT IS HEREBY ORDERED:

Plaintiffs shall be entitled to and shall amend their complaint to add the following Directors as defendants in this matter, whom Defendant Hygea represents constitutes the current Board of Directors:

Manuel Iglesias

Edward Moffly

Joe Campanella

Martha Castillo

Daniel T. McGowan

Frank Kelly, Jr.

Keith Collins, M.D.

Jack Mann, M.D.

Glenn T. Marrichi

IT IS FURTHER ORDERED that the addition of the Directors will not delay the dates currently set in this matter, and accordingly none of the stipulating parties shall argue that the addition of the Directors necessitates any delay in any currently scheduled court date. However, if one or more Directors asserts that he or she is unable to proceed according to the current schedule or that such proceeding would be improper, then Plaintiffs shall have the right to renew their claim that the Directors are not necessary and indispensable parties, and to therefore argue that one or more date(s) in the case should not be delayed.

IT IS FURTHER ORDERED that Defendant Hygea agrees to cooperate with, and not interfere with, the service of the Amended Complaint on the Directors by way of service on Hygea's registered agent pursuant to NRS 75.160.

IT IS FURTHER ORDERED that the caption of the First Amended Complaint and subsequent filings in this case may be corrected to reflect the identity of the Plaintiffs.

DATED this 19 day of APRIL, 2018.

for DISTRICT COURT JUDGE

“Exhibit 13”

“Exhibit 13”

SUPPL

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
Facsimile: (702) 471-7070
tasca@ballardspahr.com
gallm@ballardspahr.com
ewingk@ballardspahr.com

Attorneys for Defendants Hygea Holdings Corp., Manuel Iglesias, Edward Moffly, Daniel T. McGowan, Martha Mairena Castillo, Lacy Loar, Glenn Marrichi, Keith Collins, M.D., Jack Mann, M.D., Joseph Campanella, and Carl Rosenkrantz

BALLARD SPAHR LLP
1980 FESTIVAL PLAZA DRIVE, SUITE 900
LAS VEGAS, NEVADA 89135
(702) 471-7000 FAX (702) 471-7070

DISTRICT COURT

CLARK COUNTY, NEVADA

N5HYG, LLC, a Michigan limited liability company, et al., Plaintiffs, v. HYGEA HOLDINGS CORP., a Nevada corporation, et al., Defendants.	CASE NO.: A-17-762664-B DEPT NO.: 27

SUPPLEMENT TO MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND

On August 17, 2018, Defendant Hygea Holdings Corp. ("Hygea"), Manuel Iglesias, Edward Moffly, Daniel T. McGowan, Frank Kelly, Martha Mairena Castillo, Lacy Loar, Glenn Marrichi, Dr. Keith Collins, M.D., Dr. Jack Mann, M.D., Joseph Campanella, and Carl Rosenkrantz filed their Motion to Dismiss the First Amended Complaint and to Strike Supplemental Pleadings and Jury Demand (the "Motion").

On October 3, 2018, the Court heard oral argument on the Motion, as well as on that Motion to Dismiss Amended Complaint filed by Defendant Ray Gonzalez. At the conclusion of argument, the Court ordered Hygea to supplement its Motion to advise the Court on the following: whether Hygea's stock has ever traded on the over-the-counter market. Pursuant to the Court's order, Hygea submits this Supplement, which confirms that Hygea is a privately held company and that its stock has never traded on any national exchange or on the over-the-counter market (colloquially known as the "pink sheets"), including on or around October 5, 2016. *See* **Ex. A**, Declaration of Manuel E. Iglesias.

Dated: October 12, 2018

BALLARD SPAHR LLP

By: /s/ Maria A. Gall
Joel E. Tasca, Esq.
Nevada Bar No. 14124
Maria A. Gall, Esq.
Nevada Bar No. 14200
Kyle A. Ewing, Esq.
Nevada Bar No. 14051
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135

Julian W. Friedman
New York Registration No. 1110220
919 3rd Avenue, Floor 37
New York, New York 10022

Attorneys for Defendants Hygea Holdings Corp., Manuel Iglesias, Edward Moffly, Daniel T. McGowan, Martha Mairena Castillo, Lacy Loar, Glenn Marrichi, Keith Collins, M.D., Jack Mann, M.D., Joseph Campanella, and Carl Rosenkrantz

BALLARD SPAHR LLP
1980 FESTIVAL PLAZA DRIVE, SUITE 900
LAS VEGAS, NEVADA 89135
(702) 471-7000 FAX (702) 471-7070

BALLARD SPAHR LLP
1980 FESTIVAL PLAZA DRIVE, SUITE 900
LAS VEGAS, NEVADA 89135
(702) 471-7000 FAX (702) 471-7070

CERTIFICATE OF SERVICE

I certify that on October 12, 2018, and pursuant to N.R.C.P. 5(b), a true and correct copy of the foregoing **SUPPLEMENT TO MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AND TO STRIKE SUPPLEMENTAL PLEADINGS AND JURY DEMAND** was served on the following parties via the Court's electronic service system:

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Ste D-4
Las Vegas, Nevada 89106

E. Powell Miller, Esq.
Christopher D. Kaye, Esq.
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Suite 300
Rochester, Michigan 48307

Attorneys for Plaintiffs

Robert J. Cassidy, Esq.
Sydney R. Gambee, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Stravroula E. Lambrakopoulos, Esq.
Theodore L. Kornobis, Esq.
K&L GATES LLP
1601 K Street, NW
Washington, D.C. 20006

Attorneys for Defendant Ray Gonzalez

Richard Williams Esq.
8110 SW 78th Street
Miami, Florida 33143

Defendant Pro Per

/s/ C. Bowman
An Employee of BALLARD SPAHR LLP

EXHIBIT A

DECL
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
Facsimile: (702) 471-7070
tasca@ballardspahr.com
gallm@ballardspahr.com
ewingk@ballardspahr.com

Attorneys for Defendants Hygea Holdings Corp., Manuel Iglesias, Edward Moffly, Daniel T. McGowan, Frank Kelly, Martha Mairena Castillo, Lacy Loar, Glenn Marrichi, Keith Collins, M.D., Jack Mann, M.D., Joseph Campanella, and Carl Rosenkrantz

BALLARD SPAHR LLP
1980 FESTIVAL PLAZA DRIVE, SUITE 900
LAS VEGAS, NEVADA 89135
(702) 471-7000 FAX (702) 471-7070

DISTRICT COURT

CLARK COUNTY, NEVADA

N5HYG, LLC, a Michigan limited liability company, et al., Plaintiffs, v. HYGEA HOLDINGS CORP., a Nevada corporation, et al., Defendants.	CASE NO.: A-17-762664-B DEPT NO.: 27

DECLARATION OF MANUEL E. IGLESIAS

I, Manuel E. Iglesias, under penalty of perjury under the law of the State of Nevada declare as follows:

1. I am a resident of Miami-Dade County in the State of Florida and am more than twenty-one (21) years old. I am of sound mind and consider myself competent to give testimony in legal proceedings.

2. I am currently the Co-Chairman of the Board of Hygea Holdings Corp.

("Hygea"), a defendant in the above-captioned action, and have served as a director of Hygea since its incorporation. By virtue of my position with Hygea, I am competent to testify as to the matters herein.

3. Hygea is a privately held company, and its stock has never traded on any national exchange or on the over-the-counter market (colloquially known as the "pink sheets"), including on or around October 5, 2016.

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

Dated this 11th day of October, 2018.

Manuel E. Iglesias

BALLARD SPAHR LLP
1980 FESTIVAL PLAZA DRIVE, SUITE 900
LAS VEGAS, NEVADA 89135
(702) 471-7000 FAX (702) 471-7070

“Exhibit 14”

“Exhibit 14”

Electronically Filed
10/19/2018 11:24 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

N5HYG, LLC, NEVADA 5, INC., Plaintiffs, vs. HYGEA HOLDINGS CORP., ET AL., Defendants.	)	CASE NO. A-17-762664
	)	DEPT. NO. XXVII
	)	**Transcript of Proceedings**

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

ALL PENDING MOTIONS

WEDNESDAY, OCTOBER 3, 2018

SEE APPEARANCES ON PAGE 2

RECORDED BY: BRYNN GRIFFITHS, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

APPEARANCES:

For the Plaintiffs: GEORGE MARK ALBRIGHT, ESQ.
CHRISTOPHER D. KAYE, ESQ.
KEVIN WATTS, ESQ.
ROBERT EISENBERG, ESQ.
OGONNA M. BROWN, ESQ.
(via Court Call)

For the Defendants: MARIA A. GALL, ESQ.
KYLE A. EWING, ESQ.
STAVROULA E. LAMBRAKOPOULOS, ESQ.
ROBERT J. CASSITY, ESQ.
SYDNEY R. GAMBEE, ESQ.

WEDNESDAY, OCTOBER 3, 2018 AT 10:27 A.M.

THE COURT: And let's now call *N5HYG, LLC, versus Hygea Holdings*, A762664. And I was going to ask that all appearances start from the right side of the courtroom to the left.

MR. ALBRIGHT: Good morning, Your Honor. Mark Albright, appearing on behalf of the plaintiffs. And we have on the phone also, Ogonna will be joining us. If she's not with us now she's in a appellate settlement conference. I have with me, Your Honor, for the plaintiffs, Chris Kaye, Kevin Watts, and Robert Eisenberg from the Lemons, Grundy, Eisenberg firm in Reno.

THE COURT: Okay. Thank you.

MR. WATTS: Good morning, Your Honor.

MR. KAYE: Good morning, ma'am.

THE COURT: If we can go in order, please?

MR. CASSITY: Good morning, Your Honor. Robert Cassity of Holland and Hart on behalf of Ray Gonzalez.

MS. GALL: Good morning, Your Honor. Maria Gall of Ballard Spahr on behalf of Hygea and most of the director defendants.

MR. EWING: Good morning, Your Honor. Kyle Ewing on behalf of Hygea and most of the director defendants.

THE COURT: Thank you.

MS. LAMBRAKOPOULOS: Good morning, Your Honor. Stavroula Lambrakopoulos of K and L Gates on behalf of defendant Ray Gonzalez.

MS. GAMBEE: Good morning, Your Honor. Sydney Gambee from Holland and Hart on behalf of Ray Gonzalez.

THE COURT: And on the phone is Ms. Brown?

MS. BROWN: Good morning, Your Honor. Ogonna Brown on behalf of plaintiff. Thank you for allowing me to appear telephonically. I appreciate it.

THE COURT: Everyone can appear for every -- any hearing telephonically at any time, whether you're local or not. I hope this can reduce the expense for everyone. So, all right.

So, we have two motions this morning, which I think should be argued together. I'll hear from you on that. They're both defense motions. The first is the Gonzalez Motion to Dismiss and, then, the Hygea Motion. And also requesting to strike supplemental pleadings and the jury demand. Ms. Gall?

MS. GALL: Good morning, Your Honor. We have coordinated between ourselves and we've split up the argument because I'm sure Your Honor --

THE COURT: That's fine.

MS. GALL: -- appreciates the argument is quite long. Mr. Ewing is going to take the first part of the

argument, I will take the second, and, then, Ms. Lambrakopoulos will be speaking on behalf of Mr. Gonzalez.

THE COURT: Good enough. And who presents the Oppositions?

MR. KAYE: Your Honor, I will present the Oppositions.

THE COURT: Very good. And just to let you guys know, you got lucky that it's only 10:30 and you're on the stack to calendar. But we usually set four things every half hour. And when you have lengthy matters, I will always cooperate with you to get them set so that you can have the time you need. Now, you -- today you can have until 11:50 total. So, I don't want the plaintiff to be jammed up in opposing the Motions so be respectful, please, of the plaintiffs' time as you present your matters. I believe, Mr. Ewing, you go first.

MR. EWING: Thank you, Your Honor. May I approach the lectern?

THE COURT: Everyone can stand wherever you're most comfortable. And if everyone's warm, I'll relax the jacket rule for everybody.

MR. EWING: Good morning, Your Honor. I've prepared a not a substantial oral argument on the claim preclusion portion of this. And I heard what Your Honor just said so I'll try to make it as quick as possible but

please --

THE COURT: We've spent a lot of time on the matter of getting ready for today because these are, you know, fabulously interesting issues, first of all. And they're also, you know, dispositive -- potentially dispositive. But, that being said, it's not my intent to cut you off either.

MR. EWING: Okay. Thank you, Your Honor.

As plaintiffs themselves argue in their Opposition, they are the masters of their Complaint. In the context of multijurisdiction litigation like we have here -- or at least had here, this includes protecting the claims pending in one court or jurisdiction from the preclusive effect of a judgment on separate claims pending in another court. These plaintiffs, like any other, must face the preclusive consequences of plaintiff N5HYG taking one cause of action to judgment while the other claims were pending in Federal Court and State. Plaintiffs seek, however, to avoid the consequences of their actions by arguing first that the receiver court lacked jurisdiction to enter a judgment making the judgment not valid and final; second, that because the causes of action are different, plaintiffs' claims are different, too; and, third, the defendants somehow consented to plaintiffs' claim splitting notwithstanding defendants' assertion of an

affirmative defense on that very basis.

One thing I think the parties are not in dispute about are the elements of claim preclusions, so I'm going to just address those within responding to the arguments that I just highlighted.

First, the Receivership Court rendered a valid final Judgment. Plaintiffs argue that because the receivership determined it had no jurisdiction to appoint a receiver in its Judgment, the Judgment has no preclusive effect, notwithstanding approximately 20 pages of Findings of Fact and Conclusions of Law and not withstanding a Judgment on a matter of law that was entered at the close of plaintiffs' Case in Chief, far before the judge -- the Court -- excuse me, found that it had no jurisdiction in that action.

And the case law that plaintiffs rely on for the proposition that the case is dismissed on jurisdictional grounds has no preclusive effect is case law that largely refers to claims that are -- excuse me. Claims that are dismissed in the more typical jurisdictional context on a 12(b)(1) or 12(b)(2) argument where the merits are not reached, no discovery has been had, the trial is not proceeded on the merits, and defense has basically only expended the resources necessary to file one -- and win one motion and plaintiffs have had no opportunity to have their

day in court.

What we have here is a very different situation where over the top of defendants' objections that the Court did not have subject matter, plaintiffs opposed those objections and proceeded all the way through a trial when the fact that they didn't have the evidence to prove a statutory requirement on one of their claims was only in their own hands. And it was only at the close of a full trial on the merits that that information was revealed, essentially.

THE COURT: And, then, that had to do with the percentage of shared ownership?

MR. EWING: That's right, Your Honor.

THE COURT: Which is in this First Amended Complaint, which is under the statutory threshold.

MR. EWING: What's that?

THE COURT: It -- the First Amended Complaint has 8.75 percent, which is under the statutory threshold.

MR. EWING: That's correct. And I believe plaintiffs' argument in the Receivership Court was that along with the other plaintiffs there, they had the 10 percent. And those receivership claims that have the 10 percent threshold aren't pending here, which is part of the other discussion of: Are these the same claims or could these claims have been brought? But that's correct. Under

the two statutes in Chapter 78, there's a 10 percent threshold requirement.

And what the Receivership Court ultimately found was that it just didn't have the evidence to even make that determination. And that was because the parties had stipulated to the total numbers of shares plaintiffs owned, but there was no evidence that made it into the record of how many shares were, in fact, issued and outstanding so the Court was, you know, lacking half of the equation, essentially, to make that determination. But it could only do that because of the case law in Nevada that the 10 percent requirement must be met at the time of appointment at the close of a weeklong trial.

And, you know, some of the case law they cited, for instance, the *Johnson* case, says that, you know, receivership action can't be res judicata but that was in a very different procedural context where they had lost a Motion for a Temporary Receiver and, then, the defendant moved its summary judgment based on claim preclusion. And the Nevada Supreme Court said, no, you know, that was not a valid judgment, a valid final judgment, because it was on a Motion for a Temporary Receiver at the outset of the case. And, like any early injunctive relief, there is a look at the merits, but there's no decision on the merits or the likelihood of success on the merits, so it couldn't be

precluded within that case. In this case, defendants in the Receivership Court moved to consolidate the trial with the hearing on the receiver and make it a final judgment, which the Court granted. And I don't think there's any dispute that that was the intention of the trial on the merits.

And we relied on one case I'd like to talk about, it's from the Fourth Circuit but as this Court knows, Nevada often looks to the Federal Courts when it does not have its own case law on an issue. And in the *Stebbins* case, we -- there was a very similar situation. And what the Fourth Circuit ultimately held was:

> It would clearly be unfair to burden the defendant with a second action when the fact that the first action was not decided on the merits is due solely to the plaintiffs' intentional disregard to the statutory precondition.

And they went -- the Fourth Circuit went on to say:

> The unfairness that would result to the defendant from a new trial is substantial in manifest. The defendant not only prepared to litigate the merits of the first suit but actually participated in a hearing on the merits.

And, here, not only did defendants prepare for a

trial on the merits but the endured an entire weeklong trial on the merits. And part of what I think is so important here is that all of the key witnesses -- or at least some of the key witnesses from this case, testified for hours in that case. And they were often asked about and provided testimony on the facts that underlie this case. And at that -- during arguments about relevancy of those claims, counsel for the plaintiffs took the position that, you know, if there were misrepresentations and inaccuracies and financial statements provided at the time frame at issue in this case, they were relevant to that case.

And one of the arguments they make is that because we objected to the relevancy in that action, we somehow consented to claim splitting but there's simply no support for that type of an argument. While there are some cases where, you know, consent has been found, the facts are just distinguishable from what happened here. Plaintiffs' position would basically be that we either could not object to relevancy in the trial and had to let that in without saying anything or we had to object and consent to them splitting their claims. And what we're objecting to is exactly what they're trying to do. And there's no question that they were on notice that, you know, we had made the affirmative defense that there was claim splitting.

And I think one of the other points that they make on the consent argument is that, well -- I think their argument -- and I don't want to speak for them, is that we should have made some kind of Motion to Dismiss or Motion to Stay based on the First to File Rule. But we cited some case law in our Reply, there's strong federal case law, including from the U.S. Supreme Court, that says the same claims or similar claims based on the same facts can be pending in Federal and State Courts at the same time. And, so, there was simply no basis for us to move, particularly when the federal action was already stayed at that point in time. And there was no risk that the Federal Court was going to, you know, enter a judgment at that time was inconsistent with the trial that was going on. So, in no way did defendants consent or acquiesce to the claim splitting simply by making objections based on relevance because there were different claims.

And, with that, I'll move to that element of it: Were these the same claims or not? I don't think there's any dispute, certainly from the defendants, that these are different claims seeking different relief. But that's not the test in Nevada and it's been reaffirmed in several recent cases that the test is: Could the claims have been brought and were they based on the same set of facts? And, as the Court knows, we set forth a lengthy table that took

out what we considered each sub -- I think it's a pages 8, 9, and --

THE COURT: And I brought it to court because it was helpful to me.

MR. EWING: Okay. And the -- we picked out what we thought was every substantive allegation in the receivership Complaint and cited to at least one of the same paragraphs in the Complaint in this action. And, you know, we argued at one point, if you tried to make a Venn diagram out of the facts in these two cases, it would just be a smaller circle inside a bigger circle. Everything in the receiver action is just elaborated on in more detail in the Complaint in this action.

And plaintiffs suggest that because of the exclusive form provision in the SPA that they could not have brought these same claims in the receivership action and had all of them litigated at once there, and, you know, avoid any preclusive effect of the ruling on the receivership portion of that because there wouldn't be a final judgment, but there simply -- Courts do not have to enforce the forum selection clause. And had they gone to that Court and said, you know, they made us move up here and, you know, we want to assert these claims here and we tried to make an argument that we now wanted the protection of the forum selection clause after we argued against it, I

don’t think that would have gotten very far. But the point is, they didn’t try. And, so, they're essentially asking, you know, this Court and us to speculate about what we would have argued, how that Court would have ruled, and what the law is. And, you know, that in and of itself is just not enough to say you could not bring those claims. Had they tried to bring those claims and that Court said no, you know, we’d be having a very different analysis that would be a lot more straightforward. But there's nothing in the law that says that they can't bring their claims. And, in fact, NRCP 18 provides for very permissive Joinder of any and all claims you may have and any form of relief, whether it’s equitable or legal.

So, with that, I'll move to the final prong: Are these the same parties? I don’t think there’s much dispute that plaintiff N5HYG and plaintiff Nevada 5 are in privity with each other. N5HYG is a wholly owned subsidiary of Nevada 5. Plaintiffs suggest in the -- in their Opposition that because all of the plaintiffs to the receivership action are not plaintiffs here, the parties are different, but that’s simply not the rule and it would make no sense for it to be because essentially a group of plaintiffs could get together, lose a lawsuit, and, then, each of them could sue individually and it would be, you know, the exact -- it would make the -- do the exact opposite of what the

rule is meant to prevent and allow for even more litigation against the defendant.

And, on the other side of the V, there's no dispute that 10 of the defendants are the same. There are an additional three to five defendants, there's some confusion with the estates of a couple of people but each of these defendants is in privity with Hygea as one of their directors, first and foremost. But, in addition, the *Waddell* Court in 2015, under the Nevada Supreme Court, adopted the nonmutual claim preclusion, which is basically the same analysis as the claims. Could they have added the defendants in the other case? And had they brought these claims in the other case, I don't think there's any dispute that plaintiffs could have brought them and -- or brought those defendants in and asserted the claims against them in the first action.

And, unless Your Honor has any questions on claim preclusion, I'll turn it over to Ms. Gall.

THE COURT: I don't. Thank you.

MR. EWING: Thank you.

MS. GALL: Thank you, Your Honor. I'm going to be addressing the second half -- or second halves, I suppose, of our Motion to Dismiss.

First, I'd like to address Nevada 5's participation in this lawsuit. Your Honor, Nevada 5 lacks

standing to bring any claim in this case. It's not a Hygea stockholder and it's not a counterparty to the Stock Purchase Agreement at issue in the Complaint. Nevada 5 is merely the sole member or parent corporation of plaintiff N5HYG, which is the Hygea stockholder and the counterparty to the Stock Purchase Agreement. And Courts consistently hold that wrongdoing by a subsidiary does not confer standing upon the parent company, even if the parent is the sole stockholder.

Plaintiffs say that Nevada 5 is a proper party for five reasons. First, they say that our purported misrepresentations were made to Nevada 5 through RIN and through its agent, RIN Capital, and not N5HYG. However, if this is the case, then their claims against N5 -- the claims brought by N5HYG for misrepresentation against defendants need to be dismissed. It can't be both. We either made the misrepresentations to Nevada 5 or we made them to N5YHG.

Second, they argue that Nevada 5 formed N5HYG for the sole purpose of purchasing Hygea stock based on the company's misrepresentations. However, if it's the case that Nevada 5 suffered the consequences of the alleged misrepresentations, then plaintiffs need to actually allege that and identify that and identify the consequences in the Complaint. They can't just make the argument in their

Opposition. But what we see from the Complaint today is that it isn't Nevada 5 that suffered the purported consequences, it's N5HYG.

So, that brings me to the third argument, which is that this Court should somehow expand the term of buyer and include Nevada 5 as a purchaser of Hygea stock. Your Honor, this argument makes no sense, it's not supported by any authority, and it just belies the very plain meaning of the term buyer or purchaser.

Fourth, they argued that we conceded in an insurance coverage action that Hygea brought against its DNO carrier that Nevada 5 has standing to make its claims. We've conceded no such things. In our insurance coverage action, we just merely pointed out that Nevada 5 is a plaintiff to this action and has brought claims against Hygea and its current and former officers and directors and that we face exposure for such claims.

Fifth, they make this argument that we have not argued that Nevada 5 failed to plead its claims. I think our Motion clearly shows we've argued that Nevada 5 has failed to plead its claims. And, so, accordingly, we think Nevada 5, should this suit survive or any claim survive, Nevada should be dismissed as a plaintiff.

I next want to address our argument for personal jurisdiction. Your Honor, this Court does not have

personal jurisdiction over all defendants other than Hygea, Mr. Iglesias, and Moffly. Essentially, the parties to the Stock Purchase Agreement. We refer to all the other defendants as the non-guarantor defendants because they did not sign the agreement. It appears that plaintiffs concede that this Court does not have general personal jurisdiction and that this dispute centers around specific personal jurisdiction. Plaintiffs, however, ignore the overarching requirement for this Court to exercise specific personal jurisdiction over the non-guarantors. There has to be an affiliation between Nevada, between the underlying activity that's at issue in the Complaint, and the non-guarantors' involvement in such activity. The problem with their Complaint is is that at no point do plaintiffs allege what activity took place in Nevada or how the non-guarantor defendants were involved in such Nevada activity. Instead, what they do is they make arguments that have either been rejected by the U.S. Supreme Court, the Nevada Supreme Court, or are just factually incorrect.

The first argument they make is that this Court has specific personal jurisdiction because the non-guarantors approved the sale of stock to Nevada 5 and thereby harmed Nevada 5. This argument, however, ignores that Nevada 5 never owned any Hygea stocks. We're back to the standing argument. But even if Nevada 5 had standing,

it's very well settled that defendants' relationship with a plaintiff alone cannot confer jurisdiction upon the Court; rather, it's the defendants' affiliation with the forum that is determinative.

Second, plaintiffs argue that this Court has specific personal jurisdiction over the non-guarantors because some or all of the non-guarantors were Hygea officers. Nevada Supreme Court in the *Consipio* case, however, has squarely rejected this approach and said that a nonresident individual's position as a Nevada corporations director does not automatically subject that individual to the specific jurisdiction in Nevada.

Third, plaintiffs make this argument that the non-guarantor defendants were effectively served in Nevada. I'm going to try to parse out what I think their argument is. But I'm not sure -- we weren't served in Nevada.

THE COURT: I had a hard time following it too because every certificate of service indicated they were served outside of the state.

MS. GALL: I think what they're trying to argue is that under NRS 75.160, which allows you to serve a corporation's director via the corporation's registered agent, meaning somehow that the directors were effectively served in Nevada. Without getting into what that statute actually implies or means, because I don't think the Nevada

Supreme Court has yet had occasion to rule upon -- or pass upon that issue, here, they weren't served through their registered agent, they were personally served, so I don't think 75.160 even comes into play.

Lastly, they make this argument that the non-guarantors are somehow subject to the SPA's forum selection clause because the non-guarantors approved the SPA -- or, rather, what they did was they approved the officers to enter into the SPA on behalf of the company. But mere approval is not the sufficiently close enough nexus that Courts require in order to impose a forum selection clause on non-signatories. The District of Nevada case that plaintiffs rely on for that argument, it self relies on a Ninth Circuit case, which it self relies on a Northern District of Illinois case, it's called *Clinton v. Jenger* [phonetic]. And, there, the Northern District of Illinois set -- found close enough to mean a situation in which the non-signatory is a third-party beneficiary of the agreement. Here, the non-guarantors are neither alleged to be third-party beneficiaries, nor are they in reality third-party beneficiaries.

Your Honor, I'd like to move on now to the 12(b)(5) arguments. Plaintiffs bring, you know, 21 causes of action or counts on their First Amended Complaint and I'd like to address what we've defined as the claims in

fraud. When you look at the claims in fraud, there are two threshold issues I think the Court has to consider. One is the integration clause in the Stock Purchase Agreement. That integration clause, we believe, bars all their claims in fraud because those are based on plaintiffs' assertion that they relied upon certain misrepresentations -- or certain representations that Hygea had a strong financial performance and that Hygea intended to go public after their investment. But that inter -- the integration clause forbids -- and I'm going to quote from the SPA:

> All prior discussions, negotiations, proposals, understandings, and agreement, including for the express purpose of evidencing a party's intent.

So, here, the integration clause bars the claims in fraud, each of which relies upon allegations of preagreement misrepresentation and requires an allegation of defendants' intent. Plaintiffs don't dispute the existence or the validity of the clause, rather what they argue is that their clause does not bar their claims in fraud because Courts allow parole evidence to prove fraudulent inducement.

As initial matter, that argument regarding fraudulent inducement does nothing to save plaintiffs' other claims in fraud, which may not be based on fraudulent inducement. And even with respect to a claim of fraudulent

inducement, the Nevada Supreme Court has held that when a fraudulent inducement claim contradicts the express terms of the parties' integrated contract, it fails as a matter of law. Plaintiffs' allegations about defendants' misrepresentations regarding financial strain, the company, and the intent to go public contradict the agreements' indications that the -- that they were relying on their own due diligence in making a financial assessment regarding the company.

The second point I want to make about the claims in fraud have to do with Rule 9(b) -- have to do with Rule 9(b) and its heightened pleading standard. Plaintiffs are not only required to plead the particulars of fraud but they've -- they have to -- when there are multiple defendants as there are here, plaintiffs have to differentiate those allegations and inform each defendant separately of the allegations surrounding his or her alleged participation in the fraud.

As to Hygea and the guarantor defendants, plaintiffs base their claims in fraud on assertions that those defendants misrepresented Hygea's financial performance and attempt to go public. They attempt to -- plaintiffs attempt to create the venire of particularity by alleging that these defendants provide us certain documents on certain dates with inaccurate financial figures. But

what they never get to is the why and the how. What was inaccurate about these financial figures? And their lack of specificity is exacerbated by other allegations that these figures could have been inaccurate and that they were subject to ongoing adjustment. And, so, the Hygea guarantor defendants simply do not have notice of: What do I need to defend against on these financial figures?

As to the non-guarantor defendants, plaintiffs plead no facts that these defendants ever made any representation to plaintiffs, let alone a misrepresentation. Rather, they try to save their claims in fraud against the non-guarantors by pointing to conclusory allegations that such defendants knew or should have known that the information they received from Hygea was false. But that allegation at best sets forth the element of fraud demanding knowledge that the misrepresentations were false. It still doesn't set forth the misrepresentation itself as to each defendant.

Finally, plaintiffs argue that Rule 9(b) doesn't apply to their securities fraud claims but the overwhelming authority holds otherwise that where there's plead a unified course of conduct or where the securities fraud claims sound in fraud, Rule 9(b) applies. Plaintiffs' own cases, including *Nolemburg* [phonetic], state expressly this.

With respect to the securities fraud claims, I'm going to be very brief on those because Ms. Lambrakopoulos is going to expand on that argument. But plaintiffs essentially made corresponding claims for securities fraud under the -- under the Securities Act, the 1933 Securities Act and, then, the Nevada Uniform Securities Act. With respect to their statutory securities fraud claims under the federal act, they simply do not allege a public offering. With respect to their statutory securities fraud claim under the Nevada act, they simply do not allege that the offer or sale was made in Nevada. Under the registration requirements under both acts, there's a safe harbor for privately negotiated transactions. And if both the statutory securities fraud claims and the registration causes of action fail, then the control person liability claims fail because there simply isn't a primary violation.

Plaintiffs also make another grouping of causes of action under the -- under breach of fiduciary duty. And before I address the demand requirement under failure to make demand, I think there are two threshold things that bar these claims in any event. First, Rule 23.1 imposes a contemporaneous stock ownership requirement. Plaintiffs had to own stock both at the time of the complaintive transaction and throughout this lawsuit. Here, we note Nevada 5 has never owned stock and we know that N5HYG only

became a stockholder as of October 5th, 2016, the date of the agreement.

Accordingly, paragraphs 32 through 52 of the Amended Complaint, which concern actions prior to October 5th, 2016, are entirely inapplicable to any claim for breach of fiduciary duty. Second, although paragraphs 53 to 76 of the Amended Complaint contain allegations that purportedly occur for actions that purportedly occurred after October 5th, such allegations are subsumed by plaintiffs' claim for breach of contract. And Courts have held that claims for breach of fiduciary duty cannot proceed in parallel for breach of contract unless there's an independent basis for the breach of fiduciary duty claims.

To the extent any of their allegations survive both of those arguments, such allegations set forth a claim that is necessarily derivative, not direct. And this is the point of contention between the parties, whether or not the claims are in fact direct or derivative. And, as I'm sure Your Honor is familiar, about a year or so ago, the Nevada Supreme Court issued an opinion, *Parametric Sound*, where they definitively adopted the direct harm test where the Court has to consider: One, who suffered the alleged harm; and, two, who would receive the benefit of every -- any recovery. And to maintain a direct claim, both questions have to be answered in favor of the stockholder.

Here, plaintiffs' fundamental theory of this case describes what can only be a derivative claim from its management. Paragraph 74 of their Amended Complaint, they say that the entire theory behind Hygea's business model was that:

> Hygea would realize efficiencies from effective business and accounting practice. Such a theory is entirely at odds with the way defendants have actually run the organization. Among other things, this reflects defendants' disorganized accounting and ineffective management.

Paragraph 151: The highest fiduciary obligations in the management and administration of the affairs of Hygea, including oversight of compliance with federal laws and securities regulations.

Paragraph 78. Plaintiffs allege that mismanagement lead to Hygea's current distress.

But despite these allegations, plaintiffs -- despite these allegations, plaintiffs say that it would be they that would be damaged and that they would be disproportionately harmed. But they don't explain why they would be disproportionately harmed. That said, that's of no moment because disproportionate harm just isn't the test for whether a claim is direct or derivative, rather it's the test that I just announced. And, also, when plaintiffs

try to argue -- if plaintiffs -- what plaintiffs are trying to argue that they'll be disproportionately harmed because their stockholdings, well -- or because share value is destroyed, but that would merely be a decrease -- it would be the unavoidable result of a decrease in Hygea's entire value. And that is a harm to the corporation, not to the stockholder itself.

Presuming that these claims are derivative, then plaintiffs, under Rule 23.1, either had to make demand on the Board or they had to explain why demand should be excused as futile.

There is two court -- there is two tests that Nevada has adopted for determining whether demand should be excused. When there's a transaction at issue, the courts look at the test set fort originally by Delaware and *Aronson v. Lewis*. When there's not a transaction at issue, courts look at the test in *Rales*. It's unclear here whether plaintiffs are actually pleading an oversight claim or lack of oversight claim to --

THE COURT: There were only a few paragraphs that really dealt with the issue.

MS. GALL: Right. To -- for the *Rales* test to apply but it doesn't really matter because, under both tests, their argument fails. They say that demand would be futile because the Board would never have authorized the

suit against themselves because the Board has longstanding deference to Hygea's management and because the Board ignored red flags. But Nevada has joined numerous other courts in saying that the mere threat of liability and the approval of wrongdoing or other participation, that alone is not sufficient to show the interestedness that's required to excuse demand.

And although at times a lack of independence can be demonstrated by facts showing that a majority of the Board is the beholden to other liable persons, here plaintiffs haven't alleged any facts, much less particularized facts explaining why a majority of the Board is beholden to anyone.

And, then, finally, plaintiffs don't identify the red flags at issue. But even if they could be -- even if those red flags could be inferred, they don't allege that the Board was informed of the red flags and they don't allege that the Board consciously ignored the red flags, both of which is needed to allege the second prong of a care mark duty of oversight claim.

So, accordingly, we don't think that plaintiffs have overcome Rule 23.1 for purposes of pleading demand. But even if they have, they haven't rebutted the Business Judgment Rule because they have not plead any facts to demonstrate how the director defendants breached their duty

of loyalty in good faith or their duty of care. For instance, they haven't plead enough facts to show that the director defendants were self-interested in the transaction at issue. They -- and they haven't plead any facts to show that the director defendants acted on an uninformed basis. Now, they argue that the director defendants could not have acted on an informed basis, otherwise Hygea's true financial position would have come to light. But, Your Honor, that merely begs the question. They have to set forth specific facts.

With respect to if -- even if we move beyond the Business Judgment Rule, we still have the exculpatory clause, Your Honor. And I don't think that they've plead enough to demonstrate intentional misconduct fraud, for the same reasons as I argued under Rule 9(b), or an unknowing violation of the law. And even if they had somehow passed both the Business Judgment Rule and the exculpatory clause, I think, even under a pure 12(b)(5) standard, I still think that they have failed to plead cognizable claims for corporate opportunity, waste, minority shareholder oppression, which Nevada does not recognize, or the duty of candor, which again, Nevada does not recognize.

Similarly, I think their other common law claims fair no better. Negligent misrepresentation is barred by -- again, I'm assuming if they've gotten past 9(b), it's

barred by the economic loss doctrine. Tortious interference is barred by case law that says directors cannot tortiously interfere with their corporation's own contracts. Plaintiffs argue that the directors were not -- directors are not agents and Nevada Supreme Court has expressly held otherwise in multiple cases, including *Kendall v. Henry Mountain Lines* [phonetic] and *Foster v. Arata*.

Plaintiffs alternatively argue that the directors were acting outside of the scope of their authority but they need to plead one or the other. Were they acting within their authority or were they not acting within their authority? And even if -- they are alleging that the directors acted outside authority, it needs to be based on something more than information and belief. It needs to be based on actual facts that they've investigated and alleged.

Similarly, with conspiracy and concert of action, the intercorporate conspiracy doctrine bars these claims. Unjust enrichment, plaintiffs have not plead what monies belonging to them or belonging to Hygea the director defendants are actually withholding. Constructive fraud, they don't plead a special confidential relationship, as that term is properly understood. And with respect to accounting, they don't plead why they needed accounting or

what monies the director defendants are holding that only an accounting can determine.

Finally, Your Honor, we made a Motion to Strike Supplemental Allegations. We've identified those in our Motion. I don't believe that they're properly in here. Plaintiffs did not make a motion. I'm not saying the Court -- obviously, I would never speak for the Court, wouldn't grant that, but they haven't made a motion, we haven't opposed, and the Court hasn't made a ruling.

I'll now turn this over to Ms. Lambrakopoulos.

THE COURT: Thank you. You've gone about 37 minutes and it's 11:07. How long do you anticipate needing?

MS. LAMBRAKOPOULOS: I believe about 10 minutes, 15 minutes.

THE COURT: Mr. Kaye, how long do you think that you will need in response?

MR. KAYE: Your Honor, I think that that's kind of a loaded question because I could probably talk for quite a while on this. I think that I'll probably need about 45 minutes.

THE COURT: Okay. All right. So, if we are not finished at 11:50, the Court will recess at that time. We'd start back at 1:30.

MS. GALL: Okay.

MS. LAMBRAKOPOULOS: Thank you, Your Honor.

THE COURT: Thank you. Ms. Lambrakopoulos?

MS. LAMBRAKOPOULOS: Thank you, Your Honor. I appreciate the opportunity. And to conserve the Court's time, I will focus on certain particular arguments.

THE COURT: No. We've just addressed the issues that you can present your argument. And if we need to, for Mr. Kaye to finish and you to adequately reply, we'll just come back at 1:30.

MS. LAMBRAKOPOULOS: We appreciate that, Your Honor.

THE COURT: Thank you.

MS. LAMBRAKOPOULOS: Mr. Gonzalez joins in all of the arguments that have been made by -- on behalf of Hygea and the individual defendants. And we've set out, you know, the basis of our grounds for our Motion to Dismiss in our briefs. I'd like to focus on certain arguments that are particular to Mr. Gonzalez and, in particular, the personal jurisdiction argument and the group pleading argument. And, then, do a deeper dive into the claims that have been brought on the basis of the federal securities laws and the Nevada state securities statute. And, then, just very briefly address some of the other arguments that have already been dealt with by counsel for Hygea and the individual defendants.

Just to preface, Mr. Gonzalez has been a resident of Florida for over 46 years. He has not engaged in any business in Nevada. He was a director of Hygea for a very brief time, from February 2016 until October 2016, just after N5YHG entered into the Stock Purchase Agreement. So, we can cabin his conduct here in a very discrete time period of October 2016, based on the plaintiffs' allegations.

The first conduct as to Mr. Gonzalez specifically that is alleged -- and he's grouped with a whole -- all the other directors, was that he approved a resolution authorizing Hygea's management to enter into negotiations and execute a Stock Purchase Agreement with RIN Capital, a Michigan based entity. And that is the first conduct that is alleged as to him. Frankly, there is only one paragraph in the Complaint that specifically names Mr. Gonzalez, it's paragraph 16. And all it does is it identifies him and notes that he's a director of Hygea.

By cabining this conduct into October and recognizing that Mr. Gonzalez left the Board following the transaction at issue here, a fact that has not been refuted by the plaintiffs, we really can focus on this one act that's being alleged as to him and that is the approval of the Board resolution the day before the transaction.

But, as a threshold matter, plaintiffs have not

met their burden to establish personal -- this Court's personal jurisdiction over Mr. Gonzalez. He -- despite all of their arguments, they cannot evade the burden of showing that due process would be exercised by that assertion of personal jurisdiction as to him. He's had no minimum contact with the forum state. He's visited Nevada twice on vacation, a total of eight days over his lifetime, once in 2010 for four days -- and this is prior to his coming on the Board at Hygea, and then again in 2017, after he left Hygea's Board, again, for four days. He has not transacted any business. None of his efforts on behalf of Hygea as a director of Hygea involved Nevada. Certainly, Hygea is incorporated in Nevada but that's the extent of any type of touch with Nevada.

There has been no allegation that would establish purposeful availment by Mr. Gonzalez individually of the forum state with respect to the claims at issue here. There -- the transaction itself was originated by Mr. Manoj Bhargava who is a resident of Michigan. He is the investor here. Through his investment office, RIN Capital, also of Michigan, he conducted due diligence into this company and, then, formed a Michigan corporation, N5HYG, in order to invest in Hygea. All of these are Michigan entities. N5HYG has a Nevada parent but Nevada 5 was not involved in this based on the plaintiffs' allegations.

There is really no conduct by Mr. Gonzalez individually that's aimed at this forum state. And plaintiffs rely on *Consipio* in order to argue that the fact that he was a director of a Nevada corporation is sufficient. But even *Consipio* did not support that particular argument because even in that case, there needed to have been established some harm or at least an allegation of harm to the Nevada corporation. And all of the plaintiffs' allegations with respect to Mr. Gonzalez are that he harmed them, not the corporation but them in particular.

So, we don't think that, you know, this lack of purposeful availment with Nevada, lack of minimum contacts, there is no direct nexus between Nevada and the claims at issue here in Mr. Gonzalez's alleged conduct. The -- it would also not be reasonable to hail him into court here because he really has had no contact with this state as it relates to the claims at issue here. And the Courts do apply a seven-factor test here and the plaintiffs have not met their burden here.

So, with all of that in mind, we would argue that plaintiffs have not met their burden in order to assert -- have this Court assert jurisdiction and get through the gate in order to be able to plead their other claims.

Now, there are certainly a lot of deficiencies

with the Complaint. As to Mr. Gonzalez, plaintiffs have had an opportunity to amend their Complaint, there have been a total of three Motions to Dismiss filed here, one in Federal Court, one again when we were remanded to State Court. Once we filed and completed our opening briefs, plaintiffs sought leave to amend and they amended their Complaint and this is really our third round of Motions to Dismiss that at least we have filed on our side.

But I would like to focus on the 9(b) particularity standard and the obligation that the plaintiffs have to meet this heightened pleading standard. And, other than naming Mr. Gonzalez by name in this one paragraph, he is lumped together with the directors. And, based on his limited tenure on the Board, really the focus is October of 2016 with respect to him. There is really only one act that could arguably give rise to any other claims and it simply doesn't. Because, based on this particular allegation, it's an allegation of approving a resolution the day before the SPA was entered into and he couldn't have been involved in any of the misconduct that they allege prior to the entry and he couldn't have been involved in any of the misconduct that they allege following the execution of the SPA. But be that as it may, they do have an obligation to spell out the statement that he's alleged to have made, the particular act that he took,

which gives rise to the various causes of action that they've asserted against him and they have simply not met their burden to do so.

I would now -- sort of putting aside for those deficiencies here, which should, on their own, require dismissal here, I do want to focus on the federal and state securities claims that the plaintiffs have asserted here. And, really, we've seen since the initial Complaint was filed and the plaintiffs filed their various Opposition briefs and the amendment -- Amended Complaint was filed, at the end of the day, these claims are simply confused and mixed up. They are -- they consist of a spattering of quotes from different statutes that really don't apply here. They, initially, on the federal side, they asserted securities fraud, federal securities fraud. Well, you know, they did quote from Section 10(b)(5) of the 34 Act but after a lot of briefing and removal up to Federal Court, they conceded that they weren't asserting at 10(b)(5) claim.

They have quoted from 17(a), Section 17(a) of the 33 Act, which is the parallel antifraud provision under that statute. There is no private right of action for -- I think that's the alarm.

THE COURT: If anyone has a phone on, this is your reminder to please turn it off.

MS. LAMBRAKOPOULOS: It's the alarm. There is no private cause of action under 17(a) and plaintiffs have not come up with any argument that would allow them to get around this. This is just well settled law.

They've asserted and quoted from Section 5 of the 33 Act, which is the sale of unregistered securities. Again, there is no private cause of action as to Section 5. Again, there is no way that plaintiffs get -- can get around that. It's, again, well settled law. They can't bring those claims. Arguably, the sole federal claim that they have asserted where there is a private cause of action is Section 12. And this covers essentially counts 2, 4, and 6. In particular, count 2, according to the plaintiffs' arguments, is an assertion of a Section 12(a)(2) claim, which involves the making of material misstatement in connection with an offering. But that particular claim doesn't apply to this particular transaction.

First, as to Mr. Gonzalez, he was not a seller and this claim only would apply to a seller or a solicitor of a securities offering. And, in terms of the seller, the only seller here if one looks at the SPA is N5 -- is Hygea. There is no other seller here. And there's no allegation of any broker dealer who was involved and that's typically the solicitor is a broker dealer that earns a commission on

the solicitation.

Drilling down to the claim, sort of beyond whether Mr. Gonzalez and any of the other individual directors were sellers here, which they weren't, 12(2) doesn't apply because this is a private offering. This is not a public offering and that is an essential element of 12(a)(2). Plaintiffs have tried to dress up their briefs and they're making this frankly frivolous argument here.

THE COURT: Their Complaint calls this a public transaction.

MS. LAMBRAKOPOULOS: It does. But just calling it a public transaction doesn't make it a public transaction. There are specific rules that govern what a public transaction or a public offering is. They -- I believe they've called it a public exchange offering. There is no such thing. It is either a public offering or a private offering. And a public offering, under 12(a)(2), for 12(a)(2) to apply, there needs to be a prospectus. And a prospectus by -- has been defined by the SEC and the Courts as a registration statement.

THE COURT: Let me interrupt. Paragraph 27: In 2016, defendants undertook a public offering of stock in Hygea.

MS. LAMBRAKOPOULOS: It's a statement that --

THE COURT: But, then, it says, well: Not made to

the public at large through a public exchange but event, which would have been impossible given its financial distress. It was made to investors at large without any preexisting relationship to Hygea.

MS. LAMBRAKOPOULOS: There are -- the allegations that they have made in connection with this offering all support the private nature of this offering. They received a Confidential Information Memorandum. Confidential implies that it is not available of the public. A registration statement, a prospectus under 12(a)(2) is filed with the SEC, it is reviewed and commented on by the SEC staff, and, then, if they agree its deemed effective, there is no such allegation of a publicly filed registration statement pursuant to which the plaintiffs invested. One can call it whatever they want but it's -- frankly, Your Honor, excuse the expression, it's putting lipstick on a pig. It is a private offering that was made between a seller, Hygea, and one investor here. And the result was a private security -- it was base on a private placement, private securities agreement, and there is no other indicia surrounding this transaction that would support that bald statement that they have made.

Section 12(a)(1) is similar. It is an allegation that there has been a sale -- a failure to register securities. And, again, it suffers from the same

deficiencies. Mr. Gonzalez was not the seller or solicitor. This was a private offering that was not required to be registered. And there are various exemptions that a private offering can meet from registration and they have simply not alleged sufficiently that there was any basis for this offering to not meet any of those exemptions from registration.

So, for either of those two narrow claims that, really, one can argue or stated here, this is not the transaction -- the type of transaction that would meet what those statutes would cover. And, then, there's controlled person liability under Section 20. If there is no primary violation, there cannot be a control person violation. And, in addition, Mr. Gonzalez is an independent director, based on the law, is not deemed a control person here.

Similar issues as to the Nevada securities claim. They have asserted a number of different causes of action under the Nevada Securities Statute. Again, they do not meet the threshold. These are counts 1, 3 and 5. They do not meet the threshold that gets them within the reach of this statute. There was no solicitation or marketing of this securities transaction in Nevada. There was no investor in Nevada. The buyer is a Michigan entity. That in itself would preclude any of these provisions of the Nevada Securities Statute from applying. They have plead

Section 90.660 but -- and that arguably is the only -- one of the few statutes that they've plead where there is a private cause of action. But, again, it requires -- it's limited to those who offer or sell a security an Mr. Gonzalez is neither a seller here, nor frankly the maker of any statement, any misstatement in connection with the securities transaction at issue.

There is no private cause of action under the securities fraud statute that they claim, 90.570, that's count 1. They simply cannot assert it. And we would refer the Court to *Prime Mover*, which is a Southern District of New York case from 2011. It is completely on point here. It involves a Nevada corporation -- or a corporation incorporated in Nevada and has the same types of attributes that are alleged here as to this particular transaction. And, in that case, the Court ruled that the Nevada Securities Act did not apply.

And, then, lastly, they assert a -- count 3 is under 90.460, which is the registration claim, failure to register securities. They have not alleged that there were more than 35 investors who were solicited here and that really is -- it will bar their claim.

Lastly, as to their control person liability, under the Nevada statute, if there is no primary violation there is no control violation. And, again, *Prime Mover*

speaks to that.

Very lastly, Your Honor, you know, I will reference the exculpation for directors for statute, which allows a director here to be exculpated from a number of the claims that they have brought here for the exercise of business -- the business judgment. With respect to Mr. Gonzalez, there are no allegations that would allow a determination that his exercise of the Business Judgment Rule was not proper. Again, his time on the Board with respect to plaintiffs' claims was extremely limited here. And the conduct that's alleged as to him, based on the briefs that the plaintiffs have supplied, is very, very limited.

And, then, as to the other claims that have been brought here, I will conserve the Court's time and associate with the argument by the counsel of Hygea and the other defendants. Frankly, what the plaintiffs are trying to do here unusually is impute the knowledge of the corporation to the individuals. And it's the reverse. It's usually you have the knowledge of the individuals being imputed to the corporation and they're trying to do the reverse here and there was no basis for doing that.

And while they've tried to dress up their Complaint here, they haven't met any of the standards that they need to meet in order to state a claim under any of

the provisions that they've asserted here. And they simply, under the law, are not permitted to do a fishing expedition as to Mr. Gonzalez in order to try to discover enough information that they can couple together enough facts to support their claim. They have to be able to assert a basic level of fact at the get-go. They've had several opportunities to do so. And, based on Mr. Gonzalez's affidavit, which is not refuted, based on the documents that they reference, there simply is no claim here that's viable. Even if there were jurisdiction by this Court, which we submit they have not met their threshold requirement and should not be allowed to get through the gate. Thank you.

THE COURT: Thank you, Ms. Lambrakopoulos.

MS. LAMBRAKOPOULOS: Thank you.

THE COURT: Mr. Kaye? They've had about an hour so I'll ask you to go 20 minutes before we recess. You'll have 40 minutes after lunch.

MR. KAYE: Thank you, Your Honor.

So, before I get into some of the specific things we've discussed, I want to take the big picture view from 35,000 feet here. If it takes, I don't even know how many hundreds of pages at this point, to say that we have not plead a claim, somewhere in there I think we have plead a claim. And indeed, we have an it's a strong prima --

THE COURT: Now, you cooked a big pot of spaghetti, threw it against a wall. So, you -- it was specific at times but not all causes of action were plead to my satisfaction. No offense to you.

MR. KAYE: I appreciate that, Your Honor. And I hope, you know, we can sort of work through some of the spaghetti here and, also, talk about, once again, the big picture core of the case.

And the core of the case, again here, is that the defendants gave the plaintiffs false information, bad financial information. The plaintiffs relied on that information to give the defendants $30 million to buy stock in the company. And, then, the information, we discovered that it was false to the extent that we have been able to discover things at all, we hear from the independent consultant who goes in and gives us a peek behind the closed doors, just a peek behind the closed doors, that some of the financial information we were given was off by a factor of about 7. That is a strong prima facie case and dismissal is certainly not merited based on that.

THE COURT: Right. But your case for what against who? That's -- that's what you need to work out here.

MR. KAYE: Is -- certainly, Your Honor. And I will address that.

THE COURT: Thank you.

MR. KAYE: And, first of all, I want to talk about some of the -- you know, what the defenses are that have been presented and, you know, talk about why some of those defenses don't apply, and the first one is the collateral estoppel or the claim preclusion issue. And that is entirely inconsistent with the position that defendants had taken up until the point that they filed their papers making the argument now. And, also, the situation here does not raise the specter of any of the harms that claim preclusion as a doctrine is designed to address.

I think that the jurisdictional issue is also one that does not provide a defense for any of the defendants for a host of reasons. I think the integration clause is, at worst, irrelevant and, if anything it helps us and we have gone above and beyond our pleading requirements. And, so, I do want to talk about those and talk about the -- you know, the sort of who is bringing the claim against whom and why we are able to frame -- and it's entirely appropriate for us to frame, our claims as we have, keeping in mind, keeping in mind, two cardinal circumstances. One is that we have been on the outside looking in. And what the defendants have done, they did behind closed doors, without us having a little peek here and there at what was happening. Now, they say, well, okay, we might be out a lot of money, but there's nothing we can do about it

because we can't say exactly what happened behind the closed doors. And that's not just a bad result, it's contrary to the jurisprudence of pleading.

And, in particular, in particular -- and this is, I think, the second cardinal circumstance to keep in mind, is the fact that at the outset, for all the claims to which 9(b) does not apply, which is several of them, we simply have to afford notice pleading, all the inferences are drawn in favor, and all of the facts that we have alleged are taken as true. And even for the Rule 9(b) claims, the principles of notice pleading still inform them, particularly, particularly when we have a situation such as this where we have been on the outside looking in.

First of all -- and I'll take this in roughly the order that I think it's been presented by the other side. I want to talk about the claim preclusion issue. First of all, there was not a valid binding judgment in the Receivership Court because the Receivership Court found that it lacked jurisdiction. And the Court indicated -- and this is from the May 18th transcript at 962, 12 to 15:

> The Court has no jurisdiction to consider appointment of a receiver unless the applicant holds one tenth of the issue in outstanding stock.

Which the Court found that we had not shown. Also, the Court reiterated that on the same day at 865, 8

to 10. And in the Findings of Fact and Conclusions of Law under *Searchlight*, under the *Searchlight* case, the Court cannot consider appointment of a receiver under NRS 78.650, and that is at page 18, lines 23 to 24. The Court cannot consider appointment of a receiver and that simply precludes any sort -- that precludes any sort of preclusive effect from the Court's determination.

As I think we sort of hashed out but I think it's worth revisiting, the 8.57 percent that ownership -- that N5HYG does set forth in its Complaint was one part of a group of 14 plaintiffs in that case. And the issue was whether the plaintiffs in the aggregate met the 10 percent -- met the 10 percent threshold.

So, effectively, considering that the Court had no -- found that it had no jurisdiction, it's as if a proverbial tree fell in the forest, the argument that we hear from defendants is: Well, that was somehow a different specie of jurisdiction, that wasn't sort of real jurisdiction. I think that's belied by the Court's language, the Receivership Court's language. It's also belied by the fact that jurisdiction is jurisdiction. And, to be fair -- or to be clear, we did argue to the contrary. I believe we argued to the contrary here in this courtroom when this issue came up and we argued to the contrary in the Carson City Court. And, somehow, that -- defendants

kind of tried to turn that against us but that actually helps us in the sense that, look, we lost that issue and now a judicial estoppel applies. And when they made the contrary argument -- and they did make it very clearly that the Court lacked jurisdiction and they prevail on that point, its estoppel adheres. And that's -- and we cite in the papers what they've said in their trial statement in the argument. And, so, certainly not a collateral attack on the Carson City Court's jurisdiction, it's accepting what the Carson City Court found.

Second of all, the subsequent action, this action is not based on the same claims or part of them that were or could have been brought in the first action. And, first of all, first of all, I think it's important to talk about how receivership actions are simply unique and non-preclusive. Defendants' own trial statement in the receivership action quoted the *Villa* case:

> The law of receiverships is particular in its nature. It adjudicates and determines the rights of no party to the proceedings and no -- and grants no final relief directly or indirectly.

We talked about the *Johnson* case. They say: Well, that was just a preliminary receivership. But, frankly, as a practical matter, when you look at the way these cases have played out, the timeline there was

functionally when if there had been a somehow -- and I'll get to this later because this could not have happened, had there been a receivership action in a -- or a receivership action somehow joined with the damage claim, which again could not have happened, that would have been about the same schedule.

So, again, you're not looking at the sort of hazards that the claim preclusion doctrine is designed to protect against. This is not a situation, this is not a situation, where let's say we lose on this case and, then, we come back with the same case with another cause of action that we didn't plead here. This is not a situation where we lose in the receivership action and, then, we sort of flesh out our allegations somewhat, even though the circumstances haven't changed. This is a completely different situation. And the case law, including cases that they don't address such as the *Frank* case, recognize that, that it's apples and oranges.

It's similar -- and, here, I'm going to -- I will confess some lack of knowledge and would defer to local counsel in terms of local practices if I get this wrong and hopefully I won't but it's similar to the operation of the Single Action Rule in Nevada as concerns suits on a note versus foreclosure on a deed. You have to generally have to choose one or the other under the Single Action Rule.

But parties pervasively secure receiverships or seek and secure receiverships over the corporate parent without jeopardizing either one of those options. This principle that a receivership action is different, it's simply a different animal. Apples and oranges from this sort of case applies with the special force to NRS 78.650. In particular, one of the particular different -- one of the particular issues there is that the statute itself anticipates something like what happened here where it says that the statute provides for a holder or holders of 10 percent of the stock. So, it anticipates that you're going to have petitioners joining together.

And if you have a situation where, as we had here, 14 petitioners come into seek a receivership, and each one of those petitioners who are probably going to have damages claims against the -- against the corporation, against the directors, against management, if each one of them has to bring all the claims that they would need to bring, that really turns the NRS 78.650 process into a three ring circus as opposed to the instrument of shareholder democracy that it is supposed to be, the instrument of allowing shareholders to act to protect the corporation. At best, what you'd have is a situation where in turns into a de facto workout, which is really what, it seems to me, the process is supposed to be avoiding.

The cases that they've cited in their Reply brief -- and I know that was an extensive Reply briefing, to me, in opposite, for example, that they cite *Thayer v. Diver*. That was a -- an Ohio Trial Court opinion that was actually overturned on appeal. The *Gunn* case, the second clause of action, sought a receiver as well.

I do want to make one point on that, though, which is that there's a line in one of the Reply briefs suggesting that none of the petitioners could join in a renewed 78.650 proceeding. And I just want to make clear that we don't agree with that. Look, I mean, we all are cognizant of the fact that if circumstances don't change and we show up with a new proceeding, I don't think Judge Wilson's going to be very happy with us. But, by the same token, if -- I'm going to use an outrageous example, I'm not alleging this is happening but sort of deliberately off the scales, if management started burning down the medical practices for insurance proceeds, that would be a change in circumstance that would warrant that.

THE COURT: And how's that relevant to the argument today?

MR. KAYE: I mean, I wanted to get that on the record, Your Honor, and I apologize for the digression but there have been several arguments that have been set forth in the papers that, oh, well, we haven't responded to one

thing or we haven't responded to another thing, and I just did want to get that on the record.

I think, in terms of the very big difference between these two cases, one of the -- you know, one of the responses that we hear from defendants is that there are similarities to the Complaint. And that's an interesting issue because the fact is, we don't know that much about what happened within the corporation. Once again, we're on the outside looking in. Discovery is another, I think, red herring. They've conceded it was very limited discovery in the receivership action and what that had to do with was the paper -- or the documents that defendants relied upon in that action. We said: Please give us those documents and the -- some of the supporting documents for one of those documents. That was the extent of the discovery.

And, so, we don't know that much. We can only plead, again, what we know. And I think we've plead a very strong prima facie case despite those limitations. But that explains why there is broad similarities between the -- between the cases. This was simply not an effort to gather information as has been suggested. The receivership action that we joined in was not an effort to gather information. There's one example here that I do think is telling and that is defendants complain -- something that came out in the receivership action was Mr. Iglesias was

explaining the discrepancies in the numbers, what management was supporting versus -- or what management was arguing for versus what the consultant was arguing for, and which corresponds to the representations that were made to us. And he said: Well, that my numbers were based on assuming we were going to get $100 million from some source or another. And we point that out in the Complaint. That's a very small amount of information that we have been able to glean from the corporation and from the defendants and they complain about that. But, then, by the same token, they complain -- they complain that we include that. And, then, by the same token, they include -- they complain that we don't include enough details. And that's a dynamic that I think appears throughout the arguments here that heads they win, tails we lose. That was in no way misconduct on our part, as is alleged, to engage in this specialized statutory proceeding that gives us rights as a shareholder to protect the corporation while there is also a damages case. We could not have brought the damages claims there.

First of all, they removed the case, this case, the damages case, to Federal Court. We think that was a very improper removal and we talk about that a little bit in the papers. It came up in passing here a moment ago that the suggestion from the defendants in their removal

theory was that when you -- because we're alleging that we were mislead into buying stock, we've actually artfully plead a exchange act 10(b)(5) violation under federal law for which the Federal Court has exclusive jurisdiction and, therefore, we have to be in Federal Court. The Supreme Court rejected that sort of artful pleading, argument in an 8 to 0 decision in 2016. But that was the reality that we faced. The statute, 78.650, that vests jurisdiction -- that vests authority to enter -- to appoint a receiver in the District Court of Nevada. And we certainly would have had the argument had we -- with the situation we face, was that if we brought damage claims in another action, it would have been removed to Federal Court, the same removal theory would apply to any of our damage theories. And, then, we would have been faced with the argument that the Federal Court lacks jurisdiction to appoint a receiver.

Now, they cite -- the suggest, well, the -- and I hope I get the pronunciation right, the *Pioche Mines* case --

THE COURT: We call it Pioche but that's okay.

MR. KAYE: Pioche. My apologies. The *Pioche Mines* case, that that -- in which the Court mused that and sort of announced to us that it didn't need to decide that maybe -- or that if it was a Federal Court sitting in jurisdiction -- or in diversity jurisdiction, may be able

to appoint a receiver under the Nevada statutes. And, then, they say -- and, then, defendants say in a footnote in the Reply brief that even if we couldn't get an NRS 78.650 receiver in Federal Court, we could have gotten a federal common law receiver. But that's not the protection that the Legislature affords us and that is the reality that we faced.

There's another, though, very clear reason why we could not bring a damages case in Carson City and that is that the Stock Purchase Agreement says that we need to bring it here. And Your Honor will recall, we originally brought the receivership action here and we said, look, we've got the Stock Purchase Agreement for one of the largest shareholders in the -- the largest shareholder in the receivership action, and Your Honor concluded that no venue was proper under the -- the statutory language governed and the venue was proper in Carson City.

So, again, estoppel adheres, judicial estoppel adheres because we said one thing, they said the other thing, the Court found for them on that point. But, beyond that, I don't think that we could just go file the action -- or file a damages action in Carson City when we've got the Stock Purchase Agreement that says that we need to be here. Well, one of the things that counsel said a little bit earlier is that if they had made that argument in

Carson City, he doesn't think they would have gotten very far. But one of the things that I'll get to in a moment is that there has been a lot of sort of shifting positions and that's why the estoppel concept keeps coming up.

THE COURT: Is --

MR. KAYE: They --

THE COURT: Are you at a breaking point, a natural breaking point to start your estoppel argument?

MR. KAYE: Your Honor, I am at a natural breaking point. I'm happy to go for a few more minutes.

THE COURT: Well, it's 11:49. I have a mandatory meeting at noon that I can't skip or else I'd just work through.

MR. KAYE: And I appreciate that, Your Honor.

THE COURT: And I'm sorry to inconvenience all of you but it's 11:49, so we'll break until 1:30 and I'll keep track of everyone's time. Thank you very much for understanding that we have to take a break.

MR. KAYE: Thank you, Your Honor.

MS. BROWN: Thank you, Your Honor.

THE COURT: Thank you, Ms. Brown.

[Recess taken at 11:47 a.m.]

[Hearing resumed at 1:30 p.m.]

THE COURT: Thank you. Please remain seated. Recalling the case of *N5HYG, LLC, versus Hygea*. We already

had the presence of counsel. And, Mr. Kaye, I'm a couple of minutes late, I'll make sure you get all of your time.

MR. KAYE: Thank you, Your Honor. I would also note for the record, I believe that Ogonna Brown remains on the phone. She called in a moment ago.

THE COURT: Ms. Brown, are you there?

MS. BROWN: Yes, Your Honor. Thank you very much.

THE COURT: Thank you.

MR. KAYE: And I was going to say I anticipate that she will be here physically, shortly. And we'll probably leave the telephone when she arrives --

THE COURT: The doors are always open.

MR. KAYE: -- when she arrives physically.

The next point, as the Court will recall that I was about to address, is estoppel. And, really, estoppel in consent to how the -- to how the proceeding has played out. And I say estoppel or consent because in the defendants' own *Wright Miller* discussion talks about how that's really two sides of the same coin and two ways to look at this. Throughout the receivership action, the defendants were insistent that this action was very different from the receivership action and the things for -- sort of never the twain should meet.

And, to be specific about that, they were insistent that, look, we shouldn't talk about certain

things in the receivership action because --

THE COURT: Operations and capitalization.

MR. KAYE: Excuse me?

THE COURT: Operations versus capitalization.

MR. KAYE: I think that's a good way to look at it, Your Honor. And that really went throughout the receivership action where they were insisting no, that's a part of this case, when certain issues might come up. I -- we spell a lot of those out in the papers, there's just a couple that I want to -- that they want to highlight. The May 14th trial session at 42, counsel is saying they, meaning us, can bring a breach of contract action. A receivership action is not the forum to enforce their contractual rights. There was a colloquy between counsel and Judge Wilson, on that same day and that's at page 108 to 109 of the transcript:

> Your Honor just made about the Court having to determine whether or not there's been a breach of contract.
>
> And, then, the Court responds: I should have just said all legal issues, not I understand there's not a breach of contract claim.
>
> Counsel: Understood, Your Honor. Because that claim is pending in another litigation. Does the Court anticipate that it will be making a determination on

breach of contract?

The Court: No.

Counsel: Okay. Understood, Your Honor.

On May 18th at 914, if plaintiffs believed they have a right to these audits under the Stock Purchase Agreement -- that's one of the things that was set forth in the Stock Purchase Agreement -- the plaintiffs can seek to enforce that right through their breach of contract claim in Federal Court.

That's this lawsuit. Same day, a little bit further down:

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.

The same day: Plaintiff N5HYG can then seek damages for such misrepresentations through its securities claim, then, in Federal Court.

So, that was defendants arguing that there's going to be, by all rights, a damages action, separate from the receivership action. And I read a moment ago for the colloquy between defense counsel and the Court in which the Court indicated: Look, you know, we're -- I'm not deciding on that breach of contract action. That really -- that permeated, I think, everyone's understanding that this was

simply a different action and that was a very specific, very narrow, discrete special statutory proceeding is one example.

Judge Wilson found that he could not consider a receiver because he lacked jurisdiction. But he did go on to make certain findings, as counsel noted, and those findings, he explained, were in case his jurisdiction determination were to be disrupted on appeal. And one of those findings is that there are payments that were due to us under the Stock Purchase Agreement totaling then about $1.7 million, now it's about $2 million. Nobody came out of the Court in Carson City thinking, well, okay, now they need to pay -- now we have a judgment for $2 million, because everybody understood that was part of this case, that was not part of that case.

And we cited a couple of authorities about this issue. One of the ones that I think is very interesting and quite apt is the *Jaleewo* [phonetic] case. And that's the one that we really haven't heard anything about this yet. That's the one where there is a specialized proceeding -- I believe it's a condemnation proceeding brought by a city, and, then, the property owner also has a damages, sort of inverse condemnation action going on. And during the initial specialized condemnation action, the city says: No, no, no, you know, we shouldn't talk about

damages, that's for the other lawsuit. Then, when they get to the other lawsuit, and sort of, ha, I got you, that should have come up in the first one, and the Court wouldn't hear any of it. And the same situation really applies here. And, once again, the -- what the hazard that claim preclusion protects against is serial litigation. This is highly serial litigation. This is really gotcha to try to escape any -- not only escape any accountability but escape any sort of fact finding or any sort of litigation on the merits of what is a prima facie meritorious claim.

I want to talk a little bit on the claim preclusion about the claim preclusion issue about the claim splitting issue. Because one of the things that counsel said is: Oh, you know, we've cited several cases in which it's very clear that a plaintiff can choose to be in Federal Court at the same time as State Court but you're running the risk of claim preclusion. We never chose to be in Federal Court. We were taken to Federal Court, we think, improperly and certainly against our will.

What's interesting about those cases and what's so distinctive from the situation here is that those cases talk about parallel jurisdiction. Here, even if we had been -- even if the removal was proper, it would have been based on exclude the exclusivity of jurisdiction. We weren't given a choice in that matter to be in Federal

Court.

Defendants also suggest that -- they suggest that because they did an affirmative defense of claim splitting, that they've sort of preserved all these arguments. I think it's really the opposite because the fact is that even though they had that affirmative defense, the Carson City Court continued to -- continued with the receivership action. And, once again, everybody as a practical equitable matter, treated it as something very distinct from this case. But if we're going to be hypertechnical about this, then the hypertechnical conclusion there is that the Carson City Court concluded that there was no improper claim splitting, ergo there's no claim preclusion adhering.

Well, one more issue -- one more -- a couple other things that I would add on this. One is that remember -- or, again, I think this may have come up a little bit in this Court but it certainly became a more significant issue in Carson City. Well, our -- the receivership action was fundamentally a 78.650 action but there was also stated as an alternative potential ground, 32.010. And the defendants argued that there ought to be judgment as a matter of law on 32.010 because there was no ancillary proceeding. One of the things that we said is: Well, there is actually -- there's another case out there but

it's been sort of trapped in Federal Court. And the Receivership Court, once again, agreed with the defendants and said: No, there is no ancillary proceeding. So, once again, the story has changed from this is not even an ancillary proceeding to this is the same action that -- or, really, the same case that should have been brought in that -- in the receivership action.

And the one last point on the point of preclusion issue, just as a practical matter, we heard earlier that all the key witnesses have already testified. First of all, that's not accurate. That was a truncated trial and it was a truncated trial because it was an emergency petition. And while the trial on the ultimate merits was merged with the evidentiary hearing, that was a -- it was still important to do that on an expedited basis. It was done over the -- the trial was done over the course of a week. And the inquiries simply did not have to do with the issues here. As Your Honor said, capitalization versus operations. That was about operations and about that trial was about operations and about the then current financial status of the corporation. Sure, there's a little bit of overlap in terms of context and there's certainly overlap in terms of how we pleaded because we have minimal knowledge. But two fundamentally different cases and neither are the parties the same in the two actions.

And, here, I think it's so important, again, to remember that in Carson City, we were one of 14 plaintiffs. And why that's so significant is, again, because that is exactly what NRS 78.650 anticipates. And to say again that everybody needed to bring every claim that they might possibly have really does a disservice and I think it could essentially be the end of having a functioning 78.650 process.

Moving on from collateral estoppel, I want to address a few other issues, one of them is the suggestion that there are improper supplemental allegations. I don't think that's in the Amended Complaint. I don't think that's true for a couple of reasons, one of them is that the pleadings remain open. Another reason that I don't think that's accurate is that by and large, the quote/unquote, supplemental allegations, have -- you know, are grounded in things that we have learned about thing -- about what was going on prior to the time of the initiation of the lawsuit.

Beyond that, we simply don't want to hide anything from the Court. And if the situation with Hygea or at Hygea seems to have changed in some way or the -- things have happened, I don't think there's any reason not to explain that to the Court. Let me give you an example. We do know that Mr. Iglesias is no longer the CEO and is the

co-chair of the Board now. I don't see how -- you know, the original Complaint said that Mr. Iglesias was the CEO. I don't think there was an obligation on our part to put something inaccurate in the Complaint. But if the Court feels that a motion under Rule 15(d) is appropriate, we'd certainly be happy to pursue such a motion. I don't think it's necessary but we would certainly do it.

The second of all, in terms before we get to -- get back to some of the -- some, really, the meat of the issues here, the jury demand issue. As we say in the papers, plaintiffs are willing to withdraw the jury demand. To be clear, I think the jury waiver really only applied by its own terms to the signatories of the Stock Purchase Agreement. But for things like jury trial and, as we'll talk about in a moment, things such as where the litigation ought to take place, I think it's appropriate that the procedure set forth in the Stock Purchase Agreement apply to all the defendants and, so, we are willing to do that.

I want to turn next to jurisdiction. Once again, the Stock Purchase Agreement, as we alluded to a moment ago, contains a forum selection clause that puts the action here. So, the directors' request to have them dismissed based on lack of jurisdiction really is a request for bifurcation. And that is somewhat ironic, given that we've heard so much about the apparent problems with having a

case -- having anything about the situation litigated in more than one place, that now there is a suggestion that there ought to be a case here against Hygea, Mr. Iglesias, and Mr. Moffly, and case in at least one other place against the director defendants.

Beyond that, this Court does have jurisdiction over all of the defendants. So, first of all, I want to talk about NRS 75.160 and this is something that the Court inquired about earlier and I hope I'm able to clear up somewhat.

First of all, the -- what the statute provides that the directors of a Nevada corporation, such as Hygea, can be served through the registered agent in Nevada. Now, one thing that I want to address -- and Mr. Gonzalez, in his Reply last week, raised the Martinez case, *Martinez v. Aero Caribbean*, to say that constructive presence such as this does not establish a, quote/unquote: Tag jurisdiction. And, to be clear, *Martinez* was only discussing -- or *Martinez* -- the ruling was limited to the jurisdiction over a corporation in which the -- it's suggested there might be a different analysis for an individual.

But one point in *Martinez* that I think is worth bringing up because it's something that counsel had raised earlier, suggesting that we are only claiming specific

personal jurisdiction as opposed to general personal jurisdiction over the directors. Well, I think that NRS 75.160 gives us what the *Martinez* case calls tag jurisdiction and that case discusses how there's some ambiguity as to whether or not, quote/unquote, tag jurisdiction, is general personal jurisdiction or is specific personal jurisdiction. Tag jurisdiction being when you are served within the state. To be clear, we are asserting whichever of those two, whether it be personal or general -- excuse me. Whether it be specific or general personal jurisdiction, adheres via tag.

THE COURT: Now, am I incorrect or did your Opposition say that you served the director defendants in Nevada?

MR. KAYE: Your Honor, I believe --

THE COURT: Because I saw the returns of service were done in their states of residence.

MR. KAYE: Your Honor, that -- I want to -- I do want to address that --

THE COURT: Please.

MR. KAYE: -- and that was one of the points that I had in mind a moment ago when I said that I hope that I can clear that up.

For the defendants here, including Hygea, we served in both -- for example, Hygea, we served to the

registered agent in Nevada and at its place of business. You -- that is correct that the proofs of service for the director defendants are limited to their service on their bodily persons and that's correct. I think that, first of all, we could certainly reissue new proofs of service because when the registered agent was served with a Complaint that set forth claims, clearly identified against those director defendants, I think that is sufficient under 75.160 to constitute service on those director defendants. If it's not, an easy resolution would simply to be -- be to issue new summonses and go through the -- you know, go through the process of taking the summonses up to the registered agent in Carson City and being very clear: This summons is for Mr. Moffly, this summons is for this director, this summons is for that director.

I don't think we actually need to do that, though, because, for 75.160, the significance really extends beyond the actual or, quote/unquote: Tag jurisdiction. And it really is the -- as the *Advanced Vision* case discusses, it shows that it's a general consent to jurisdiction within the state and shows that, really, that's what service within the state, presence within the state, is really inherent under the statute.

Now, I think that Nevada has specific jurisdiction over them anyway, regardless of whether or not they're

served under 75,160 and, really, regardless of whether or not there is consent. Consent, once again being a -- meeting all of the thresholds for due process, if consent to jurisdiction meets the test. I don't think there's any question of that.

THE COURT: I read the statute only as consent to service. No consent to jurisdiction.

MR. KAYE: Your Honor, as the *Advanced Vision* case that we cite does discuss how NRS 75.160, it notes that several Courts have found that consent to service, so-called director of consent statutes, it establishes consent to jurisdiction. And, in that case, it had that analysis and, then, went on to even saying even if there isn't inherent jurisdiction, there is the specific jurisdiction analysis. And I think we easily meet the specific jurisdiction test here.

First of all, again, the conduct here arises out of their services as -- and the liability arises, the claims arise out of their service as directors of a Nevada corporation. And I think you do look at 75.160 as one part of the package there of them making themselves -- availing themselves of the protection of Nevada law. The *Consipio* case talks about that and one of the things that *Consipio* talks about is that even if -- you know, even if there's the directorship, the jurisdiction here also needs to be

reasonable. And that's true and I think the jurisdiction here is easily reasonable.

Once again, as I stated at the outset, the request is to bifurcate the case so that's a -- that goes to reasonableness, the fact that we can avoid bifurcation. But, also, the forum selection clause is set forth in a Stock Purchase Agreement that all of the defendant directors approved. So, even if they are not parties to the Stock Purchase Agreement -- I think, first of all, as a matter of equities, it's similar to our approach to the jury selection -- excuse me. The jury waiver and the jury demand. But, even beyond that, we know that they approved the Stock Purchase Agreement and that Stock Purchase Agreement included the forum selection clause. Now, they may say, well, we didn't know about that, we didn't read that, but once again, that was a big, significant transaction. And, as I'll get to in a moment, it was very foreseeable that litigation was going to arise from that transaction.

In addition, several of the director defendants were officers, titled officers. And I think that there's some conflation of officer titles with what we might call mere directorship in some of the defendants' arguments. That's another plus factor for those particular defendants.

I also think it is appropriate here to look at

what happened in Carson City because, once again, the arguments here are strikingly different from the arguments. And Mr. Gonzalez, I appreciate, wasn't a part of that but several of the other director defendants were. And it's appropriate to look at that, at that conduct. When they agreed to service through NRS 75.160, they actually sought through their codefendant, Hygea, to be defendants in that action.

And what I think is so telling about that is that it shows that this Nevada directorship -- Hygea is not a Nevada corporation on paper and they're not directors of a Nevada corporation on paper without any real-world -- without any real-world element to it. And when it suited their purposes, when their authority was challenged, they were happy to come here. They were -- they insisted on coming here. Some of them came and testified. But when they're called to account for the conduct, it's suggested that it's a real stretch to say that they being directors had anything to do with Nevada. I don't think that they can sustain that discontinuity and I don't think the latter argument is meritorious. This is a Nevada corporation that has a lot to do with Nevada.

And if you look at the test for specific jurisdiction, one of the reasons that they meet that test is because they directed harm towards a different Nevada

corporation, Nevada 5. And the *Dole Food* case that we cite talks about purposeful direction to a forum state. We've heard a lot about how there was nothing in the forum state, nothing in Nevada. But Nevada 5 is a Nevada corporation and they directed misrepresentations to be sent to the Nevada corporation.

And I think -- and I'll talk about Nevada 5's role and why Nevada 5 is an appropriate plaintiff in a moment. But one of the things on this point that I think is notable is the suggestion that Nevada 5 has fraudulently joined to the case for purposes of jurisdiction, I think that's very inapt. It's not fraudulent Joinder in the least. In fact, it was very appropriate to bring them into the case.

And that -- the misrepresentations that were directed at Nevada 5 included misrepresentations that the director defendants, not Mr. Moffly, or Mr. Iglesias, or Hygea itself but that the director defendants engaged in and we allege and we show two in particular. One of those is the e-mail discussed at paragraph 41K of the Complaint in which Mr. Moffly sends the plaintiffs the bad EBITDA figures and says: This is what the Board has approved. And, then, as was acknowledged earlier, the Board approves the Stock Purchase Agreement.

THE COURT: Did you say 141?

MR. KAYE: Excuse me. 41K.

THE COURT: Thank you.

MR. KAYE: 41K.

And that's addressed also in the Chris Fowler declaration. The Stock Purchase Agreement is approved by the directors and we include the instrument of approval and it's entirely appropriate to include that for purposes of the jurisdictional analysis, even though that arguably steps outside the pleadings. Although, I think, given the fact that the Stock Purchase Agreement has been brought in to the Motion consideration, the attachments and deliverables are appropriate to bring in as well. But clearly appropriate for a jurisdictional analysis. That resolution, that Board resolution is unanimous, unanimous approval of the Stock Purchase Agreement. The resolution itself includes the bad valuation figures that turned out to be fraudulent, suggesting that you can extrapolate them out on a price per share basis to say the company's worth vastly more than it turned out to be worth, based on the actual financials. And, and, that approval, encompassed within it the terms of the -- the terms of the agreement, even if they are not signatories, it shows that they clearly -- it'd clearly be reasonable for them to foresee that an action would take place here.

Beyond all that -- and those two specific things, it's very interesting because we've heard from defendants a

lot about how: Well, there's no allegations against the Board Members, there's no allegations against the defendants, save for the acknowledgement of the Stock Purchase Agreement approval. Those are two very significant, very important misrepresentations and that was purposefully directed to a Nevada corporation.

Now, one of the other reasons why jurisdiction is appropriate is simply by the fact that we have stated a cognizable control person claim. And we've explained case law in the papers showing that when there is a control person claim, it is that alone if there's jurisdiction over the underlying -- of the underlying securities claim, control person claim establishes jurisdiction. So, I don't think there's really -- for all those reasons, I think jurisdiction is appropriate here and there is no need to bifurcate the case.

I want to talk about Nevada 5 and its role here a little bit. And we've talked about a little bit already with the -- with defense counsel and it's set forth in the papers all the reasons why Nevada 5 is an appropriate plaintiff. I want to just touch on two of them because they're related to each other.

One of them is we've already heard from defendants today that the suggestion that: Well, if N5HYG wasn't around to receive the misrepresentations, then N5HYG could

have no fraud claim. And, as we explained in the papers, part of the whole reason to include Nevada 5 as a plaintiff is to avoid a situation where defendants make a misrepresentation to one entity and, then, it's -- and, then, argue that, no, the only injury happened to a different entity, and therefore they're able to hold on to the $30 million.

THE COURT: Give me just a second? Andrew [phonetic], will you approach, please?

THE MARSHAL: Yes.

[Bench conference at 2:00 p.m. - not recorded]

THE COURT: I apologize for the interruption. Go ahead, please.

MR. KAYE: No problem, Your Honor. Thank you.

And, in fact, that particular hazard -- so, I think this why it's entirely appropriate. And, you know, we show that the case law suggesting that there's an independent injury to Nevada 5. And, in fact, Nevada 5 lost the money that it lost when it created N5HYG to go through with the transaction. But that issue, the risk that you're going to have an argument such as this, is really the -- I think what underlies the approach of the Securities Act, that has a broad conception of buyer and a broad conception of seller. We hard earlier the suggestion that we are asking the Court to expand the definition of

buyer. We don't need to because the Supreme Court of the United States already expanded the definition of buyer, which is not defined, I might add, in either of the statutes. And that's important in the securities context because you're frequently going to have a situation where a -- where someone who is trying to trick someone into buying a security will make a representation to that person's representative or agent and, then, the person might establish a business to own the stock, it might put it into a 401(k), might put it into a trust, might put it into an IRA that technically has a different personage and thereby, under the defendants' approach, you can sort of split all the causes of action and they get away scot free. That's what all this is designed to protect against.

I want to address briefly the integration clause. And I think it's worthwhile -- I know we talked about this at great length in the papers and I don't want to belabor those points. But, first of all, when the whole contract as here has been fraudulently induced, there is very strong case law that the integration clause cannot overcome that. Second of all, though, the integration clause here is -- it doesn't do what the defendants suggest that it does. It says:

> This agreement, together with the ancillary agreements and any documents, schedules, instruments,

or certificates refereed to herein, or delivered in connection herewith, constitutes the entire agreement.

And throughout the Stock Purchase Agreement, as we discussed, the text of the agreement represents and warrants the -- you know, represents and warrants the information that has been provided to us. So, this is hardly a situation where we are claiming that there are representations where our theory is at odds with the agreement. Quite the contrary. It's a 180 degrees different from that.

And, so defendants then, in their Reply brief, make a very somewhat unusual argument that: Well, if it -- that seems to me to be that if everything is in -- if all these representations are cross-referenced or expressly included within the Stock Purchase Agreement, then we can't have a fraud claim or can't have a fraudulent inducement claim because it's just -- then it's just the breach of contract claim. Well, once again, that's sort of heads they win, tails we lose. And it's simply -- there's simply no need to get into that at the pleading point here in the case.

I want to move on to the pleading under Rule 9(b) and there's a couple of things here. First of all, even though this is a heightened pleading standard, it is still based on the concepts and is informed by the commitment to

notice pleading. Second of all, once again, as I mentioned earlier, we're on the outside looking in and they have all the information. Frankly, given that situation, we've stated a very strong prima facie case. Third of all, as we say in the papers, for the securities fraud -- and it's kind of funny that that's called fraud but it's not actually a claim that requires culpability. For that cause of action, we don't need to meet 9(b) but we do meet 9(b) anyways. And the -- frankly, to me, the Complaint is replete and we spell a lot of this out in the papers with the who, what, when, and where.

Now, the answer that we've heard from the defendants today is: Well, we haven't heard the how or the why the information provided to us was wrong. That's -- I really do think that's true. The Complaint says that there's a -- that there's an independent consultant who came in to Hygea and determined that the numbers provided to us were, quote/unquote, fabricated, and were off by about a factor of 7. I don't know what more we're supposed to plead to show that the numbers were inaccurate.

Then, there's the issue of the directors. And we've heard the suggestion again that there's no allegations about what the defendant -- what the defendant directors said. That's, once again, not true. Again, paragraph 41K of the Complaint. Mr. Moffly says this

EBITDA figure is -- or these EBITDA figures are what the board has approved. And the Stock Purchase Agreement that the Board approved. And not only does the Board approve the Stock Purchase Agreement but the Stock Purchase Agreement says that the sellers' knowledge that's represented and warranted in the agreement is imputed to the directors.

Now, okay, they're not signatories to the agreement. But for purposes of pleading, for purposes of whether or not we have stated a claim against them, we're allowed to take their word for things. And the same goes for Mr. Moffly. Mr. Gonzalez suggests that perhaps Mr. Moffly wasn't telling the truth when said the Board had approved the EBITDA figures. We don't have to prove what he -- that what he said was the truth at this point. We can rely on what the defendants said in putting together our -- in putting together our claim and framing our pleadings.

For all this -- for similar reasons, the -- Mr. Gonzalez's, quote/unquote, group pleading argument, fails. First of all, we have stated particularized allegations against the directors, including Mr. Gonzalez. And I note again -- and I realize there's, you know, some ambiguity as to whether or not this is properly within the pleadings. But the Board resolution approving the Stock Purchase

Agreement is unanimous including -- and Mr. Gonzalez is present there. But we don't even need to get to that and get to that level of specificity because, as we talk about in the papers, the group pleading doctrine protects against exactly the situation where a group of people gathers behind closed doors and out of that closed-door meeting comes a misstatement. And we, we're locked out, we don't know whose idea it was to include what number. We just know that the numbers that came out were wrong.

And, here, it's important to remember, this investment was an existential lifeline to the company. It was the sale of about eight and a half percent of the company for $30 million. The idea that this was day-to-day business or something that the Board wasn't involved in is, I think -- I don't see how that argument holds water unless you assume that the Board was completely asleep at the switch. And they don't get to assume at the pleading -- that they don't get to assume at the pleading stage that they weren't doing their job. And we can't -- we don't need to prove that they were doing some modicum of their -- of adherence to their fiduciary duties in approving this transaction.

I want to talk briefly about the -- briefly about the Federal Securities Act and --

THE COURT: It's really time for you to conclude.

How many more issues did you have after federal securities?

MR. KAYE: Your Honor, I think there's maybe two more issues after federal securities that I think I can address fairly quickly.

THE COURT: Thank you.

MR. KAYE: And I'm mindful of the -- of the time pressure and I appreciate the Court's indulgence.

THE COURT: Technically, your time just ran out. So, if you'll address those issues please, briefly?

MR. KAYE: Thank you, Your Honor.

So, first of all, as to the federal securities law violations, it is, as we spell out in great detail in the papers, it is the defendants' burden to show that this was a private transaction. We've stated a very strong prima facie case that it was a public transaction. Now, we're complete strangers to Hygea when this begins. There's a -- there's an investment bank involved. The investment bank is claiming that its owed commissions. And, although we have, quote/unquote, access to information, it's bad information. All those things say this is a public -- this is a public issuance. I think it's a red herring to suggest that public issuance means issuance on a public exchange. We talk about the case law that says specifically that, no, public issuance for purposes of the Securities Act does not mean public issuance on a publicly

traded exchange.

Some of the other arguments are red herrings, also. There's this consistent Complaint that we cite -- we cite in the Complaint certain sections of the statute that don't, in and of themselves, have a cause of action. That's not the issue. The issue is whether we've stated a claim and whether there is a cause of action and there is a -- you know, there is a cause of action. The safe harbor, the safe harbor argument, that's an affirmative defense that they can present. And I don't -- we have never brought a 10(b)(5) claim and I just want to state that for the record. And I'm going to skip over some things and when I don't address things, I mean, that's not a waiver to the argument --

THE COURT: Understood.

MR. KAYE: -- but that's been a significant issue throughout in terms of the removal and I do think it's worth -- you know, it's worth pointing that out.

The exemptions here are strictly construed against them. We've stated a strong prima facie case, both for purposes of misstate -- the misstatement claims and for purposes of the nonregistration claim. Moreover, they are all sellers because they all have authority over the statements that are provided -- and authority over the transaction. We've seen they exercised authority over the

statements to us and exercised authority over the transaction itself. And if they are not, they're somehow not sellers themselves, each and every one of the defendants is certainly involved enough to be a control person. And there is a prospectus or oral communication. They don't get out of -- they -- prospectus means a piece of paper that gives us information. There's a lot of piece of papers that give us a lot of information and we talk about that in the pleadings.

They don't -- cannot escape lability -- and there's case law that talks about this, by simply failing to follow the rules and file the registration statement. They don't get out of -- they don't get out of the misrepresentation claim because they violated the registration rules.

Another issue having to do with the securities fraud claims but that, I think, encompasses all of the misrepresentation claims is that the -- in the Reply briefs and in some of the argument here today, I think for the first time, we're hearing the suggestion, we're hearing the suggestion that the Business Judgment Rule, which is codified at the exculpation -- at the exculpation statute, that that somehow is a protection from securities fraud or misrepresentation claims and that is not accurate.

And I'd be happy to present supplemental authority

on this but one case is the *In Re Westinghouse Securities Litigation*, 832 F. Supp. 989, talking about how if -- and this is talking about an exchange act claim. But if you apply the Business Judgment Rule to that, it would, quote/unquote, emasculate the federal policy, of preventing management from engaging in securities fraud. *Wolf v. Frank, 477 F. 2d. 467*, is another example, a Fifth Circuit case that a violation of a 10 -- there it is talking about a 10(b)(5) claim but that's not protected by the Business Judgment Rule. And *Freighter v. Tiger Capital Limited* [phonetic] which is 1999 Westlaw 4892, which is citing the Block, Barton, and Radin materials on the Business Judgment Rule, and that talks about how the Business Judgment Rule does not pertain to third-party disputes. It does afford them some protection from our claims as a shareholder from after we acquired our shares. But, but, that is a -- it's a presumption that goes to the trier of fact. And the statute is very clear and some of the case law is very clear on that, that we cite, that it goes to the trier of fact. So, it's simply not an issue that is apt for consideration at this point in the proceedings.

I just want to talk very briefly about the application of the Nevada Securities Act. As we talk about that in the papers, the -- look, this is a Nevada corporation, one Nevada corporation directing

misrepresentations to another Nevada corporation. That's an awful lot of Nevada for Nevada not to have the ability to enforce its Securities Act here. Even if it doesn't apply, then the answer would be to bring in another state's act. There's not a gap that they can fall through here by spacing things out amongst multiple states and saying no single -- or suggesting, perhaps, that no single state can apply its Securities Act. But, remember again, there is a choice of law provision in the Stock Purchase Agreement that shows Nevada law. And, again, that's an agreement that all of the defendants approved. So, it's entirely appropriate on that basis alone to apply the Nevada Securities Act.

I also want to talk very briefly about -- and for all the reasons, there's a suggestion that we somehow waived some arguments because we didn't spell it out in the papers about the Nevada Securities Act. For all the reasons set forth in the papers and with respect to the Federal Securities Act, which is in several respects analogous, we've stated claims under the Nevada Securities Act. The Economic Loss Rule does not bar these claims. Amongst other things, once again, the directors are not even signatories to the Stock Purchase Agreement.

And I want to talk in conclusion here about the breach of fiduciary duty claims and a lot of the -- what I

would call generally the post-acquisition claims. Because that's been a topic of -- you know, we sort of addressed that at some length in the defendants' presentation. The moment we bought our stock, all of the defendants owed us a fiduciary duty. And that -- they violated that duty by not giving us, in all candor, the truth about Hygea's situation. So, that in and of itself, that right there is a breach of fiduciary duty. It's a breach of candor.

Now, we've plead additional -- and there are additional violations of our shareholder rights -- and the fiduciary duty, I think, is independent of the contract, even if it's a breach of the Stock Purchase Agreement, it's also a breach of the independent fiduciary duty, and those violations injured us independent of the rest of the corporation and did injure us directly. But at the very least, at the very least, there is that core instantaneous breach of fiduciary duty and that's enough, once again, for purposes of notice pleading, that's enough to state a claim. Again, all the facts are assumed to be true, all the inferences are drawn in our favor. The defendants have a very high burden to say that the courthouse door ought to be closed.

Respectfully, Your Honor, I don't think they have approached meeting that burden and the case should proceed. We've been waiting now for nearly a year as this was parked

in Federal Court.

THE COURT: This Complaint goes back to October 5th. Today is October 3rd.

MR. KAYE: Yeah.

THE COURT: So --

MR. KAYE: Your Honor, and I think it's appropriate for the case to proceed to litigation on its merits.

THE COURT: Thank you. It's 2:20 and we started back at 1:30. Do you wish to take a short recess before we finish the arguments?

MS. GALL: I think we, from Ballard Spahr are fine. I'll ask Ms. Lambrakopoulos to speak for herself.

MS. LAMBRAKOPOULOS: I think I would be fine.

THE COURT: Very good. Then we'll proceed.

MR. EWING: Good afternoon, Your Honor.

I'm going to do my best to address these in more or less the order that Mr. Kaye did. But I'm going to try to group them a little bit, too, so I may jump around a little bit.

I'd like to start on the subject matter jurisdiction issue. And Mr. Kaye focused a lot on the Court's use of the words that he cannot consider -- at the end of trial that he could not consider appointment of a receiver. And, first of all, I'd like to talk again about

the Judgment as a matter of law because, at that point, the Court had made no such finding. And that was a significant ruling on the merits of several different claims. He denied the receiver under NRS 32.010, he denied the receiver under NRS 78.630 on the merits, and he actually denied the receiver on approximately half of the grounds under 78.650 that plaintiffs sought a receiver, including on the base --

THE COURT: You're on Exhibit C of your appendix. So, if you want to direct me to a certain part of the transcript?

MR. EWING: Yeah. I -- you know, I don't have the exhibits.

THE COURT: That's all right.

MR. EWING: I don't remember where it is in the transcript.

THE COURT: It's okay.

MR. EWING: Within the Findings of Fact and Conclusions of Law, which were another exhibit early on.

THE COURT: That's what I have. Sorry.

MR. EWING: I think at about page 4. It's at the end of the procedural history, the Order discusses the Judgment as a matter of law. It's the last two paragraphs, I think, of the procedural history.

And, so, the judge ruled on a number of the merits

of their claims at that point, including the grounds under 78.650 of fraud by management or directors, and that's, you know, the very grounds that plaintiffs argued in that action that made evidence relevant to the allegations in this action relevant in that action. Sorry if that got a little confusing. And those were all entered well before the Court found it didn't have jurisdiction. And it didn't -- the Court did not upset those rulings later when it found that it did not have jurisdiction and plaintiffs didn't --

THE COURT: And that would be Court Order found that there was some evidence that Hygea's management:

> Management's failure to be able to account for a cashflow to the degree that an audit 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.

Is that the --

MR. EWING: Yeah. Correct.

THE COURT: Thank you.

MR. EWING: And that was the part of the claim that he did let proceed through our Case in Chief. But a lot of them he resolve before we even began our Case in Chief in that action. And those rulings have never been upset and in our Reply brief, we cited U.S. Supreme Court

testimony that says when the Court enters a judgment, it inherently is ruling that it has jurisdiction. And that Judgment hasn't been upset since its time, either by a Motion to Amend or sua sponte by the Court, and it was made final when the Court entered its Findings of Facts and Conclusions of Law.

And, setting that issue aside, you know, I focused in my argument on the *Stebbins* case from the Tenth Circuit. Claim preclusion is a judicially created equitable doctrine. And Mr. Kaye said, jurisdiction is jurisdiction, and I'm not going to argue with that. You know, a Court has it or it does not. But you're not deciding jurisdiction, you're deciding whether claim preclusion, that's what's before this Court, Your Honor. And that is an equitable doctrine and it is not black and white. And I think that the Tenth Circuit's reasoning was very persuasive. When a defendant or a group of defendants in this case is dragged through trial, only to find out at the conclusion of trial that the plaintiffs had intentionally disregarded a statutory requirement and that's the only reason that there aren't any findings on the merits, the plaintiffs shouldn't come back and say: Well, we get to do the merits again.

And one thing we argued in our Reply that I didn't focus on too much earlier this morning is that if you take

plaintiffs' position to their logical argument, then any group of stockholders can get together, say they own 10 percent in their Complaint, go through an entire receivership trial, lose, find another group of plaintiffs and say, well, these plaintiffs have 10 percent, and so on and so forth and just keep going to trial. Because the way that 78.650 works in the case law interpreting it -- well, it's really the case law, it's the *Searchlight* case. You can't make the determination on the 10 percent issue -- the Court cannot, until it is considering appointing a receiver. So -- and we tried to move for summary judgment and the Court said it's premature because even if they don't have it today, I'm not considering appointing -- excuse me. Considering appointing a receiver today.

So, there's sort of this practical issue and, as a final point on the subject matter jurisdiction, this is, again, a practical issue, plaintiffs' counsel said that, you know, we hadn't discussed the harms of claim preclusion that were hearing. I think we have but one of them that was not touched on this morning is avoiding inconsistent judgments. And the Findings of Facts and Conclusions of Law and all the orders made final by them, including the Judgment as a matter of law, are on appeal right now. And presumably, plaintiffs are going to attack the subject matter jurisdiction portion of the Findings of Fact because

they can't get to the rest of it unless they -- show that the Court was wrong.

So, what defendants fear could happen is that the Court does say the 10 percent issue was wrong, says that the findings were correct, affirms those findings, they become a final judgment after appeal, and this Court, by that time, has already ruled on some of the same issues. And I think plaintiffs acknowledge that there were findings that go to the same facts that this Court will have to make findings on. There were on the fraud and there were on the contract. And I think there's a real risk that inconsistent judgments could occur. And defendants' position on that point would be that, at the very least, if the subject matter jurisdiction is what, you know, would cause the Court to not apply claim preclusion, that this case be stayed pending that appeal to avoid potential inconsistent judgments.

And, from there, I'll move on to the -- I guess, the rest of the issues. And my overarching point on all of these is that the test under *Five Star Capital* is not were the claims brought, is not were the claims pending in Federal Court, it's: Could the claims have been brought in the action that proceeded the Judgment first? And I really didn't hear convincing answer from plaintiffs' counsel either in the briefs or on that. The say: Well, there's a

forum selection clause. We already argued -- and this Court already ruled, when it had the receivership action before it, that the forum selection clause didn't apply because a statutory venue provision trumped it. And there's a Nevada Supreme Court case law that says if justice requires, then forum selection clauses can be essentially ignored by the Court so that a plaintiff can bring all of its claims in a convenient forum. And there's no reason that even while that case was pending in Federal Court, when plaintiffs decided to file the receivership action, they couldn't have reasserted all of the same claims. And plaintiffs keep arguing that that would be unwieldy. But, again, you know, we have NRCP 18, every plaintiff has the right to bring all of its claims, legal or equitable, in any Court. And there's no reason to believe that just because there's a number of plaintiffs asserting a number of different claims that a Court would be unable to handle that.

And if they had, in fact, done it that way, there's no way that that case would have proceeded through all those claims or that there would be a final judgment on the receivership issue. And all of this debate about were the primary rights adjudicated, it would be clear that they weren't, only the temporary relief was adjudicated and the primary rights would have remained pending in one Court

where they should be. And there's binding U.S. Supreme Court case law that says they can bring those claims again while they're pending in Federal Court. They also could have dismissed them in Federal Court and reasserted them. And, you know, I imagine we could speculate a lot about all of the arguments defendants could have made but it's defendants' prerogative to make their defenses and it's plaintiffs' prerogative to bring their claims and prosecute their claims without inadvertently precluding them.

On the waiver/collateral estoppel type of argument, I'd first like to talk about the *Jaleewo* [phonetic] case because I think it's distinguishable in an important way. In that case -- and I'm actually reading from the Plaintiffs' Opposition, so I don't think they'll disagree with me about these facts.

> After the property owner brought an inverse condemnation action against the City, the City brought a condemnation proceeding. In the condemnation proceeding, the City expressly stated that no consideration should be given to losses that cause to the property owner.

And, then, of course, the city made an about case when it got to the property owner's case. The big difference is we didn't bring any cases here. The City was in its own case, its own condemnation case, arguing: No,

no, the property owners already brought an inverse condemnation case, we're going to consider the losses there. That's not what happened here. We went to trial on their claims, we pointed out that they had split their claims, and, then, we tried to avoid what we considered to be irrelevant evidence related to these claims coming into the receivership action. And Mr. Kaye read a number of colloquies between Ms. Gall and the Court in that action. And what I would suggest is that what she was doing was just describing reality. There were no contract claims pending in that case and they weren't before the Court. There were contract claims pending before Mahan. They could have brought their contract claims, those were the words he picked out. And all of those things are true and the important one on this issue is that they could have brought them there and all of this would be a moot point.

And, you know, one final thing. I think we pointed this out in the papers, the Trial Court in the receiver action repeatedly offered plaintiffs continuances, including at the close of all of the evidence, and they didn't take those options. And, with that, I'll turn it over to Ms. Gall.

THE COURT: Thank you.

MR. EWING: Thank you, Your Honor.

THE COURT: Ms. Gall?

MS. GALL: Thank you, Your Honor. My reply is not very long. And, again, I'm going to try to take it in the order presented in the opposition argument.

With respect to Rule 15(d) in the supplemental allegations, simply, Rule 15(d) is very clear. If you are making allegations about occurrences that happened after the filing of the Complaint, they are not amended allegations, they are supplemental allegations. You got to move the Court, we have to have an opportunity to respond, and the Court needs to have a chance to rule. That procedure hasn't happened yet. So, the supplemental allegations, we submit, should be struck.

With respect to the jury demand, they have conceded, apparently, that they are removing their jury demand. As plaintiffs point out, there a number of defendants who are not signatories, they did not sign on to the jury waiver, and, so, if this case proceeds on and those defendants are in this case and the defendants make a jury demand, then plaintiffs will have an opportunity to make an argument as to why those defendants may have to be bound to the agreement. But I do not think that that issue is ripe before the Court at this time.

With respect to personal jurisdiction, one argument that I think we heard or a theme we heard repeated is is that if the case -- if the Court dismisses the non-

guarantor defendants for lack of personal jurisdiction, the case will have to be bifurcated. That's not necessarily so -- or it didn't have to necessarily be so. Plaintiffs could have brought this case -- and, again, this comes back to the forum selection clause, plaintiffs could have brought this case in a jurisdiction where the Court could have had jurisdiction over everyone, should plaintiffs have so chosen. Again, forum selection clauses are not absolute for purposes of forum nonconvenience. A Court can choose not to enforce a forum selection clause, even over the protestations of one party to the clause.

With respect to the remaining arguments, specific jurisdiction is just very simple. You need a plead and affiliation between the forum state, Nevada, the underlying activity at issue, and how the defendants who are trying to bring into the case were involved in such activity. I simply do not see that here. And I do not think -- and there is no case law to support, that simply a transaction between one Nevada -- or a purported transaction between one Nevada corporation, since that is Nevada 5, and another Nevada corporation, that being Hygea, is enough to then subject its directors to personal jurisdiction here. In, in fact, *Consipio* says exactly the opposite. You need something more. And, here, we have -- and that something more is minimum contact, some modicum of due process, and

we simply do not have that, at least not on the pleadings.

With respect to the argument of 75.160 and tag jurisdiction, the Nevada Supreme Court has not interpreted the plain words of that statute, as Your Honor herself noted, that there is somehow implied consent through 75.160. Nevada Supreme Court has not said that. Perhaps another Court in another jurisdiction has said that about our stat -- their -- that jurisdiction statute but not our Court.

With respect to this attempt to imprint the director defendants appearing in the receivership action in Carson City as somehow meaning consent to jurisdiction in this action, that is simply not the case law. The activity and the affiliation had to have occurred prior to the filing of the Complaint. And what I'll note about the directors appearing in the Carson City action is the reason the directors appeared in that action is because the statute required that they be added as necessary and indispensable parties.

With respect to the Rule 9(b) argument, I wanted to point out -- sorry, Your Honor. I'm just going to go grab my copy of the Complaint for a second. With respect to the 9(b) argument, one paragraph that plaintiffs pointed out to in the Complaint was paragraph 41K, which is at page 9 of the Amended Complaint.

THE COURT: I have it up.

MS. GALL: But even this is not enough. First of all, I'll just break it -- I'll just break this down. Defendant Moffly sent to Dan Miller an e-mail attaching a capital table structure analysis. The e-mail stated that this attachment was approved by Core-Mark and defendant Hygea's Board. Hygea's Board didn't make any statement and I'm not sure somebody saying somebody else made a statement is sufficient for purposes of Rule 9(b) and the requirement that you not engage in group pleading. A misrepresentation has to be attributed to each individual defendant.

In addition, it goes on to say: It indicated a favorable 2016 EBITDA that turned out to be false, claimed that when -- claimed the EBITDA, ahead of schedule used four months ago with Core-Mark, when, in fact, the actual EBITDA fell far short of indicated figures and reflected additional misleading valuation information as well.

I want to turn to the last sentence. When the word it is used, I have no idea what it is referring to. If it is referring to the capital table structure, which is what Hygea's Board apparently approved, well a cap table typically doesn't have EBITDA figures and commentary such as the EBITDA is ahead of schedule. If it is referring to the e-mail, well, the Board did not write the e-mail, it

would be Moffly that wrote -- Mr. Moffly that wrote the e-mail. But even if you take those statements alone at face value, I do not know what the EBITDA figure is, there's no specificity. I do not know how far the EBITDA fell short and I do not know what this additional misleading valuation information is. That is the type of specificity that Rule 9(b) demands and that, unfortunately, the First Amended Complaint does not have.

With respect to the securities claim, I think Ms. Lambrakopoulos is going to address that further, however, I will say one thing. On the issue of public offering, they have plead, as Your Honor pointed out, that there was a public offering. That is a legal conclusion, Your Honor. While I agree that the Court at a Motion to Dismiss stage must draw all inferences, all reasonable inferences in plaintiffs' favor, I do not know how a Court can draw that inference in plaintiffs' favor when there are other allegations in the Complaint that point to a private offering, including under the *Ralston Purina* test. And, so, when there's inconsistent allegations, I do not know how the Court draws a favor -- that favorably in front of plaintiffs. In fact, I would argue that the Court is unable to draw any inference at that point.

With respect to the fiduciary duty allegations, I think I covered that at length, both in our written Motion,

Reply, and in oral argument. And, so, I will not belabor that point here except I will clarify one thing. We did not argue that the Business Judgment Rule protects the securities fraud claims. We said that the Business Judgment Rule applies to fiduciary duty claims and including this failure to make demand.

With respect to the duty of candor, I'll just reiterate that that is subsumed by the duty of loyalty and Nevada does not recognize that. Because I didn't say this in my opening remarks, you need a shareholder action for a violation of the duty of candor in any event. You need some type -- for instance, a merger vote or some other type of shareholder action. There is no obligation upon Board of Directors merely to provide information under the structure of fiduciary duty.

In addition to that, with respect to this breach of contract and breach of fiduciary duty and that the two can proceed in parallel, they simply can't, Your Honor. The authority is overwhelming on this point. You cannot use a breach of contract as a basis for a breach of fiduciary duty action unless there's some independent basis outside of the breach of contract for the breach of fiduciary duty.

And, unless Your Honor has any questions, I'm done with my argument.

THE COURT: I don't. Thank you.

MS. GALL: Thank you.

THE COURT: Ms. Lambrakopoulos?

MS. LAMBRAKOPOULOS: Thank you. There's a lot to unpack here and I'll try to do my best to sort out and address the claims and argument by plaintiffs' counsel.

Let me start with a personal jurisdiction issue. This notion of tag jurisdiction and the *Martinez* Court -- it's a Ninth Circuit case, held it won't apply here. There's still a due process obligation here and plaintiffs haven't shown any authority that would absolve them of the obligation to demonstrate facts that would support due process is served here. I heard plaintiffs' counsel suggest that they would go around and maybe reissue the proofs of service here to reflect that they had served Mr. Gonzalez through the resident agent of the corporation, rather than the service that they actually affected as to him in Florida. It's been a year since this lawsuit has been filed. We've been up and down and two different courts here, several Motions to Dismiss, that should not be permissible. They could have done this much earlier. We've raised personal jurisdiction repeatedly over the last year and it wouldn't address the deficiency in their claim here as to Mr. Gonzalez.

They do appear to conflate service with consent to

-- service of -- consent to service of process with consent to jurisdiction under NRS 75.160. Again, as counsel for Hygea and the other defendants indicated, there is no Nevada Supreme Court case that supports that. In fact, *Consipio* and any of the authorities that they've cited here from this jurisdiction for the purposes of personal jurisdiction as to a director of a Nevada corporation, there has to be harm to the corporation alleged. Again, I'm not hearing those types of allegations, I'm hearing allegations of harm to the plaintiffs. In other circumstances, there were situations where there were actual operations within the state of Nevada, customers in Nevada, or a corporation where there was a 50/50 sole shareholders of a Nevada corporation. This is not the case that we have here and plaintiffs have not established that one can conflate the service of process statute with consent to service for the purposes of personal jurisdiction.

As to the forum selection clause and the securities purchase agreement, plaintiffs acknowledge that Mr. Gonzalez is not a signator to this SPA, however, they suggest that because he authorized the entry of the company into an agreement to sell the securities that he should be held individually to the forum selection clause, which we don't even know if he saw. Plaintiffs have -- could have

had -- could have sought personal jurisdiction discovery here over the last year, just narrowly focused on personal jurisdiction, to elicit whether or not Mr. Gonzalez actually saw the terms of the SPA, or reviewed them, or authorized specific terms, to elicit what the directors were specifically shown by management leading up to the Board resolution. They have not done so. They have not plead any kind of basis for holding Mr. Gonzalez to consenting to jurisdiction over his individual person by virtue of the company's consent to jurisdiction as part of a private securities transaction here.

Addressing Nevada 5 and the issue of the directors direct and purposefully availing themselves of the forum state by directing misrepresentations to that Nevada entity. Nevada 5 is the parent of the buyer in this particular situation. Plaintiffs have not -- I have not heard -- seen anything in their briefs, I've not heard anything today where they are alleging any specific misstatement or communication that went directly to Nevada 5. In fact, their own allegation, paragraph 35 of Plaintiffs' Amended Complaint states that misrepresentations and omissions were made to RIN Capital. RIN Capital is a Michigan entity. RIN Capital is what's named in the Board resolution. Nevada 5 is not named. There is no indication that anyone new on the director

level, certainly Mr. Gonzalez, knew that that entity was in play.

There's reference to their paragraph 41K, the e-mail that they have attached as part of Mr. Fowler's affidavit, which is frankly outside the pleadings, it is hearsay, unclear whether it's even admissible. We don't believe it's proper to even consider it but it's essentially a reference that doesn't name Mr. Gonzalez specifically, does not name Nevada 5, so one cannot take that particular quote that is referenced here in Mr. Fowler's affidavit and impute any kind of purposeful availment by Mr. Gonzalez to Nevada as a forum state.

Control person is -- he's suggesting that just by virtue of their allegations that Mr. Gonzalez was a control person, then personal jurisdiction attaches here. None of the control person claims against Mr. Gonzalez are viable here or actually any of the individual defendants, they are not viable. There's not been a primary claim asserted here of any kind of liability under either the federal or the state securities statute in Nevada.

The broad definition of buyer that Mr. Kaye suggests is present somewhere under the federal securities laws. I've been in private practice representing defendants in this area for over 20 years now, that's the first I've heard of that. Certainly, in this particular

situation, we have the real party in interest here is an individual investor out of Michigan who has formed these various shell entities and made a decision to invest 30 million through the Michigan entity. He could have invested through Nevada 5, the Nevada entity that he had formed. He did not do so, we don't know why, it's not relevant here. The fact remains that one cannot simply expand the definition of buyer here to loop in a Nevada entity for the purposes of personal jurisdiction.

As to the issue of Rule 9(b), in particularity and the generalized nature of the pleadings, I thought I heard Mr. Kaye say that claims for federal securities fraud are not bound by 9(b). They may not be bound by Rule 9(b) but they're bound by the Private Securities Litigation Reform Act and other authority that requires that securities fraud, federal securities fraud be plead with particularity. In this particular case, they have no claim for federal securities fraud under either 10(b) or 17(a) of the 33 Act. What they've plead is Section 12 claims and, under those particular claims, there is no authority for absolving them of their duty to plead with particularity as to any kind of omissions.

There is also the Unified Pleading Rule that applies here. And, so, because they've asserted fraud claims here under common law fraud claims, then they need

to plead all of their claims with particularity.

Drilling down on the one act that they allege relates to Mr. Gonzalez and that's the October 4 resolution. By him authorizing the negotiation and the execution of a securities transaction here with RIN Capital, there is no bad act that's alleged as to Mr. Gonzalez that would support any kind of individual liability as to him, it's simply that he approved a resolution. They have asked the Court to draw certain inferences of bad act. They ask the Court to infer that by proving the resolution, Mr. Gonzalez also approved misrepresentations as to the valuation of the company, that the valuation was inflated, that the public offering, the reverse takeover that was supposed to be going into effect down the road after Mr. Gonzalez had left the Board, that this October 4 resolution authorized Hygea's decision not to go forward with that particular transaction. Two plus two does not equal six here. What plaintiffs are doing is they're pleading hypotheticals to try to get within, you know, any kind of claim here. They're not pleading based on any kind of information and belief or any kind of actual knowledge of claims. They are -- as the Court noted, they've put together a lot of spaghetti and they're trying to see what will stick here. We don't believe any should stick to Mr. Gonzalez.

I will turn now to the federal securities issues that Mr. Kaye has raised. He indicated that defendants have the burden now to show that this was a private offering, that they have met a prima facie case of a public offering. That is not the case here. They have not alleged any type of document, any type of filing that would constitute a public offering.

They indicate that because they had bad information in the Confidential Information Memorandum that they received and that means that this was a public offering because they really didn't get that confidential information. That's sort of how I understand their argument. That would suggest that every private transaction, every private securities transaction where the parties felt that they didn't get good information, they could then turn around and say: Well, this was a public offering. That's simply not the law. He hasn't cited any authority there.

They try to make this play with words here that we're suggesting that they argue that this was a -- not a public exchange offering or that they're not arguing that this is a public exchange offering. Well, of course, you can have a public offering without a security being listed on a public -- on a national exchange. They can be -- the company can trade its shares in the pink sheets in the OTC

market. And, in fact, Hygea does that. We're not suggesting that this is not a public offering because it wasn't listed on an exchange. There's no indicia of any general marketing out here, any general solicitation, based on their own allegations.

They note that a prospectus, they define it as a piece of paper that gives information. I don't think that that -- I would want to be in any position of arguing that to the SEC when submitting a prospectus to the SEC for their review. There is -- it is a term of art. There is a body of law that defines what prospectus is and for the purposes of Section 12, it is a registration statement because it has the authority of being -- of having been filed publicly, on ETGAR, having been reviewed by the SEC, having been subject to comments by the SEC. This is not something that can be equated to the CIM, the Confidential Information Memorandum, that they cite to. They don't specify any other documents here.

They indicate also that we're suggesting that the -- that fraud -- that we should be absolved of any liability for fraud because Hygea did not register its shares, that that's our argument. We're not making that argument. But, in doing so, I think they're suggesting that there was some failure to register here, the securities that were received by N5HYG.

First of all, there was no obligation by the company to register the securities. And if one looks at the securities purchase agreement, it's silent as to whether or not the securities were going to be registered. I have seen documents of this nature prepared by various parties. There is often a clause in those documents, which obligates the issuer to register the shares within a certain amount of time. The spa at issue here is silent on that. There is no obligation here, there was no obligation under the law to register the securities in a private offering of this nature, and the company did not do so, relied on an exemption, at least as best as we can tell based on the allegations. And plaintiffs have not made any argument that would suggest that there was any obligation to register the securities here.

His cite to the 10(b)(5) cases, I think it was an argument relating to the Business Judgment Rule and that we've argued that the Business Judgment Rule absolves a defendant in a 10(b)(5) case, certainly for Mr. Gonzalez. We've not made that argument. There is no 10(b)(5) case plead here. It's -- that argument really doesn't apply here. Our argument as to the Business Judgment Rule relates to the common law of the corporate liability claims that have been asserted against Mr. Gonzalez.

Last, with respect to the Nevada Securities Act

claims that have been brought here, Mr. Kaye has indicated that this is -- it's one Nevada corporation to another Nevada corporation. That's not borne out by the Amended Complaint. Again, paragraph 35 indicates that the misstatements, the omissions were made to RIN Capital, Michigan entity.

He also indicates that even if Nevada -- this -- that state's securities law doesn't apply here, then a securities law of some other state would apply. Well, they haven't plead the securities law of some other state. And, so, as defendants, we just don't have an obligation to file a Motion for an Extension to exceed the page limits to brief the securities laws of the 50 states here. Plaintiffs allege claims under the Nevada Securities Act and that is what the Court should be looking at here. And the argument that it might be illegal somewhere else is just not relevant to the Complaint that they filed.

The Court has any questions?

THE COURT: I don't.

MS. LAMBRAKOPOULOS: Okay. Thank you.

THE COURT: Mr. Kaye, you looked like you wanted to have a last word?

MR. KAYE: Your Honor, I would appreciate the opportunity to make a few points.

THE COURT: You may.

MR. KAYE: Thank you, Your Honor. I think I'm going to try to work backwards from what we've just discussed.

Once again, the lack of adequate information here, as we discussed in the papers, is one of the factors that makes this a public offering and that keeps it outside of the private offering exemption, both for the misstatement claim and the private offering exemption from the registration requirement. I thought that something that was very interesting was we just heard from counsel that apparently Hygea does trade securities on a supplemental market.

MS. GALL: It's not -- I think that was a misstatement.

MS. LAMBRAKOPOULOS: I stand corrected. I'll defer to defense counsel.

THE COURT: Thank you. Because I --

MS. GALL: We do --

THE COURT: It's okay.

MS. GALL: If sometime in history Hygea did, I haven't known them forever but I know as of today, we --

THE COURT: Did they --

MS. GALL: -- as far as I know, we don't trade on the pink sheets.

THE COURT: Did they trade on pink sheets or over

the counter in 2016?

MS. GALL: I do not think so, Your Honor. Yeah.

THE COURT: You're not sure?

MS. GALL: I mean, look, I've never asked that exact question, in 2016 did you trade on the OTC or the pink sheets, but I've never seen any evidence of Hygea having traded. It's always been a private company. It's always been represented to me as a private company.

THE COURT: All right. And I don't even have the day of this transaction except for in the Complaint. I have it in the PSA -- or SPA.

MR. KAYE: Your Honor, I think that that exchange sort of illustrates that there are fact issues here. And the issues that we're talking about here really turn on fact issues and it's appropriate to proceed to discovery.

You know, there was some suggestion that it's not a prospectus because it wouldn't meet SEC requirements. But we talked -- we cite case law saying that: Look, if it's inadequate, that doesn't get them off the hook. If there isn't a filing -- a public filing despite the fact that there should have been a public filing, that doesn't get them off the hook. Once again, they can't fail to meet their obligations on one of the -- with respect to one of the requirements under the statute and say that it gets them off the hook with respect to another requirement under

the statute.

We also heard that -- the suggestion that, well, you know, we should have perhaps -- should have been doing discovery relating simply to jurisdiction. We've sought that in the alternative. The door has been shut in our face consistently with respect to discovery. We had actually tried to do a little bit of preservation when this was in Federal Court because we were alarmed by some things that were happening and the answer has always been: No discovery, no discovery, no discovery. And I would point out that even though we have sought as an alternative, jurisdictional discovery, we never tried to do any of that in the Carson City case because, again, the Carson City case was not an effort to sort of do an end run around the proceedings or the limitations -- the limitations in this case.

There was talk earlier from counsel about the equities of the application of the -- of the claim preclusion doctrine. And I think all the equities run in our favor here. Claim preclusion simply isn't designed to be sort of a gotcha situation. It is true that defendants did sit through a trial in Carson City. But they sat through a trial in Carson City in which their counsel consistently explained: Look, there's another damages case going on, leave the damages issue to the damages case.

I would also add that, you know, the 10 percent issue, the idea that there was a deliberate failure on our part, I think is quite misguided. In fact, we thought we had shown that we met the 10 percent threshold based on the representations and warranties that the -- that the defendants had provided. Judge Wilson disagreed with us on that. But the idea that somehow we just didn't try to do it is quite -- you know, is quite inept. It certainly, certainly, wasn't an intentional disregard of any of our pleading obligations and why on earth would we do that? Why would we do that?

There's the suggestion again that, well, you know, we could have just violated the -- I think there were two suggestions that we could just violate the Stock Purchase Agreement's forum selection clause. Once again, I don't think it's just that easy to just ignore what your contract requires. But even if, even if, assuming arguendo we could have done that, we know that they would have removed any damages claim in the receivership action and we heard again, well, this idea that you -- we could pursue claims in parallel in Federal and State Court. We couldn't. They removed under a notion of exclusive jurisdiction. And to prove positive that we couldn't do both at the same time, is that this case was parked over in Federal Court all that time. We didn't get to proceed here while it was also in

Federal Court. The whole thing was just -- was just flat out removed.

There was a lot of talk in the presentation just now, you know, quite a bit of talk about inferences and, you know, what we're seeking inferences. We're allowed to seek inferences. Not only are we allowed to seek inferences, but we are entitled to inferences in our favor. And when you look at the -- for example, the e-mail discussed in paragraph 41K, it says: This is what the Board has approved, this is what the Board -- or this has been approved by the Board. I think there's surely a more than plausible inference that the Board approved the whole spreadsheet that was sent there. But, at the very least, that is a fact issue.

Another thing that we've heard the suggestion that Mr. Gonzalez, I think -- and I suspect they would apply the argument to all the directors, couldn't have known that RIN was representing Nevada 5. But, once again, the directors here are approving the sale, 8.57 percent of the company for $30 million. I think there's a very plausible inference that they knew who they were selling it to. And, sure, RIN was involved but, once again, all those representations were going through RIN as the agent to Nevada 5.

There was a suggestion that it was somehow

untoward for us to talk about the text of certain materials or -- that were presented with respect to Mr. Gonzalez that were shown in the affidavit and in the documents that we attached because it's outside of the pleadings. But that went to jurisdiction. And earlier we heard about how Mr. Gonzalez had an affidavit. So, the -- Mr. Gonzalez can have an affidavit, we can then -- if there's a suggestion that there ought to be jurisdictional discovery, I think we can certainly -- we can certainly show facts. And, frankly, I don't think we need to. I think it was all sufficiently plead but we can certainly document the intentional conduct on the part of Mr. Gonzalez and that -- and the Board.

The PSLRA, we cite cases saying that you can have -- that there is no culpability required for the 12(a)(2) claim. And we also show cases -- Nevada cases talking about how the PSLRA applies to class action claims but does not apply to -- does not apply to cases such as this.

There was the suggestion that, once again, that the defendants don't know what the numbers were, how they were off. We plead as best we can here, as best we can glean information, that the consultant found that they were off by a factor of about seven. I mean, that's going, I think, really above and beyond the sort of specificity that could be reasonably asked of us. And, in terms of not

including specific dollar numbers, the reason we didn't do that, as we have pointed out in a footnote both in the Complaint and we point out in the papers as well, is that we have -- we have faced confidentiality issues with the defendants and we don't want to violate those confidentiality restrictions. We're certainly willing to share all that information -- as we said in the Complaint, we're certainly willing to provide all of that information to the Court.

And, with that in mind, I would ask -- and I do not think it's at all necessary but, as we say in the papers, we would ask for leave to amend if there are any amendments that the Court thinks are necessary on the basis of this. And I would just point out, at -- in conclusion, we were kept, once again, outside. We're on the outside looking in, trying to find out what we can. I think we've really done as much as could be reasonably asked in terms of pleading that, keeping in mind, again, that there were significant omissions that we've alleged. And we certainly can't allege the omissions with specificity because they were left unsaid. But we have plead a strong prima facie case. I think it well exceeds our pleading obligations and I appreciate the Court's indulgence.

THE COURT: Thank you. You took 10 minutes on your sur-opposition. The moving parties will have an

additional 10 minutes and that will be the conclusion of the hearing.

MS. GALL: Thank you, Your Honor. I'm going to speak just very briefly, because my remarks are not very long, on both the claim preclusion and the remainder of the arguments. But, first, because I haven't gotten this on the record, we do join in the arguments that Mr. Gonzalez and that Ms. Lambrakopoulos has made here today during oral argument insofar as they are not specific to Mr. Gonzalez such as the affidavit itself and the facts alleged there -- or the facts set forth therein.

First, I do want to reiterate, as far as I know, Hygea does not trade on the pink sheets or the OTC. I believe that was an inadvertent misstatement by Ms. Lambrakopoulos, which she can address during her sur-reply.

Your Honor, this -- our Motion can largely be bifurcated into two sections: The claim preclusion section and, then, what I'll call the 12(b) section. With respect to claim preclusion, I think there's a lot of noise but I think the test is just very simple. Could the claims in this action, which arise from the same nucleus of operative facts, have been brought in Carson City? Could they have been brought? And we've heard argument about maybe why they weren't brought or maybe why the forum selection clause may have prevented it. But I think when you drill

down onto the test, they arise from the same operative nucleus of facts and they could have been brought in Carson City. Who knows what Judge Wilson would have said if they had been brought, who knows what would have happened, but the operative test is: Could they have been brought? And they were not brought.

And, then, the second question to ask is: Well, was there a judgment on the merits? And even if you set aside the Findings of Fact and Conclusions of Law where Judge Wilson found that he does not have jurisdiction to appoint a receiver, which I would off -- which I would offer, Your Honor, is different from appointing receiver as opposed to hearing the claims on the merits. We have the Judgment as a matter of law, which was entered after the conclusion of plaintiff N5HYG's case in chief. And, therein, Judge Wilson ruled he denied relief under 32.010, he completely denied relief under 78.630, and he denied relief under 78.650 under half of the substantive claims made therein.

With respect to the what I'll call the 12(b) arguments, I'm going to work a little bit backwards from what Mr. Kaye was arguing. Mr. Kaye keeps arguing that there are fact issues. Your Honor, on a 12(b) motion, it's about the pleadings and what's in the pleadings. Have plaintiffs alleged enough under the various pleading

standards to now get to discovery, which might result in fact issues? And, under the various pleading standards, whether it's 9(b), the Private Securities Litigation Reform Act, Rule 23.1 for breach of fiduciary duty, we have argued that they have not met their pleading standards. And even if they have met their pleading standards, a number of their claims just simply fail as a matter of law. And I will reiterate that, yes, they are entitled to all reasonable inferences in their favor. They are not entitled to legal conclusions, the Nevada Supreme Court has clearly said that, and they are not entitled to inferences if the Court cannot draw those inferences because of inconsistent allegations.

One thing that I do want to note -- and I'm jumping back a little bit, plaintiffs are arguing -- or at least N5HYG is arguing, that their failure to demonstrate the 10 percent threshold was not a deliberate failure. Judge Wilson found otherwise. He awarded us our attorneys' fees because of their deliberate failure. He found that they had acted in bad faith and his words are: They did hardly anything to demonstrate that. And, now, what they want to do is they want to take us through another trial, another action, including one in which, honestly, I don't even know what some of the claims that they're alleging are against my clients.

And, Your Honor, they could have brought these claims, we could still be proceeding in Carson City, but they've chosen not to. And, for these reasons, Your Honor, we ask you to dismiss their Complaint in its entirety without leave to amend. Thank you.

THE COURT: Thank you. Ms. Lambrakopoulos?

MS. LAMBRAKOPOULOS: Thank you.

THE COURT: Lambrakopoulos.

MS. LAMBRAKOPOULOS: Thank you. I'll be very brief, Your Honor. Just address a couple things.

And, again, just to confirm, I will withdraw the statement that Hygea has traded in the pink sheets. I'll defer to defendants' counsel and there's no issue of fact there. That was a misstatement withdrawn. It does not take away the point that I was making, which is that we are not arguing that this was not a public offering because the company was not listed on a national exchange. We are arguing that this was not a public offering because they've not plead any kind of indicia of a public offering. It's all private, even as described by Mr. Kaye.

It is -- it contradicts a central claim that they have, a central set of allegations, which is that Hygea failed to take the company public through an RTO, a reverse takeover offering. So, either you have a public offering or you don't. And, in this case, this was a private

offering and they're claiming that -- you know, they're claim -- they're asserting claims based on a decision by the company, after Mr. Gonzalez had left, not to take the company public through the RTO. So, that's contradicted.

As to the seeking personal jurisdiction discovery in the alternative, I am not aware, never received to my knowledge any request by plaintiffs' counsel for discovery that would be limited to personal jurisdiction. All of the requests -- and we were in Federal Court at the time, were broad jurisdiction -- broad discovery not focused on a personal jurisdiction issue. And, in fact, plaintiffs did agree as to the broad discovery that the Private Securities Litigation Reform Act did apply and, so, discovery was stayed. However, a year later, we would think it would be inappropriate for personal jurisdiction discovery to be permitted here. We don't believe that any additional facts as to Mr. Gonzalez would be elicited.

In terms of the inferences that are drawn here from this one act, this October 4 resolution, plaintiffs are -- the inferences that they are seeking to draw from this one act are not reasonable, they're not fairly drawn. And I'll give you, the Court, some examples. They are not alleging that the directors had knowledge at the time that they approved the transaction that the valuation that was shown to plaintiffs, to RIN, was inflated at the time.

They don’t make that allegation.

And, then, with respect to Mr. Gonzalez, they are asking for an inference to be drawn as to him regarding the reverse takeover offering that was not done by the Board -- by the company, at a time when Mr. Gonzalez wasn’t even on the Board. So, these, again, are not inferences that are fairly drawn.

I will close by saying that they keep suggesting that because of the nature of this transaction, this was a large investment in Hygea, that Mr. Gonzalez should have known that the other party to this transaction was a Nevada entity, Nevada 5. There's no indication that the parent entity was involved and no indication that that information was shared with Mr. Gonzalez. Certainly, you know, RIN Capital was the agent, the buyer is stated as N5HYG, and in the securities purchase agreement itself it’s noted as a Michigan entity.

Finally, I will close by indicating that with respect to the plaintiff seeking leave to amend at this point, I think with respect to Mr. Gonzalez, he has been put through this for a year and incurred significant legal expenses and we don’t believe that based on every opportunity that the plaintiffs have had to amend, that they are going to be able to plead a case as to him.

Thank you.

THE COURT: Thank you all. This is the matter of *N5HYG, LLC, versus Hygea Holdings Corporation*. The matter is now submitted. The parties will have through the end of the day on October 12th, 2018 to supplement with regard to one issue only and that will deal with only whether Hygea was traded as of October 5, 2016 over the counter on the pink sheets. The matter is submitted for decision. It'll be on my chambers calendar on November 6th, 2018. You should expect a ruling that week.

I will not do extensive findings and conclusions. I will, however, issue a minute order directing one of the sides -- when I say one, because the issues are teed up differently from both defendants, which is why I need the extra time to then prepare findings and conclusions. And, so, the hearing at this point is concluded and it -- you should expect a decision the week of November 6th. Thank you all.

And next time you guys come here, whether it's this case or another, please schedule a separate time so that we -- you would -- you got lucky today that my trial went off this afternoon. But I would hate for people to

...

...

...

fly in and, then, not be heard. Thank you.

MS. GALL: Thank you, Your Honor.

MR. KAYE: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 3:12 P.M.

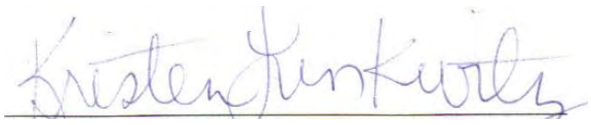
* * * * *

CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER