IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL IGLESIAS and EDWARD MOFFLY,

Petitioners,

v.

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

Respondents,

and

N5HYG, LLC, and NEVADA 5, INC.,

Real Parties in Interest.

No. 83157

ANSWER OF REAL PARTIES IN INTEREST

****

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL IGLESIAS and EDWARD MOFFLY, Petitioners, v. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK and the Honorable NANCY L. ALLF, District Court Judge, Respondents, and N5HYG, LLC, and NEVADA 5, INC., Real Parties in Interest.	**No. 83157**

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: Nevada 5, Inc. is the parent company of limited liability company N5HYG, LLC. Neither entity is publicly traded.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Lemons, Grundy & Eisenberg

Lewis Roca

Albright, Stoddard, Warnick & Albright

The Miller Law Firm, PC

3. If litigant is using a pseudonym, the litigant's true name: N/A.

DATED: Aug. 27, 2021

/s/ Robert L. Eisenberg

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INTRODUCTION

Petitioners Manuel Iglesias ("Iglesias") and Edward Moffly ("Moffly") seek this Court's immediate assistance in overturning the district court's correct application of Nevada law to claims against them, in favor of a Florida court's subsequent application of Florida law to different claims against differently-situated parties. The Petition is meritless as a matter of procedure and substance.

Nevada 5, Inc. ("Nevada 5") filed this suit in the Nevada district court in 2017 against Hygea Holdings Corp. ("Hygea")[1] and its officers and directors, including Iglesias and Moffly, for fraudulently inducing Nevada 5 into paying Hygea **$30 million** as part of an October 2016 purchase of Hygea stock. Although Petitioners admit that Nevada 5 paid the $30 million, and although their misrepresentations regarding Hygea's financial performance prompted Nevada 5 to part with its $30 million, Petitioners say "Nevada 5 has no standing to make these claims against anybody." (Petition, p. 18) The district court repeatedly—and correctly—disagreed.

Through their woefully incomplete Appendix and statements of the facts and procedural history, Petitioners fail to apprise this Court that ***the district court rejected Petitioners' arguments at least three times***, dating back to 2019. In the third such instance, the court ruled: "This motion … is almost identical to the motion

[1] Real Parties in Interest Nevada 5 and N5HYG, LLC ("N5HYG") are not pursuing their claims in the operative Second Amended Complaint ("SAC") against Hygea in light of its bankruptcy.

I denied in January of 2020... **[V]ery clearly, Nevada 5 is not barred here -- clearly has standing.**" (3 Ans.App. 648-49)(bold added)

After the district court's rulings, a Florida court ruled in Nevada 5's 2019 lawsuit against ***differently-situated*** defendants that Nevada 5 lacked standing under ***Florida*** law to pursue its ***Florida***-based claims against those defendants. Disregarding those distinctions, Petitioners moved the Nevada district court to reverse its prior rulings on the basis of issue preclusion. But the district court correctly concluded that the Florida ruling required no such thing. The "issue" of whether *Nevada law* permitted Nevada 5 to pursue its claims against *Iglesias and Moffly* had only—and already—been adjudicated by the district court.

Now, *three months later*, Petitioners seek this Court's intervention, claiming the district court's sound conclusion was indisputable legal error, and a manifest abuse of discretion requiring urgent review. Petitioners are wrong on all fronts.

First, Petitioners provide no compelling basis for interlocutory review. Petitioners have a right to appeal the district court's decision in the event a final judgment is awarded in Nevada 5's favor. Expediency and cost-savings in the interim are insufficient bases to short-circuit the normal appellate process. Moreover, Petitioners have failed to show even ordinary error or abuse of discretion in the district court's ruling—much less the *clear* error or *manifest* abuse of discretion required for the extraordinary relief they request.

Second, Petitioners are wrong on the merits. The district court correctly declined to apply issue preclusion because Petitioners cannot meet the elements: (1) the Florida court's decision was based on a lack of jurisdiction—not "on the merits;" and (2) the issues in the two cases are not "identical" because (3) the issue "actually and necessarily litigated" in Florida—whether Florida law permits Nevada 5 to pursue Florida law claims against differently-situated defendants—is **not** "identical" to the issue the Nevada district court previously decided: that Nevada law permits Nevada 5 to pursue its claims against Petitioners in Nevada.

The district court was also correct that the integration clause from the Stock Purchase Agreement that Petitioners and Hygea signed with N5HYG (the "SPA") is no bar to Nevada 5's fraud claims under Nevada law. Moreover, the SPA's choice of law and jurisdiction clauses require adjudication of claims against Petitioners **in a Nevada court, under Nevada law.** The Florida court never even considered those provisions because the Florida defendants were **not** parties to the SPA—yet another reason why the Florida court's ruling is not preclusive in Nevada.

The Petition should be denied. Petitioners have delayed this case for nearly four years with their serial motion practice; it should proceed on the merits.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioners purport to advise this Court of the "FACTS NECESSARY FOR AN UNDERSTANDING OF THE ISSUES PRESENTED BY THE PETITION." (Petition, p. 5)

But they omit a host of necessary facts—including their months-long courtship of Nevada 5, inducing it to pay $30 million based on their misrepresentations of Hygea's financial performance. Petitioners also fast-forward past **more than two years** of litigation history dating to 2018 in which the district court **repeatedly rejected** the very arguments they seek to resurrect and co-opt from the Florida court's subsequent ruling. And their Appendix **omits all of the critical pleadings, transcripts, and orders of 2020.** Those misleading omissions are provided in the Appendix submitted by Nevada 5 and N5HYG, and are discussed below.

I. Petitioners Solicit And Defraud Nevada 5 Out Of $30 Million

Prior to its 2020 bankruptcy, Hygea was a Nevada corporation purporting to acquire and manage medical practices. (X PA 2354, ¶¶1-2) Iglesias is its founder and former CEO, and Moffly was the CFO. (*Id.* at ¶¶3-6) Beginning in June 2016, Petitioners conspired to induce Nevada 5 to fund a share purchase in Hygea by misrepresenting in communications and financial documents that Hygea was positioned for listing on a public stock exchange, and enjoyed years of robust financial performance (X PA 2357-63, ¶¶28-42; 2365, ¶¶47-53), summarized below:

- 2014: $3.7 – $4.5M in EBITDA,[2] based on $52.4 – $52.9M in revenue;
- 2015: $20 – $28M in EBITDA, based on $185 – $246M in revenue;
- 2016: at least $56.9M in EBITDA, based on at least $300M in revenue.

[2] "EBITDA" ("earnings before interest, taxes, depreciation, and amortization") is an accounting metric that gauges a company's overall financial performance.

Relying on Petitioners' misrepresentations, Nevada 5 wired its $30 million to Hygea on October 5, 2016, and it formed N5HYG which executed the SPA and became a Hygea shareholder. (X PA 2363, ¶¶39-41) Contrary to Petitioners' suggestion (*see* Petition, p. 5), **Iglesias and Moffly were also individual parties to the SPA.**[3] (X PA 2431)

The SPA contains "Governing Law" and "Jurisdiction" clauses, which subject Petitioners to Nevada law, applied by Nevada courts:

> 8.10. Governing Law. This Agreement, the negotiation, terms, and performance of this Agreement, the rights of the Parties under this Agreement, and all Actions arising in whole or in part under or in connection with this Agreement, shall be governed by and construed in accordance with the domestic substantive **laws of the State of Nevada, without giving effect to any choice or conflict of law provision or rule that would cause the application of the laws of any other jurisdiction.** (X PA 2428)(bold added)

> 8.11.1. Jurisdiction. **Each Party to this Agreement**, by his, her, or its execution hereof, (a) **hereby irrevocably submits to the exclusive jurisdiction and venue of the Nevada state** and/or United States federal **courts located in Clark County, Nevada** for the purpose of any Action between any of the Parties hereto **arising in whole or in part under or in connection with this Agreement**, any Ancillary

[3] SPA §6.3 requires Petitioners to make "Post-Closing Monthly Payments" to N5HYG, which they personally guaranteed under §7.4. (X PA 2418, 2422) N5HYG's claims in the SAC are limited to Petitioners' breaches of contract for failing to make such payments for several years, as well as other conduct affecting N5HYG's shareholder rights. (X PA 2375-78: Count 8 (breaches of contract); Count 11 (books and records); Counts 9-10 at ¶¶137, 147 (violation of shareholder rights)) All of N5HYG's claims and damages asserted in the SAC are thus distinct from those of Nevada 5, which are based on Petitioners' fraudulent inducement of the $30M payment. (X PA 2366-78: Counts 1-7 (fraud); Counts 9-10 at ¶¶137, 147 (misleading Nevada 5 into $30M payment)).

> Agreement, the Contemplated Transactions, **or the negotiation, terms or performance hereof or thereof,** (b) hereby waives to the extent not prohibited by applicable Legal Requirements, and **agrees not to assert, by way of motion, as a defense or otherwise, in any such Action,** any claim ... that such Action should be stayed by reason of the pendency of some other Action in any other court other than the above-named court or **that this Agreement or the subject matter hereof may not be enforced in or by such court**.... (*Id.*)(bold added)

Nevada 5 later learned from an independent financial consultant that had reviewed Hygea's financials that Hygea's actual 2016 revenue was closer to $90M than $300M, making Petitioners' $50-$60M EBITDA representations impossible to achieve. (X PA 2365, ¶50) The consultant raised similar concerns about Petitioners' vastly inflated revenue for 2014 and 2015. (*Id.* at ¶51) In sum, Petitioners misrepresented Hygea's financial performance to be approximately ***three times higher than reality***. Petitioners also ceased making the Post-Closing Monthly Payments to N5HYG. (X PA 2366, ¶58)[4]

Accordingly, on October 5, 2017, Nevada 5 and N5HYG filed this case against Petitioners, Hygea, and twelve Hygea directors (the "Director Defendants").[5]

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[4] On May 10, 2021, the district court granted N5HYG's motion for partial summary judgment of Petitioners' liability for their failure to make the Post-Closing Monthly Payments. (3 Ans.App. 561) On July 22, 2021, the court entered an order and a final judgment awarding N5HYG damages, attorneys' fees, and costs. (*Id.* at 572, 592) Again, the award in favor of N5HYG and the underlying claims are separate from Nevada 5's fraud claims and the damages it seeks.

[5] The Director Defendants approved the fraudulent financials and other misrepresentations Petitioners provided to Nevada 5. However, the Director Defendants did not sign, and were not personally bound by, the SPA.

II. Petitioners' Motion To Dismiss The First Amended Complaint

In August 2018, after remand from Petitioners' improper removal to federal court (for which they were sanctioned with an attorneys' fee award), Petitioners and the Director Defendants moved to dismiss the First Amended Complaint. They asserted claim preclusion based on a receivership action in which N5HYG had joined, and they averred Nevada 5 lacked standing, and that N5HYG—not Nevada 5—was the "buyer" of the Hygea stock. (I PA 196-97; VI PA 1218-20) They also argued that the SPA's integration clause barred any fraud claims. (I PA 200-02; VI PA 1225-26) The Director Defendants (but not Petitioners) also moved to dismiss for lack of personal jurisdiction. (I PA 198-200; VI PA 1220-24) Nevada 5 argued in opposition that as the target of the misrepresentations and payor of the $30 million, it is a real party in interest, with standing to assert fraud claims on its own behalf. (IV PA 835-37) It further argued that integration clauses are no bar to fraudulent inducement claims under established Nevada law. (*Id.* at 841-42)

On May 10, 2019, the district court initially dismissed Nevada 5's claims with prejudice for lack of standing. (VII PA 1486-86) However, the court did **not** rule that the integration clause barred Nevada 5's claims. The court also dismissed the Director Defendants for lack of personal jurisdiction.

On June 3, 2019, Nevada 5 filed a motion for reconsideration. (VIII PA 1763) At the July 17, 2019 hearing, **the district court granted the motion**, ruling

"...the dismissal should be without prejudice, but ... **[y]ou have to differentiate the standing between the different entities.** You have to have better allegations supporting fraud. And you have to remember the legal standards between parents and subsidiaries."[6] (X PA 2321, 2331)(bold added) On December 13, 2019, Nevada 5 and N5HYG filed the operative SAC consistent with the court's ruling.

III. The Florida Action Against The Director Defendants

On May 16, 2019, following the personal jurisdiction dismissal in Nevada, Nevada 5 sued the Director Defendants in Florida. In the operative complaint (the "Florida SAC"), Nevada 5 alleged statutory and common law fraud under Florida law. (XI PA 2498-2507)

IV. Petitioners Twice Move To Dismiss The SAC In The District Court

Back in Nevada, on January 13, 2020, Petitioners filed a motion seeking to dismiss the SAC, including Nevada 5's re-pled claims. (1 Ans.App. 155; 2 Ans.App. 266) In opposition, Nevada 5 argued it established its standing and appropriately pled its fraud claims. (1 Ans.App. 186-87, 193-95) After a January 30, 2020 hearing, the district court **denied** the motion. (2 Ans.App. 278) Undeterred, on November 4,

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[6] The district court also granted Petitioners' motion for reconsideration regarding claim preclusion. (X PA 2333) However, the court did not dismiss "all claims," as Petitioners say. (Petition, p. 7) Rather, the court allowed Nevada 5 to re-plead its fraud claims. (X PA 2321, 2331) The court also allowed N5HYG to replead claims that were not based on the same facts as the receiver action. (X PA 2351) As the district court subsequently ruled, both Plaintiffs met these requirements in the SAC. (3 Ans.App. 551, 649)

2020, Petitioners filed yet *another* motion to dismiss. (2 Ans.App. 283) The court **denied that as well,** and reiterated its ruling that Nevada 5 could pursue its fraud claims:

> **This motion ... is almost identical to the motion I denied in January of 2020**... [U]nfortunately for me, I have to do a new timeline every time we have a hearing... **But very clearly, Nevada 5 is not barred here -- clearly has standing.** I granted leave to assert those fraud claims. I compared the [SAC] with the first and the specificity is appropriate. I find that there's no bar due to the Receivership Action and that the Claim Preclusion Order here is not applicable, because a nucleus of operative facts [has] very carefully been written to the [SAC]. **Every cause of action is available under Nevada law. All of them have been adequately pled -- Nevada or Michigan or Florida law, and they have all been adequately pled.** (3 Ans.App. 649)(bold added)

The district court could scarcely have been more clear.

V. The Florida Court Dismisses The Florida SAC

The Director Defendants moved to dismiss the Florida SAC in March 2020, reiterating nearly identical arguments under Florida law that the Nevada court had previously rejected under Nevada law. The Florida court's order dated December 9, 2020 ruled that Nevada 5 lacked standing under Florida law to bring Florida statutory and common law fraud claims against the Director Defendants. The Florida court ruled that Nevada 5's payment of the $30 million was not "the relevant inquiry in regard to standing." (XI PA 2627) The Florida court somehow found that it was N5HYG—which did not even exist at the time of the misrepresentations, and did not pay a dime of the $30 million—that was the only party with standing to assert

fraud claims against the Director Defendants under Florida common law or the Florida securities statutes. (*Id.*)

Regarding the statutory claims, the Florida court ruled the Florida statutes are "far more restrictive" than comparable federal statutes such as Exchange Act Rule 10b-5 and that, therefore, Nevada 5 was not a "purchaser" of the Hygea shares under Florida law. (XI PA 2628-29) For the common law claims, the Florida court ruled the SPA's integration clause "defeats Nevada 5's claims for fraudulent inducement" against the Director Defendants under Florida law. (*Id.* at 2628) This was despite the court's acknowledgement that Nevada 5 was not even a party to the SPA.

However, the Florida court did not adjudicate Nevada 5's standing and right to bring *different* statutory and common law claims (Nevada and Michigan[7], as well as Florida) against *Iglesias and Moffly*, according to *Nevada* law. Nor did the Florida court consider the effect of the SPA's Nevada governing law and jurisdiction clauses on Petitioners, who were not parties in Florida.

VI. Petitioners Seek Partial Judgment On The Pleadings In Nevada

Nevertheless, on February 22, 2021, Petitioners filed a motion for partial judgment on the pleadings in the Nevada case. They argued that issue preclusion barred Nevada 5's claims, citing the Florida court's ruling and rationale—**again, a**

[7] Because some of Petitioners' misrepresentations to Nevada 5 were "directed to persons situated in Michigan," Nevada 5 also asserts claims under the Michigan securities fraud statute. (X PA 2370-73, ¶¶89, 99)

rationale that the district court had already rejected under Nevada law. (XI PA 2576-77, 79-80) In opposition, Nevada 5 argued that the district court's prior rulings based on Nevada law were correct, were unaffected by the Florida ruling which applied to differently-situated defendants, and issue preclusion did not apply. (XI PA 2634-38)

Following a March 2021 hearing, the district court denied Petitioners' motion. The court again concluded that Nevada 5 had established its standing, commenting that "**I have visited and revisited this issue again.**" (XII PA 2781)(bold added) The court ruled that the Nevada case was unaffected by the Florida court's ruling where the two cases involved different defendants and different causes of action; Nevada law, rather than contrary Florida law, governed the issue of standing and the integration clause; and issue preclusion did not apply. (XII PA 2780-81, 2811)

Over three months later, on July 6, 2021, Petitioners filed this Petition seeking interlocutory review of that ruling "as soon as possible." There is no basis—urgent or otherwise—to overturn the district court.

ARGUMENT

I. The High Standard For Extraordinary Writ Relief

"Extraordinary relief should be extraordinary." *Walker v. Second Judicial Dist. Court*, 136 Nev. __, 476 P.3d 1194, 1195 (2020). This Court's power to issue writs for extraordinary relief is "purely discretionary." *Smith v. Dist. Court*, 107 Nev.

674, 677, 818 P.2d 849, 851 (1991). Petitioners bear the burden to demonstrate that such relief is warranted, and the bar is high. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

A writ of mandamus compels a district court to perform an act which the law requires of it, to control its manifest abuse of discretion (a "clearly erroneous" interpretation or application of law), or arbitrary or capricious exercise of discretion (a ruling "founded on prejudice or preference"). *State v. Dist. Court (Armstrong)*, 127 Nev. 927, 931-932 267 P.3d 777, 780 (2011); NRS 34.160. A manifest abuse of discretion goes beyond "a mere error in judgment," but "is one exercised improvidently or thoughtlessly and without due consideration," such that "the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable." *Id.* Further, the purpose of mandamus is not error correction. *Walker*, 136 Nev. at __, 476 P.3d at 1198.

A writ of prohibition arrests district court proceedings when they are without or in excess of the court's jurisdiction. NRS 34.320. It also does not serve to correct errors. *Mineral Cty. v. State*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001).

Writs of mandamus and prohibition may only be issued when there is no plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170, 34.330. Therefore, when a party may ultimately challenge an interlocutory order in an appeal from the final judgment, extraordinary relief is precluded. *Pan*, 120 Nev. at 224-25,

88 P.3d at 841. The fact that an extraordinary writ would be a more expeditious remedy is not the criterion. *Washoe County v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602, 603 (1961).

Further, even substantial litigation expenses do not constitute the irreparable or serious harm extraordinary relief is designed to prevent. *See Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986-87 (2000) (in context of stay in writ petition case); *Nevada ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 361-62, 662 P.2d 1338, 1340 (1983).

Petitioners fail to meet their high burden in several respects.

II. Writ Relief Is Improper Because Petitioners Already Have A Plain, Speedy, And Adequate Remedy

The Petition fails in the first instance because Petitioners seek extraordinary relief where ordinary relief is available. Petitioners can challenge the district court's decision in an appeal from the final judgment if Nevada 5 prevails at trial. That remedy precludes extraordinary relief. *Pan*, 120 Nev. at 228, 88 P.3d at 843-44. Indeed, on this basis, this Court has denied writ petitions from denials of motions for judgment on the pleadings. *See, e.g., Balodimas v. Eighth Judicial Dist. Court*, 2017 WL 6597149 (Nev., December 22, 2017; No. 72123; unpublished disposition).

Petitioners argue that without extraordinary relief, they will have to spend time and money defending against Nevada 5's claims. (Petition, pp. i, 10). But mere expediency and cost-savings are not the criteria. *Washoe County*, 77 Nev. at 156,

360 P.2d at 603; *Hansen*, 116 Nev. at 658, 6 P.3d at 986-87. If they were, this Court would be compelled to grant virtually every writ petition. Petitioners fail to demonstrate anything extraordinary about the district court's ruling that would justify this Court elevating them over any other litigant disappointed by an interlocutory order. The Petition should be denied on this basis alone.

III. The Petition Otherwise Lacks Merit Because Petitioners Fail To Show The District Court's Ruling Was A *Manifest* Abuse Of Discretion Or A *Clear* Error Of Law

The district court considered Petitioners' arguments for issue preclusion—as well as their underlying arguments regarding standing and integration clauses—over the course of several years, through at least four motions and multiple hearings. But the district court was not duty-bound to grant Petitioners' motions, and Petitioners fail to show that the court erred at all—much less that it *egregiously* erred, or *manifestly* abused its discretion, so as to warrant extraordinary relief. Indeed, it is Petitioners' omission of critical components of the record below that is egregious.

A. Petitioners Fail to Apprise this Court that the District Court Previously Determined that Nevada 5 *Does* have Standing and is *Not Barred* from Pursuing its Claims Against Petitioners in Nevada

Petitioners say "[t]he issue of Nevada 5's standing to maintain its claims has been raised in both this case and the Florida case." (Petition, p. 14) But Petitioners misleadingly omit the above-described history of the litigation of the standing and integration clause issues in Nevada dating back to 2018. *See* NRAP 21(a)(4)

(petitioner's appendix must provide all documents that are essential to understand the petition). Indeed, their Appendix **omits over a year of record entries** dealing with those issues, including **Petitioners' *two* dispositive motions**, as well as the transcripts and orders in which the district court ***denied*** those motions. They fail to inform this Court that before Nevada 5 even *filed* the Florida SAC, and multiple times since, the Nevada court *rejected* Petitioners' arguments. The court was unequivocal: "**Nevada 5 clearly has standing.**" (3 Ans.App. 649)(bold added)

That procedural history makes clear that the district court's ruling does not imperil the policy interests served by issue preclusion: "limiting litigation by preventing a party who had one full and fair opportunity to litigate an issue from again drawing it into controversy." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009) (internal quotation and citation omitted). The doctrine "lends stability to judgments, thus inspiring confidence in the judicial system." *Id.* If anything, those interests have been served here by the multiple full and fair opportunities ***Petitioners*** have had to litigate Nevada 5's standing and the integration clause in Nevada. Yet, it is ***Petitioners*** who have repeatedly drawn these issues into controversy, refusing to take "no" for an answer. And it is ***Petitioners'*** desired outcome—to overturn a Nevada court's multiple rulings against them, based on a Florida court's later ruling in favor of someone else, thus robbing $30 million

fraud victim Nevada 5 of an opportunity to seek redress—that would shake confidence in the judicial system.[8]

Petitioners' assertion that Nevada 5—a Nevada corporation that paid $30 million to another Nevada company, based on fraudulent financial documents and flagrant misrepresentations from the company's officers—"has no standing to make these claims against anybody" in a Nevada court is radical and meritless. Whatever limitations Florida might impose on a victim of fraud on such a massive scale, the district court correctly and repeatedly recognized that Nevada does not. And Petitioners cannot manufacture a manifest abuse of discretion in the district court's refusal to apply issue preclusion by ignoring the record of underlying decisions supporting the ruling.

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[8] Petitioners even *admitted in **2018** that Nevada 5 could establish standing.* Moving to dismiss the First Amended Complaint, Petitioners argued:

> if it is Plaintiffs' contention that Defendants made their purported representations 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 either made the misrepresentations to either Nevada 5 or N5HYG, but not both.** (VI PA 1218)(bold added)

Consistent with the district court's subsequent rulings, only Nevada 5 asserted fraud claims in the SAC—*exactly what Petitioners invited it to do.* Petitioners thus acquiesced to Nevada 5's standing.

B. The District Court's Refusal to Apply Issue Preclusion was not a Manifest Abuse of Discretion or a Clear Error of Law

Despite their ample (but unsuccessful) opportunities to challenge Nevada 5's standing and the application of the integration clause in Nevada, Petitioners say the Florida ruling controls. For issue preclusion to apply:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action;
>
> (2) the initial ruling must have been on the merits and have become final;
>
> (3) the party against whom the judgment is asserted must have been a party ... to the prior litigation; **and**
>
> (4) the issue was actually and necessarily litigated.

Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008). Petitioners fail to establish three of the four required factors.[9]

1. The Florida court's ruling was not a decision "on the merits."

At the outset, Petitioners' arguments undermine their position that the Florida ruling was a decision on the merits. They admit standing is a matter of jurisdiction that must be established before a court can reach the merits:

> Standing is a threshold question required in every case that determines whether the court may even entertain the proceeding. **For a court to have jurisdiction over the case, the party bringing the suit must establish standing.** (Petition, p. 14) (internal citations and quotations omitted; bold added)).

[9] There is no dispute that Nevada 5 (but not N5HYG) was a party to both the Florida case and the Nevada case under factor (3) above.

See also Brunk v. Eighth Judicial Dist. Court, 2019 WL 5110141 (Nev., October 11, 2019; No. 76052; unpublished disposition) (court lacked subject matter jurisdiction because plaintiff lacked standing to assert claims); *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 815, 815 (9th Cir. 2017) (no jurisdiction without standing).

And they admit that under NRCP 41(b), "a dismissal ... **other than a dismissal for lack of jurisdiction** ... operates as an adjudication upon the merits." (Petition, p. 16)(bold added).[10] Accordingly, a determination on standing is **distinct** from a determination on the merits. *See Kirola v. City & Cty. of S.F.*, 860 F.3d 1164, 1175 (9th Cir. 2017) (district court "improperly conflated" issue of standing with merits. "Our threshold inquiry into standing in no way depends on the merits" of claim (internal citations and quotations omitted); *Cotter ex rel. Reading Int'l, Inc. v. Kane*, 136 Nev. __, 473 P.3d 451, 456-58 (2020) (distinguishing standing from merits).

Petitioners argue that *Glass v. Select Portfolio Servicing, Inc.*, 466 P.3d 939 (Nev. 2020) [Petition's citation should have been: 2020 WL 3604042 (Nev., July 1, 2020; No. 78325; unpublished disposition)] holds that a determination of standing in a prior action is a determination on the merits. (Petition, p. 21) In violation of NRAP 36(c)(3), Petitioners fail to note that *Glass* was an unpublished opinion. It is

[10] Petitioners also cite Fla. R. Civ. P. 1.420(b) (Petition, p. 21 at n. 60), but fail to mention it contains the same exception: "...a dismissal ... **other than a dismissal for lack of jurisdiction** ... operates as an adjudication on the merits." (bold added).

not binding precedent. It should be given no persuasive value, because, as an unpublished order, it provides insufficient information regarding its passing observation that the district court's first decision was on the merits. And the only relevant legal authority cited in the order is *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 997 P.2d 130 (2000), which did not involve standing.

Here, the Florida court's ruling on Nevada 5's standing merely answered in the negative the "threshold question" of whether that court had jurisdiction to entertain Nevada 5's claims; it was not a determination on the merits. That alone renders issue preclusion inapplicable.

2. The "issues" addressed by the Florida court are not "identical" to the "issues" previously decided by the Nevada court.

Even if the Florida court's decision were deemed to be on the merits, there is no "identity" of issues with Nevada. The Florida court decided whether *Florida* law on standing and integration clauses permitted Nevada 5 to pursue claims under a *Florida* statute and common law, against *different* defendants who were *not parties* to the SPA. Those issues are **not even close to being "identical"** to the issues that the district court *had already decided*: that *Nevada* law on standing and integration clauses *does* permit Nevada 5 to assert fraud claims based on *Nevada, Michigan, and Florida law*, against *SPA parties Iglesias and Moffly*. Petitioners merely label the issues addressed by the two courts "standing" and "integration clause," and dub them identical with no analysis, ignoring the critical distinctions. Petitioners thus

misapprehend and misapply fundamental premises of issue preclusion.

Petitioners argue "the fact that Nevada 5 did not have identical causes of action in this case and the Florida action is irrelevant as its *claims* are based on the same set of facts." (Petition, p. 4; emphasis added) This is incorrect. The claims are not based on the same facts because Petitioners' fraudulent acts are not identical to the Director Defendants' fraudulent acts. But more importantly, the factual bases of the *claims* is not the focus; issue preclusion "focuses upon the underlying factual bases surrounding ***issues***." *Kahn v. Morse & Mowbray*, 121 Nev. 464, 475, 117 P.3d 227, 235 (2005) (emphasis added). Petitioners compound this misapprehension by further arguing, "interpretation of each state's law is irrelevant." (Petition, p. 4) Not so. Unlike in Nevada, the **issues** the Florida court decided were **directly dependent on Florida law**—the court's interpretation and application of **Florida law on standing and integration clauses** to **Florida law** claims against the **SPA non-party** Director Defendants.

These distinctions underpin another foundational tenet Petitioners disregard: "when determining whether issue preclusion applies ... courts must **scrupulously review the record** to determine if it actually stands as a bar to relitigation." *Kahn*, 121 Nev. at 475, 117 P.3d at 235 (bold added). Through their omission of large swaths of the relevant record and their cursory analysis, Petitioners fail to meet this fundamental step. *See Hudson v. City of N. Las Vegas*, 2007 U.S. Dist. LEXIS 2377,

at *9-10 (D. Nev. Jan. 4, 2007) (plaintiff failed to provide court with enough information to "scrupulously review" lower court record for issue preclusion analysis). An appropriate review of the record—comparing the Florida court's rationale for its decision regarding standing and the integration clause to the Nevada law previously applied by the district court in its multiple rulings—highlights the different underlying factual bases surrounding the issues.

First, the Florida court ruled that the *Florida* securities fraud statutes are "*far more restrictive*" than comparable federal law and, therefore, Nevada 5 was not a "purchaser" of the Hygea shares with standing under *Florida* law. (XI PA 2518-19) But over a year before that ruling, the Nevada court reversed its dismissal of Nevada 5's claims on the basis of standing after Nevada 5 pointed out that *Nevada* law is *not* so restrictive, and is *consistent with* federal law.

In its June 2019 motion for reconsideration, Nevada 5 cited *In re Stratosphere Corp.*, 1 F. Supp. 2d 1096, 1123 (D. Nev. 1998) ("it is proper to interpret Nevada's securities laws **consistently with similar federal law provisions**" such as Rule 10b-5)(bold added) and directed the court to decisions recognizing that corporate entities that fund share purchases—even if the purchase was ultimately consummated by a subsidiary—have standing as a "purchaser" to sue for securities fraud. *See, e.g., Grubb v. FDIC,* 868 F.2d 1151, 1161–62 (10th Cir. 1989) (plaintiff that created holding company to purchase shares had standing where: (a) holding company was

created immediately prior to transaction; (b) misrepresentations were made to plaintiff, before holding company was created; and (c) plaintiff was "the actual party at risk"). (VIII PA 1764-65)[11]

The protections for fraud victims under the securities statutes are thus consistent with established common law fraud principles: "The tort of fraud ... does not require as an element that the tortfeasor be in a contractual relationship with the victim." *Lu v. Chi*, 1996 U.S. App. LEXIS 14685, at *3 (9th Cir. May 30, 1996).[12] (*See* IV PA 835-36; VIII PA 1765-66)

Therefore, as Nevada 5 asserted, to establish its standing to pursue its fraud claims (whether statutory or common law), no "expansion" of the term "purchaser," nor a blurring of distinctions between corporate parents and subsidiaries is required. *Id.* Rather, as the victim-recipient of the misrepresentations and the party that *directly paid* the $30 million to Hygea, Nevada 5 was at risk, suffered harm, and is protected by Nevada law. The district court agreed—first by granting Nevada 5's motion for reconsideration, and then by reaffirming that decision by denying

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[11] *See also Griffin v. Ramtek Corp.*, 1988 U.S. Dist. LEXIS 16344, at *3-4 (N.D. Cal. Nov. 22, 1988) (privity not required to maintain federal securities fraud action; rather the transaction involving the purchase must "touch the transaction involving the defendant's fraud").

[12] *See also Blanchard v. Blanchard*, 108 Nev. 908, 910-11, 839 P.2d 1320, 1322 (1992) (establishing elements of intentional misrepresentation, including plaintiff's damage as a result of reliance on false or unsupported representations, intended to induce plaintiff's action).

Petitioners' subsequent motions to dismiss the SAC. The court thus recognized that Nevada law provides Nevada 5 standing—even if it does so in a way that the Florida court's interpretation of Florida law does not.[13]

Second, the Florida court's reliance on the SPA's integration clause highlights another key distinction between Florida and Nevada that the district court recognized. Petitioners say "fraudulent inducement claims [can] proceed despite integration clauses" under Florida law. (Petition, p. 22) Nevada 5 agrees, but the Florida court nonetheless ruled the integration clause "defeats Nevada 5's claims for fraudulent inducement." (XI PA 2518) And as described above, Petitioners neglect to inform this Court that they *unsuccessfully argued in 2018* (before the Florida case existed) that the integration clause barred the fraud claims in Nevada.

The district court rejected that argument because just as in 2018, *Nevada* law remains crystal clear that "**integration clauses do not bar claims for**

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[13] Like Nevada, Michigan securities law "substantially tracks" the federal act, and a claim under the Michigan law is "nearly identical" to a federal securities fraud claim. *Blalock v. Hunterdon Rentals LLC*, 2021 U.S. Dist. LEXIS 89237, at *4-5 (E.D. Mich. May 11, 2021). Michigan's sister courts in the federal Sixth Circuit have also adopted the more inclusive rationale of *Grubb* and other cases cited by Nevada 5 in its motion for reconsideration which interpret the "actual purchasers" requirement of federal Rule 10b-5 broadly, and to include parties who fund share purchases through their capital contributions and guarantees as "actual parties at risk." *See, e.g., Ashland Inc. v. Oppenheimer & Co.*, 689 F. Supp. 2d 874, 880 (E.D. Ky. 2010), citing *Grubb* and *United Dept. Stores v. Ernst & Whinney,* 713 F. Supp. 518, 524 (D.R.I. 1989). The district court thus correctly ruled that Nevada 5 also has standing under the Michigan statute.

misrepresentation." *Blanchard*, 108 Nev. at 912, 839 P.2d at 1322-23 (bold added). *See also Epperson v. Roloff*, 102 Nev. 206, 211; 719 P.2d 799, 802 (1986) (same); *Khan v. Bakhsh*, 129 Nev. 554, 558, 306 P.3d 411, 413 (2013) (extrinsic evidence admissible to prove fraud in the inducement).

In declining to give the Florida ruling preclusive effect, the district court correctly refused to apply to Petitioners subject to Nevada law a ruling regarding the Director Defendants applying contrary Florida law. The distinct defendants and applicable laws regarding the integration clause highlight yet another difference between the facts underlying the disparate issues decided in Florida and Nevada.

3. The "issue" of Nevada 5's standing and ability to pursue its claims against Petitioners in Nevada was *not* "actually and necessarily litigated" in Florida.

An issue is "necessarily and actually litigated" if the "court in the prior action addressed and decided the same underlying factual issues." *Kahn*, 121 Nev. at 475, 117 P.3d at 235. As discussed above, neither Petitioners, nor the underlying facts and law relevant to Nevada 5's standing and ability to pursue its claims against them in Nevada were even before the Florida court.

Petitioners say it is "irrelevant" that they are not defendants in Florida. (Petition, p. 18) They are wrong. Their reliance on the SPA further illustrates why the issues in Nevada were not—and could not have been—actually and necessarily litigated in Florida, and why Petitioners cannot rely on the Florida court.

Even if the SPA is applied to Nevada 5 (not a party to the SPA), then Petitioners (as parties to the SPA) run headlong into their agreement to be bound by ***Nevada law, applied exclusively by Nevada courts***. As described above, under SPA §8.10, Petitioners agreed that actions against them "shall be governed by and construed in accordance with" Nevada law. Under §8.11.1, they further "irrevocably submit[ted] to the exclusive jurisdiction and venue of the Nevada ... courts" and agreed **not** to challenge the Nevada court's right to enforce the SPA and its subject matter. Petitioners cannot rely (even mistakenly) on the SPA's integration clause while *disavowing* its governing law and jurisdiction clauses. And those provisions highlight additional distinctions that defeat Petitioners' issue preclusion argument.

Petitioners were not defendants in Florida, and the Director Defendants were not bound to SPA §§8.10 or 8.11.1. The issue of the application of the SPA to Petitioners was thus never—*and never could have been*—before the Florida court. Relatedly, by Petitioners' express agreement, they cannot avail themselves of rulings from a Florida court, applying Florida law, particularly to SPA non-parties. Therefore, issues relating to claims against Petitioners ***could not have been actually or necessarily litigated by the Florida court.*** Again, there are neither "identical" issues, nor a Nevada issue "actually and necessarily litigated" in Florida that could cause issue preclusion to apply.

C. Petitioners' Reliance on *Glass* is Misplaced

As referenced above, Petitioners' reliance on *Glass* is unavailing. But even if this Court considers *Glass*, it should recognize the *Glass* court's holding that issue preclusion did **not** bar the plaintiff's claims because two exceptions to issue preclusion applied under the Restatement (Second) of Judgments § 28 (1982). Here, even if issue preclusion could be deemed applicable, several exceptions should also apply. The Restatement provides (bold added) that "relitigation of the issue in a subsequent action between the parties is not precluded" where:

> **(2) The issue is one of law and ... (b) a new determination is warranted ... to avoid inequitable administration of the laws;**
>
> Here, the standing and integration clause issues decided in Nevada were based on Nevada law. The different standing and integration clause issues subsequently decided in Florida were based on Florida laws that do not comport with Nevada law. It would be inequitable to undermine the Nevada court's prior determinations, and divest Nevada 5 of the standing and right to pursue its claims against Petitioners it had already established.
>
> **(3) A new determination of the issue is warranted ... by factors relating to the allocation of jurisdiction between them;**
>
> This exception applies for similar reasons to (2) above. In addition, Petitioners' insistence that the SPA applies to Nevada 5's claims in Nevada only subjects them to the Nevada governing law and jurisdiction clauses that

were not at issue in Florida. Petitioners cannot escape the district court's jurisdiction and decisions by piggybacking on a Florida court's subsequent decision that did not—and could not—apply to them.

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action...

According to the Florida court's interpretation of Florida law, Nevada 5 faced far more restrictive requirements to establish standing and to avoid the integration clause. But as the district court recognized, Nevada law does not impose such heavy restrictions on fraud victims.

(5) There is a clear and convincing need for a new determination of the issue ... (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of ... other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Nevada 5 had neither an opportunity nor a reason to (re) adjudicate in Florida its standing to pursue Florida non-parties Iglesias and Moffly in Nevada; whether the integration clause barred its claims against Petitioners under Nevada law; nor whether the SPA barred Petitioners from asserting defenses based on non-Nevada law or decisions of a non-Nevada court.

Under these circumstances, consistent with *Glass*, even if issue preclusion were otherwise applicable, it does not bar Nevada 5's claims.

CONCLUSION

Petitioners have failed to meet any of the fundamental requirements for the extraordinary relief they seek, and the district court was well within its discretion in denying Petitioners' efforts to avoid adjudication of Nevada 5's claims against them on the merits. The Petition should be denied.

Dated: Aug. 27, 2021

Robert L. Eisenberg

Robert L. Eisenberg (SBN No. 950)
Lemons, Grundy & Eisenberg

ATTORNEY FOR REAL PARTIES IN INTEREST

CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this answer has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this answer complies with the type-volume limitations of NRAP 21(d) because it contains 6,988 words.

3. Finally, I hereby certify that I have read this answer, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this answer complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(e)(1), which requires every assertion regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: Aug. 27, 2021

Robert L. Eisenberg

CERTIFICATE OF SERVICE

I certify that I am an employee of LEMONS, GRUNDY & EISENBERG and that on this date the foregoing document and appendix was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

D. Chris Albright
Ogonna M. Brown
Kory Kaplan
G. Mark Albright

I further certify that on this date I served copies of the foregoing document and appendix, postage prepaid, by U.S. mail to:

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Hon. Nancy L. Allf, District Judge
Eighth Judicial District Court, Dept. 27
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

DATED this 27th day of August, 2021.

Employee of LEMONS, GRUNDY & EISENBERG