IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

MANUEL IGLESIAS; AND EDWARD MOFFLY

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA; IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE,

Respondents,

and

N5HYG, LLC; AND NEVADA 5, INC.,

Real Parties in Interest

Electronically Filed
Aug 27 2021 02:14 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 83157

APPENDIX TO ANSWER OF REAL PARTIES IN INTEREST VOLUME 2, PART 1

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CHRONOLOGICAL INDEX TO APPENDIX

TRANSCRIPT(S)

EXHIBIT "8"

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

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

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT

BEFORE THE HONORABLE JAMES E. WILSON JR.

VOLUME III

PAGES 414 - 648

DATE: Wednesday, May 16, 2018
TIME: 9:00 a.m.
LOCATION: Carson City District Court
885 E. Musser Street
Carson City, Nevada

REPORTER: Daren Bloxham RPR/CSR-685

showing the corporation is managing its debts. I think Mr. Iglesias provided an explanation as to why those checks bounced and how the corporation immediately covered those checks.

But most importantly, Your Honor, I think what we haven't seen any evidence of -- of any of these claims under 78.650 or 630 that are relevant today. The majority of evidence that plaintiffs have put on concern the time period when the lead plaintiff, N5HYG, was looking to become an investor in Hygea and purported misrepresentations that may have been made by Mr. Iglesias and Mr. Moffly during that 2016 time period.

In addition, we have heard complaints from plaintiff about the audits, a lot about the audits, which is reflected in a Stock Purchase Agreement between N5HYG and Hygea. But, again, that is a breach of contract claim, not a basis for the appointment of a receivership.

Plaintiffs have presented absolutely no evidence or, at best, scant evidence of what is happening today at Hygea. Your Honor, I believe that is the relevant time period for this Court to consider. For these reasons, we move for judgment as a matter of law or, alternatively, judgment on partial findings.

C E R T I F I C A T E

STATE OF NEVADA)

COUNTY OF CLARK)

I, Daren S. Bloxham, a Certified Shorthand Reporter and Registered Professional Reporter, do hereby certify: That I reported the proceedings commencing on the 16th of May, 2018.

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

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

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

Daren Bloxham

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

EXHIBIT "9"

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

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

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT

BEFORE THE HONORABLE JAMES E. WILSON JR.

VOLUME IV

PAGES 649 - 893

DATE: Thursday, May 17, 2018

TIME: 9:00 a.m.

LOCATION: Carson City District Court
885 E. Musser Street
Carson City, Nevada

REPORTER: Daren Bloxham RPR/CSR-685

And they're trying to bootstrap in that 8.57 percent based on a representation that was made in October of 2016, almost -- I'll say fairly a year and a half ago, to have this Court calculate the 10 percent shareholding.

And they base this on, Your Honor, an antidilution provision of the Stock Purchase Agreement. However, they have not provided any authority whatsoever that merely because a private ordering, a contract between Hygea and N5HYG, contains an antidilution provision, that plaintiff is automatically conferred 8.57 percent stock ownership and, thereby, all plaintiffs collectively 10 percent stock ownership.

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

78.650 says nothing about dilution, whether

COUNTY OF CLARK)

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

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

Daren Bloxham

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

EXHIBIT "10"

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

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

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT

BEFORE THE HONORABLE JAMES E. WILSON JR.

VOLUME V

PAGES 894 - 975

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

REPORTER: Daren Bloxham RPR/CSR-685

Page 911

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

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

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

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

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

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

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

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

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

That large payment, which Hygea will receive,

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

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

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

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

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

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

Page 914

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

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

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

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

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

stock purchase.

But, again, plaintiff N5HYG can then seek damages for such misrepresentations through its securities claim in federal court. Plaintiffs have a legal remedy for each and every one of their complaints.

Indeed, defendants submit that the Court must ask about plaintiffs' true motivation in filing this action when they already had an action pending, and when they were also readily receiving, as we saw from Mr. Dragelin, confidential information from one of Hygea's agents, not one of their agents.

Plaintiffs are seeking, clearly seeking, to do in this courtroom what they cannot or they have chosen not to do in Hygea's boardroom, including by their own admitted relinquishment of a board seat.

N5HYG, if it believed that the directors were engaged in mismanagement, it could have taken its board seat, and it could have directly influenced the management of the corporation, but it chose not to do so.

The Court should also look at the proposed order for an appointment of a receiver that plaintiffs submitted. It is incredibly telling about their motivation for filing this lawsuit.

The proposed order, which was filed on May 9, provides that the receiver is to open the books and records of the corporation to the stockholders and to complete the 2014 and '15 audited financial statements. Those requirements benefit one stockholder - N5HYG.

In short, the plaintiffs, in particular N5HYG, come to this Court asking for equity, but they do not show that they come with clean hands. And with respect to equity, the Court must engage in a balancing of equities. And plaintiffs have not shown that that balance weighs in their favor.

As to the appointment of a receiver, the Nevada Supreme Court in Hines v. Plante, 99 Nev. 259, 661 P.2d 880, has stated this. I think it is very important, Your Honor. "The appointment of a receiver is a harsh and extreme remedy which should be used sparingly and only when the securing of ultimate justice requires it."

A corollary of this rule is that if the desired outcome may be achieved by some method other than appointing a receiver, then this course should be followed.

The reasons for the above rules are fundamental. Appointing a receiver to supervise the affairs of a business is potentially costly, as the

receiver typically must be paid for his or her services.

A receivership also significantly impinges on the right of the individuals or corporations to conduct their business affairs as they see fit and may endanger the viability of a business.

The existence of a receivership can also impose a substantial administrative burden on the Court. Justice here does not demand appointment of a receiver; rather, what justice demands is that this Court ask a very simple question: Would Hygea do better under a receiver than under its current management?

Hygea -- what we have seen is Hygea is solvent. Hygea is managing its debts. Hygea is operating under the direction of a well-qualified and active board of directors, including through a slate of new C-suite executives.

Indeed, the appointment of a receiver would not only add to Hygea's expenses during a time of cash constraint, but it would almost certainly render an otherwise solvent corporation insolvent, achieving the exact opposite result that the plaintiffs purport to seek.

In short, as Mr. Iglesias and Drs. Collins

and Mann have testified, and even Dr. Gaylis, one of plaintiffs' witnesses has testified, if a receiver is appointed, Hygea would stand to risk losing its contracts with HMO plans, all of whom have a contractual right to terminate the contract with Hygea in the case that a receiver is appointed to manage the company's affairs.

It's also demonstrated, if an HMO canceled its contract with Hygea, the Medicare Advantage patient panel associated with that HMO would be immediately and automatically reassigned to another provider, and Hygea would permanently lose its ability to generate revenue by optimizing capitation for that particular patient panel.

Even more alarming, if that patient panel is reassigned, the new medical management organization to which the patient panel would be reassigned will have the right to receive all surpluses going forward, even those that are properly attributable to the coding and services provided by Hygea from 2016 through 2018.

In other words, the free cash flows associated with revenue and accounts receivable already booked by Hygea would be immediately and irrevocably assigned to a third party because the money follows the patient panel.

C E R T I F I C A T E

STATE OF NEVADA)
COUNTY OF CLARK)

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

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

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

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

Daren Bloxham

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

EXHIBIT "11"

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

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

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT
VOLUME II
PAGES 281 - 413

DATE: Tuesday, May 15, 2018
TIME: 1:00 p.m.
LOCATION: Carson City District Court
885 E. Musser Street
Carson City, Nevada

REPORTER: Daren Bloxham RPR/CSR-685

And, therefore, if they put Mr. Iglesias up, they can open up it up to anything they want to ask, not confined by the terms of my direct examination.

THE COURT: As long as it's relevant and -- and maybe I need to be a little more sensitive to relevance objections. If -- I mean, it strikes me as correct that it doesn't really matter what went on before. What we're looking at is what's going on now.

MS. GALL: Right.

THE COURT: So if I am a little more sensitive to that, what's the difference?

MS. GALL: Your Honor, I always defer to you. The other thing I would ask for is if this has nothing to do with the securities litigation, I would ask for a protective order that prohibits his testimony in this litigation from being used in the other litigation.

THE COURT: Mr. Kaye?

MR. KAYE: Your Honor, a couple of responses. Once again, if I can state this is -- the issues at play in the securities litigation specifically are not the reasons that we're looking to put Mr. Iglesias in on our direct.

And I think the Court really previewed something I was going to say. If counsel has objections to questions, counsel can make objections to

C E R T I F I C A T E

STATE OF NEVADA)

COUNTY OF CLARK)

I, Daren S. Bloxham, a Certified Shorthand Reporter and Registered Professional Reporter, do hereby certify: That I reported the proceedings commencing on the 15th of May, 2018.

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

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

Witness my signature at Las Vegas, Nevada, on this 16th day of May, 2018.

Daren Bloxham

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C.C.R. #685

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Attorneys for Defendants Hygea Holdings Corp., Manuel Iglesias, and Edward Moffly

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.: XXVII

Hearing Date: January 30, 2020

Hearing Time: 10:00 a.m.

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM OF POINTS AND AUTHORITIES

I. DEFENDANTS' MOTION IS PROCEDURALLY PROPER.

As set forth in the first sentence of Defendants' opening brief, this Motion can be dispensed with promptly. At bottom, the Motion presents one question: have Plaintiffs violated the Court's Claim Preclusion Order by filing a SAC that is based on the same nucleus of operative facts as the dismissed-with-prejudice FAC? To answer this question the Court need only (1) review the unambiguous terms of the Claim Preclusion Order, which states: "[a]ny second amended complaint filed by [Plaintiff] N5HYG and/or Nevada 5, Inc. must … be based on a different nucleus of operative facts from that presented in the [First] Amended Complaint"; and (2) compare the FAC with the SAC. It is a narrow question. Despite this, Plaintiffs accuse Defendants of "gamesmanship" and procedural improprieties in bringing the Motion on shortened time. These accusations are hardly worth responding to and reflect nothing more than histrionics. Indeed, Defendants respond only briefly to Plaintiffs' accusations in order to preserve their rights.

First, although it is not entirely clear exactly what Plaintiffs complain of at page 10 of their Opposition, it appears Plaintiffs are saying that Defendants should have consolidated the Motion presently before the Court with their yet-to-be-filed Rule 12(b)(6) motion and adhered to the briefing schedule for that Rule 12(b)(6) motion. Plaintiffs provide no support for this proposition, which misses the point of the present Motion. Defendants filed this Motion in order to avoid having to file a Rule 12(b)(6) motion on claims that Plaintiffs were prohibited from bringing in the first place.

Second, the Motion was properly brought on shortened time. Plaintiffs cite to *Cheek v. FNF Const., Inc.*, 112 Nev. 1249, 924 P.2d 1347 (1996), for the blanket proposition that courts may not shorten a party's time to oppose a motion for summary judgment. As an initial matter, *Cheek* is outdated, as it was based on an earlier version of Rule 56 that required 10 days' notice for a summary judgment

hearing. Rule 56 no longer requires 10 days' notice of a summary judgment hearing (or any notice at all). Even if the principles underlying *Cheek* still applied, *Cheek* did not set forth a "hard and fast" rule that a party opposing summary judgment must be afforded its full time to respond to the motion. Rather, *Cheek* expressly held that it was fine for a court to shorten time "to less than ten days' notice of a summary judgment hearing … if the party opposing the motion will not suffer prejudice." *Cheek*, 112 Nev. at 1253, 924 P.2d at 1351 (emphasis added). Plaintiffs not only neglect to address this express holding, Plaintiffs also fail to identify what prejudice they suffered with "only" 8 full days to respond to the Motion and 17 full days' notice of the hearing of the Motion—a Motion that concerns a very narrow question about this Court's Claim Preclusion Order and claim preclusion issues the parties have litigated several times over.[1]

Third, Plaintiffs say that the Motion is a thinly-disguised Rule 12(b)(6) motion that has been styled as one for summary judgment to avoid the original, extended briefing schedule. Defendants styled the Motion as one for summary judgment, in part, not to avoid the original briefing schedule, but to avoid expressly accusing Plaintiffs of contempt of court. Indeed, there is nothing about the Motion that raises a Rule 12(b) defense, and if the Motion should be re-styled as anything, it should be as a "Motion for Contempt and Enforcement of the Claim Preclusion Order." In any event, nothing in Nevada law—whether the NRCP, case law, or otherwise—prohibits Defendants from filing a non-Rule 12(b) motion before responding to a complaint with Rule 12(b) defenses.

///

[1] Plaintiffs also forget that they had scheduled, *ex parte*, a telephonic hearing with the Court to address the briefing schedule, but decided to vacate that hearing after Defendants agreed to continue the shortened time hearing from January 23 to January 30, 2020. If Plaintiffs were under as much "duress" as they say they were, Plaintiffs had the option of proceeding with that telephonic hearing and asking for additional time.

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II. PLAINTIFFS' OPPOSITION DOES LITTLE MORE THAN REARGUE THE ORIGINAL CLAIM PRECLUSION MOTION, RECONSIDERATION MOTION, AND COMPETING ORDER BRIEFING.

A. Nevada 5 Is Just As Claim Precluded As N5HYG Because The Two Are Indisputably In Privity With One Another.

As Defendants predicted in their opening brief, Plaintiffs argue that Nevada 5 was not a party to the Receiver Action and is thus permitted to bring claims based on the same nucleus of operative facts as the FAC and Receiver Action. Opp., p. 15:5-14. This is the same argument the Court expressly rejected when it entered its Claim Preclusion Order over Plaintiffs' objections that Nevada 5 should be permitted to bring claims based in fraud arising from the purchase of Hygea stock. Now Plaintiffs effectively ask the Court to ignore (1) the undisputed fact that N5HYG is the wholly-owned subsidiary of Nevada 5, and thus the two are in privity with one another for purposes of claim preclusion; (2) as well as well-defined Nevada law applying claim preclusion to those in privity with one another. *Mendenhall v. Tassinari*, 403 P.3d 364, 369 (Nev. 2017) (applying claim preclusion to parent company found to be in privity with its subsidiary entity); FAC ¶ 24 ("All of [N5HYG's] membership shares are owned by Plaintiff Nevada 5, Inc."). The Court should not accept Plaintiffs' invitation.

B. Nevada 5 Effectively Concedes That Its Fraud-Based Claims Arise From The Same Nucleus Of Operative Facts As The FAC And The Receiver Action.

Plaintiffs argue that the SAC is a "radical departure" from the FAC (Opp., p. 14:22-23) and based on a different nucleus of operative facts both from the FAC and the Receiver Action because the SAC says it is. Opp., p. 16:2-19 (citing to SAC ¶¶ 21-22). Plaintiffs, however, cannot just "wish" a legal conclusion into reality. Plaintiffs provide absolutely no explanation as to how Nevada 5's fraud-based claims are based on facts different from those that Plaintiffs asserted in the FAC or that N5HYG asserted or could have asserted in the Receiver Action. They hardly could given that

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the SAC is based on the allegations that Defendants Manuel Iglesias and Edward Moffly misrepresented Hygea's financial status in the lead-up to the stock purchase—the exact same allegations Plaintiffs made in the FAC.

Instead, Plaintiffs fall back on literally the same argument they made in their oppositions to the Motion to Dismiss and the Reconsideration Motion: that Defendants should not get the benefit of claim preclusion because Defendants argued during the Receiver Action that it and this Action should be treated distinctly. This is just another way for Plaintiffs to argue that Defendants acquiesced to claim-splitting and proceeding in two different fora. But, Defendants did no such thing. Indeed, as this Court found and held in its Claim Preclusion Order, Defendants repeatedly objected to both the Receiver Action and this Action proceeding simultaneously:

> [The Court's] examination of the Receiver record reveals that Hygea repeatedly objected to N5HYG simultaneously proceeding on the same facts in two different fora. In fact, at pages 19 and 20 of its Opposition brief, N5HYG provided a list of statements Hygea made during the course of the Receiver Action that show Hygea objecting over-and-over to N5HYG bringing the Receiver Action in one forum while its contract and misrepresentation claims pended in this Action. In addition, Hygea pleaded claim-splitting as a defense in its Receiver Answer."

Claim Preclusion Order ¶ 37 at p. 14:5-16.

Plaintiffs also try to suggest that the Receiver Court expressly preserved their right to maintain this Action, and therefore, claim preclusion is inapplicable. The Court has already decided the applicability of claim preclusion, and Plaintiffs' attempt to raise this argument (whether again or anew) is inappropriate and untimely. Even if the Court considered the argument, it is baseless. The Receiver Court did not express preserve Plaintiffs right to maintain this Action, and Plaintiffs can point to nothing in the record reflecting such preservation, express or otherwise.

Plaintiffs point only to the Receiver Court's statement that it considered the relevant timeframe for the Receiver Action to be "what's going on now" (i.e., the time

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of the Receiver Trial). But this statement had nothing to do with a preservation of Plaintiffs' right to maintain this Action, much less an express preservation. Rather, the Receiver Court's statement concerned whether under NRS 78.650(4) "good cause exists" to appoint a receiver and when that good cause must exist, at the time of trial or otherwise. Given that NRS 78.650(4) speaks of good cause in the present tense—"exists"—the Receiver Court agreed with defense counsel that the relevant timeframe for whether the receivership remedy is appropriate is at the time of trial. It decided nothing else.

C. N5HYG's Breach of Contract Claims For Post-Closing Payments Are Just As Barred As Any Other Contract-Based Claim.

As Defendants anticipated in their opening brief, Plaintiffs argue that Defendants' alleged failure to pay post-closing payments purportedly provided for under the Stock Purchase Agreement is a continuing contractual violation, purportedly falling outside any claim preclusion. (*See* SAC ¶ 26 at p. 4:4-8). In support of this proposition, Plaintiffs cite a number of cases about how claims based on continuing contractual violations escape otherwise applicable statutes of limitation. Opp., pp. 22:1-24:10. But, as Plaintiffs admit, these cases concern statutes of limitation, not the doctrine of claim preclusion and res judicata.

As set forth in Defendants' opening brief, the continuing violation theory "applies to avoid claims that would otherwise be barred by the statute of limitations; it does not permit a plaintiff to avoid the application of res judicata." *Carlson v. Ameriprise Fin.*, No. 08-5303 (MJD/JJK), 2009 U.S. Dist. LEXIS 132440, at *31 (D. Minn. May 21, 2009) (emphasis added). Claim preclusion (res judicata) is a doctrine designed to promote finality of judgments and judicial efficiency by demanding that litigants bring all claims based on the same nucleus of operative facts in one proceeding. If the continuing violation theory applied as an exception to claim preclusion, the doctrine's underlying policy of judicial efficiency would be eviscerated. Indeed, Plaintiffs' proposition to the contrary leads to an absurd result. According to

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Plaintiffs, Hygea's post-closing payment obligations under the Stock Purchase Agreement are in perpetuity until Hygea "goes public;" thus, if Hygea never "went public" and never paid, Plaintiffs could sue Hygea again and again (in third, fourth, fifth lawsuits!) That is not how claim preclusion and res judicata work.

D. N5HYG Litigated Its Books And Record Claim In the Receiver Action When It Sought Books and Record Relief From The Receiver Court.

As set forth in Defendants' opening brief, Plaintiff N5HYG sought books and records relief in the Receiver Action through its proposed receivership order when it complained about not having access to Hygea's books and records and then asked in its proposed receiver order that the receiver "make the [books and records] available [not only to the Receiver but also] to the Court and to the shareholders." N5HYG is precluded from raising the same claim in this Action under the claim preclusion principle that prohibits it from bringing in a second case the "same claims or any part of them that were or could have been brought in the first case." *Weddell v. Sharp*, 350 P.3d 80, 82 (Nev. 2015). *See also* Claim Preclusion Order ¶ 18 at p. 8:24-26 (citing to this portion of *Weddell*). N5HYG is correct that it is not barred from bringing a future books and records action, but the problem N5HYG faces is that its current books and record claim is based on a request that N5HYG admits it made on April 17, 2018, a month before the Receivership Trial. SAC ¶ 156 ("N5HYG … provided written demand to Hygea on April 17, 2018 seeking books and records under Hygea's bylaws.") If N5HYG wants to bring a "future" books and records claim, it must do so based on a new and separate request to inspect Hygea's books and records. It has never made such a request.

CONCLUSION

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For the foregoing reasons, Hygea asks that the Court grant summary judgment in its favor, dismissing all claims with prejudice and without leave to replead.

Dated: January 27, 2020

BALLARD SPAHR LLP

By: /s/ Maria A. Gall
Joel E. Tasca, Esq.
Nevada Bar No. 14124
Maria A. Gall, Esq.
Nevada Bar No. 14200
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Attorneys for Defendants Hygea Holdings Corp., Manuel Iglesias, and Edward Moffly

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CERTIFICATE OF SERVICE

I certify that on January 27, 2020, a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served on the following parties through the Court's e-service system:

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Lewis Roca Rothgerber Christie LLP
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Las Vegas, Nevada 89169

D. Chris Albright
Albright, Stoddard, Warnick & Albright
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106

E. Powell Miller
Christopher D. Kaye
The Miller Law Firm, P.C.
950 W. University Drive, Suite 300
Rochester, MI 48307

Attorneys for Plaintiffs

/s/ Adam Crawford
An Employee of BALLARD SPAHR LLP

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A-17-762664-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Securities (NRS 90)	**COURT MINUTES**	**February 11, 2020**

A-17-762664-B N5HYG, LLC, Plaintiff(s)
vs.
Hygea Holdings Corp., Defendant(s)

February 11, 2020 **3:00 AM** **Status Check**

HEARD BY: Allf, Nancy **COURTROOM:** No Location

COURT CLERK: Nicole McDevitt

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- COURT FINDS after review on January 30, 2020, the Court heard argument on Defendants Motion for Summary Judgment. The Court took the matter under submission and set a Status Check for February 11, 2020 on Chambers Calendar for the Court to release a Minute Order with its decision.

THEREFORE, COURT ORDERS for good cause appearing and after review the Status Check set for Chambers Calendar on February 11, 2020 is CONTINUED to February 25, 2020 on Chambers Calendar; the Court will issue a Minute Order with its decision by the February 25, 2020 Status Check.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Nicole McDevitt, to all registered parties for Odyssey File & Serve. /nm 2/12/2020

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Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * *

N5HYG, LLC, et al. Plaintiff(s) vs. HYGEA HOLDINGS CORP., et al. Defendant(s)	CASE NO.: A-17-762664-B DEPARTMENT 27

ORDER SETTING HEARING

COURT FINDS after review that on February 19, 2020, a Notice of Related Case filed in Bankruptcy Court was filed, wherein Defendant Hygea Holdings Corp. filed a Chapter 11 Voluntary Petition in the U.S. Bankruptcy Court for the District of Delaware.

THEREFORE, COURT ORDERS for good cause appearing and after review that a **STATUS CHECK** as to the effect of the bankruptcy on this case is hereby **SET** for February 26, 2020 at 9:00 a.m. on Motions Calendar. Counsel may appear telephonically if needed.

DATED this 21 day of February, 2020.

Nancy L Allf
NANCY ALLF
DISTRICT COURT JUDGE

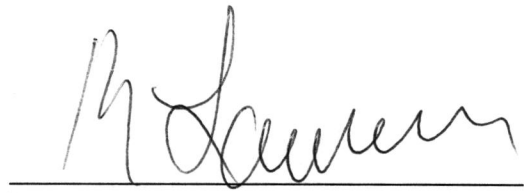
HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE
DEPT XXVII

CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, a copy of the foregoing Order was electronically served pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court's Electronic Filing Program.

If indicated below, a copy of the foregoing was also:

☐ Mailed by United States Postal Service, Postage prepaid, to the proper parties listed below at their last known address(es) :



Karen Lawrence
JUDICIAL EXECUTIVE ASSISTANT

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Steven D. Grierson
CLERK OF THE COURT

ORDR
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Former Attorneys for Defendants Hygea Holdings Corp., Manuel Iglesias, and Edward Moffly

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.: XXVII

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITHOUT PREJUDICE

This matter came on for hearing on shortened time on January 30, 2020 at 10:00 a.m. before the Honorable Nancy Allf on Defendants Hygea Holdings Corp., Manuel Iglesias, and Edward Moffly's ("Defendants") Motion for Summary Judgment ("Motion"), filed on January 13, 2020. On January 21, 2020 Plaintiffs N5HYG, LLC and Nevada 5, Inc. ("Plaintiffs") filed their Opposition to Defendants' Motion ("Opposition"). Defendants filed their Reply In Support of the Motion on January 27, 2020. Maria A. Gall, Esq. of the law firm of Ballard Spahr LLP appeared at the hearing on behalf of Defendants, and Ogonna M. Brown, Esq. of the

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Case Number: A-17-762664-B

law firm of Lewis Roca Rothgerber Christie, LLP and Kevin Watts, Esq. of Oakland Law Group, PLLC appeared in person at the hearing on behalf of Plaintiffs. Christopher Kaye, Esq. of the Miller Law Firm, P.C. and G. Mark Albright, Esq. of the law firm Albright, Stoddard, Warnick & Albright appeared at the hearing by telephone on behalf of Plaintiffs.

The Court considered the papers and pleadings on file, heard oral argument presented by counsel at the hearing on the Motion, and the Court took the matter under submission and set a Status Check for February 11, 2020 for the Court to issue a Minute Order with its decision. On February 11, 2020 the Court continued the Status Check to February 25, 2020. On February 19, 2020, Defendants filed a Notice of Related Case Filed in Bankruptcy Court in connection with Defendant Hygea Holdings Corp.'s Chapter 11 Voluntary Petition commenced in the United States Bankruptcy Court for the District of Delaware, Case No. 20-10361-KBO ("Bankruptcy Proceeding"). On February 21, 2020, this Court *sua sponte* issued an Order Setting Hearing to schedule a Status Check as to the effect of the Bankruptcy Proceeding on the above-entitled case for February 26, 2020 at 9:00 a.m.

On February 26, 2020 at 9:00 a.m., the Court held a Status Check pursuant to the Order Setting Hearing. Maria A. Gall, Esq. of the law firm Ballard Spahr appeared in person on behalf of Defendants. Ogonna M. Brown, Esq. of the law firm Lewis Roca Rothgerber Christie, LLP appeared in person on behalf of Plaintiffs and Kevin Watts, Esq. of Oakland Law Group, PLLC appeared telephonically on behalf of the Plaintiffs. Felice R. Yudkin, Esq. of the law firm Cole Schotz P.C., Defendant's Delaware bankruptcy counsel, appeared telephonically on behalf of the Defendant Hygea Holdings Corp. The Court having conducted the Status Check and good cause appearing therefor,

IT IS HEREBY ORDERED that given Defendant Hygea Holdings Corp.'s Chapter 11 Voluntary Petition commenced in the United States Bankruptcy Court for the District of Delaware, Case No. 20-10361-KBO, Defendants' Motion for

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2Ans.App.279

Summary Judgment is **DENIED** at this time as to all Defendants, without prejudice, in its entirety.

IT IS FURTHER ORDERED this matter is stayed for ninety (90) days as a result of Defendant Hygea Holdings Corp.'s Chapter 11 Voluntary Petition commenced in the United States Bankruptcy Court for the District of Delaware, Case No. 20-10361-KBO, pending a further status hearing.

IT IS FURTHER ORDERED that an in-chambers status hearing is scheduled for May 26, 2020.

IT IS FURTHER ORDERED that Plaintiffs shall file a status report with the Court before the in-chambers status hearing scheduled for May 26, 2020 to address the status of the bankruptcy and advise the Court of Plaintiffs' intended course of action with respect to its claims as to each Defendant.

IT IS SO ORDERED.

Dated this 15th day of April, 2020.

Nancy L Allf

HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE

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Submitted by:

BALLARD SPAHR LLP

By: /s/ Maria A. Gall
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2Ans.App.281

A-17-762664-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Securities (NRS 90)	**COURT MINUTES**	**September 10, 2020**

A-17-762664-B N5HYG, LLC, Plaintiff(s)
vs.
Hygea Holdings Corp., Defendant(s)

September 10, 2020 10:00 AM Status Check

HEARD BY: Allf, Nancy **COURTROOM:** RJC Courtroom 10E

COURT CLERK: Nicole McDevitt

RECORDER: Brynn White

REPORTER:

PARTIES PRESENT: Brown, Ogonna M. Attorney

JOURNAL ENTRIES

- All appearances made via the BlueJeans Videoconferencing Application

Maria Gall present on behalf of non-party Neighbor MD, the reorganized debtor of Defendant Hygea.

Colloquy regarding Delaware Bankruptcy order and status report. Ms. Brown stated they would like to conduct discovery and to pursue their claims against Defendants Iglesias and Moffly. Ms. Brown further stated Plaintiffs do not intend to pursue or collect a debt from Defendant Hygea however, they want them to preserve information and make it available to Defendants Iglesias and Moffly. Ms. Gall stated it is not appropriate to attempt to retain Hygea Holding Corp. as any type of Defendant for any purpose and any assets that belonged to Hygea now belong to Neighbor MD, which includes documents. Court stated the issues of discovery and scope of discovery is an issue for another day and ORDERED, Mandatory Rule 16 Conference SET, parties will need to decide how to move the case forward. Court directed Plaintiff to make sure notice is given.

10/1/2020 10:00 AM MANDATORY RULE 16 CONFERENCE

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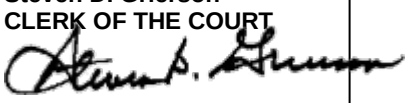
Steven D. Grierson
CLERK OF THE COURT



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Facsimile: (702) 832-5559
Attorneys for Defendants Manuel Iglesias and Edward Moffly

DISTRICT COURT

CLARK COUNTY, NEVADA

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, Plaintiffs, vs. HYGEA HOLDINGS CORP., a Nevada corporation; MANUEL IGLESIAS; EDWARD MOFFLY, and DOES I through X, inclusive, and ROES I-XXX, inclusive, Defendants.	CASE NO. A-17-762664-B DEPT. XXVII **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO DISMISS** **HEARING REQUESTED** Date of Hearing: Time of Hearing:

KAPLAN COTTNER
850 E. Bonneville Ave.
Las Vegas, Nevada 89101
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Defendants, Manuel Iglesias ("Iglesias") and Edward Moffly ("Moffly," collectively with Iglesias, the "Defendants"), by and through their attorneys, Kory L. Kaplan, Esq. and Kyle P. Cottner, Esq., of the law firm of Kaplan Cottner, hereby file this Motion for Summary Judgment, or in the alternative, Motion to Dismiss ("Motion").

This Motion is made and based on the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, and any oral argument the Court may choose to entertain

. . .

. . .

. . .

Case Number: A-17-762664-B

at the time of the hearing.

Dated this 4th day of November, 2020.

KAPLAN COTTNER

By: /s/ Kory L. Kaplan
KORY L. KAPLAN, ESQ.
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This Motion concerns the Court's Findings of Fact, Conclusions of Law, and Order Granting Defendants' Motion for Reconsideration Re: Claim Preclusion (the "Claim Preclusion Order"), entered on December 3, 2019. The Claim Preclusion Order ***DISMISSED WITH PREJUDICE*** Plaintiffs' First Amended Complaint ("FAC"). It further provided—in no unclear terms—that "[a]ny second amended complaint filed by [Plaintiff] N5HYG and/or Nevada 5, Inc. must … be based on a different nucleus of operative facts from that presented in the [First] Amended Complaint." Plaintiffs' Second Amended Complaint ("SAC") violates the unambiguous terms of the Claim Preclusion Order. The SAC is not based on a different nucleus of operative facts from the FAC; rather, it regurgitates the same nucleus of facts, makes the same claims, and asserts the same causes of action as the FAC.

In short, by their SAC, Plaintiffs N5HYG, LLC ("N5HYG") and/or NEVADA 5. INC. ("Nevada 5") try to allege for the third time that Defendants Hygea Holdings Corp., Manuel Iglesias, and Edward Moffly defrauded one or both Plaintiffs into purchasing Hygea stock by misrepresenting its financial condition and then subsequently breached the stock purchase

agreement by failing to make post-closing monthly payments. The Court dismissed the claims based on such allegations in the FAC with prejudice because Plaintiffs tried and/or had the opportunity to bring claims based on these facts in the related Receiver Action but failed to do so.

The Motion presents one question: have Plaintiffs violated the Court's Claim Preclusion Order by filing a SAC that is based on the same nucleus of operative facts as the dismissed-with-prejudice FAC? To answer this question the Court need only (1) review the unambiguous terms of the Claim Preclusion Order, which states: "[a]ny second amended complaint filed by [Plaintiff] N5HYG and/or Nevada 5, Inc. must … be based on a different nucleus of operative facts from that presented in the [First] Amended Complaint"; and (2) compare the FAC with the SAC. It is a narrow question.

Plaintiffs' attempt to revive the same allegations in the SAC is inappropriate, particularly in the face of the Claim Preclusion Order, which expressly prohibits them from doing so. Accordingly, the Court should grant dismissal and/or summary judgment in Defendants' favor on allegations and claims it previously dismissed with prejudice.

II.

STATEMENT OF FACTS

This Motion merits a brief explanation of how the parties have arrived at the Claim Preclusion Order and Second Amended Complaint that are the subject of this Motion.

A. The Filing and Removal of this Action.

On October 5, 2017, Plaintiffs Nevada 5 and N5HYG filed this Action, which arises from N5HYG's purchase of Hygea stock. Nevada 5 is N5HYG's parent company. Plaintiffs alleged a purported fraudulent course of conduct by Defendants in connection with N5HYG's stock purchase. Plaintiffs contended that, during the course of discussions leading up to N5HYG's execution of the stock purchase agreement between it and Hygea, Defendants made two sets of misrepresentations—one as to Hygea's financial performance and the other as to the intention to take Hygea public via a reverse takeover that never occurred. Based on these allegations, Plaintiffs set forth a veritable "kitchen-sink" of claims, not only for breach of contract, but also for twenty more causes of action, including securities fraud, common law fraud, breach of fiduciary duty, and

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conspiracy. On November 16, 2017, former defendant Ray Gonzalez removed this Action to federal court on the basis that Plaintiffs had pled federal securities law claims. Upon removal and the filing of Defendants' motion to dismiss, the federal court automatically stayed all discovery in this Action under the Private Securities Litigation Reform Act.

B. The Filing and Trial of the Receiver Action.

On January 26, 2018, while this Action was pending in federal court and discovery stayed, Plaintiff N5HYG filed another state court action against Hygea in which it requested the appointment of a receiver over the company. The parties refer to that case as the Receiver Action. N5HYG argued for the appointment of a receiver based upon, among other things: the supposed misrepresentations of Defendants Hygea, Iglesias, and Moffly in connection with N5HYG's purchase of Hygea stock; their alleged breaches of the stock purchase agreement between N5HYG and Hygea, including $175,000 in post-closing monthly payments; and their failure to provide N5HYG with Hygea's books and records. On May 14, 2018, the Receiver Action proceeded to trial. After a week-long trial, the court entered judgment in favor of Hygea and its directors on all claims.

C. Hygea's Claim Preclusion Motion and the Court's Claim Preclusion Order in this Action

On June 6, 2018, the federal court remanded this Action. Defendants subsequently filed a motion to dismiss the FAC based on claim preclusion and failure to state a claim on which relief can be granted. Although the Court dismissed a significant number of Plaintiffs' claims based on their pleading failures, the Court initially denied dismissal based on claim preclusion. On June 17, 2019, Defendants filed a motion for reconsideration, which persuaded the Court that it should vacate its decision with regard to claim preclusion and enter a new decision granting dismissal of the FAC based on claim preclusion. *See* Claim Preclusion Order, a true and correct copy of which is attached hereto as **Exhibit A**.

On December 3, 2019, the Court issued its Claim Preclusion Order, which found that both the Receiver Action and the FAC arose from the same core allegations, namely that N5HYG purchased Hygea stock and memorialized that purchase in a stock purchase agreement; Hygea,

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through the misconduct of its officers and directors, misrepresented Hygea's value; and Hygea failed to provide contractually obligated audits of Hygea's financial statements and to make monthly post-closing payments. *Id.* ¶ 22 at p. 10:4-17.

Accordingly, the Court dismissed the FAC **with prejudice** and ordered that:

> Any second amended complaint filed by N5HYG and/or Nevada 5, Inc. **must** … be based on a different nucleus of operative facts from that presented in the Amended Complaint.

Id. ¶ 4 at p. 15:15-17 (emphasis added). This holding is consistent with the Court's oral pronouncement at the end of the reconsideration hearing, where it explained that it was only allowing Plaintiffs leave to replead because "[t]here might be some other causes of action that still exist," and agreeing with defense counsel that "the causes of action that [were] previously pled, those are dismissed, then, under claim preclusion." Transcr. of Proceedings (filed July 22, 2019), pp. 35:25-36:9, already on file herein.

The Court also sets forth what "nucleus of operative facts" means in its Claim Preclusion Order, adopting the approaches taken by the Restatement and the federal courts in the absence of direct Nevada authority.

> 19. As the U.S. Court of Appeals for the Seventh Circuit explained, "[U]nder well-established claim-preclusion doctrine, [] common nucleus of operative facts **means the claims are the same even though they involve different legal theories**." *Matrix IV, Inc. v. Am. Nat'l Bank & Tr. Co.*, 649 F.3d 539, 548 (7th Cir. 2011). Citing to another Seventh Circuit case, the court further explained that "**a 'claim' consists of the underlying factual events** rather than the legal theories advanced." *Id.*
>
> 20. Other federal circuits are in accord. For instance, the Second Circuit, quoting from the Restatement (Second) of Judgments § 24, has held that "[t]o ascertain whether two actions spring from the same 'transaction' or 'claim,' we look to **whether the underlying facts are 'related in time, space, origin, or motivation**, and whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations ....'" *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 108 (2d Cir. 2000).
>
> 21. The comments and illustrations to the Restatement also explain that "[t]hough no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the

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> second action should ordinarily be held precluded. But the opposite does not hold true; **even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.**" Restat 2d of Judgments, § 24.

Exhibit A ¶¶ 19-21 at pp. 9:10-10:3 (emphasis added).

Further, the Court found that Plaintiff petitioned the appointment of a receiver based on the allegations in the FAC, namely that: (1) N5HYG purchased Hygea stock; and (2) Hygea, through its officers and directors, misrepresented Hygea's value, failed to provide contractually obligated audits of Hygea's financial statements, and failed to make monthly post-closing payments:

> 22. N5HYG argued in Opposition that this Action and the Receiver Action are based on different facts because it said so on the face of its Receiver Complaint. This argument is not well taken. The mere fact that N5HYG stamped a "disclaimer" onto the face of its Receiver Complaint cannot alter the reality that both actions arose from the same core allegations of fact: in 2016, N5HYG purchased Hygea stock and memorialized that purchase in a stock purchase agreement; N5HYG alleges Hygea, through the misconduct of its officers and directors, misrepresented Hygea's value; N5HYG further alleges that Hygea failed to provide contractually obligated audits of Hygea's financial statements and to make monthly post-closing payments. In the Receiver Action, N5HYG petitioned for the appointment of a receiver based on these alleged wrongdoings. In this Action, N5HYG seeks damages and rescission of the stock purchase agreements based on the same allegations. Although the remedies N5HYG sought differed in the two actions, the dispositive point for purposes of the claim preclusion inquiry is that the core facts underlying both actions are the same.

Exhibit A ¶ 22 at p. 10:4-17.

Despite this, Plaintiffs filed their SAC that parrots in form and substance the allegations and claims made in the FAC (and in the Receiver Action). Plaintiffs even admit such:

> 25. **Nevada 5's claims herein are based upon Defendants' conduct which fraudulently-induced Nevada 5 into paying Hygea $30 million on or about October 5, 2016**. […]
>
> 26. **N5HYG's claims herein are based primarily upon Defendants' repeated breaches of the SPA occurring on and after August 1, 2017**, and include breaches occurring after conclusion of the Receivership Action. […]

SAC ¶¶ 25-26 at p. 4:1-6 (emphasis added), already on file herein.

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D. Defendants' Previous Motion for Summary Judgment

Defendants Iglesias, Moffly, and Hygea Holdings Corp. previously filed a Motion for Summary Judgment on January 13, 2020. *See* Defendants' Motion for Summary Judgment filed on January 13, 2020, already on file herein. On January 21, 2020, Plaintiffs N5HYG, LLC and Nevada 5, Inc. filed their Opposition to Defendants' Motion for Summary Judgment. *See* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment filed on January 21, 2020, already on file herein. Defendants filed their Reply In Support of the Motion for Summary Judgment on January 27, 2020. *See* Defendants' Reply in Support of Motion for Summary Judgment filed on January 27, 2020, already on file herein.

The Court considered the papers and pleadings on file and heard oral argument presented by counsel at the hearing on the Motion for Summary Judgment on January 30, 2020. The Court took the matter under submission and set a Status Check for February 11, 2020 for the Court to issue a Minute Order with its decision. On February 11, 2020 the Court continued the Status Check to February 25, 2020. On February 19, 2020, Defendants filed a Notice of Related Case Filed in Bankruptcy Court in connection with Defendant Hygea Holdings Corp.'s Chapter 11 Voluntary Petition commenced in the United States Bankruptcy Court for the District of Delaware, Case No. 20-10361-KBO ("Bankruptcy Proceeding"). On February 21, 2020, this Court *sua sponte* issued an Order Setting Hearing to schedule a Status Check as to the effect of the Bankruptcy Proceeding on the above-entitled case for February 26, 2020 at 9:00 a.m.

On February 26, 2020 at 9:00 a.m., the Court held a Status Check pursuant to the Order Setting Hearing. Given Defendant Hygea Holdings Corp.'s pending Chapter 11 Voluntary Petition, the Court denied Defendants' Motion for Summary Judgment ***without prejudice***. *See* Notice of Entry of Order Denying Defendants' Motion for Summary Judgment without Prejudice filed on April 15, 2020, already on file herein. The Court also stayed the matter for ninety (90) days as a result of the Bankruptcy Proceeding. *Id*. The Court also scheduled a status hearing for May 26, 2020 and ordered Plaintiffs to file a status report prior to the May 26, 2020 hearing. *Id.*

On May 20, 2020, Plaintiffs filed a Status Report advising the Court, among other things, that the Bankruptcy Proceeding remained pending. *See* Plaintiff's Status Report pursuant to April

15, 2020 Order filed on May 20, 2020, already on file herein. On May 26, 2020, the Court continued the Status Check to September 1, 2020 on chambers calendar and directed the parties to file status reports in advance of the Status Check. On August 31, 2020, Plaintiffs filed a Status Report advising the Court, among other things, that the Delaware Bankruptcy Court entered an Order confirming the Second Amended Plan of Reorganization for Defendant Hygea Holdings Corp. on June 15, 2020 that became effective on July 15, 2020. *See* Status Report filed on August 31, 2020, already on file herein. Plaintiffs advised that the Plan discharged Defendant Hygea Holdings Corp. from pre-petition claims to collect a debt and therefore Plaintiffs do not intend to pursue claim to collect a debt from Hygea Holdings Corp. *Id*. As such, only Defendants Manuel Iglesias and Edward Moffly remain despite Plaintiffs' attempt to name Hygea Holdings Corp. again in the SAC.

The Court set a Mandatory Rule 16 Conference for October 1, 2020. On October 1, 2020, Defendants Iglesias and Moffly represented that they were in the process of obtaining new counsel. The Court provided them with the opportunity to respond to the SAC by November 5, 2020.

Because Defendants' previous Motion for Summary Judgment was denied without prejudice due to Hygea Holdings Corp.'s pending Bankruptcy Proceeding, and because the Second Amended Plan of Reorganization was approved, the Motion is now ripe to be heard on the merits with respect to Defendants Manuel Iglesias and Edward Moffly.

III.

LEGAL ARGUMENT

A. Legal Standard for Motion for Summary Judgment to Nev. R. Civ. Proc. 56.

Summary judgment is appropriate under NRCP 56 only "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc*., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id*. "A factual dispute is genuine when

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the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.*

The purpose of a summary judgment is not to deprive the litigants of their right to trial by jury if factual issues really exist. *Caughlin Ranch Homeowners Ass'n v. Caughlin Club*, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993). As such, when reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence must be viewed in a light most favorable to the nonmoving party. *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 137, 206 P.3d 572, 575 (2009). When the plaintiff cannot recover as a matter of law, the defendant is entitled to summary judgment. *Harrington v. Syufy Enterprises*, 113 Nev. 246 (1997) (citing *Van Cleve v. Kietz-Mill Minit Mart*, 97 Nev. 414, 633 P.2d 1220 (1991)). NRCP 56 mandates the entry of summary judgment upon motion, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). Several Nevada cases have properly applied the *Celotex*-type analysis in affirming the lower court's grant of summary judgment because the claimant did not come forward with any evidence that dispelled the movant's demonstration of the lack of material issues of fact. *See Charles v. J. Steven Lemmons & Associates*, 104 Nev. 388, 760 P.2d 118 (1988); *Elley v. Stephens*, 104 Nev. 413, 760 P.2d 768 (1988); *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588 (1992); *Billingsley v. Stockmen's Hotel, Inc*., 111 Nev. 1033, 901 P.2d 141 (1995).

Whatever quantum of proof would apply at the trial on the merits applies at the summary judgment stage. The mere existence of some evidence in support of Plaintiff's claim is not enough. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242,106 S.Ct. 2505 (1986). In *Anderson*, the United States Supreme Court stated that the trial judge must "bear in mind the actual quantum and quality of proof necessary to support liability" when inquiring into the existence of a genuine issue of material fact. *Id*. at 252. If, for example, "the existence presented in the opposing affidavits is of insufficient caliber or quantity," then no genuine issue of material fact is raised. *Id*. at 254.

Plaintiff cannot avoid the entry of summary judgment by fabricating an issue or raising a sham issue. *Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965); *Dzack v. Marshall*, 80 Nev. 345,

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393 P.2d 610 (1964). Plaintiff is not entitled to have the motion for summary judgment denied on the mere hope that at trial it will be able to discredit Defendants' evidence. Plaintiff must be able to point out to the court something indicating the existence of a triable issue of fact. *Thomas v. Bokelman*, 86 Nev. 10, 462 P.2d 1020 (1970); *Bair v. Berry*, 86 Nev. 26, 464 P.2d 469 (1970); *Leggett v. Estate of Leggett*, 88 Nev. 140, 494 P.2d 554 (1972); *Hickman v. Meadow Wood Reno*, 96 Nev. 414,633 P.2d 1220(1981); *Collins v. Union Federal Savings & Loan Association*, 99 Nev. 284,662 P.2d 610 (1983) (the opposing party is not entitled to build a case for trial "on the gossamer threads of whimsy, speculation and conjecture"); *Michaels v. Sudeck*, 107 Nev. 332, 810 P.2d 1212 (1991); *Bulbman*, 108 Nev. 105, 825 P.2d 588. To establish entitlement to judgment as a matter of law, the defendant need only negate one element of the plaintiff's case. *Harrington*, *supra* (citing *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589 (1991)).

Of note, applying review appropriate to summary judgment does not lessen the "demanding" substantive law that applies to independent actions seeking review from judgment. *Bonnell v. Lawrence*, 128 Nev. 394, 401, 282 P.3d 712, 716 (2012) (internal quotations omitted). The policy supporting the finality of judgments recognizes that, "'in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered.'" *NC–DSH*, 125 Nev. at 653, 218 P.3d at 858 (quoting *Hazel–Atlas Co. v. Hartford–Empire Co*., 322 U.S. 238, 244, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *abrogated on other grounds by Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976)). Similar to a qualified immunity or other privilege defense, the bar against relitigation of already-decided issues is, in essence, "an entitlement not to stand trial or face the other burdens of litigation" and "should be resolved at the earliest possible stage in litigation." *Butler v. Bayer*, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007) (internal quotations omitted).

"Summary judgment is appropriate when [claim or] issue preclusion bars a claim." *Bonnell*, 128 Nev. at 401, 282 P.3d at 716 (quoting *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 43, ——, 245 P.3d 547, 548 (2010)).

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B. Legal Standard for Motion to Dismiss Pursuant to Nev. R. Civ. Proc. 12(b)(5).

A party may move for dismissal of claims when a pleading fails to state a claim upon which relief may be granted. *See* Nev. R. Civ. P. ("NRCP") 12(b)(5). A NRCP 12(b)(5) motion must be granted if the claimant would be entitled to no relief under the facts set forth in the pleading. *See Morris v. Bank of America Nevada*, 110 Nev. 1274, 1277, 886 P.2d 454, 457 (1994) (citing *Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)). A pleading must contain: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief." *See* NRCP 8(a).

The meaning of a "short and plain statement of the claim" has been clarified in Nevada case law. "Notice pleading" requires plaintiffs to set forth facts which support a legal theory. *See Liston v. Las Vegas Metropolitan Police Dept.*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995) (citing *Swartz v. Adams*, 93 Nev. 240, 245, 563 P.2d 74, 77 (1977)). "[C]onclusory allegations are not considered as expressly pleaded facts or factual inferences." *In re Amerco Derivative Litig*., 127 Nev. Adv. Op. 17, 252 P.3d 681, 706 (2011) (citing *Brehm v. Eisner*, 746 A.2d 244, 255 (Del.2000)). Further clarity as to what specific facts are necessary is provided by the mandate that a sufficient pleading must give fair notice of both the nature and the basis of the claim. *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979); *see also Western States Constr. v. Michoff*, 108 Nev 931, 936, 840 P.2d 1220, 1223 (1992) (same).

For purposes of a Rule 12(b)(5) motion, the claimant's allegations are generally assumed to be true and viewed in the light most favorable to the claimant. *See e.g., Hynds Plumbing v. Clark Co. Sch. Dist.*, 944 Nev. 776, 777, 587 P.2d 1331, 1332 (1978). However, the court need not accept as true any unreasonable inferences or unwarranted deductions of fact. *See Mirrin v. Justices of the Supreme Court of Nevada*, 415 F. Supp. 1178, 1190 (D. Nev. 1976). In other words, the court and the defendant should not be placed in a position to guess as to the factual basis of any element of a claim, where the plaintiff has the responsibility to set forth facts establishing its alleged right to relief. When it appears to a certainty that, under the facts set forth in the complaint, the plaintiff could prove no set of facts that would entitle him to the remedy sought, dismissal is appropriate. *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720, 734 (2003). A court may

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consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

C. Nevada 5 Impermissibly Tries to Bring Claims Based on The Same Allegations of Fraud and Misrepresentation in The FAC.

Despite the Court's clearly worded Claim Preclusion Order, Plaintiff Nevada 5 tries to assert the below fraud-based causes of action, all of which stem from allegations that Defendants misrepresented the Company's financial condition to Plaintiffs' agent, RIN Capital, LLC, in the lead-up to the Hygea stock purchase (*see* SAC ¶¶ 28-38 at pp. 4:14-10:5). These are **the exact same allegations and claims made in the DISMISSED WITH PREJUDICE First Amended Complaint** and that were or could have been made in the Receiver Action.

- Florida Statutory Securities Fraud
- Control Person Liability under the Florida Securities Act
- Michigan Statutory Securities Fraud
- Control Person Liability under the Michigan Securities Act
- Common Law Fraud
- Negligent Misrepresentation
- Silent Fraud/Material Omissions
- Civil Conspiracy
- Concert of Action

Hygea anticipates that Plaintiffs will argue that Nevada 5 was not a party to the Receiver Action and is thus permitted to bring the above claims, even if based on the same nucleus of facts in the FAC and/or the Receiver Action. *See* SAC ¶¶ 19-23 at p. 3:10-25. But Plaintiffs made this same argument in their brief advocating for the entry of their competing claim preclusion order, which this Court rejected. Plaintiffs' Brief in Opposition to Defendants' Proposed Order (filed Aug. 19, 2019), pp. 1:14:17; 1:23-4:17, already on file herein. In fact, the Court decided the issue when it entered Hygea's proposed Claim Preclusion Order, holding that "[a]ny second amended complaint filed by N5HYG **and/or Nevada 5**, **must** … be based on a different nucleus of operative

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facts from that presented in the Amended Complaint." Exhibit A ¶ 4 at p. 15:15-17) (emphasis added). Plaintiffs' effort to include the same allegations and claims as they did in the FAC is in direct violation of that holding and an impermissible attempt to seek reconsideration of the Court's Claim Preclusion Order.

D. N5HYG Impermissibly Tries to Bring Claims Based on The Same Allegations of Breach of Contract in The FAC.

In the meantime, Plaintiff N5HYG tries to assert a claim for breach of contract based on Hygea's alleged failure to pay $175,000 in post-closing monthly payments starting in August 2017. (SAC ¶ 26 at p. 4:4-8 & ¶ 132 at p. 23:17-20). N5HYG, however, brought a breach of contract claim based on the post-closing monthly payments in the FAC, complaining that "[b]eginning in or around August, 2017, Defendants ceased making the $175,000 Post-Closing Monthly Payments to Plaintiff N5HYG, and interest thereon, requires under Section 6.3 of the Stock Purchase Agreement." (FAC ¶ 76(a) at p. 16:6-8; *see also* FAC ¶ 142 at p. 25:12-23 (stating as part of the Tenth Cause of Action for breach of contract: "they have failed to make the $175,000 Post-Closing Monthly Payments to Plaintiff N5HYG, and interest thereon (which payments and interest were personally guaranteed by Iglesias and Moffly)). N5HYG's effort to include the same allegations and claims in the SAC violates the Claim Preclusion Order.

Hygea anticipates that Plaintiffs will argue that the alleged failure to pay the post-closing payments is a continuing violation, falling outside claim preclusion resulting from the Receiver Action. (*See* SAC ¶ 26 at p. 4:4-8). Although Nevada has yet to squarely address the issue, other jurisdictions hold that the continuing violation theory "applies to avoid claims that would otherwise be barred by the statute of limitations; it does not permit a plaintiff to avoid the application of res judicata." *Carlson v. Ameriprise Fin.*, No. 08-5303 (MJD/JJK), 2009 U.S. Dist. LEXIS 132440, at *31 (D. Minn. May 21, 2009); *see also Tarabochia v. Clatsop Cty., Oregon*, No. 3:16-CV-01457-TC, 2018 WL 2225354, at *2 (D. Or. Mar. 19, 2018), *report and recommendation adopted*, No. 3:16-CV-01457-TC, 2018 WL 2223319 (D. Or. May 15, 2018) (a breach of contract occurs when a party fails to perform under the contract; the party does not commit a "new" breach each consecutive day afterward); *see Zibbell v. Marquette Cty. Res. Mgmt.*,

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No. 2:12-cv-302, 2013 WL 625062, at *11 (W.D. Mich. Feb. 20, 2013) ("Where it is obvious that the alleged ongoing unlawful conduct is actually the defendant continuing on the same course of conduct ..., the court reviewing the second or subsequent lawsuit must conclude that the plaintiff is simply trying to relitigate the same claim ..."); *see also Dubuc v. Green Oak Twp*., 312 F.3d 736, 748-49 (6th Cir. 2002) (declining to recognize a recurring issue of wrongdoing based on later misconduct or to extend the continuing violation theory to the doctrine of claim preclusion in a § 1983 context).

Plaintiffs could have asserted and did assert these claims in the FAC, and therefore are precluded from litigating the same issues. Additionally, Plaintiffs' claims for indefinite damages of $175,000 per month cannot exist into perpetuity, especially given the fact that Hygea's Bankruptcy Plan was approved.

E. N5HYG Impermissibly Tries to Bring A Books and Records Claim.

N5HYG also tries to bring a books and records claim against Iglesias and Moffly (presumably this pre-petition claim is not being made against Hygea). N5HYG, however, is no longer a Hygea stockholder, as the bankruptcy wiped out N5HYG's equity interest in Hygea. Accordingly, N5HYG does not have standing to assert a claim for Hygea's books and records. Even if N5HYG had standing, Iglesias and Moffly are no longer officers or directors of Hygea and thus have no ability to control provision of its books and records. Moreover, according to the bankruptcy confirmation plan, Hygea's assets, to include its books and records, transferred to the reorganized debtors.

F. Nevada 5 Is Just as Claim Precluded as N5HYG Because the Two Are Indisputably in Privity With One Another.

Plaintiffs are likely to argue that Nevada 5 was not a party to the Receiver Action and is thus permitted to bring claims based on the same nucleus of operative facts as the FAC and Receiver Action. This is the same argument the Court expressly rejected when it entered its Claim Preclusion Order over Plaintiffs' objections that Nevada 5 should be permitted to bring claims based in fraud arising from the purchase of Hygea stock. Now Plaintiffs effectively ask the Court to ignore (1) the undisputed fact that N5HYG is the wholly-owned subsidiary of Nevada 5, and

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thus the two are in privity with one another for purposes of claim preclusion; (2) as well as well-defined Nevada law applying claim preclusion to those in privity with one another. *Mendenhall v. Tassinari*, 403 P.3d 364, 369 (Nev. 2017) (applying claim preclusion to parent company found to be in privity with its subsidiary entity); FAC ¶ 24 ("All of [N5HYG's] membership shares are owned by Plaintiff Nevada 5, Inc."); *Nevada Contractors Ins. Co. v. Risk Servs.-Nevada, Inc.*, 132 Nev. 1011 (2016) (claim preclusion applied because the parties in the new case were the same to or in privity with the parties in the previous case); *see FQ Men's Club, Inc. v. City of Reno*, 441 P.3d 1090 (Nev. 2019) (Privity can "encompass a relationship in which 'there is substantial identity between parties, that is, when there is sufficient commonality of interest.'" (citing *Mendenhall*, 133 Nev., Adv. Op. 78, 403 P.3d at 369 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003) (internal quotation marks omitted))); *Sparks Nugget, Inc. v. Comm'r of Internal Revenue*, 458 F.2d 631, 639 (9th Cir. 1972) (This may include "a close corporation and its sole or controlling stockholder." (internal quotation marks omitted)); *see also Weddell v. Sharp*, 131 Nev. 233, 240 n.2, 350 P.3d 80, 85 (2015) (when considering whether a plaintiff had "good reasons" to justify a second suit against a new defendant, many, if not most, federal courts focus on whether the new defendant had a "close and significant relationship" with the defendant in the first suit); *see also Russell v. SunAmerica Secs., Inc.*, 962 F.2d 1169, 1175–76 (5th Cir.1992) (concluding that the relationship between two defendants was "close enough" to apply nonmutual claim preclusion); *Fowler v. Wolff*, 479 F.2d 338, 340 (8th Cir.1973) (recognizing that defendants' relationship with each other was "so close" that nonmutual claim preclusion should be applied).

Additionally, the Court held in its Claim Preclusion Order that the claim-preclusion doctrine consists of the underlying factual events rather than the legal theories advanced. Exhibit A ¶¶ 19-20 at p. 9:10-23. Plaintiffs' new legal theory of Nevada 5 has no bearing on the fact that the claims are precluded as the underlying facts are "related in time, space, origin, or motivation." *Id.*; *Waldman v. Vill. Of Kiryas Joel*, 207 F.3d 105, 108 (2d. Cir. 2000). The Court should not accept Plaintiffs' invitation.

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G. Nevada 5 Effectively Concedes that Its Fraud-Based Claims Arise from the Same Nucleus of Operative Facts as the FAC And the Receiver Action.

Plaintiffs may argue, as they did in their previously filed Opposition to the Motion for Summary Judgment, that the SAC is a "radical departure" from the FAC (Opp. Filed on January 21, 2020, p. 14:22-23, already on file herein) and based on a different nucleus of operative facts both from the FAC and the Receiver Action because the SAC says it is. *Id.* at p. 16:2-19 (citing to SAC ¶¶ 21-22). Plaintiffs, however, cannot just "wish" a legal conclusion into reality. Plaintiffs have provided absolutely no explanation as to how Nevada 5's fraud-based claims are based on facts different from those that Plaintiffs asserted in the FAC or that N5HYG asserted or could have asserted in the Receiver Action. They hardly could, given that the SAC is based on the allegations that Defendants Iglesias and Moffly misrepresented Hygea's financial status in the lead-up to the stock purchase—the exact same allegations Plaintiffs made in the FAC.

Instead, Plaintiffs can only fall back on literally the same argument they made in their oppositions to the Motion to Dismiss and the Reconsideration Motion: that Defendants should not get the benefit of claim preclusion because Defendants argued during the Receiver Action that it and this Action should be treated distinctly. This is just another way for Plaintiffs to argue that Defendants acquiesced to claim-splitting and proceeding in two different fora. But, Defendants did no such thing. Indeed, as this Court found and held in its Claim Preclusion Order, Defendants repeatedly objected to both the Receiver Action and this Action proceeding simultaneously:

> [The Court's] examination of the Receiver record reveals that Hygea repeatedly objected to N5HYG simultaneously proceeding on the same facts in two different fora. In fact, at pages 19 and 20 of its Opposition brief, N5HYG provided a list of statements Hygea made during the course of the Receiver Action that show Hygea objecting over-and-over to N5HYG bringing the Receiver Action in one forum while its contract and misrepresentation claims pended in this Action. In addition, Hygea pleaded claim-splitting as a defense in its Receiver Answer."

Exhibit A ¶ 37 at p. 14:5-16.

Plaintiffs likely will also try to suggest that the Receiver Court expressly preserved their right to maintain this Action, and therefore, claim preclusion is inapplicable. The Court has already decided the applicability of claim preclusion, and Plaintiffs' attempt to raise this argument

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(whether again or anew) is inappropriate and untimely. Even if the Court considered the argument, it is baseless. The Receiver Court did not expressly preserve Plaintiffs' right to maintain this Action, and Plaintiffs can point to nothing in the record reflecting such preservation, express or otherwise.

Plaintiffs again will likely point only to the Receiver Court's statement that it considered the relevant timeframe for the Receiver Action to be "what's going on now" (i.e., the time of the Receiver Trial). But this statement had nothing to do with a preservation of Plaintiffs' right to maintain this Action, much less an express preservation. Rather, the Receiver Court's statement concerned whether under NRS 78.650(4) "good cause exists" to appoint a receiver and when that good cause must exist, at the time of trial or otherwise. Given that NRS 78.650(4) speaks of good cause in the present tense – "exists" – the Receiver Court agreed with defense counsel that the relevant timeframe for whether the receivership remedy is appropriate is at the time of trial. It decided nothing else.

H. N5HYG's Breach of Contract Claims for Post-Closing Payments Are Just as Barred as Any Other Contract-Based Claim.

Plaintiffs will also likely argue that Defendants' alleged failure to pay post-closing payments purportedly provided for under the Stock Purchase Agreement is a continuing contractual violation, purportedly falling outside any claim preclusion. (*See* SAC ¶ 26 at p. 4:4-8). In support of this proposition, Plaintiffs cited in their previous Opposition a number of cases about how claims based on continuing contractual violations escape otherwise applicable statutes of limitation. Opp. filed on January 21, 2020, pp. 22:1-24:10, already on file herein. But, as Plaintiffs admit, these cases concern statutes of limitation, not the doctrine of claim preclusion and res judicata.

As set forth in Defendants' opening brief, the continuing violation theory "applies to avoid claims that would otherwise be barred by the statute of limitations; **it does not permit a plaintiff to avoid the application of res judicata**." *Carlson v. Ameriprise Fin.*, No. 08-5303 (MJD/JJK), 2009 U.S. Dist. LEXIS 132440, at *31 (D. Minn. May 21, 2009) (emphasis added). Claim preclusion (res judicata) is a doctrine designed to promote finality of judgments and judicial

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efficiency by demanding that litigants bring all claims based on the same nucleus of operative facts in one proceeding. If the continuing violation theory applied as an exception to claim preclusion, the doctrine's underlying policy of judicial efficiency would be eviscerated. Indeed, Plaintiffs' proposition to the contrary leads to an absurd result. According to Plaintiffs, Hygea's post-closing payment obligations under the Stock Purchase Agreement are in perpetuity until Hygea "goes public;" thus, if Hygea never "went public" and never paid, Plaintiffs could sue Hygea again and again (in third, fourth, fifth lawsuits!). That is not how claim preclusion and res judicata work.

IV.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' Motion for Summary Judgment, or in the alternative, Motion to Dismiss, in its entirety.

Dated this 4th day of November, 2020.

KAPLAN COTTNER

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CERTIFICATE OF SERVICE

I hereby certify that the *Defendants' Motion for Summary Judgment, or in the alternative, Motion to Dismiss* submitted electronically for filing and/or service with the Eighth Judicial District Court on the 4th day of November, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows[1]:

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[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

“Exhibit A”

“Exhibit A”

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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

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION RE: CLAIM PRECLUSION

2Ans.App.303

The Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Reconsideration Re: Claim Preclusion, was filed in the above-entitled matter on December 3, 2019, a copy of which is attached as Exhibit A.

Dated: December 3, 2019

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CERTIFICATE OF SERVICE

I certify that on December 3, 2019, a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION RE: CLAIM PRECLUSION** was served on the following parties through the Court's e-service system:

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EXHIBIT A

EXHIBIT A

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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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION RE: CLAIM PRECLUSION

On May 10, 2019, the Court entered its Findings of Facts, Conclusions of Law, and Order on the Hygea Defendants' Motion to Dismiss. The Hygea Defendants had asked this Court to dismiss the Amended Complaint, as a threshold matter, on the basis of claim preclusion. They premised their argument on the case styled *Claudio Arellano, et al. v. Hygea Holdings Corp., et al.*, Case No. 18-OC-00071-1B, which Plaintiff N5HYG, LLC, initially filed in this Court, asking for the appointment of a receiver over Hygea pursuant to NRS 78.650, 78.630 and/or 32.010 (the "Receiver Action"). This Court transferred the Receiver Action to the First Judicial District Court of the State of Nevada in and for Carson City (the "Receiver Court.") N5HYG was the lead plaintiff in in the Receiver Action, and Hygea and most of the named defendants to this Action were defendants in the Receiver Action.

N5HYG asked for the appointment of a receiver for several reasons, including based on alleged director mismanagement. As discussed further in the Court's Findings and Conclusions, below, N5HYG argued that the directors had mismanaged Hygea because they misrepresented Hygea's financial position, inducing N5HYG to purchase stock in the company, and then allowed Hygea to breach the stock purchase agreement by failing to provide contractually required audits, post-closing payments, and a board and observer seat.

On May 14, 2018, the Receiver Action proceeded to a trial on the merits. At the end of trial, the Receiver Court denied the appointment of a receiver after concluding that it did not have jurisdiction to appoint a receiver because N5HYG had failed to show that it and its co-plaintiffs held 10% of Hygea's stock issued and outstanding. *See* Receiver Action, Amended Findings of Fact and Conclusions of Law (the "Receiver Judgment") (issued Oct. 29, 2018), p. 21:13–18. The Receiver Court also made substantive findings on the merits of N5HYG's claims and ultimately determined that there was not good cause for a receiver, even if the Receiver Court had the power to provide that remedy. *See id.* at p. 21:19–22:6.

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Based on the Receiver Judgment, the Hygea Defendants moved to dismiss this case for claim preclusion, arguing that the claims in this case arise from the same nucleus of operative facts at issue in the Receiver Action. The Court initially denied the motion to dismiss based on the first element of claim preclusion alone. Specifically, the Court found that "a court's decision whether or not to appoint a receiver is not a final decision for purposes of claim preclusion," and also that, "based on the Receivership Court's finding that it lacked jurisdiction to appoint a receiver under NRS 78.650(1) ... that Receivership Court did not render a final judgment for purposes of determining claim preclusion." Findings of Fact, Conclusions of Law, and Order ("FFCO") (issued May 10, 2019), pp. 3:27–28 & 4:1–3. Hygea timely moved for reconsideration of these findings and asked for clarification on the remaining elements of claim preclusion.

On July 17, 2019, Hygea's Motion for Reconsideration came before the Court for hearing. Maria A. Gall and Kyle A. Ewing of the law firm Ballard Spahr LLP appeared on behalf of Hygea. Stavroula E. Lambrakopoulos of the law firm K&L Gates LLP and Jon Pearson of Holland & Hart LLP appeared on behalf of former Defendant Ray Gonzalez. Christopher D. Kaye of the Miller Law Firm, G. Mark Albright of the law firm Albright, Stoddard, Warnick & Albright, Ogonna M. Brown of the law firm Lewis Roca Rothberger Christie LLP, and Robert L. Eisenberg of the law firm Lemon, Grundy & Eisenberg, appeared on behalf of Plaintiffs N5HYG, LLC and Nevada 5, Inc.

The Court is persuaded that the Reconsideration Motion presents complex factual and legal issues that warrant reconsideration and clarification of the Court's FFCO denying the claim preclusion argument. Now having reconsidered those issues, the Court is persuaded that it should revisit its decision, vacate the FFCO with regard to claim preclusion, and enter a new decision and order for that ground granting dismissal of the Amended Complaint based on claim preclusion. Thus, after considering the Reconsideration Motion, its Opposition and Reply, the other

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pleadings and papers on file, and the oral argument of counsel, the Court hereby VACATES the FFCO and GRANTS the Reconsideration Motion, consistent with the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Typically for claim preclusion to apply, a defendant must demonstrate three things: that "(1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, or the defendant can demonstrate that he or she would 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*, 131 Nev. Adv. Op. 28, 350 P.3d 80, 82 (Nev. 2015), *reh'g denied* (July 23, 2015).

2. The first element of claim preclusion requires a judgment that is both (1) final and (2) on the merits. *Id.* In its FFCO, this Court found that (1) "a court's decision whether or not to appoint a receiver is not a final decision for purposes of claim preclusion," and that (2) "based on the Receivership Court's finding that it lacked jurisdiction to appoint a receiver, the Receivership Court did not render a final judgment for purposes of claim preclusion." FFCO, 3:27–4:4. With regard to the latter finding, the Court takes this opportunity to clarify that it meant to say: "the Receivership Court did not render a *judgment on the merits* for purposes of claim preclusion." This clarification and distinction is relevant to the Court's analysis, below.

3. In its Reconsideration Motion, Hygea argued that the Court's finding that "a court's decision whether or not to appoint a receiver is not a final decision," FFCO, 3:27–28, contravenes the Supreme Court's decision in *Lynch v. Awada*, 2018 Nev. Unpub. LEXIS 882, 427 P.3d 123 (Sept. 28, 2018). After reviewing *Awada* and its related litigations, the Court agrees and finds *Awada* highly persuasive to its

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decision to grant reconsideration and dismiss the Amended Complaint based on claim preclusion.

4. In *Awada*, John Lynch successfully brought a first action seeking the equitable remedies of dissolution of an LLC and appointment of a receiver to wind up its affairs. *See id.* at *1. Mr. Lynch sought dissolution and appointment of a receiver because the LLC members were misappropriating and diverting royalty payments that belonged to the LLC. *Id.* at 5. *See also Lynch v. Awada*, District Court Case No. A-16-744849-C, 2017 Nev. Dist. LEXIS 1639, ¶¶ 1A & 1B (Nov. 4, 2017) (Delaney, J.). Mr. Lynch took the receiver action to trial, after which the district court entered its findings of facts and conclusions of law. *See id.* ¶¶ 10 & 11.

5. Mr. Lynch then brought a second action seeking damages based on the same facts. Judge Delaney, writing for the "damages" court, granted summary judgment based on claim preclusion after finding that the receiver action barred further claims based on the same facts. *See Awada*, 2018 Nev. Unpub. LEXIS 882, at *1–2. Mr. Lynch appealed, arguing that he could not have brought his "damages" claims in the receiver action—the same argument N5HYG makes here. The Nevada Supreme Court, however, said such argument "lacks merit." *Awada*, 2018 Nev. Unpub. LEXIS 882, at *7.

6. Instead, the Nevada Supreme Court affirmed Judge Delaney, holding that "ancillary claims may be raised in dissolution actions" seeking the appointment of a receiver, because "barring a petitioner from asserting supplemental claims in a special proceeding and requiring a separate [damages] action would produce additional and unnecessarily formalistic practice." *Id.* (internal quotations omitted.)

7. This Court is thus persuaded that *Awada* confirms two things: (1) N5HYG could have brought the damages claims it pursues in this Action in the Receiver Action; and (2) an order *disposing of* a receiver action by granting or denying the appointment of a receiver *is* a final judgment for purposes of claim preclusion.

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8. In Opposition, N5HYG argued that *Awada* is unpublished, not binding, and in any event, cannot be squared with *Johnson v. Steel, Inc.*, 100 Nev. 181, 678 P.2d 676 (1984), which this Court cited in support of its earlier decision to deny claim preclusion. The Court has reread *Johnson* and is persuaded that it previously overlooked pertinent facts that distinguishes *Johnson* from this Action. Also, *Awada* may be unpublished, but it is highly persuasive given that it is the only Nevada Supreme Court case to address the very issue before the Court.

9. The Court agrees with Hygea that *Johnson* is inapposite because it concerned an *interlocutory* order denying the appointment of a temporary receiver. A careful reading of *Johnson* demonstrates that the plaintiff there brought a derivative claim for breach of fiduciary duty and asked for a receiver *pendente lite*—i.e., while the action was pending. As explained by the *Johnson* court, "[t]he use of a receiver *pendente lite* is an ancillary remedy used to preserve the value of assets pending outcome of the principal case. The appointment determines no substantive rights between the parties but is merely a means of preserving the status quo. Accordingly, an order appointing a receiver or denying a motion to appoint a receiver [pendente lite] is not a final judgment on the merits." *Johnson*, 100 Nev. at 183, 678 P.2d at 678.

10. In contrast to the plaintiff in *Johnson*, N5HYG did not seek a receiver *pendente lite*. N5HYG sought a management receiver to take the stead of Hygea's officer and directors based on their alleged mis-, mal-, and nonfeasance and gross mismanagement. Further, the Receiver Judgment was not an interlocutory order; it was a final order denying N5HYG's claims.

11. The Receiver Judgment was also a judgment on the merits. The Court agrees with Hygea that a distinction exists between a court's jurisdiction to hear a party's claims and a court's jurisdiction to grant a remedy on those claims, where only a lack of the former renders a court without *subject matter* jurisdiction to enter a judgment on the merits.

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12. Although there is not a Nevada Supreme Court case addressing this distinction, the Court finds the California Supreme Court's decision in *Abelleira v. Dist. Court of Appeal*, 109 P.2d 942 (1941), persuasive. The Nevada Supreme Court cited approvingly to *Abelleira* in *Landreth v. Malik*, 125 Nev. Adv. Rep. 61, 221 P.3d 1265, 1269–70 (2009).

13. In *Abelleira*, the California Supreme Court explained that "jurisdiction" has multiple meanings and that a court may have "jurisdiction over the subject matter and the parties in the fundamental sense, [but] no 'jurisdiction' ... to give certain kinds of relief." 109 P.2d 942, 947–48 (1941) (emphasis added). The California Supreme Court provided a couple salient examples where this distinction may be applied: (1) "a probate court, with jurisdiction of an estate, and therefore over the appointment of an administrator, nevertheless acts in excess of jurisdiction if it fails to follow the statutory provisions governing such appointment"; and (2) "[a] court with jurisdiction over a cause may hear and determine it and give judgment, but it cannot award costs in a situation not provided by statute." *Id.* Just like these examples, the Receiver Court heard, determined, and rendered judgment on N5HYG's receiver claims, but it could not appoint a receiver because N5HYG failed to show it held the statutory prerequisite of 10% of Hygea stock issued and outstanding.

14. N5HYG did not meaningfully dispute this distinction. N5HYG instead argued that the Receiver Court disavowed subject matter jurisdiction when it relied on *Searchlight Dev. v. Martello*, 84 Nev. 102 (1968), in rendering its decision. The Receiver Court, however, did not rely on *Searchlight* for the proposition that it lacked subject matter jurisdiction; in fact, the term "subject matter" is entirely absent from the Receiver Judgment. The Receiver Court relied on *Searchlight* only for the proposition that "the time at which the Court must determine whether Plaintiffs hold the requisite one-tenth of the Company's shares issued and outstanding is at the time at which the Court is considering the stockholders'

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application for the appointment of a receiver." Receiver Judgment, 17:14–17. *See also id.* at 17:6–11.

15. This Court also cannot discount the fact that the Receivership Court exercised substantial jurisdiction over N5HYG's claims, including through a week-long trial. By entering judgment at the conclusion of trial, the Receiver Court itself decided it had subject matter jurisdiction. Stated differently, the Receiver Court could not have entered judgment in Hygea's favor without at least implicitly finding that it had jurisdiction to hear and decide N5HYG's claims. This principle is well-settled. In *Stoll v. Gottlieb* the U.S. Supreme Court explained that "[e]very court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter." 305 U.S. 165, 171–72 (1938).

16. Notably, had the Receiver Court found that it lacked subject matter jurisdiction to hear and determine N5HYG's claims, it would have had to dismiss—not deny—the claims under Rule 12(h), which demands that "[i]f the court determines *at any time* that it lacks subject matter jurisdiction, the court *must dismiss* the action." N.R.C.P. 12(h). The Rule's use of the word "must" expresses a requirement and leaves no discretion. *See* NRS 0.025(c).

17. For these reasons, the Court finds that the Receiver Judgment is a final judgment, on the merits. The Court also finds that the Receiver Court's judgment as a matter of law, or more aptly a judgment on partial findings, rendered after N5HYG's case-in-chief, was also a final judgment, on the merits. This judgment disposed of N5HYG's claims under NRS 78.630 in total and NRS 78.650, in part, without mentioning jurisdiction.

18. The Court now addresses the second element of claim preclusion, which asks whether this Action is based on the same claims or any part of them that were or could have been brought in the Receiver Action. *Weddell*, 350 P.3d at 82. Courts often employ the term "common nucleus of operative facts" when analyzing this element. In fact, Judge Delaney used this term in the *Awada* district court

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proceedings, explaining that allegations underlying John Lynch's "damages" case "involve[d] the same common nucleus of operative facts contained in the [Receivership] Action—that royalty payments were unaccounted for or were being diverted by managers (Awada) from Tyche." *Lynch v. Awada*, District Court Case No. A-16-744849-C, 2017 Nev. Dist. LEXIS 1639, ¶¶ 14 (Nov. 4, 2017) (Delaney, J.) The Nevada Supreme Court, however, has not yet had occasion to directly address what "nucleus of operative facts" means in the context of claim preclusion, and so the Court also reviews guidance from other courts on how this standard has been applied.

19. As the U.S. Court of Appeals for the Seventh Circuit explained, "[U]nder well-established claim-preclusion doctrine, [] common nucleus of operative facts means the claims are the same even though they involve different legal theories." *Matrix IV, Inc. v. Am. Nat'l Bank & Tr. Co.*, 649 F.3d 539, 548 (7th Cir. 2011). Citing to another Seventh Circuit case, the court further explained that "a 'claim' consists of the underlying factual events rather than the legal theories advanced." *Id.*

20. Other federal circuits are in accord. For instance, the Second Circuit, quoting from the Restatement (Second) of Judgments § 24, has held that "[t]o ascertain whether two actions spring from the same 'transaction' or 'claim,' we look to whether the underlying facts are 'related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations ....'" *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 108 (2d Cir. 2000).

21. The comments and illustrations to the Restatement also explain that "[t]hough no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does

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not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series." Restat 2d of Judgments, § 24.

22. N5HYG argued in Opposition that this Action and the Receiver Action are based on different facts because it said so on the face of its Receiver Complaint. This argument is not well taken. The mere fact that N5HYG stamped a "disclaimer" onto the face of its Receiver Complaint cannot alter the reality that both actions arose from the same core allegations of fact: in 2016, N5HYG purchased Hygea stock and memorialized that purchase in a stock purchase agreement; N5HYG alleges Hygea, through the misconduct of its officers and directors, misrepresented Hygea's value; N5HYG further alleges that Hygea failed to provide contractually obligated audits of Hygea's financial statements and to make monthly post-closing payments. In the Receiver Action, N5HYG petitioned for the appointment of a receiver based on these alleged wrongdoings. In this Action, N5HYG seeks damages and rescission of the stock purchase agreement based on the same allegations. Although the remedies N5HYG sought differed in the two actions, the dispositive point for purposes of the claim preclusion inquiry is that the core facts underlying both actions are the same.

23. In fact, based on the Receiver Trial Transcript, it appears that N5HYG's attorney admitted during the Receiver Trial that the Receiver Action was based, at least in part, on the same facts that form the basis for N5HYG's damages claims in this Action: the communications between N5HYG (or its agents) and Hygea, as well as the information provided to Hygea prior to N5HYG's stock purchase. In response to Hygea's objection that N5HYG not be permitted to elicit testimony on matters in dispute in this Action, N5HYG's counsel explained as follows: "I do think that the fact of the representations and the information provided in 2016 does have some probative value here [in the Receiver Action] because if there were inaccuracies or if there was anything misleading about that information, that

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gets to misfeasance, malfeasance, and nonfeasance criteria." Receiver Tr. Transcr., p. 289:2–7.

24. The Court now addresses the third element for claim preclusion, which asks 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 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*, 350 P.3d at 82.

25. There is no dispute that N5HYG was a plaintiff in the Receiver Action. There is also no dispute that Hygea, Iglesias, and Moffly, and most of their original co-defendants, were defendants to the Receiver Action.

26. N5HYG argued in Opposition that the plaintiffs between the two actions are not the same because N5HYG "banded together" with thirteen other stockholders in the Receiver Action, all of whom are absent here. N5HYG cited *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1243 (W.D. Wash. 2009), in support of its argument. *Rey*, however, is inapposite. There, it was the presence of additional and non-related plaintiffs in a *second* lawsuit based on *entirely different facts* that resulted in the Washington court's denial of claim preclusion. N5HYG offers no authority for the proposition that it can bring a second lawsuit based on the same facts as the first and escape the consequences of claim preclusion because its former co-plaintiffs are not present in the later lawsuit.

27. For these reasons, the Court finds that the parties and/or their privies are the same in this Action as they were in the Receiver Action, including all named co-defendants who, as current and/or former officers and/or directors, stand in privity with Hygea (even if they were not named in the Receiver Action, although most were).

28. N5HYG also asserted a number of defenses to claim preclusion that the Court addresses and rejects.

29. First, N5HYG argued that Hygea is estopped from asserting claim

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preclusion because N5HYG could not have brought its damages claims in the Receiver Action due to the parties' stock purchase agreement, which has a forum selection clause for Clark County, Nevada. N5HYG points out that under NRS 78.650, the Receivership Action had to proceed in Carson City, Nevada (where Hygea's Nevada registered agent sits). N5HYG says that Hygea is equitably estopped from arguing otherwise because it reaped the benefits of the stock purchase agreement by accepting its contract price.

30. The Court is not persuaded by this argument. Forum selection clauses are presumptively enforceable, but if they lead to an unreasonable result, *such as claim-splitting*, a court can 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). N5HYG did not even try to bring all its claims in one forum.

31. N5HYG also misapplies equitable estoppel. In *Teriano v. Nev. State Bank (In re Harrison Living Tr.)*, the Nevada Supreme Court explained that "[e]quitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." 121 Nev. 217, 223, 112 P.3d 1058, 1061–62 (2005). The Supreme Court then set forth four elements for equitable estoppel: "(1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped."

32. N5HYG provides no explanation about how the foregoing elements support its argument that Hygea should be equitably estopped from arguing that N5HYG should have brought its "damages" claims in the Receivership Action. Certainly N5HYG fails to show that it was "ignorant of the true state of facts" or "relied to [its] detriment" on Hygea's conduct when it was fully apprised of its own claims and was the party that moved the Receiver Action forward. *Cf. id.*

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33. N5HYG also argues that Hygea is judicially estopped from arguing claim preclusion because it took the position that the Receivership Action had nothing to do with the parties' stock purchase agreement; won a transfer of venue based on this argument; and so cannot say differently now. As an initial matter, the Court transferred venue of the Receiver Action to Carson City because of the mandatory venue provision found in NRS 78.650 and 78.630. Even if the stock purchase agreement affected the Court's decision to transfer venue, it is not clear how Hygea obtained an advantage from the venue change, and N5HYG identifies none. As the Nevada Supreme Court explained in *NOLM, Ltd. Liab. Co. v. Cty. of Clark*, "judicial estoppel should be applied only when a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage. Judicial estoppel does not preclude changes in position that are not intended to sabotage the judicial process." 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (bracket in original) (internal quotations omitted).

34. N5HYG also argued that it could not have brought its receivership claims while this Action was removed to federal court. N5HYG provides no support for this argument. Also, there is no case that says federal courts are prohibited from exercising diversity or supplemental jurisdiction over claims grounded in NRS 78.650 and 78.630, or cannot, at the very least, appoint equity receivers.

35. N5HYG next argued that Hygea acquiesced to claim splitting when Hygea argued that N5HYG should not be allowed to advance its contract and misrepresentation theories in the Receiver Action. The Court is not persuaded by this argument for several reasons.

36. First, there was nothing for Hygea to acquiesce to, because a party is always free to split its claims between a federal and state court. The rule that permits simultaneous litigation in state and federal court of overlapping, and even identical cases, is deeply rooted in the federalist system. As the U.S. Supreme Court wrote in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,

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"[t]he state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." 398 U.S. 281, 295 (1970). N5HYG, however, proceeded at the risk of claim preclusion.

37. Second, N5HYG misconstrues what constitutes "acquiescence" in the context of claim-splitting. As the comments to the Restatement indicate, "acquiescence" means a defendant's *failure to object* to the claim-splitting. Restatement (Second) of Judgments § 26 cmt. a (1982) ("The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim."). The Court's examination of the Receiver record reveals that Hygea repeatedly objected to N5HYG simultaneously proceeding on the same facts in two different fora. In fact, at pages 19 and 20 of its Opposition brief, N5HYG provided a list of statements Hygea made during the course of the Receiver Action that show Hygea objecting over-and-over to N5HYG bringing the Receiver Action in one forum while its contract and misrepresentation claims pended in this Action. In addition, Hygea pleaded claim-splitting as a defense in its Receiver Answer.

38. N5HYG also tried to direct this Court's attention to the fact that it did not seek damages in the Receiver Action and so would be prejudiced if it cannot do so here. But N5HYG's failure to ask for money—*because it chose to split its claims*—is not Hygea's fault. The relevant question for claim preclusion is whether N5HYG *could have* brought a cause of action for breach of contract or misrepresentation in the Receivership Action? It could have, but chose not to.

39. N5HYG's final defensive argument is that forcing stockholders who band together for purposes of standing to seek a receiver to bring all potential damages claims would lead to unwieldy litigation. This is not a cognizable defense, and N5HYG does not cite to any authority for the proposition that "unwieldy" litigation is a defense to claim preclusion. Also, what N5HYG proposes cuts directly against the doctrine of claim preclusion, which proposes that litigants must bring all

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claims that *arise from the same nucleus of operative facts* in the same action or face dismissal of the later action. Its argument is also in direct tension with Nevada's liberal joinder rules. *See* N.R.C.P. 18(a) & (b).

ORDER

Based on the foregoing findings of fact and conclusions of law, the Court hereby ORDERS as follows:

1. The Court's May 8, 2019, Findings of Fact, Conclusions of Law, and Order regarding claim preclusion is VACATED in its entirety.

2. Hygea's Motion for Reconsideration, Clarification, and alternatively, a Stay is GRANTED, in part, consistent with the foregoing findings of facts and conclusions of law, and DENIED, in part, as moot to the extent Hygea alternatively asked for a stay.

3. The Amended Complaint is DISMISSED WITH PREJUDICE on the basis of claim preclusion.

4. Any second amended complaint filed by N5HYG and/or Nevada 5, Inc., must, therefore, be based on a different nucleus of operative facts from that presented in the Amended Complaint.

Dated this 27 day of NOV., 2019.

Nancy L. Allf

HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE

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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; and ROES I-XXX, inclusive, Defendants.	CASE NO.: A-17-762664-B DEPT. NO.: 27 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO DISMISS** Date of Hearing: December 9, 2020 Time of Hearing: 10:30 a.m.

Plaintiffs N5HYG, LLC and Nevada 5, Inc. ("Plaintiffs"), by and through their undersigned counsel, hereby bring Plaintiffs' Opposition to Defendants[1]' Motion for Summary Judgment, or in the Alternative, Motion to Dismiss ("Opposition"). This Opposition is supported by the Declaration

[1] Defendants Moffly and Iglesias filed the instant Motion. Plaintiffs are not pursuing claims from the Complaint against Defendant Hygea Holdings Corp. in light of Hygea's bankruptcy.

of Ogonna M. Brown, Esq. ("Brown Decl."), local counsel for Plaintiffs, a true and correct copy of which is attached hereto as **Exhibit "A"**. This Opposition is further based upon the memorandum of points and authorities and the pleadings and papers on file herein, and any oral argument the Court wishes to entertain on the Motion for Summary Judgment, or in the Alternative, Motion to Dismiss ("Motion").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants' Motion is their **fourth** pre-Answer motion on a case filed **more than three years ago**. And the Motion is the very definition of seeking another bite at the apple—the majority of it is ***copied-and-pasted from Defendants' January 13, 2020 Motion for Summary Judgment on Order Shortening Time*** that this Court already denied.[2] Defendants' Motion is improper and untimely.

Aside from its procedural impropriety, Defendants' rehashed arguments from their prior motion fare no better this time. As the Second Amended Complaint ("SAC") expressly sets forth, the Court's December 3, 2019 Order granted Nevada 5 leave to plead a fraud claim; this forecloses Defendants' argument that Nevada 5 is barred from bringing such a claim. The Court also granted N5HYG leave to file the SAC, which means that at a minimum, N5HYG can bring claims which had not accrued during any period of preclusion. Yet, Defendants argue that *any* claim by N5HYG is barred by the Receivership Action, which would mean that the shareholder petitioners in that case effectively wagered their shares in seeking a receiver to save the failing company. Defendants' radical proposition is untenable.

Defendants also attempt to justify their recycled Motion by the fact that this Court denied the elder doppelgänger motion without prejudice after Hygea filed for bankruptcy. But prior to the bankruptcy, Iglesias and Moffly advanced—and the Court entertained via briefing and oral argument—the exact same arguments they repeat here. Defendants claim "the Motion is now ripe to be heard on the merits." (Motion at 8) But the Motion was ripe to be heard on the merits, and it *was*

[2] Plaintiffs provide for the Court's reference Brown Decl. **Exhibit "19**," a color-coded copy of Defendants' Motion. The yellow highlights show verbatim argument from Defendants' prior Motion for Summary Judgment on Order Shortening Time; the blue highlights show verbatim argument from Defendants' prior Reply in support of the prior motion; and the green highlights show where Defendants failed to change the description of the movants from the prior motion or reply (continuing to include "Hygea," the non-moving debtor entity).

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heard on the merits, *ten months ago*. The Court was fully capable of ruling on any of Plaintiffs' claims against Iglesias or Moffly regardless of *Hygea's* bankruptcy, and the Court declined to grant Defendants' motion. There is no reason to change course now. Further, the Court's denial of the prior motion without prejudice is unremarkable because summary judgment motions are typically filed *after discovery*. To the extent Defendants have any good-faith arguments that no genuine issue of material fact exists after the facts are actually explored, they would not be precluded from bringing a motion then. Accordingly, the Court should deny the Motion and order Defendants to finally file an Answer.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendants tricked Nevada 5 into paying them $30 million. And there is no question that they violated their contract with N5HYG. But they have managed to keep this case at the pleadings stage for over three years. It is time to put an end to their stalling and allow this case to go forward.

A. Defendants Defraud Nevada 5 and Breach Their Contract with N5HYG, Prompting the Present Case

Prior to its bankruptcy in 2020, Hygea Holdings Corp. ("Hygea") was a Nevada corporation purporting to acquire and manage medical practices. ¶2.[3] Defendant Manuel Iglesias ("Iglesias") is its founder and former CEO, and Defendant Edward Moffly ("Moffly") was the CFO. ¶¶3-6.

Plaintiff Nevada 5, Inc. ("Nevada 5") is a Nevada Corporation. ¶9. In 2016, its agents were approached about the possibility of an investment in Hygea. ¶28. Defendants made two interlocking sets of misrepresentations: Hygea's supposedly-robust financial performance, and the claim that, after Nevada 5's investment, Hygea would be listed on a public stock exchange. In fact, the financial performance was dismal, and Defendants knew that Hygea was in no shape for a public listing. ¶30.

The SAC details many of the misrepresentations at ¶36. It summarizes them at ¶37, rounded to the nearest $100,000:

> ● For 2014, between $3.7 and $4.5 million in EBITDA[4] based on revenue between $52.4 and $52.9 million. ¶37(a).

[3] As used throughout, "¶" refers to a paragraph in Plaintiffs' SAC.

[4] "EBITDA" means "earnings before interest, taxes, depreciation, and amortization." ¶ 36(a). It "is an accounting metric that gauges a company's overall financial performance and is particularly useful for determining how much cash a company generates before servicing its debts." SAC fn.1. "By excluding variables such as taxes and interest, which can vary by company, it can be a useful

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- For 2015, between $20 and $28 million in EBITDA based on revenue between $185 and $246 million. ¶37(b).

- For 2016, EBITDA between $46.5 and $65 million, with additional specifications that it was "at least: $56.9 million; that $54 million was the "low" amount; and that $57.5 million was "expected." ¶37(c).

Relying on the misrepresentations, Nevada 5 wired $30 million to Hygea. ¶39.[5]

Nevada 5 also formed a Michigan entity called N5HYG, LLC ("N5HYG"). ¶¶10, 40. N5HYG executed a Stock Purchase Agreement (the "SPA") with Hygea, Iglesias, and Moffly, under which N5HYG became a stockholder owning an 8.57 percent interest in Hygea. ¶¶40-41. Section 6.3 of the SPA requires Defendants to make "Post-Closing Monthly Payments" to N5HYG in the amount of $175,000 (plus applicable interest) on the first day of each calendar month, beginning January 1, 2017 and continuing until Hygea either "went public" through the issuance of shares on a public stock exchange or N5HYG was no longer a shareholder. ¶56. *Defendants Iglesias and Moffly personally guaranteed these payments.* ¶55. And "Article VII, Section 1 of Hygea's bylaws provides N5HYG an opportunity to inspect Hygea's stock ledger, a list of its stockholders, and its other books and records upon written demand." ¶155.

After Nevada 5 wired the $30 million, it began to discover that things were not as Defendants claimed. Defendants "purport[ed] to disclose a 'corrected' EBITDA figure for 2016, which was far less than that Defendants previously claimed." *Id.* Even this "corrected" figure was untrue: "one outside consultant, having reviewed Hygea's financials, reported … that Defendants were still misrepresenting Hygea's true financial picture," and the corporation's "actual revenue was closer to $90 million than the $300 million figure that Defendants' $50-$60 million EBITDA representations were based upon." *Id.* "Therefore, it would be virtually impossible for its EBITDA to reach $50 or $60 million in EBITDA." *Id.* The outside consultant raised similar questions about inflated revenue for 2014 and 2015. ¶51. Thus, the independent outside consultant exposed Defendants' financial representations to be untrue (all figures in millions):

metric of a business's 'all else being equal' performance and is therefore frequently emphasized in business valuation." *Id.*

[5] Defendants' Motion ignores the fact that Nevada 5 paid the money to Hygea.

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	Defendants' Representations		Est. Actual	Difference
	Revenue	*EBITDA*	*Revenue*	*Rev. over-statement*
2014[6]	$52.4-52.9	$3.7-4.5	$17-32	$35.4-20.9
2015[7]	$185-246	$20-28	$73-92	$112-154
2016[8]	$300	$46-65	$90	$210

Defendants knew at the time of their representations that they were false. For example, they knew that the EBITDA figures they represented to Nevada 5 were based upon an assumed additional $130 million influx that had not materialized, and never did materialize. ¶53.

Moreover, "beginning in or around August 1, 2017, Defendants ceased making the mandatory Post-Closing Monthly Payments to N5HYG." ¶58. And when N5HYG made written demands for books and records on April 17, 2018 and February 19, 2019, Defendants denied them access. ¶¶156-158.

On October 5, 2017, Plaintiffs were compelled to file the above-captioned action. Defendants immediately began to impede the proceedings, first by improperly removing the case to Federal Court under shifting and specious theories, the second of which (removal due to "artful pleading") the United States Supreme Court had expressly rejected in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568-69 (2016). While the Federal Court considered Plaintiffs' motion for remand, the case essentially lay dormant for months.

B. Fourteen Hygea Shareholders Seek a Receiver to Save the Failing Company

In the meantime, Hygea's condition worsened, and N5HYG joined thirteen other Hygea shareholders[9] to seek a receivership primarily under the specialized statutory procedure of NRS 78.650 (the "Receivership Action"). That case was narrowly tailored and did not address the issues in this case except in the most general way. In fact, Defendants consistently insisted that the cases were separate and asked the Receivership Court to respect the distinction between them. And Nevada 5 was *not* a party to the Receivership Action. Indeed, it could not have been, since it did not own any

[6] Sources: Defendants' Representations, ¶37(a); Est. Actual, ¶51.
[7] Sources: Defendants' Representations, ¶37(b); Est. Actual, ¶51.
[8] Sources: Defendants' Representations, ¶50 (revenue basis for EBITDA claim) and ¶37(c) (EBITDA); Est. Actual, ¶50.
[9] Defendants' Motion ignores the fact that N5HYG was one of fourteen petitioners in the Receivership Action, and misleadingly claims that "N5HYG filed another state court action" without mentioning the other petitioners. (Motion at 4)

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Hygea shares at all. At bottom, the only matter at issue was whether Hygea's management and financial position in May 2018 warranted the appointment of a receiver—*not* whether Nevada 5 had been defrauded out of $30 million in October 2016, and *not* whether Defendants were liable for committing breaches (especially post-Receiver Action breaches) of N5HYG's rights under the SPA.

On Defendants' motion, this Court transferred the Receivership Action to Carson City. That Court found—as the Defendants argued all along—that it lacked jurisdiction. The Court ruled there was insufficient evidence that the petitioners combined held more than ten percent of Hygea's stock, as the statute requires to confer jurisdiction. It nonetheless observed, in dicta, that while the Court lacked good cause to appoint a receiver in light of recent executive changes, the company had suffered mismanagement and its executives had misstated its financials. (*See* excerpts of Amended Findings of Fact and Conclusions of Law at Brown Decl. **Exhibit "1,"** 5:22-23, 19:14-24).

C. This Case Resumes After Remand; the Parties Litigate Defendants' Motion to Dismiss the First Amended Complaint

In June 2018, the Federal Court remanded this case and awarded Plaintiffs attorneys' fees for the improper removal, but not before Defendants had wrongfully delayed the case for about six months. On July 13, 2018, Plaintiffs filed a First Amended Complaint ("FAC"). Beginning on August 17, 2018, Defendants filed nearly 100 pages of briefing asking to dismiss the case. (Mot. to Dismiss the First Am. Compl. and to Strike Supp'l Pleadings and Jury Demand; Reply) They argued, among other things, that Plaintiffs were precluded from bringing their damages claims because, as pled, they concerned the same "nucleus of operative facts" as the Receivership Action. They also argued that Nevada 5 lacked standing to bring any fraud claims.

On October 3, 2018, this Court heard argument on the motion to dismiss. On December 14, 2018, the Court issued a minute order granting the motion in part and denying it in part. The minute order did not expressly address the claim preclusion issue, but it allowed certain claims to proceed. The Court also granted Defendants' motion with respect to Nevada 5, and dismissed it with prejudice.

On June 3, 2019, Defendants filed a "Motion for Reconsideration and Clarification of Order on Defendant's Motion to Dismiss Based on Claim Preclusion and, Alternatively, Motion to Stay." They claimed that the Court had failed to address their claim preclusion argument. On June 3, 2019, Plaintiffs filed a "Motion for Reconsideration Regarding the Dismissal of Nevada 5, Inc." Nevada 5

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argued that it had standing, could plead all the elements of its fraud claims for itself, and was not seeking to assert them on behalf of its subsidiary, N5HYG.

On July 17, 2019, the Court heard argument on these two motions and indicated that it was granting both. In doing so, the Court expressly granted Plaintiffs leave to file a Second Amended Complaint, and the Court made clear on the record that it anticipated an amended complaint pertaining to the fraud at issue here: "…it does seem that the [Nevada 5] dismissal should be without prejudice, but you have to be more specific if you replead. **You 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." (*See* Brown Decl. **Exhibit "2"**; *see also* ¶13)(emphasis added). Thus, the Court's instructions contemplated that Nevada 5 could establish standing and that its fraud claims, as a matter of course, were not precluded.

On December 3, 2019, the Court entered an Order Granting Defendants' Motion for Reconsideration Re: Claim Preclusion (the "Claim Preclusion Order"). The Claim Preclusion Order dismissed Plaintiffs' First Amended Complaint ("FAC") based on Defendants' argument that N5HYG's participation in the Receivership Action precluded the claims made therein, but permitted an amended pleading. The Court also entered an Order Granting Plaintiffs' Motion for Reconsideration Re: Nevada 5, Inc. (the "Nevada 5 Order") on the same day as the Claim Preclusion Order, which expressly permitted Nevada 5 to replead its claims. Plaintiffs did so, filing the operative SAC on December 13, 2019.

D. Defendants Twice Move to Dismiss the Operative Second Amended Complaint

Plaintiffs' SAC is entirely consistent with the Court's Orders. The Claim Preclusion Order found that the FAC failed to state Nevada 5's fraud claim; that N5HYG's claims, as stated, were precluded; and that both Plaintiffs may replead. Meanwhile, the Nevada 5 Order expressly permitted Nevada 5 to plead its claims, and the Court's instructions on the record explicitly contemplated a repleading of Nevada 5's fraud claim. Accordingly, the SAC removes *any* fraud claim by N5HYG. Instead, it includes fraud claims *only* by Nevada 5, which was *not* a party to the Receivership Action, and which the Court *expressly authorized* to bring a fraud claim. And the SAC states a strong *prima*

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facie case. As detailed above, Defendants knowingly and massively overstated Hygea's performance to Nevada 5, which relied on the misrepresentations and wired $30 million to Hygea.

The SAC also includes claims by N5HYG which are unaffected by the Claim Preclusion Order: breach of contract, and a shareholder claim for books and records. Defendants do not dispute that they stopped making the payments to N5HYG required by the SPA, or that they refused to provide N5HYG access to its books and records. Indeed, many of the missed payments, and one of the books-and-records requests, took place *after* the Receivership Action.[10]

Nevertheless, Defendants filed a third pre-Answer dispositive motion, again taking advantage of Plaintiffs. This time, their former counsel secured an extension to file a motion to dismiss until January 17, 2020, which by stipulated order extended Plaintiffs' deadline to file their opposition until March 2, 2020.[11] But Defendants then filed a Motion for Summary Judgment *on Order Shortening Time*. They did not serve the motion or the Order Shortening Time ("OST"), instead allowing them to be served through the e-filing system on January 13, 2020, leaving Plaintiffs only *two days to respond to the dispositive motion*. Plaintiffs sought an extension to the 14 days the Nevada Rules provide, but Defendants would only agree to a six-day extension. Under duress, Plaintiffs were compelled to accept it. Defendants also filed a Reply in support of that motion.

On January 30, 2020, this Court held oral argument on Defendants' motion. On February 26, 2020, having heard and entertained all of Defendants' extensively briefed arguments, the Court indicated in a telephonic status check conference that it would **deny that motion** without prejudice. It entered the corresponding Order Denying Defendants' Motion for Summary Judgment Without Prejudice on April 15, 2020. The Court then stayed further proceedings as Hygea—*but not Iglesias or Moffly*—filed for bankruptcy on February 19, 2020, subjecting claims against the company to the automatic stay. Following disposition of the bankruptcy proceedings, the Court lifted the stay of this

[10] However, N5HYG's claim to obtain the books and records of the bankrupt debtor entity, Hygea (Count Eleven), appears likely affected by the bankruptcy of Hygea. Without waiving any of its rights, and with the express reservation of its right and ability to seek discovery of Hygea's corporate records to the extent they may be relevant to its remaining claims against Defendants, N5HYG would agree that its books and records claim is effectively moot.

[11] *See* Stip. and Ord. for Extension of Time for Defs to Respond to Pls' Second Am. Compl. ("Stipulation"), Brown Decl. **Exhibit "3"** at 2.

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case at the telephonic status check on September 10, 2020, and sought to convene the parties for a Rule 16 Conference to move this years-old case forward. At the October 1, 2020 Rule 16 Conference, the Court could not have been more clear:

> THE COURT: I'm going to set this out 30 days; **it will be the last time the Rule 16 will be rescheduled**. If you don't have counsel, then I'll assume you're going to represent yourselves, and **if there's not an answer on file the Plaintiff will be allowed to [go] forward**. … Mr. Moffly and Mr. Iglesias, I myself loud and clear that this is really your [last] continuance…
>
> **[Y]ou have to cooperate with Ms. Brown with regard to formulating a discovery plan, and participate [in] discovery**. And at our next hearing, I will set a discovery cutoff, which will trigger trial setting.
>
> Any Questions?
>
> EDWARD MOFFLY: Thank you, Your Honor. **That makes sense.**
>
> MANUEL IGLESIAS: Thank you, Your Honor. **You've been very generous.**
> …
>
> MS. BROWN: --please confirm for the record, what is the date for the answer to the [second] amended complaint that is due that Mr. Moffly and Mr. Iglesias are aware without any confusion when the answer deadline is due.
>
> THE COURT: **If when we come back on November 5th, no answer has been filed, the Plaintiff will be allowed to move the case forward in the way it chooses**. (10/1/2020 Hrg. Trans., Brown Decl. **Exhibit "4"** at 7) (emphasis added).

With that unmistakable direction, in the four weeks that followed, Plaintiffs **repeatedly** attempted to engage Defendants (first directly, and then with their new counsel) in discussions regarding scheduling and discovery in advance of the November 5th Rule 16 conference. Defendants refused at every turn, either ignoring Plaintiffs' overtures or refusing to participate on at least *four separate occasions* between October 5 and November 4, 2020. (*See* Brown Decl. **Exhibits "5—11,"** email correspondence, including attached draft Rule 16 Disclosures and Notices of Early Case Conference).

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Instead of filing the Answer the Court ordered, Defendants **copied-and-pasted** from their January 13, 2020 motion, and the reply in support—the same arguments they extensively briefed and orally argued to the Court ten months ago.[12] The Court declined to grant Defendants' motion then, and Defendants have established no reason for a different outcome now.

III. LEGAL ARGUMENT

A. Standards Of Review

"Summary judgment is appropriate only when a review of the record in a light most favorable to the nonmoving party reveals no genuine issues of material fact and judgment is warranted as a matter of law." *Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 518, 893 P.2d 367, 369 (1995) (citing *Butler v. Bogdanovich,* 101 Nev. 449, 451, 705 P.2d 662, 663 (1985)). "In determining whether summary judgment is proper, the nonmoving party is entitled to have the evidence and all inferences reasonably drawn therefrom accepted as true." *Price*, 111 Nev. at 518, 893 P.2d at 369 (citing *Wiltsie v. Baby Grand Corp.,* 105 Nev. 291, 292, 774 P.2d 432, 433 (1989)). "Accordingly, a district court may not grant summary judgment if a reasonable jury could return a verdict in favor of the non-moving party." *Price*, 111 Nev. at 518, 893 P.2d at 369. The inquiry is factual: "A district court shall grant summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Schneider v. Cont'l Assur. Co.*, 110 Nev. 1270, 1272, 885 P.2d 572, 573 (1994) (citing NRCP 56(c)). *See also Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005).

For a motion to dismiss under Nev.R.Civ.P. 12(b)(5), the Court must construe all inferences in favor of the non-moving plaintiff and accept all factual allegations in the complaint as true. *Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). A plaintiff's complaint may be "dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Id*.

[12] Indeed, Moffly and Iglesias—the only present moving Defendants—did not even bother to modify some parts of the prior motion that refer to the movant as "Hygea" (*see, e.g.,* Brown Decl. "**Ex. 19"** at 12, 13), or that refer to "Defendants' opening brief" (recycled from the prior Reply) (*see id.* at 17).

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B. Defendants' Motion Is Procedurally Improper And They Must Answer The SAC

Plaintiffs filed the SAC on December 13, 2019. Under NRCP 15(a)(3), Defendants were required to respond within fourteen days, which fell on December 27, 2019. Although Defendants sought an extension, they let the December 27 deadline pass without any follow-up with Plaintiffs or, to Plaintiffs' knowledge, the Court. Then, on January 13, 2020, instead of filing a motion to dismiss, they filed a motion for summary judgment on OST, undoubtedly to get out of the stipulated order that set the briefing schedule they had agreed to for the putative motion to dismiss. Nevertheless, the Court heard their motion on January 30, 2020 and ultimately denied it. Although Iglesias and Moffly now assert the denial was based solely on the bankruptcy of Hygea and the related stay, *at no time did they ask the Court to reconsider its ruling given their status as non-debtors*. Instead, they accepted the ruling, and then delayed in getting counsel after this Court lifted its stay and attempted to hold a Rule 16 Conference. Indeed, Iglesias and Moffly did not even appear at the status check on September 10, 2020.

When Defendants finally did appear on the October 1 adjourned Rule 16 Conference, they had not hired new counsel. However, the Court expressly ordered them to file an **Answer** to the SAC by November 5, 2020, and to cooperate with Plaintiffs' counsel for scheduling and discovery in the interim. But Defendants refused to participate in any informal discovery and scheduling conference, and instead filed the present Motion. Even to the extent the Court permitted Defendants to file another dispositive motion rather than an Answer, the Court undoubtedly did not envision a copying-and-pasting of the arguments it already considered.

Defendants had their opportunity to assert defenses by way of a pre-answer motion under NRCP 12(b) and they have both failed to do so timely, and failed to meet their burden of showing that the SAC fails on its face. They have also failed to show that there is no genuine issue of material fact that would warrant summary judgment—least of all before discovery has even begun. And while Defendants make much of the Court's denial of their prior motion without prejudice, *of course* the Court denied it without prejudice—rare indeed would be the case in which a court deprives a party of an opportunity to file a *post-discovery summary judgment motion*.

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Moreover, nothing in Rule 12 permits Defendants to file successive pre-answer motions. The purpose of these rules is to provide a defendant with a single opportunity to file a dispositive motion before answering, followed by an answer instead of a succession of pre-answer motions. *See, e.g., U.S. Fid. & Guar. Co. v. Jepsen*, No. 90 C 6931, 1991 WL 249706, at *2 (N.D. Ill. Nov. 14, 1991) ("The purpose of [the analogous federal] Rule 12(b)(6) is to prevent litigants from interposing defenses in a piecemeal fashion for purposes of delay," citing *Eddy v. John Alden Life Ins. Co*., No. 90–C 1736, 1991 WL 78182 at p. 1 (N.D.Ill. April 18, 1991); *Chilicky v. Schweiker*, 796 F.2d 1131, 1135 (9th Cir. 1986), rev'd on other grds, 487 U.S. 412 (1988); and *Myers v. American Dental Association,* 695 F.2d 716, 720–721 (3rd Cir. 1982), *cert. denied,* 462 U.S. 1106 (1983)). Defendants must therefore respond to the SAC and proceed to litigating the merits. NEV.R.CIV.P. 12(a), 15(a)(3).

C. <u>Nevada 5 Is Not Barred From Bringing Its Fraud Claims</u>

1. The Court Expressly Permitted Nevada 5 to Bring Such Claims

To the extent the Court entertains Defendants' improper Motion, their arguments also fail again on the merits. As discussed above, the Court expressly permitted Nevada 5 to replead its claims in the SAC. Mindful of the procedural history and the Court's directive, the SAC describes the chronology and discusses the Nevada 5 Order and the Claim Preclusion Order in detail. ¶13. Thus, as the SAC explains, "Plaintiffs bring this Second Amended Complaint consistent with the Court's December 3, 2019 Orders and the above-described instructions underlying those Orders." ¶14. "[S]pecifically," the two Plaintiffs "clarify and differentiate their respective interests, their relationship to themselves and to Defendants, and the harm done to Plaintiffs respectively." *Id.* They "also bring forth facts not previously alleged," and "Nevada 5 sets forth … more detailed allegations regarding its re-pled fraud claims." *Id.* Defendants ignore all of this in their analysis.

As the SAC further explains, "Nevada 5 is not a party to the SPA and has never been a shareholder in Hygea." ¶18. In addition, "Nevada 5 was not a party to the Receivership Action," ¶19, and, indeed, "[a]s a non-shareholder in Hygea, Nevada 5 lacked standing to join the Receivership Action." ¶20. Moreover, "[t]he subject matter of the Receivership Action was also not within the interests of Nevada 5, and Nevada 5's interests were not represented in the Receivership Action." ¶21. "The Receivership Action was an effort by shareholders whose interests were to address

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Hygea's financial peril in 2018 and stabilize the company through a court-appointed receiver." *Id.* In contrast, "Nevada 5's interests are, and have been, to obtain a more than $30 million judgment against Hygea and its management for fraudulent conduct in 2016; this claim was never asserted in the Receivership Action and was outside the scope of the Receivership Action." *Id.*

As the SAC continues, "[t]he determinative facts and timeframe in the Receivership Action (the state of financial and managerial affairs at Hygea in May 2018) are different from those determinative of Nevada 5's claims in this case (representations made to Nevada 5 in 2016)." ¶22. "Defendants repeatedly asserted in the Receivership Action their belief and expectation that the Receivership Action was a distinct case, unrelated in time and subject matter to this case, and to be litigated separately." ¶23. Moreover, "[f]rom October 5, 2017 through the present—before, during, and after the Receivership Action—Nevada 5 has been pursuing its interests and claims in this case." ¶24.

In the end, "Nevada 5's claims … are based upon Defendants' conduct which fraudulently induced Nevada 5 into paying Hygea $30 million on or about October 5, 2016." ¶25. "Nevada 5 brings its claims on behalf of itself, independently of N5HYG's claims," which "are based primarily upon Defendants' repeated breaches of the SPA occurring on and after August 1, 2017, and include breaches occurring after conclusion of the Receivership Action." ¶¶25-26. The two Plaintiffs' respective claims "are based upon conduct distinct from" that alleged by the other Plaintiff. ¶26.

Defendants disregard all of this, pretending that Plaintiffs have ignored the Court's orders, and that the SAC is a restatement of the FAC. Defendants are wrong. N5HYG has not included any of its claims except for its breach of contract and books-and-records claims, which are discussed below and both of which partly involve *post-Receivership Action events*.[13] Meanwhile, Nevada 5 brings a fraud claim that distinguishes Nevada 5's position and the harm it suffered from that of N5HYG—*just as the Court instructed*. Given that the Nevada 5 Order explicitly permitted Nevada 5 to bring its claims, and given that the Court explicitly discussed Nevada 5's pleading of a "fraud" claim, Defendants' recycled assertion that Plaintiffs' SAC is "in direct violation of [the Court's] holding and an impermissible attempt to seek reconsideration of the Court's Claim Preclusion Order"

[13] This was and is without waiver of any appellate rights N5HYG has with respect to its previously-dismissed claims.

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(Motion at 13) is as unfounded as it was the first time. If anything, it is Defendants who are asking the Court to reconsider its earlier conclusions.

2. Nevada 5 Was Not a Party to the Receivership Action and its Claims are not Precluded through Privity

Again, Nevada 5 was not a petitioner in the Receivership Action. Indeed, *it could not have been a petitioner under the statutory receivership scheme, because it was not a shareholder*. Defendants echo their oft-repeated assertion that Nevada 5's claims are barred because it is "in privity" with N5HYG. (Motion at 14; Defs' 8/21/18 Mot. to Dismiss at 13) But the Court has already rejected this argument, not only by denying Defendants' prior mirror-image motion, but also by permitting Nevada 5 to replead its claims in the first place through the Nevada 5 Order.

Further, Defendants' reliance on *Mendenhall v. Tassinari*, 403 P.3d 364, 369 (Nev. 2017) is misplaced. *Mendenhall* does not stand for the proposition that a parent-subsidiary relationship equals privity for claim preclusion purposes.[14] There, privity existed because both entities signed the contract at issue. Here, only N5HYG signed the SPA, was a shareholder, and was a petitioner in the Receiver Action—not Nevada 5. Notably, *Mendenhall* references *Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 915-16 (Nev. 2014), which applied the Restatement (Second) of Judgments § 24 cmt. a (1982) ("[I]f more than one party has a right to relief arising out of a single transaction, **each such party has a separate claim for purposes of merger and bar.**") (emphasis added). *Alcantara* also involved a statute that afforded parties separate rights which could be asserted in separate actions without a claim preclusion bar. Similarly, the Receivership Action statute (NRS 78.650) required the petitioners to be **shareholders, which Nevada 5 was not.** Thus, **the statute inherently provides**

[14] The other cases Defendants cite are similarly inapposite. In *Nev. Contractors Ins. Co. v. Risk Servs.-Nevada, Inc.*, 132 Nev. 1011 (2016), claim preclusion applied because the cases were "coordinated," the precluded party participated in the earlier case, and it pursued the same claim in the later case as in the evidentiary hearing in which it participated in the earlier case. None of those factors are present here. The Receivership Action and the present case were in different courts, involved different parties, different claims, and different interests. In *FQ Men's Club, Inc. v. City of Reno*, 441 P.3d 1090 (Nev. 2019), the plaintiff company's action was precluded by a prior action filed by the company's controlling owner. Here, the parent, Nevada 5, was *not* a party to the earlier action. Further, Defendants selectively quote the footnote in *Weddell v. Sharp*, 131 Nev. 233, 240 n.2, 350 P.3d 80, 84 (2015). That Court actually indicated that the consideration of a "close and significant" relationship "simply reverts back to a consideration of whether privity exists between the new defendant and the previous defendant" and that showing such a "close and significant" relationship "**may be sufficient in some cases**" to find privity and apply claim preclusion. *Id*. (emphasis added).

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for non-shareholders to pursue their claims elsewhere, which Nevada 5 was already doing in this case. Defendants' argument thus fails because "claim preclusion [can] not be used to contravene the Legislature's policy decision." *S. Cal. Edison v. First Judicial Dist. Court*, 127 Nev. 276, 286 n.5, 255 P.3d 231, 237 (2011).

Moreover, as is discussed below and described in the SAC, Nevada 5 and N5HYG's respective claims and motivations are markedly different. There was no privity for purposes of claim preclusion and Nevada 5 is not bound by the Receivership Action.

3. Nevada 5's Claims Are Based on a Different Nucleus of Operative Facts Than were at Issue in the Receivership Action

As Plaintiffs have previously demonstrated, Nevada 5's claims fall outside the Receivership Action's core nucleus of operative facts. Again, as described in the SAC at ¶22, and highlighted in the prior briefing, the Receivership Action pertained to Hygea's *mismanagement and financial peril in 2018*, whereas Nevada 5's claim here is that it was defrauded into *paying $30 million in 2016*. These are not the same "underlying factual events," nor identical claims that merely "involve different legal theories." (Claim Preclusion Order at ¶¶19-21). Indeed, Defendants admit in their Motion that "…the Receiver Court agreed with defense counsel that the relevant timeframe for whether the receivership remedy is appropriate is at the time of trial." (Motion at 17).

To further establish the distinction between the Receivership Action and Nevada 5's claims, *the SAC specifically addresses the elements set forth in the Claim Prelusion Order at ¶20*: "[t]o ascertain whether two actions spring from the same 'transaction' or 'claim,' we look to whether the underlying facts are 'related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations…'" (citing Restatement (Second) of Judgments Sec. 24 and *Waldman v. Vill. Of Kiryas Joel*, 207 F.3d 105, 108 (2d Cir. 2000)). Just as they did in their prior briefing, Defendants ignore that the SAC differentiates the time, space, and origin of the Receivership Action from those of Nevada 5's claims at ¶22:

> The determinative facts and timeframe in the Receivership Action (the state of financial and managerial affairs at Hygea in May 2018) are different from those determinative of Nevada 5's claims in this case (representations made to Nevada 5 in 2016).

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Paragraph 21 differentiates the motivation of Nevada 5 from the Receivership Action petitioners:

> The subject matter of the Receivership Action was also not within the interests of Nevada 5, and Nevada 5's interests were not represented in the Receivership Action. The Receivership Action was an effort by shareholders whose interests were to address Hygea's financial peril in 2018 and stabilize the company through a court-appointed receiver. Nevada 5's interests are, and have been, to obtain a more than $30 million judgment against Hygea and its management for fraudulent conduct in 2016; this claim was never asserted in the Receivership Action and was outside the scope of the Receivership Action.

And the SAC describes how the parties believed and expected the Receivership Action to be treated and tried separately at ¶23:

> Defendants repeatedly asserted in the Receivership Action their belief and expectation that the Receivership Action was a distinct case, unrelated in time and subject matter to this case, and to be litigated separately.

In short, nothing about non-party Nevada 5's particular Hygea-related loss could have fallen within the Receivership Action's core nucleus.

Even to the extent this Court has found that the Receivership Action had *some* preclusive effect, it has not defined the scope of that effect. And to the extent the Court considers the issue, it should narrow the scope of any preclusive effect. For all the reasons Plaintiffs have previously argued, they respectfully maintain that the Court should not have found that the Receivership Action barred any claims.

Indeed, Plaintiffs have repeatedly argued that claim preclusion does not apply to a prior action which is disposed of on grounds of subject matter jurisdiction, as the Receivership Action was. (*See, e.g.,* Plaintiff's Brief in Opposition to Defendants' Order re Defendants' Motion for Reconsideration at 8-9, citing, *inter alia*, *Searchlight Dev., Inc. v. Martello*, 84 Nev. 102 (1968)) Over Plaintiffs' objection, the Claim Preclusion Order adopted Defendants' faulty assertion that "[t]he Receiver Court, however, did not rely on *Searchlight* for the proposition that it lacked subject matter jurisdiction…" (Clm. Prec. Ord, ¶14) and "[n]otably, had the Receiver court found that it lacked subject matter jurisdiction to hear and determine N5HYG's claims, it would have had to dismiss—not deny—the claims under Rule 12(h), which demands that '[i]f the court determines at any time that it lacks subject matter jurisdiction, the court *must dismiss the action*.'" (Clm. Prec. Ord,

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¶16). But as the Nevada Supreme Court has since recently made clear in considering an appeal relating to the Receivership Action, **that is exactly what happened:**

> [T]he district court determined that appellants' calculation did not prove their ten-percent ownership… Accordingly, **the district court *dismissed* appellants' receivership petition**…
>
> …NRS 78.650's ten-percent ownership requirement is ***jurisdictional*** [citing *Searchlight*], and **s*ubject matter jurisdiction* cannot be conferred by estoppel**. …
>
> Even if we accepted that appellants somehow waived the issue, we would consider the **jurisdictional** question sua sponte. *Arellano v. Iglesias*, 468 P.3d 375, 2020 Nev. Unpub. LEXIS 761 *1, *5 (Nev. 2020) (emphasis added).

Respectfully, claim preclusion is not properly applied in this case—least of all as a total bar to Nevada 5 or N5HYG's claims. For these and other reasons Plaintiffs have articulated previously, the Court should, at a minimum, narrow the application of any such preclusion.

For example, "claim preclusion will not be applied when the party seeking its benefit has actively encouraged the actions of the party against whom it would be invoked." *S. Cal. Edison*, 127 Nev. 276, 286 n.5 (2011) (citing *Campbell v. State, Dep't of Taxation*, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992)). Yet as Plaintiffs have previously noted, Defendants argued at the Receivership Action that the cases should be treated as distinct, arguing time and again that the claims in this case are distinct and must only be litigated (and were being litigated) in this separate action:

- This action does not arise in connection with a stock purchase agreement. There has been no breach of contract or fraud based on the agreement. There have been no claims brought based on the agreement. *See* Feb 21, 2018 Hearing Tr. at 19:25-20:3 (emphasis added), **Exhibit "12"** to Brown Decl.[15]

- I do know I have in my notes here that he talked about breach of the -- the SPA. Well, they have a litigation against Hygea for that. It's pending before Judge Mahan. *There's not a claim for breach of the SPA here*. And in any event a breach -- a breach of contract isn't even a basis for a receivership. (*See* Brown Decl. **Ex. "12"** at 48:45-8 (emphasis added)).

- If Plaintiff N5HYG believes it has a contractual right to an audit, *then it should seek to enforce that purported right in its breach of contract claim [then] pending in federal court.* (*See* Defs' Trial Stmt. at 19:4-6, **Exhibit "13"** to Brown Decl).

- Your Honor, what we will see and what we will see as a repeating theme throughout this lawsuit is that if plaintiffs had an issue about the issued and

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

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outstanding stock, they have a remedy at law. *They can bring a breach of contract action.* If they, feel that Hygea has violated that antidilution provision, which as plaintiff's counsel just stated, it merely provides a preemptive right, *then they can bring a lawsuit for breach of contract against Hygea. but a receivership action is not the forum to enforce their contractual rights.* (*See* May 14, 2018 Trial Tr. at 42:12-22 (emphasis added), **Exhibit "14"** to Brown Decl).

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

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

- I am, Your Honor. I have one point of clarification about a comment, Your Honor, just made about the Court having to determine whether or not there's been a breach of contract.
  THE COURT: I should have just said all legal issues, not -- I understand there's not a breach of contract claim.
  Understood, Your Honor, because that claim is pending in another litigation, does the Court anticipate it will be making a determination on breach of contract?
  THE COURT: No.

  Okay. Understood, Your Honor.
  (*See* Brown Decl., **Ex. "14"** at 108-109).

- We have heard complaints from plaintiff about the audits, a lot about the audits, which is reflected in a Stock Purchase Agreement between N5HYG and Hygea.· But, again, *that is a breach of contract claim, not a basis for the appointment of a receivership*. (*See* May 16, 2018 Trial Tr. at 598:14-19, **Exhibit "15"** to Brown Decl.).

- Even if Hygea has violated the antidilution provision, which we do not admit that we have done *because that is a claim based in contract, and there is a breach of contract action that N5HYG has brought against us in another Court,* it doesn't matter because NRS 78.650 provides very – I'm going to read here, "Unambiguously provides any holder or holders of·one-tenth of the issued and outstanding stock may apply to the district court for an order dissolving the corporation and appointing a receiver to wind up its affairs." (*See* May 17, 2018 Trial Tr. at 885:14-24 (emphasis added), **Exhibit "16"** to Brown Decl.).

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- Indeed, the vast majority of plaintiffs' complaints stem from the Stock Purchase Agreement between the lead plaintiff, N5HYG, and the company. Plaintiffs -- we have heard much testimony about the 2014 and 2015 audited financial statements. *If plaintiffs believe they have a right to these audits under their Stock Purchase Agreement, plaintiffs can seek to enforce that right through their breach of contract claim in federal court.* (*See* May 18, 2018 Trial Tr. at 914:6-14, **Exhibit "17"** to the Brown Decl.).

- Plaintiffs complain that Mr. Iglesias made misrepresentations in the form of projections about the company's financials in the time leading up to N5HYG's·stock purchase. But, again, *plaintiff N5HYG can then seek damages for such misrepresentations through its securities claim [then] in federal court.* Plaintiffs have a legal remedy for each and every one of their complaints. (*See* Brown Decl., **Ex. "17"** at 914:23-915:6 (emphasis added)).[16]

This is not offered to show that "Defendants acquiesced to claim-splitting," as they say Plaintiffs are arguing. (*See* Motion at 16) Indeed, as a non-party to the Receivership Action, Nevada 5 had no claim to split. Rather, it merely demonstrates that *the two cases are simply different*, and that Defendants and the Receivership Action Court recognized them as such. Defendants should not benefit from an about-face now. If claim preclusion is to be applied, it should be applied narrowly.

A further basis to apply any claim preclusion only narrowly is that "the general rule of claim preclusion does not apply if the court in the first action expressly reserves the right to maintain a second action" or defense, and "[t]he same rule should hold for issue preclusion." *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 894-95, 266 P.3d 602, 607-08 (2011) (quoting 18 Federal Practice and Procedure, § 4413, at 314 and § 4424.1, at 642, and citing Rest. (Second) of Judgments § 26(1)(b)) and *Central States, SE and SW Areas Pen. v. Hunt Truck*, 296 F.3d 624, 629 (7th Cir. 2002)).

Again, the Receivership Court and Defendants agreed that the state of affairs at Hygea in May 2018 entailed the "nucleus of operative facts" for that case. Defendants seek to minimize that now. But Defendants' counsel specifically stated "Your Honor, I believe that [today] is the relevant time period for this Court to consider." (*See* Brown Decl. **Ex. "15"**, p. 598) "…[T]he allegations of representations made in the time period leading up to when N5HYG became a shareholder in this lawsuit, which we do not believe is relevant here, and which essentially are the allegations in the securities lawsuit…" (*See* Brown Decl. **Ex. "18,"** p. 287) … The Court saw things the same way:

[16] Defendants objected to the introduction of *any* evidence bearing any relation to damages theories. (*See, e.g.,* Brown Decl., **Ex. "14"** at 87:17 ("This is not a breach of contract action")).

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"[THE COURT] I mean, it strikes me as correct that it doesn't really matter what went on before. What we're looking at is what's going on now. MS. GALL: Right." (*Id.* at 288:6-9) And this "court may consult the record and proceedings giving rise to another court's order," including its oral statements. *Holt*, 127 Nev. at 894-895 (citing *First Union Nat. Bank v. Pictet Overseas Trust*, 477 F.3d 616, 620 (8th Cir. 2007); *Kirsch v. Traber*, 414 P.3d 818, 822 n.3 (Nev. 2018) (same). *See also Oklahoma v. Texas*, 256 U.S. 70, 88, 41 S. Ct. 420, 65 L. Ed. 831 (1921)); *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 30 P.3d 446, 450-51 (Wash. 2001)). Because the Receivership Action Court articulated a distinction between the two cases, any claim preclusion should be narrowly drawn.

D. Claim Preclusion Does Not Bar N5HYG's Claims

1. Defendants' Theory Assumes That Receivership Petitioners Effectively Forfeit Their Shares

To the extent the Court considers Defendants' improper Motion with respect to N5HYG's claims, Defendants present the same radical proposition they unsuccessfully peddled previously: that N5HYG may not bring *any* claims, *even if such claims arose from conduct occurring after the Receivership Action*. (Motion at 13) Thus, Defendants argue that N5HYG can bring *no* action for breaches of the SPA that Iglesias and Moffly personally guaranteed. Nothing in NRS 78.650 specifically or Nevada law generally supports such an unsettling departure from the law and common sense. There is no rule that shareholders that petition for a receiver forfeit the right to bring a later lawsuit based on their share ownership. Any such rule would amount to: if a shareholder brings a receivership action, that shareholder loses all of the other rights to which the shares entitle it, including the right to redress even *subsequent* harms. That effectively amounts to losing the shares. The Court should again reject this unfounded argument.

2. N5HYG May Bring its Breach of Contract Claim

a. N5HYG's Claim for Post-Closing Monthly Payments Was Not Litigated in the Receivership Action

In the SAC, N5HYG is asserting breaches of contract for Defendants' failure to pay the post-closing monthly payments they personally guaranteed, including those that Defendants failed to pay *after* the Receivership Action. Defendants' failures to pay amounts owed as of May 2018 were mentioned in the Receivership Action, but the issue was not litigated. In fact, the Receivership Court

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noted that N5HYG was owed nearly $2 million. (*See* Brown Decl., **Ex. "1"** at ¶3.) But the Receivership Court never even suggested that this should be reduced to a judgment against Defendants. Nor did the Court suggest that it was adjudging Defendants' liability for future payments not yet due. This Court should thus follow the Receivership Court's lead and conclude that the Receivership Case lacks any preclusive effect on this issue here. *See Holt*, *supra*, 127 Nev. at 894-895. *See also* arguments regarding lack of any preclusive effect at Section C.3., *supra*.

b. The Receivership Action Could Not Bar a Claim for Payments Due After the Receivership Action

Even if the Court finds the Receiver Action has some preclusive effect, that cannot bar N5HYG's claims for Defendants' *subsequent* breaches of the SPA. As they unsuccessfully did last time around, Defendants would graft upon N5HYG's breach of contract claims a "continuing violation" theory. (Motion at 17) But N5HYG is not asserting one "continuing violation;" it is asserting a *separate* breach of contract claim for each month Defendants failed to pay the required post-closing monthly payment. This is consistent with Nevada's recognition of the widely-adopted rule that contracts may be "divisible" – that is, that the parties may agree to distinct obligations such as, here, monthly installment payments. *See Dredge Corp. v. Wells Cargo, Inc.*, 82 Nev. 69, 73–74, 410 P.2d 751, 754 (1966) (citations omitted).[17]

[17] This issue is frequently, though not exclusively, encountered in considering statute of limitations issues. In that context, the "universal rule [is] that when an obligation is to be paid in installments the statute of limitations runs only against each installment as it becomes due… In essence, this rule treats each missed or otherwise deficient payment as an independent breach of contract subject to its own limitations period." *Pierce v. Metro. Life Ins. Co.*, 307 F. Supp. 2d 325, 328-29 (DNH 2004), citing *Keefe Co. v. Americable Int'l, Inc.*, 755 A.2d 469, 472 (D.C. 2000). Thus, for example, in *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459 (6th Cir. 2013), the Court recognized that the plaintiff in a lease-violation case had eschewed a "continuing violation theory" and instead "argued that their leases should be construed as divisible contracts, with each underpayment giving rise to a separate cause of action." *Id.* at 466. "Where a contract is divisible and, thus, breaches of its severable parts give rise to separate causes of action, the statute of limitations will generally begin to run at the time of each breach; in other words, each cause of action for breach of a divisible part may accrue at a different time for purposes of determining whether an action is timely under the applicable statute of limitations." *Id.* at 467 (citing 15 Williston on Contracts § 45.20 (4th ed. 2000)). "If, on the other hand, a continuing contract is entire and indivisible, an action can be maintained on it only when a breach occurs or the contract is in some way terminated, and the statute of limitations will begin to run from that time only." *Id.* "Courts have thus deemed different kinds of contracts to be divisible, with each default in a periodic or installment payment giving rise to a separate cause of action." *Lutz*, 717 F.3d at 467-70 (collecting cases).

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Here, the parties agreed to discrete monthly payments, due each month in which Hygea had not "gone public" (provided N5HYG remained a shareholder). Defendants are liable for each month they failed to pay. *See, e.g., Ancala Holdings, L.L.C. v. Price*, 220 F. App'x 569, 572 (9th Cir. 2007) ("Once a party fails to pay the agreed upon amount at the time the payment is due, a separate breach occurs and a cause of action accrues. The damages for each breach is severable from the damages suffered from the original breach and any subsequent breach of the defendant's obligation to pay an agreed upon amount"); *Knight v. Columbus, Ga.*, 19 F.3d 579, 581-82 (11th Cir. 1994) (collecting cases rejecting "continuing wrong" approach to overtime cases and concluding that "the FLSA has been violated each time the City issued an officer plaintiff a paycheck that failed to include payment for overtime hours actually worked"); *Harrison v. Bass Enters. Prod. Co*., 888 S.W.2d 532, 537 (Tex. Ct. App. 1994) (holding that the claims by a royalty interest owner in oil wells for unpaid royalties "'accrued' monthly"); *Hondo Oil & Gas Co. v. Texas Crude Operator*, 970 F.2d 1433, 1440 (5th Cir. 1992) ("Where a contract provides for monthly payments and not a present sale of gas or oil, a cause of action accrues when any given monthly payment is due.") (internal citation and quotation omitted); *Rupe v. Triton Oil & Gas Corp*., 806 F. Supp. 1495, 1498 (D. Kan. 1992) ("a cause of action for breach of an obligation to make payments under a continuing [gas purchase] contract generally accrues at the time each payment becomes due, thus giving rise to a separate cause of action for each failure to make payment when due").

Even where a judgment is rendered on previous breaches of an installment contract, it is not a bar to actions on subsequent breaches for later installments. *Keefe Co. v. Americable Int'l, Inc.*, 755 A.2d 469, 472-473 (D.C. 2000) ("If a contract provides for the payment of money in installments, an action will lie for each installment as it falls due," and "[a] judgment rendered in any one of those actions will not operate as a bar to the maintenance of the others." (quoting 4 CORBIN ON CONTRACTS § 948 (1951 ed. & Supp.1999))). "Indeed, so embedded is this concept of distinct installment obligations that there is doubt whether an obligee even has the option, absent an acceleration clause, to bring a single suit, seeking both past-due and future payments, based solely on the obligor having missed installments." *Id.*

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Any contrary conclusion would be irrational. N5HYG could not have reasonably brought a claim for all future unpaid post-closing monthly payments, because it would have had no way of knowing how long the obligation would remain in place, or how long Defendants would fail to meet it. The law does not require such clairvoyance. *See Rock Springs Mesquite II Owners' Ass'n*, 464 P.3d 104 at 109 ("We are unwilling to extend claim preclusion to an action that a party was aware might arise in the future, when such an action was based on different facts than those of the initial case."). *See also Armstrong Petro. Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal. App. 4th 1375, 1391 (2004) ("[b]ecause the act of paying or delivering the wrong amount constituted the breach of contract and caused damage in the amount of the underpayment or underdelivery . . . all of the elements of a cause of action relating to a breach of that monthly obligation did not occur, and thus a cause of action did not accrue, until [defendant] made the incorrect payment or delivery for that month").

Defendants once again disregard this authority and rely on the inapposite *Carlson v. Ameriprise Fin.*, No. CV 08-5303 (MJD/JJK), 2009 WL 10678283 (D. Minn. May 21, 2009), *aff'd*, 409 F. App'x 976 (8th Cir. 2011). But not only does *Carlson* involve a continuing violation theory (which N5HYG is not advancing), it is factually distinguishable. The plaintiff in *Carlson* was a serial wrongful termination plaintiff who tried to bring successive lawsuits based on his former employer's failure to rehire him. *Id.* at *11. Here, Defendants failed to pay required monthly payments on multiple, separate occasions, before and each month after the Receivership Action. N5HYG was a Hygea shareholder since October 2016, entitled to its rights under the SPA that Iglesias and Moffly signed and personally guaranteed. Had the *Carlson* plaintiff remained employed at Ameriprise, the earlier litigation would not have entitled Ameriprise to violate his rights as a continuing employee. *Carlson* also illustrates the weakness of Defendants' argument for maximal preclusion. There, plaintiff's termination *was the actual issue litigated in the prior case*. That is a stark contrast to this case, especially where many of the breaches post-date the Receivership Action.[18]

[18] Defendants' other cases on this point are also easily distinguishable. In *Tarabochia v. Clatsop Cty., Oregon*, the Court deemed the defendant's failure to meet its obligations that the contract required *all* be completed by *one* specified date to be one breach of contract. *Zibbell v. Marquette Cty. Res. Mgmt.*, 2013 U.S. Dist. LEXIS 22516 (W.D. Mich. Feb. 20, 2013) did not involve a contract and **Defendants misleadingly edit the holding:** "Where it is obvious that the alleged ongoing unlawful conduct is actually the defendant continuing on the same course of conduct **which has previously been found by a court to be proper and lawful**, the court reviewing the second or subsequent lawsuit must conclude that the plaintiff is simply trying to relitigate the same claim...".

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Claim preclusion simply does not apply to actions for subsequent breaches. *See Klahn v. Valley Fed. Credit Union of Mont.*, Nos. 75889, 77127, 2020 Nev. Unpub. LEXIS 951, at *2 (Sep. 30, 2020) (no claim preclusion where alleged wrongful conduct occurred subsequent to prior action); *Creek v. Vill. of Westhaven*, 80 F.3d 186, 190-91 (7th Cir. 1996) (no claim preclusion because second suit "challenged unlawful acts committed *after* the first suit, and hence is based on different facts, [citation omitted] facts, moreover, that could not have been made the basis (or a basis) of the first suit because they did not yet exist."); *Nev. Indus. Comm'n v. O'Hare*, 76 Nev. 107, 349 P.2d 1058, 1061-62 (1960) ("In affirming the judgment herein, it is not intended that the district court's determination of the respondent's present right to payments under the act be res judicata (either with respect to continued payments in the future, or with respect to its determination that plaintiff's disability and incapacity is permanent and total) as to any subsequent action…"); *Kesler v. Curators of the Univ. of Mo.*, 516 S.W.3d 884, 894 (Mo. Ct. App. 2017) ("Res judicata will not bar a plaintiff from bringing successive claims on the same contract when the contract 'impos[es] a continuous duty which causes a steady accretion of damage' and the subsequent suit is based on separate and distinct breaches that did not occur until after the previous judgment."); *Int'l Star Registry of Ill. v. Bowman-Haight Ventures, Inc.*, 2001 U.S. Dist. LEXIS 18356, at *10-11 (N.D. Ill. Nov. 8, 2001) ("Plaintiff's damages claim that wrongful conduct occurred during the Specified Time Period (including resulting damages that did not come to fruition until after the Specified Time Period) is not barred by *res judicata* because such a claim could not have been resolved in the prior judgment.").

Even if N5HYG's claim for the post-closing monthly payments is deemed based on a "continuing violation," as Defendants assert, the result would be the same because a subsequent action is "not precluded just because it is premised on some facts representing a continuance of the same course of conduct as Case 1." *Rock Springs Mesquite II Owners' Ass'n v. Raridan*, 464 P.3d 104, 108-109 (Nev. 2020). *See also Ancala Holdings, LLC*, 220 Fed.Appx. at 572 ("[The continuing violation notion] applies to recurring payments that have become due," and permits a party to recover

Id. at *30 (emphasis added). Here, no Court previously found any of Defendants' breaches to be "proper and lawful." And in *Dubuc v. Green Oak Twp.*, 312 F.3d 736 (6th Cir. 2002), the Court found the wrongdoing alleged by the 1983 plaintiff had all occurred prior to disposition of the prior action. Again, that is not the case here.

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for subsequent breaches even if a claim for the original breach would be untimely. Thus, "[o]nce a party fails to pay the agreed upon amount at the time the payment is due, a separate breach occurs and a cause of action accrues. The damages for each breach are severable from the damages suffered from the original breach and any subsequent breach of the defendant's obligation to pay an agreed upon amount."); Rest. 2d of Judgments, § 26 (1) ("When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant: … (e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course."); *Bacon v. Cox*, No. 60465, 2014 WL 2013447, at *1 (Nev. May 13, 2014) (district court's dismissal of case overturned where it failed to consider continuing wrong issue).

Moreover, contrary to Defendants' characterization, permitting N5HYG to pursue its breach of contract claims or Nevada 5 from pursuing its fraud claim would be consistent with the policy served by claim preclusion. Neither a verdict in favor of Nevada 5 and against Iglesias and Moffly for its $30 million fraud claim, nor a verdict in favor of N5HYG and against Iglesias and Moffly for its breach of contract claim will overturn the Receivership Action Court's decision that it lacked jurisdiction to appoint a receiver over Hygea in May 2018. *See Rock Springs*, 464 P.3d at 109 (claim preclusion not warranted where subsequent action will not undermine finality of decision in first). The outcomes of the two cases will be entirely independent of each other.

3. N5HYG's Books-and-Records Claim

For the reasons set forth in Plaintiffs' prior briefing, N5HYG's books and records claim was neither litigated in the Receivership Action nor barred by that action, which predated at least one of N5HYG's books and records requests that Defendants refused.

However, N5HYG acknowledges that this claim (Count Eleven) appears likely affected by the bankruptcy of Hygea. Without waiving any of its rights, and with the express reservation of its right and ability to seek discovery of Hygea's corporate records to the extent they may be relevant to

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its remaining claims against Defendants, N5HYG would agree that its books and records claim is effectively moot.

IV. CONCLUSION

For all of the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendants' Motion and require them to file an Answer to the SAC no later than December 16, 2020.

DATED this 18th day of November, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on November 18, 2020, I served a copy of **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO DISMISS** on all parties as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system via the Odyssey Court e-file system;

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EXHIBIT “A”

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DISTRICT COURT
CLARK COUNTY, NEVADA

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, Plaintiffs, vs. HYGEA HOLDINGS CORP., a Nevada corporation; MANUEL IGLESIAS; EDWARD MOFFLY; and ROES I-XXX, inclusive, Defendants.	CASE NO.: A-17-762664-B DEPT. NO.: 27 **DECLARATION OF OGONNA M. BROWN, ESQ. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO DISMISS** Date of Hearing: December 9, 2020 Time of Hearing: 10:30 a.m.

I, Ogonna M. Brown, Esq., declare as follows,

1. I am a shareholder with the law firm of Lewis Roca Rothgerber Christie LLP, attorneys of record for Plaintiffs N5HYG, LLC and Nevada 5, Inc. ("Plaintiffs") in the above-referenced proceeding.

2. I have personal knowledge of the facts in this Declaration, except as to those matters based upon information and belief, and as to those matters, I believe them to be true and correct.

3. I am over the age of eighteen (18) years and competent to testify to the matters set forth herein.

4. I make this Declaration based upon my personal knowledge of the facts and matters of this action.

5. I make this Declaration in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, or in the Alternative, Motion to Dismiss ("Opposition").

6. A true and correct copy of excerpts of the *Amended Findings of Fact and Conclusions of Law in the Receivership Action* discussed in the Opposition is attached hereto as **Exhibit "1"** (Receivership Action).

7. A true and accurate copy of a selection from the transcript of this Court's hearing on July 17, 2019, on *Defendants' Motion for Reconsideration and Clarification of Order on Defendant's Motion to Dismiss Based on Claim Preclusion and, Alternatively, Motion to Stay* and *Plaintiffs' Motion for Reconsideration Regarding the Dismissal of Nevada 5, Inc.* is attached as **Exhibit** "**2"** hereto.

8. **Exhibit "3"** hereto is a true and accurate copy of the Stipulation entered in this Court, which the Court entered on January 6, 2020.

9. On October 1, 2020, I attended, on behalf of Plaintiffs, the hearing on the Court's Mandatory Rule 16.1 Conference. A true and correct copy of the Hearing Transcript of the October 1, 2020 ("Hrg. Trans.") is attached hereto as **Exhibit "4"**.

10. On October 5, 2020, my office caused to be served on Defendants on behalf of Plaintiffs their Rule 16 Disclosures, a true and correct copy of which is attached hereto as **Exhibit "5"**. Defendants provided no disclosures of their own, and did not respond.

11. On October 16, 2020, Plaintiffs attempted to hold a Rule 16 conference with Defendants, having previously circulated the associated Notice of Early Case Conference, dial-in conference line information, and a draft Joint Case Conference Report. As counsel for Plaintiffs,

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I remained on the line for 30 minutes, waiting for Defendants and attempting to establish contact. Defendants never advised that they would not be attending.

12. Finally, I received an email from Defendant Moffly indicating that Defendants had retained their present counsel. A true and correct copy of the Email dated October 16, 2020, is attached hereto as **Exhibit "6"**.

13. However, despite being copied on Moffly's email, Defendants' counsel did not join in the conference call, respond to the email regarding the joint case conference, or contact Plaintiff's counsel to reschedule.

14. On October 19, 2020, my office caused to be served on Defendants on behalf of Plaintiffs a renewed Notice of Early Case Conference to Defendants' new counsel, a true and correct copy of which is attached hereto as **Exhibit "7"**.

15. However, Defendants' counsel responded on October 20, 2020, indicating that because Defendants had not filed an Answer, such a conference was premature. A true and correct copy of the Email dated October 20, 2020, is attached hereto as **Exhibit "8"**.

16. On October 26, 2020, my office caused to be served on Defendants on behalf of Plaintiffs (including upon Defendants' new counsel) an amended Notice of Early Case Conference, scheduling the conference for November 4, 2020 at 1:30 p.m., a true and correct copy of which is attached hereto as **Exhibit "9"**.

17. On the morning of November 4, 2020, my office sent a follow-up email reminding Defendants' counsel about the conference. A true and correct copy of the Email dated November 4, 2020, is attached hereto as **Exhibit "10"**.

18. But Defendants' counsel again refused to participate in the conference. Later that day, I attempted a final time, quoting the Court's directive from the October 1 hearing, and attaching the transcript. A true and correct copy of the Email dated November 4, 2020, is attached hereto as **Exhibit "11"**.

19. In connection with Plaintiffs' Opposition, the following filings and a number of transcripts are relied upon for this Court's reference:

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- February 21, 2018 Hearing Transcript (Receivership Action), **Exhibit "12"** hereto.
- Defendants' Trial Statement (Receivership Action), **Exhibit "13"** hereto.
- May 14, 2018 Trial Transcript (Receivership Action), **Exhibit "14"** hereto.
- May 16, 2018 Trial Transcript (Receivership Action), **Exhibit "15"** hereto.
- May 17, 2018 Trial Transcript (Receivership Action), **Exhibit "16"** hereto.
- May 18, 2018 Trial Transcript (Receivership Action), **Exhibit "17"** hereto.
- May 15, 2018 Trial Transcript (Receivership Action), **Exhibit "18"** hereto.
- A color-coded copy of Defendants' November 4, 2020 Motion for Summary Judgment or, in the Alternative, Motion to Dismiss, **Exhibit "19"** hereto. The yellow highlights show verbatim argument from Defendants' January 13, 2020 Motion for Summary Judgment on Order Shortening Time; the blue highlights show verbatim argument from Defendants' January 27, 2020 Reply in support of the prior motion; and the green highlights show where Defendants failed to change the description of the movants from the prior motion or reply (continuing to include "Hygea," the non-moving debtor entity).

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

DATED this 18th day of November, 2020.

/s/ Ogonna Brown
OGONNA M. BROWN, ESQ.

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EXHIBIT "1"

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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

~~[PROPOSED]~~ AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

///

///

///

Court could have made adverse inferences against Hygea and the individual Defendants, precluded Defendants from even arguing that the Plaintiffs owned less than ten percent, or other sanctions. The record, however, is devoid of any evidence of Plaintiffs' efforts.

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

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

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

- Under subsection 1 (b), the Court finds that Plaintiffs have failed to establish by a preponderance of the evidence—that the directors have been guilty of gross mismanagement in the conduct or control of Hygea's affairs;
- Under subsection 1 (c), the Court finds that Plaintiffs have failed to establish by a preponderance of the evidence—that the directors have been guilty of misfeasance or malfeasance; however, the Court does find, that Plaintiffs have established by a preponderance of the evidence that the directors have been guilty of nonfeasance;
- Under subsection l(d), l(e), and (l)(i), that nonfeasance resulted in Hygea not being able to conserve its assets by reason of the directors' neglect, placed Hygea's assets in danger of waste, sacrifice, or loss, and caused Hygea to not be able to pay its debts or obligations as they mature except through costly agreements and/or loans.

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2Ans.App.357

Further, the Court considers the fact that the appointment of a receiver will (in the best case) increase the risk that the HMO's will cancel the contracts they have with Hygea, which could very well cause the death of the Company. If that occurs, all Parties lose.

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

V. CONCLUSIONS OF LAW

1. Plaintiffs have failed to establish by a preponderance of the evidence that they hold one-tenth of the issued and outstanding stock of Hygea and have thus failed to establish that this Court has jurisdiction to appoint a receiver under NRS 78.650(1) and the Nevada Supreme Court's decision in *Searchlight*. 84 Nev. at !09, 437 P.2d at 90.

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

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

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

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

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

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EXHIBIT "2"

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Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

N5HYG, et al,	)	CASE NO. A-17-762664-B
	)	
Plaintiffs,	)	DEPT NO. XXVII
	)	
vs.	)	
	)	
HYGEA HOLDINGS CORP., et al,	)	
	)	**Transcript of**
Defendants.	)	**Proceedings**
	)	

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

PLAINTIFFS' MOTION FOR RECONSIDERATION REGARDING THE DISMISSAL OF NEVADA 5, INC.
MOTION FOR RECONSIDERATION AND CLARIFICATION OF ORDER ON DEFENDANTS' MOTION TO DISMISS BASED ON CLAIM PRECLUSION AND, ALTERNATIVELY, MOTION TO STAY

WEDNESDAY, JULY 17, 2019

APPEARANCES:

FOR THE PLAINTIFFS:	CHRISTOPHER D. KAYE, ESQ. OGONNA M. BROWN, ESQ. GEORGE MARK ALBRIGHT, ESQ. ROBERT EISENBERG, ESQ.
FOR THE DEFENDANTS:	MARIA A. GALL, ESQ. KYLE A. EWING, ESQ. JOHN PEARSON, ESQ. STAVROULA E. LAMBRAKOPOULOS, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

claim which was rejected. And, look, Your Honor, we've heard it, it's been rejected. You know, I'm here, I don't work for free, I think, you know, there's a strong suggestion that, you know, Hygea -- Hygea will live another day here.

And so, Your Honor, I would ask that for our motion that you grant reconsideration, but, again, I understand it's a hairy issue and Your Honor might be reticent to grant reconsideration based on what's before her. And so alternatively, Your Honor, we would ask for a stay. And regardless, though, we would like a full record and clarification on Your Honor's decision on the remaining elements. Thank you.

THE COURT: Thank you both. All right. So in looking at the matter, you know, in every business court case there's always a motion to dismiss. Sometimes I require amendment, and then I always second guess myself later, should I have just allowed the complaint to go forward to see, let the parties do discovery.

You know, sometimes complaints don't adequately plead a cause of action and the defendant shouldn't be required to defend under the circumstances. But in this one, it's just gone on so long. This is really the last gasp, you guys, because the case needs to go forward after this point.

I am going to grant both motions, and I know that that puts us in a somewhat procedural quandary, and I've kind of

thought through that a little bit. But setting aside timeliness issues, it does seem that the N5 dismissal should be without prejudice, but you have to be more specific if you replead. You 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. So that's your last gasp, Mr. Kaye.

With regard to the claim preclusion issue, I do find Lynch versus Awada very persuasive and I have determined based upon a re-reading of everything that the Wilson decision was a final judgment. And I'll grant the motion also with regard to clarifying the elements in accordance with your request in the brief.

Both parties to prepare findings and conclusions. Both sides to make sure that the other side has the ability to review and approve before they are submitted to me.

Now, let's talk briefly about procedural because there's a request for a Rule 16 conference. If there's going to be a third amended complaint, I'm prepared to set a date and a date for answer, but how does this affect procedurally where we go?

MS. GALL: Your Honor, if you've granted our motion for reconsideration and you're dismissing the case based on claim preclusion, I'm confused as to why there might be --

THE COURT: There might be some other causes of action

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.

Julie Potter
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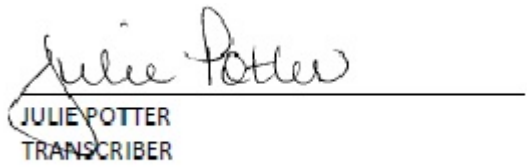

EXHIBIT “3”

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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.: XXVII

STIPULATION AND ORDER FOR EXTENSION OF TIME FOR DEFENDANTS' TO RESPOND TO PLAINTIFFS' SECOND AMENDED COMPLAINT

(First Request for Extension)

STIPULATION

Plaintiffs N5HYG, LLC and Nevada 5, Inc., and Defendants Hygea Holdings Corp., Manuel Iglesias, and Edward Moffly **STIPULATE AND AGREE** to the following briefing schedule for Defendants' response to the Second Amended Complaint:

1. Defendants shall file and serve their motion to dismiss in response to the Second Amended Complaint on or before January 17, 2020;

2. Plaintiffs shall file and serve their opposition brief on or before March 2, 2020; and

3. Defendants shall file and serve their reply brief on or before March 16, 2020, or 14 days after the opposition brief is filed if filed earlier than March 2, 2020.

4. The Parties will present oral argument on the motion to dismiss on March 25, 2020, or another date approximate to March 25 if the Court is not available on March 25.

This is the first request for an extension of Defendants' deadline to respond to Plaintiffs' Second Amended Complaint. The Parties enter into this Stipulation in good faith, to account for the complexity of this case, to accommodate the schedule of counsel, and not for purposes of delay.

Dated: December 26, 2019

LEWIS ROCA ROTHBERGER CHRISTIE

By: /s/ Ogonna Brown
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Attorneys for Plaintiffs

Dated: December 26, 2019

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ORDER

Based on the foregoing Stipulation, IT IS ORDERED as follows:

1. Defendants shall file and serve their motion to dismiss in response to the Second Amended Complaint on or before January 17, 2020;

2. Plaintiffs shall file and serve their opposition brief on or before March 2, 2020; and

3. Defendants shall file and serve their reply brief on or before March 16, 2020, or 14 days after the opposition brief is filed if filed earlier than March 2, 2020.

4. The Court shall hear oral argument on the motion to dismiss on March 25, 2020, at 10:30 a.m, or as soon thereafter as counsel may be heard.

Dated this 6 day of ~~December, 2019~~ Jan. 2020.

Nancy L Allf

THE HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE

Submitted by:

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By: _____
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EXHIBIT “4”

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

N5HYG, LLC Plaintiff, vs. HYGEA HOLDINGS CORP., Defendant.	CASE#: A-17-762664-B DEPT. XXVII

BEFORE THE HONORABLE NANCY L. ALLF, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 1, 2020

RECORDER'S TRANSCRIPT OF HEARING
MANDATORY RULE 16 CONFERENCE

Appearing via Video Conference:

For the Plaintiff: OGONNA M. BROWN, ESQ.

For the Defendant: EDWARD MOFFLY
MANUEL IGLESIAS

RECORDED BY: BRYNN WHITE, COURT RECORDER

Las Vegas, Nevada, Thursday, October 1, 2020

[Case called at 10:01 a.m.]

THE COURT: Let's take page 8, N5HYG versus Hygea.

MS. BROWN: Good morning, Your Honor. How are you today? Ogonna Brown.

THE COURT: I'm well. Thank you.

MS. BROWN: Thank you. Ogonna Brown on behalf of Plaintiff, N5HYG, LLC and Nevada 5 Inc.

THE COURT: Thank you. And for the Defendants.

EDWARD MOFFLY: This is Edward Moffly, Your Honor. I'm appearing on my own behalf. Though we will be asking the Court to give us a continuance 'til we can obtain counsel.

MANUEL IGLESIAS: And Manuel Iglesias, Your Honor, also appearing on my own behalf. And like Mr. Moffly said, we'll be asking the Court to continue the Rule 16 Conference until we have a counsel to appear. And quite frankly, in addition to that, we feel that our counsel needs to have the time to respond to Plaintiff's new amended complaint before we have a Rule 16 Conference.

THE COURT: Well, the case has been pending for a long time, guys. And I realize the challenges you've had; I know there's an intervening bankruptcy for the company, and a reorganized entity. But this case goes back to October of 2017. We're three years into it.

MANUEL IGLESIAS: Your Honor, you're absolutely -- I'm sorry.

THE COURT: Go ahead, please.

MANUEL IGLESIAS: You're absolutely right, you're absolutely right. But, quite frankly, some of the reason this case has languished because the Plaintiffs have chosen to amend the complaint several times, and then we had the issue with the main Defendant filing a chapter 11.

So, as soon as we heard about the case, or this hearing, we thought we had counsel. On Monday they had a national conflict; they ran a national conflict and withdrew. So we're now talking to counsel on Friday, and we -- because of the complexity of the case, we need -- we feel strongly that we need represented by counsel, that's one.

And obviously, not only does that counsel, that firm has to get up to speed, because this is a very complex case, we have not responded, and I believe at Your Honor's order, to the amended -- latest amended complaint by the Plaintiff. So that would make sense that our new counsel would have time to respond to that amended complaint, before we have the Rule 16 Conference.

THE COURT: Mr. Moffly, would your comments be identical to Mr. Iglesias?

EDWARD MOFFLY: Yes, Your Honor. I can just say that we thought this case had been -- was on hold and we didn't get notified until two weeks ago, as Mr. Iglesias said. So we -- we've been very active in trying to obtain counsel, it's just unfortunate that the firm found a national conflict on Monday, otherwise, we would be represented right now.

THE COURT: All right. In your [indiscernible - unstable

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internet connection] withdraw in January.

EDWARD MOFFLY: I'm sorry, Your Honor, you broke up. Could you repeat that, please?

THE COURT: I'm seeing that your counsel withdrew in January. So why is it that you guys have taken so long?

EDWARD MOFFLY: Because of the bankruptcy, it didn't make sense to -- they were representing the company and us, and we didn't know how -- what the disposition of that was going to be. And frankly, we were waiting to see if it was going to be Hygea and us, or just us individually. And we found that out that there was going to be this Rule 16 Conference on September 10th I believe, opposing counsel sent us a notice.

THE COURT: Okay. And Mr. Iglesias, would you agree with the comments made by Mr. Moffly?

MANUEL IGLESIAS: Yes, we actually thought that the case may be dropped. We didn't know if Plaintiff was going to pursue it just against Mr. Moffly and me, and it came as an unfortunate surprise that we're still here.

THE COURT: Okay.

MANUEL IGLESIAS: Yes, I agree with Mr. Moffly.

THE COURT: All right. Ms. Brown, do you have a response?

MS. BROWN: I do, thank you very much, Your Honor, for allowing me to speak on this very important point.

I just wanted to highlight for the Court a few things. Mr. Iglesias is an attorney. Individually, Mr. Moffly and Mr. Iglesias have

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never filed for bankruptcy. Unless they sought protections under 11 U.S.C. 105 that the bankruptcy code to extend the automatic stay under 11 U.S.C. 362. They were never really under the stay protection. But notwithstanding that, my client has been very gracious, and we are simply requesting that they answer the amended complaint. We will give them an additional 10 days or 15 days, we just do need a date certain, Your Honor.

We are only here today, to set the date and time for trial, dispositive motion deadlines, expert witness deadlines. And we're happy to kick it out 180 days for the close of discovery, versus the standard 120 days, just to give them an opportunity to retain counsel and move forward.

But, really in the interim, to the extent counsel is not obtained, we really just want to get their addresses, telephone numbers, e-mail addresses on the record today, so we are able to reach them, to the extent they cannot obtain counsel, so that we can move this case along. And again, we're happy to give them 10 or 15 days to file an answer to the complaint, it has been quite some time as this Court noted. And we've been requesting a Rule 16 Conference for years, unfortunately.

And I do take some issue with the comments about our clients filing an amended complaint; they were in response to motions to dismiss. But now we're finally at the stage where we have an amended complaint, and we simply are requesting a response by way of an answer, in the next 10 or 15 days, whatever this Court deems appropriate.

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We would like to use this opportunity for this Court to set a trial date and to kick out discovery, 180 days is fine; we're fine with a March dispositive discovery deadline, just to give everybody time to get up to speed. And we'll even schedule a separate Rule 16 Conference, we'll schedule a notice and set that out, and to the extent there's new counsel available. That way we can have a meet and confer with Mr. Moffly and Mr. Iglesias, and hopefully new counsel. And we'll set that out in the notice, mid-October to give them time.

But we would like to use this opportunity when the Court is available, and for judicial economy, for this Court please to set the relevant dates and to hear from the parties so we can proceed with a trial order to be issued from this Court. We've had sufficient delay, as you noted. We've been here since October 2017, there's been quite a bit of motion practice, including repeated motions to dismiss. And notwithstanding the bankruptcy filing, it only impacted directly the debtor entity. And there's no discharge in a bankruptcy case for guarantors or individuals, as this Court is aware, you used to practice in bankruptcy court. So I don't think that is really relevant to this Court's determination for proceeding today under the Mandatory Rule 16 Conference.

Thank you very much for your time.

THE COURT: So, Mr. Moffly, let's have your address, phone number and e-mail, for the record, please.

EDWARD MOFFLY: Yes, Your Honor. It is Ted@drvn.com. And my phone number is 305-905-0569. And my address is 185 Southwest 7th Street, Apartment 3301, Miami, Florida 33130.

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THE COURT: Thank you.

EDWARD MOFFLY: Thank you.

THE COURT: And Mr. Iglesias, the same please.

MANUEL IGLESIAS: My telephone number is 786-247-0227. My e-mail is meidclaw@yahoo.com. My address is, 1408 Brickell Bay Drive, Apartment 415, Miami, Florida 33131.

THE COURT: Okay. To all of the parties, I'm going to set this out 30 days; it will be the last time the Rule 16 will be rescheduled. If you don't have counsel, then I'll assume you're going to represent yourselves, and if there's not an answer on file the Plaintiff at the Rule 16 Conference will be allowed to [indiscernible - unstable internet connection] forward, appropriate to go [indiscernible - unstable internet connection] simply because the party meet and confer with regard to discovery doesn't appear.

Nicole McDevitt, may we have a date 30 days [indiscernible - unstable internet connection]

THE CLERK: That will be November 5th, at 10:30.

THE COURT: Okay. Mr. Moffly and Mr. Iglesias, I made myself loud and clear that this is really your [indiscernible - unstable internet connection] continuance. You have the right to represent yourselves, but you have to move [indiscernible - unstable internet connection] and so, given the fact you just found out this week that your chosen counsel [indiscernible - unstable internet connection], we need to get [indiscernible - unstable internet connection] if you're going to represent yourselves, you have to cooperate with Ms. Brown with regard

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to formulating a discovery plan, and participate discovery. And at our next hearing, I will set a discovery cutoff, which will trigger trial setting.

Any questions?

EDWARD MOFFLY: Thank you, Your Honor. That makes sense.

MANUEL IGLESIAS: Thank you, Your Honor. You've been very generous.

MS. BROWN: Your Honor --

MANUEL IGLESIAS: Thank you.

MS. BROWN: -- Ogonna Brown --

THE COURT: Ms. Brown.

MS. BROWN: -- if I may please --

THE COURT: Yes.

MS. BROWN: -- request a point of clarification --

THE COURT: Of course.

MS. BROWN: -- please confirm for the record, what is the date for the answer to the amended complaint that is due that Mr. Moffly and Mr. Iglesias are aware without any confusion when the answer deadline is due.

THE COURT: If when we come back on November 5th, no answer has been filed, the Plaintiff will be allowed to move the case forward in the way it chooses.

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MS. BROWN: Thank you very much, Your Honor, for the clarification. I appreciate it. Have a good day and stay safe.

THE COURT: Same to all three of you.

MANUEL IGLESIAS: Thank you, Your Honor.

[Hearing concluded at 10:11 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Brynn White

Brynn White
Court Recorder/Transcriber

EXHIBIT “5”

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Attorneys for Plaintiffs
NYHYG, LLC and Nevada 5, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

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,

Plaintiffs,

v.

HYGEA HOLDINGS CORP., a Nevada corporation; MANUEL IGLESIAS; EDWARD MOFFLY, and DOES I through X, inclusive, and ROES I-XXX, inclusive,

Defendants.

Case No. A-17-762664-B

Dept. No.: 27

PLAINTIFFS' INITIAL DISCLOSURES PURSUANT TO NRCP 16.1(A)(1)

Pursuant to Nev. R. Civ. P. 16.1(a)(1), Plaintiffs N5HYG, LLC and Nevada 5, Inc. ("Plaintiffs"), by and through their attorney of record, Ogonna M. Brown, Esq. of Lewis Roca Rothgerber Christie LLP, G. Mark Albright, Esq. of Albright, Stoddard, Warnich & Albright, and Christopher Kaye, Esq. of The Miller Law Firm, P.C. hereby make the following initial disclosures in this case. These disclosures are based on the information reasonably available to Plaintiffs at this time and are made without waiving any objections to relevance, materiality, or admissibility of evidence in this action or any other action or proceeding. Plaintiffs reserve the right to revise, correct, supplement, or clarify its disclosures, consistent with Rule 26(e) of the Nevada Rules of Civil Procedure.

The following disclosures are made subject to the above objections and qualifications:

I. PERSONS LIKELY TO HAVE DISCOVERABLE INFORMATION:

Based on the information currently available to Plaintiffs, the following individuals are identified:

1. The Person Most Knowledgeable of N5HYG, LLC
   c/o Ogonna Brown, Esq.
   Lewis Roca Rothgerber Christie LLP
   3993 Howard Hughes Parkway, Suite 600
   Las Vegas, Nevada 89169
   Telephone: (702) 949-8200

The Person Most Knowledgeable ("PMK") of Plaintiff, N5HYG, LLC ("N5HYG") is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation information related to Defendants' breaches of the October 2016 Stock Purchase Agreement ("SPA") to which N5HYG and Defendants are parties.

2. The Person Most Knowledgeable of Nevada 5, Inc.
   c/o Ogonna Brown, Esq.
   Lewis Roca Rothgerber Christie LLP
   3993 Howard Hughes Parkway, Suite 600
   Las Vegas, Nevada 89169
   Telephone: (702) 949-8200

The PMK of Plaintiff, Nevada 5, Inc. ("Nevada 5") is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to Defendants' inducement of Nevada 5's payment of $30 million for the purchase of stock in Hygea Holdings Corp. ("Hygea").

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3. The Person Most Knowledgeable of Hygea Holdings Corp. d/b/a NeighborMD
c/o Maria A. Gall, Esq.
Ballard Spahr LLP
One Summerlin
1980 Festival Plaza Drive, #900
Las Vegas, NV 89135
Telephone: (702) 471-7000
Email: gallm@ballardspahr.com

The PMK of Hygea Holdings Corp. d/b/a NeighborMD is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

4. Manuel Iglesias
1408 Bricklebay Drive, Apt. 415
Miami, FL 33131
Telephone: (786) 247-0227
Email: meidclaw@yahoo.com

Defendant Manuel Iglesias ("Iglesias") was the Chief Executive Officer ("CEO") of Hygea at all relevant times, and a member of its Board of Directors. He is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

5. Edward Moffly
185 SW 7th St., Apt. 3301
Miami, FL 33130
Telephone: (305) 905-0569
Email: ted@drvn.com

Defendant Edward Moffly ("Moffly") was the Chief Financial Officer ("CFO") of Hygea at all relevant times, and a member of its Board of Directors. He is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

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6. Daniel T. McGowan
c/o David Allan Freedman, Esq. Coffey Burlington, Attorneys at Law
2601 South Bayshore Drive, Penthouse
Miami, FL 33133
Telephone: (305) 858-2900
Email: dfreedman@coffeyburlington.com

Daniel T. McGowan ("McGowan") was the Chairman of the Hygea Board of Directors at relevant times, and a former defendant in this action. McGowan is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

7. Administrator of the Estate of Frank Kelly
c/o Robert J. Kaufman, Esq.
Fox Rothschild LLP
999 Peachtree Street NE
Suite 1500
Atlanta, GA 30309
Telephone: (404) 962-1000
Email: rkaufman@foxrothschild.com

Frank Kelly ("Kelly") (now deceased) was the Vice Chairman of the Hygea Board of Directors at relevant times, and a former defendant in this action. Kelly's estate is believed to have knowledge or information regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

8. Martha Mairena Castillo
mailto:12727 SW 116th St.
Miami, FL 33186
Telephone: (786) 387-7086
Email: ramagabe@aol.com

Martha Mairena Castillo ("Castillo") was the Chief Administrative Officer ("CAO") of Hygea at relevant times, a member of the Hygea Board of Directors, and a former defendant in this action. Castillo is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

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9. Lacy Loar
mailto:2060 Dartmouth Avenue N.,
St. Petersburg, Florida 33713
Telephone: (727) 798-9812
Email: lacycatpaw@aol.com

Lacy Loar ("Loar") was a member of the Hygea Board of Directors at relevant times, and a former defendant in this action. Loar is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

10. Richard L. Williams, Esq.
8451 SW 72nd Terrace
Miami, FL 33143-3701
Telephone: (786) 405-3312
Email: rlwilliams.law@gmail.com

Richard L. Williams, Esq. ("Williams") was the Chief Legal Officer ("CLO") of Hygea at relevant times, a member of the Hygea Board of Directors, and a former defendant in this action. Williams is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

11. Glenn Marrichi, M.D.
c/o David Allan Freedman, Esq.
Coffey Burlington, Attorneys at Law
2601 South Bayshore Drive, Penthouse
Miami, FL 33133
Telephone: (305) 858-2900
Email: dfreedman@coffeyburlington.com

Glenn Marrichi, M.D. ("Marrichi") was a member of the Hygea Board of Directors at relevant times, and a former defendant in this action. Marrichi is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

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12. Keith Collins, M.D.
c/o David Allan Freedman, Esq.
Coffey Burlington, Attorneys at Law
2601 South Bayshore Drive, Penthouse
Miami, FL 33133
Telephone: (305) 858-2900
Email: dfreedman@coffeyburlington.com

Keith Collins, M.D. ("Collins") was a member of the Hygea Board of Directors at relevant times, and a former defendant in this action. Collins is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

13. Jack Mann, M.D.
c/o David Allan Freedman, Esq.
Coffey Burlington, Attorneys at Law
2601 South Bayshore Drive, Penthouse
Miami, FL 33133
Telephone: (305) 858-2900
Email: dfreedman@coffeyburlington.com

Jack Mann, M.D. ("Mann") was a member of the Hygea Board of Directors at relevant times, and a former defendant in this action. Mann is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

14. Administrator of the Estate of Howard Sussman, M.D. (deceased)
c/o Marc G. Sussman
12740 Countryside Terrace
Cooper City, FL 33330
Email: mgsuss@bellsouth.net

Howard Sussman, M.D. ("Sussman") (now deceased) was a member of the Hygea Board of Directors at relevant times, and a former defendant in this action. The appointed administrator of Dr. Sussman's estate is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

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15. Joseph Campanella
c/o David Allan Freedman, Esq.
Coffey Burlington, Attorneys at Law
2601 South Bayshore Drive, Penthouse
Miami, FL 33133
Telephone: (305) 858-2900
Email: dfreedman@coffeyburlington.com

Joseph Campanella ("Campanella") was a member of the Hygea Board of Directors at relevant times, and a former defendant in this action. Campanella is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

16. Carl Rosencrantz
c/o Joshua Lee Spoont, Esq.
Sodhi Spoont PLLC
3050 Biscayne Blvd., Suite 904
Miami, FL 33137-4294
Telephone: (305) 907-7573
Email: josh@sodhispoont.com

Carl Rosencrantz ("Rosencrantz") was a member of the Hygea Board of Directors at relevant times, and a former defendant in this action. Rosencrantz is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

17. Ray Gonzalez
c/o Digna Blanco French, Esq.
Squire Patton Boggs LLP
200 S. Biscayne Blvd., Suite 4000
Miami, FL 33131
Telephone: (305) 577-7056
Email: digna.french@squirepb.com

Ray Gonzalez ("Gonzalez") was a member of the Hygea Board of Directors at relevant times, and a former defendant in this action. Gonzalez is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

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18. Chris Fowler and/or the Person Most Knowledgeable of RIN Capital and/or SI Capital
38955 Hills Tech Dr.
Farmington Hills, MI 48331
Telephone: (248) 987-7856
Email: cfowler@sicapitalllc.com

Chris Fowler ("Fowler") and/or the PMK of RIN Capital and/or SI Capital is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

19. Tim Dragelin and/or the Person Most Knowledgeable of FTI Consulting
c/o Matthew Bascardi, Esq.
Chief Counsel, US Operations
FTI Consulting
6300 Blair Hill Lane
Suite 303
Baltimore, MD 21209
Telephone: (410) 951-4800

Tim Dragelin ("Dragelin") and/or the PMK of FTI Consulting ("FTI PMK") is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including the outside review of Hygea's financial performance commissioned by Plaintiffs.

20. Michael Weintraub and/or the Person Most Knowledgeable of RIN Capital and/or SI Capital LLC
38955 Hills Tech Dr.
Farmington Hills, MI 48331
Phone: (248) 987-7774
Email: mweintraub@sicapitalllc.com

Michael Weintraub ("Weintraub") and/or the PMK of RIN Capital and/or SI Capital is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

21. Dan Miller
c/o Scott Seabolt, Esq.
Seabolt Law Firm
17199 N. Laurel Park Dr., #215
Livonia, MI 48152
Telephone: (248) 717-1302
Email: sseabolt@seaboltpc.com

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Dan Miller ("Miller") is believed to have knowledge regarding the facts and circumstances surrounding this litigation, including, without limitation, information related to the inducement of Nevada 5's $30 million payment and Defendants' breaches of the SPA.

II. LIST OF DOCUMENTS PURSUANT TO NRCP 16.1(a)(1)(A)(ii):

Pursuant to NRCP 16.1(a)(1)(A)(ii), the following is a description of non-privileged documents, data compilations, and tangible things that are in the possession, custody or control of Plaintiff, which support their claims and which are discoverable under NRCP 26(b). Such documents may be obtained through Plaintiffs' counsel:

NO.	DOCUMENT TITLE OR DESCRIPTION
1	2016.10.05 Stock Purchase Agreement by and among N5HYG LLC, HYGEA Holdings Corp., and The Seller Principals Named Herein (execution version with schedules)
2	2016.04 Hygea Confidential Information Memorandum - $30,000,000 Equity Capital
3	2016.09.16 Email correspondence, Fwd: Deal Structure
4	2016.10.03 Hygea Holdings Corp. Quality of Earnings Report Update- TTM June 30, 2016
5	2018.04.17 Letter from Fowler regarding Demand for Hygea Corporate Records
6	2016.09.29 Email correspondence Fwd: Cap structure for investment and RTO
7	2016.06.27 Correspondence from Darin to Fowler attaching CIM
8	2016.08.02 Correspondence from Moffly to Miller attaching a final quarterly work file being used by third party financial analysts to perform a Quality of Earnings Report ("QoE") and a purported audit of Hygea's finances
9	2016.09.14 Correspondence from Moffly to Miller attaching the CIM, containing information pertinent to a potential investment deal, including updated unaudited financials

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NO.	DOCUMENT TITLE OR DESCRIPTION
10	2016.09.20 Email correspondence from Moffly to Miller re: the final trial balances for June 30, 2016 would be finished in a matter of hours with the "consolidation done by [outside accountants] CLA (Clifton Larson Allen, LLP) [. . .] but assembled by our accounting team
11	2016.09.21 Email correspondence from Moffly to Miller re: the final trial balances for June 30, 2016 would be finished in a matter of hours with the "consolidation done by [outside accountants] CLA (Clifton Larson Allen, LLP) [. . .] but assembled by our accounting team
12	2016.09.20 Email correspondence from Moffly to Miller attaching financials, containing balance sheets, income statements, and a statement of cash flows, purportedly done by CPA firm Rodriguez, Trueba & Co
13	2016.09.22 Email from Hygea Corporate Counsel to Miller providing information regarding existing physician contracts, incentive plans, bonus provisions, and other service agreements
14	2016.09.25 Email from Hygea Corporate Counsel to Miller providing information regarding existing physician contracts, incentive plans, bonus provisions, and other service agreements
15	2016.09.27 Correspondence from Moffly to Miller enclosing Offering Memorandum
16	2019.02.19 Letter from Fowler regarding Demand for Hygea Corporate Records

Plaintiffs further state that they are in possession of other documents which may support their claims, but which are either currently under further review, or subject to confidentiality protective orders in other litigation. To the extent such additional documents become known, discoverable, and/or subject to disclosure, Plaintiffs reserve the right to supplement these Initial Disclosures or otherwise produce such documents. Plaintiffs reserve the right to submit as an exhibit any document or tangible item identified by any other party in this action or obtained by any third

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party. Plaintiffs further reserve the right to amend/or supplement this list of documents and tangible items as discovery proceeds up to the time of trial.

III. DESCRIPTION OF DAMAGES:

Plaintiff Nevada 5 is seeking damages against the remaining non-Debtor Defendants in an amount to be determined, including all compensatory, exemplary, and punitive damages, costs, interest, and attorneys' fees, and such equitable relief as the Court deems to be appropriate, including the return to Nevada 5 not less than its $30 million, plus interest.

Plaintiff N5HYG is seeking damages against the remaining non-Debtor Defendants in an amount to be determined, but not less than the full amount of post-closing monthly payments under the SPA in the amount of $175,000 per month for each month since August 2017, as well as all other compensatory, exemplary, and punitive damages, costs, interest, and attorneys' fees, and such equitable relief as the Court deems to be appropriate.

IV. INSURANCE AGREEMENTS:

It is unknown at this time whether Defendants are covered under applicable insurance.

DATED the 5th day of October, 2020

LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ Ogonna Brown
Ogonna Brown (NBN 7589)
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

G. Mark Albright, Esq. (NBN 13940)
D. Chris Albright, Esq. (NBN 4904)
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive
Suite D-4
Las Vegas, NV 89106

E. Powell Miller, Esq. (*admitted pro hac vice*)
Christopher Kaye, Esq. (*admitted pro hac vice*)
THE MILLER LAW FIRM, P.C.
950 W. University Dr.
Suite 300
Rochester, MI 48307

Attorneys for Plaintiffs N5HYG, LLC and Nevada 5, Inc.

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on October 5, 2020, I served a copy of **PLAINTIFFS' INITIAL DISCLOSURES PURSUANT TO NRCP 16.1(A)(1)** on all parties as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system via the Odyssey Court e-file system;

N5HYG, LLC

D. Chris Albright	dca@albrightstoddard.com
G. Mark Albright	gma@albrightstoddard.com
Andrea Brebbia	abrebbia@albrightstoddard.com
Barbara Clark	bclark@albrightstoddard.com
Amy Davis	aad@miller.law
Robert L. Eisenberg	rle@lge.net
Lelia Geppert	lelia@lge.net
Alexis C Haan	ACH@millerlawpc.com
William Kalas	WK@millerlawpc.com
Christopher D Kaye	cdk@millerlawpc.com
E. Powell Miller	epm@millerlawpc.com
Kevin Watts	KW@oaklandlawgroup.com

Hygea Holdings Corp.

Docket Clerk	DocketClerk_LasVegas@ballardspahr.com
Las Vegas Docket	LVDocket@ballardspahr.com
Maria A. Gall	gallm@ballardspahr.com
Las Vegas Intake	LVCTIntake@ballardspahr.com
Joel E. Tasca	tasca@ballardspahr.com

Other Service Contacts

Theodore Kornobis	ted.kornobis@klgates.com
Stavroula Lambrakopoulos	stavroula.lambrakopoulos@klgates.com
Richard L. Williams	RLWilliams.law@gmail.com

☒ E-mail – By serving a copy thereof at the email addresses listed below; and

Manuel Iglesias	meidclaw@yahoo.com
Edward Moffly	Ted@drvn.com

. . .

. . .

. . .

Lewis Roca ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

☒ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below.

Edward Moffly
185 S. West 7th Street, Apt. 3301
Miami, Florida 33130

Manuel Iglesias
1408 Bricklebay Drive, Apt. 415
Miami, Florida 33131

/s/ Kennya Jackson
An employee of Lewis Roca Rothgerber Christie LLP

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

EXHIBIT “6”

From: Ted Moffly <ted@drvn.com>
Sent: Friday, October 16, 2020 1:55 PM
To: Brown, Ogonna <OBrown@lrrc.com>
Cc: meidclaw@yahoo.com; Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>; Kory Kaplan <kory@kaplancottner.com>; carita@kaplancottner.com
Subject: Re: FW: Rule 16 Conference JCCR

[EXTERNAL]

Orgonna,

Sorry we finally were able to retain counsel Kory Kaplan. I am not sure he got this notice. Please reach out to him. He is copied on this email.

Best regards,

Ted

Edward (Ted) Moffly | Managing Director
tel. 305-442-4442 x202 | cell: 305-905-0569
| drvn.com
New York | DC | Miami | LA | Chicago | Bogota | Mexico City | Sao Paulo

EXHIBIT “7”

Electronically Filed
10/19/2020 4:12 PM
Steven D. Grierson
CLERK OF THE COURT

ANEC
Ogonna M. Brown, Esq.
Nevada Bar No. 7589
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169
Tel: 702.949.8200
Fax: 702.949.8398
OBrown@lrrc.com

G. Mark Albright, Esq.
Nevada Bar No. 13940
D. Chris Albright, Esq.
Nevada Bar No. 4904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive
Suite D-4
Las Vegas, NV 89106
Tel: 702.384.7111
Fax: 702.384.0605
gma@albrightstoddard.com
dca@albrightstoddard.com

E. Powell Miller, Esq. (*admitted pro hac vice*)
Christopher Kaye, Esq. (*admitted pro hac vice*)
THE MILLER LAW FIRM, P.C.
950 W. University Dr.
Suite 300
Rochester, MI 48307
Tel: 248.841.2200
epm@millerlawpc.com
cdk@millerlawpc.com

Attorneys for Plaintiffs
NYHYG, LLC and Nevada 5, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

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,

Plaintiffs,

v.

HYGEA HOLDINGS CORP., a Nevada corporation; MANUEL IGLESIAS; EDWARD MOFFLY, and DOES I through X, inclusive, and ROES I-XXX, inclusive,

Defendants.

Case No. A-17-762664-B

Dept. No.: 27

FIRST AMENDED NOTICE OF EARLY CASE CONFERENCE

Case Number: A-17-762664-B

TO: KORY KAPLAN, ESQ., counsel for Defendants MANUEL IGLESIAS; EDWARD MOFFLY.

NOTICE IS HEREBY GIVEN that you and each of you are hereby notified that pursuant to NRCP 16.1, an early case conference has been scheduled for **October 23, 2020, at 9:30 a.m.**, and that the early case conference will take place telephonically. The parties are instructed to please use the following dial in information to participate:

Dial-In: (866) 496-2887

Bridge Number: 2622

PIN number: 92622

You are invited to email your disclosures in advance of the early case conference, and bring your files and participate in the conference and, pursuant to NRCP 16.1, to discuss and propose a plan for discovery as well as possible settlement of the case.

DATED the 19th day of October, 2020

LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ Ogonna Brown

Ogonna Brown
Nevada Bar No. 7589
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

G. Mark Albright, Esq.
Nevada Bar No. 13940
D. Chris Albright, Esq.
Nevada Bar No. 4904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive
Suite D-4
Las Vegas, NV 89106

E. Powell Miller, Esq. (*admitted pro hac vice*)
Christopher Kaye, Esq. (*admitted pro hac vice*)
THE MILLER LAW FIRM, P.C.
950 W. University Dr.
Suite 300
Rochester, MI 48307

Attorneys for Plaintiffs N5HYG, LLC and Nevada 5, Inc.

2Ans.App.396

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on October 19, 2020, I served a copy of **FIRST AMENDED NOTICE OF EARLY CASE CONFERENCE** on all parties as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system via the Odyssey Court e-file system;

N5HYG, LLC

D. Chris Albright	dca@albrightstoddard.com
G. Mark Albright	gma@albrightstoddard.com
Andrea Brebbia	abrebbia@albrightstoddard.com
Barbara Clark	bclark@albrightstoddard.com
Amy Davis	aad@miller.law
Robert L. Eisenberg	rle@lge.net
Lelia Geppert	lelia@lge.net
Alexis C Haan	ACH@millerlawpc.com
William Kalas	WK@millerlawpc.com
Christopher D Kaye	cdk@millerlawpc.com
E. Powell Miller	epm@millerlawpc.com
Kevin Watts	KW@oaklandlawgroup.com

Hygea Holdings Corp.

Docket Clerk	DocketClerk_LasVegas@ballardspahr.com
Las Vegas Docket	LVDocket@ballardspahr.com
Maria A. Gall	gallm@ballardspahr.com
Las Vegas Intake	LVCTIntake@ballardspahr.com
Joel E. Tasca	tasca@ballardspahr.com

Other Service Contacts

Theodore Kornobis	ted.kornobis@klgates.com
Stavroula Lambrakopoulos	stavroula.lambrakopoulos@klgates.com
Richard L. Williams	RLWilliams.law@gmail.com

☒ E-mail – By serving a copy thereof at the email addresses listed below; and

Manuel Iglesias	meidclaw@yahoo.com
Edward Moffly	Ted@drvn.com
Hygea Holdings Corp.	keith.collins@hygea.net

Kory L. Kaplan, Esq. kory@kaplancottner.com
Attorney for Manuel Iglesias and Edward Moffly

. . .

. . .

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

☒ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below.

Edward Moffly
185 S. West 7th Street, Apt. 3301
Miami, Florida 33130

Manuel Iglesias
1408 Bricklebay Drive, Apt. 415
Miami, Florida 33131

Hygea Holdings Corp.
8700 Flagler Street Suite 280
Miami, FL 33174

/s/ Kennya Jackson
An employee of Lewis Roca Rothgerber Christie LLP

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

EXHIBIT “8”

From: Kory Kaplan <kory@kaplancottner.com>
Sent: Tuesday, October 20, 2020 7:35 AM
To: Jackson, Kennya; meidclaw@yahoo.com; Ted@drvn.com
Cc: Brown, Ogonna; Dale, Margaret
Subject: RE: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly

[EXTERNAL]

Ms. Jackson,

As I stated to Ms. Brown on Friday, I was just retained on this matter and am in the process of coming up to speed on this case. Nevertheless, no answer has been filed by my clients, and therefore your unilateral notice of early case conference is premature. Again, we can schedule an early case conference within 30 days after my clients' first pleading as required by NRCP 16.1.

Thank you,
Kory

KAPLAN COTTNER
Kory L. Kaplan, Esq.
850 E. Bonneville Ave.
Las Vegas, NV 89101
Tel (702) 381-8888
Fax (702) 832-5559
www.kaplancottner.com

From: Jackson, Kennya <KJackson@lrrc.com>
Sent: Monday, October 19, 2020 4:19 PM
To: Kory Kaplan <kory@kaplancottner.com>; meidclaw@yahoo.com; Ted@drvn.com
Cc: Brown, Ogonna <OBrown@lrrc.com>; Dale, Margaret <MDale@lrrc.com>
Subject: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly

Good afternoon:

This email is being sent to you at the request of Ogonna Brown, Esq. If you have any questions or concerns please feel free to contact Ms. Brown at (702) 474-2622 or by emailing her at obrown@lrrc.com.

Thank you,

Kennya Jackson
Legal Secretary
702.474.2623 office
702.949.8398 fax
KJackson@lrrc.com

Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
lrrc.com

Because what matters
to you, matters to us.
Read our client service principles

EXHIBIT “9”

Electronically Filed
10/26/2020 4:02 PM
Steven D. Grierson
CLERK OF THE COURT

ANEC
Ogonna M. Brown, Esq.
Nevada Bar No. 7589
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169
Tel: 702.949.8200
Fax: 702.949.8398
OBrown@lrrc.com

G. Mark Albright, Esq.
Nevada Bar No. 13940
D. Chris Albright, Esq.
Nevada Bar No. 4904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive
Suite D-4
Las Vegas, NV 89106
Tel: 702.384.7111
Fax: 702.384.0605
gma@albrightstoddard.com
dca@albrightstoddard.com

E. Powell Miller, Esq. (*admitted pro hac vice*)
Christopher Kaye, Esq. (*admitted pro hac vice*)
THE MILLER LAW FIRM, P.C.
950 W. University Dr.
Suite 300
Rochester, MI 48307
Tel: 248.841.2200
epm@millerlawpc.com
cdk@millerlawpc.com

Attorneys for Plaintiffs
NYHYG, LLC and Nevada 5, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

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, Plaintiffs, v. HYGEA HOLDINGS CORP., a Nevada corporation; MANUEL IGLESIAS; EDWARD MOFFLY, and DOES I through X, inclusive, and ROES I-XXX, inclusive, Defendants.	Case No. A-17-762664-B Dept. No.: 27 **SECOND AMENDED NOTICE OF EARLY CASE CONFERENCE**

TO: KORY KAPLAN, ESQ., counsel for Defendants MANUEL IGLESIAS; EDWARD MOFFLY.

NOTICE IS HEREBY GIVEN that you and each of you are hereby notified that pursuant to NRCP 16.1, an early case conference has been scheduled for **November 4, 2020, at 1:30 p.m.**, and that the early case conference will take place telephonically. The parties are instructed to please use the following dial in information to participate:

Dial-In: (866) 496-2887

Bridge Number: 2622

PIN number: 92622

You are invited to email your disclosures in advance of the early case conference, and bring your files and participate in the conference and, pursuant to NRCP 16.1, to discuss and propose a plan for discovery as well as possible settlement of the case.

DATED the 26th day of October, 2020

LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ Ogonna Brown

Ogonna Brown
Nevada Bar No. 7589
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

G. Mark Albright, Esq.
Nevada Bar No. 13940
D. Chris Albright, Esq.
Nevada Bar No. 4904
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive
Suite D-4
Las Vegas, NV 89106

E. Powell Miller, Esq. (*admitted pro hac vice*)
Christopher Kaye, Esq. (*admitted pro hac vice*)
THE MILLER LAW FIRM, P.C.
950 W. University Dr.
Suite 300
Rochester, MI 48307

Attorneys for Plaintiffs N5HYG, LLC and Nevada 5, Inc.

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on October 26, 2020, I served a copy of **SECOND AMENDED NOTICE OF EARLY CASE CONFERENCE** on all parties as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system via the Odyssey Court e-file system;

N5HYG, LLC

D. Chris Albright	dca@albrightstoddard.com
G. Mark Albright	gma@albrightstoddard.com
Andrea Brebbia	abrebbia@albrightstoddard.com
Barbara Clark	bclark@albrightstoddard.com
Amy Davis	aad@miller.law
Robert L. Eisenberg	rle@lge.net
Lelia Geppert	lelia@lge.net
Alexis C Haan	ACH@millerlawpc.com
William Kalas	WK@millerlawpc.com
Christopher D Kaye	cdk@millerlawpc.com
E. Powell Miller	epm@millerlawpc.com
Kevin Watts	KW@oaklandlawgroup.com

Hygea Holdings Corp.

Docket Clerk	DocketClerk_LasVegas@ballardspahr.com
Las Vegas Docket	LVDocket@ballardspahr.com
Maria A. Gall	gallm@ballardspahr.com
Las Vegas Intake	LVCTIntake@ballardspahr.com
Joel E. Tasca	tasca@ballardspahr.com

Other Service Contacts

Theodore Kornobis	ted.kornobis@klgates.com
Stavroula Lambrakopoulos	stavroula.lambrakopoulos@klgates.com
Richard L. Williams	RLWilliams.law@gmail.com

☒ E-mail – By serving a copy thereof at the email addresses listed below; and

Manuel Iglesias	meidclaw@yahoo.com
Edward Moffly	Ted@drvn.com
Hygea Holdings Corp.	keith.collins@hygea.net

Kory L. Kaplan, Esq. kory@kaplancottner.com
Attorney for Manuel Iglesias and Edward Moffly

. . .

. . .

Lewis Roca ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

☒ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below.

Edward Moffly
185 S. West 7th Street, Apt. 3301
Miami, Florida 33130

Manuel Iglesias
1408 Bricklebay Drive, Apt. 415
Miami, Florida 33131

Hygea Holdings Corp.
8700 Flagler Street Suite 280
Miami, FL 33174

/s/ Kennya Jackson
An employee of Lewis Roca Rothgerber Christie LLP

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Lewis Roca ROTHGERBER CHRISTIE

EXHIBIT “10”

Subject: RE: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly

From: Brown, Ogonna <OBrown@lrrc.com>
Sent: Wednesday, November 4, 2020 9:18 AM
To: Kory Kaplan <kory@kaplancottner.com>; meidclaw@yahoo.com; Ted@drvn.com
Cc: Dale, Margaret <MDale@lrrc.com>; Jackson, Kennya <KJackson@lrrc.com>
Subject: RE: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly
Importance: High

Dear Mr. Kaplan:

In the avoidance of doubt, the judge was clear at the hearing in stating that defendants "have to cooperate with Ms. Brown with regard to formulating a discovery plan, and participate discovery. And at our next hearing, I will set a discovery cutoff, which will trigger trial setting". A copy of the transcript is attached for your reference in case your clients have not provided you with an accurate recitation of what transpired at the hearing conducted on October 1, 2020. Your continued refusal to appear at the Rule 16 conference, which we have now rescheduled a third time to accommodate you, is in direct contravention of the judge's direction at the hearing. Please confirm that you will cooperate and participate at this afternoon's 1:30 p.m. conference. Thank you.

Ogonna Brown
Partner
702.474.2622 office
702.949.8398 fax
OBrown@lrrc.com

From: Kory Kaplan <kory@kaplancottner.com>
Sent: Wednesday, November 4, 2020 8:52 AM
To: Brown, Ogonna <OBrown@lrrc.com>; Jackson, Kennya <KJackson@lrrc.com>; meidclaw@yahoo.com; Ted@drvn.com
Cc: Dale, Margaret <MDale@lrrc.com>
Subject: RE: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly

[EXTERNAL]

Ogonna,

Thank you for the dial-in information for tomorrow's hearing. Again, as stated multiple times before, a Rule 16 conference is not appropriate until after my clients file a pleading as defined in Rule 7. We can agree to a mutually acceptable date and time for a Rule 16 conference after a pleading is filed.

Thanks,
Kory

Kory L. Kaplan, Esq.
850 E. Bonneville Ave.
Las Vegas, NV 89101
Tel (702) 381-8888
Fax (702) 832-5559
www.kaplancottner.com

From: Brown, Ogonna <OBrown@lrrc.com>
Sent: Wednesday, November 4, 2020 8:11 AM
To: Kory Kaplan <kory@kaplancottner.com>; Jackson, Kennya <KJackson@lrrc.com>; meidclaw@yahoo.com; Ted@drvn.com
Cc: Dale, Margaret <MDale@lrrc.com>
Subject: RE: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly

Dear Mr. Kaplan:

Please confirm you have received the dial in information for the hearing before Judge Allf this November 5, 2020 (see first attachment).

Also, please confirm you are participating in today's Rule 16 Conference scheduled for 1:30 p.m. this afternoon now that you have had more time to become familiar with the case since we communicated on October 16,2020. I have attached the Second Amended Notice for your convenience, which contains the dial in information. Thank you.

Ogonna Brown
Partner
702.474.2622 office
702.949.8398 fax
OBrown@lrrc.com

Because what matters
to you, matters to us.
Read our client service principles

From: Kory Kaplan <kory@kaplancottner.com>
Sent: Tuesday, October 20, 2020 7:35 AM
To: Jackson, Kennya <KJackson@lrrc.com>; meidclaw@yahoo.com; Ted@drvn.com
Cc: Brown, Ogonna <OBrown@lrrc.com>; Dale, Margaret <MDale@lrrc.com>
Subject: RE: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly

[EXTERNAL]

Ms. Jackson,

As I stated to Ms. Brown on Friday, I was just retained on this matter and am in the process of coming up to speed on this case. Nevertheless, no answer has been filed by my clients, and therefore your unilateral notice of early case conference is premature. Again, we can schedule an early case conference within 30 days after my clients' first pleading as required by NRCP 16.1.

Thank you,
Kory

Kory L. Kaplan, Esq.
850 E. Bonneville Ave.
Las Vegas, NV 89101
Tel (702) 381-8888
Fax (702) 832-5559
www.kaplancottner.com

From: Jackson, Kennya <KJackson@lrrc.com>
Sent: Monday, October 19, 2020 4:19 PM
To: Kory Kaplan <kory@kaplancottner.com>; meidclaw@yahoo.com; Ted@drvn.com
Cc: Brown, Ogonna <OBrown@lrrc.com>; Dale, Margaret <MDale@lrrc.com>
Subject: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly

Good afternoon:

This email is being sent to you at the request of Ogonna Brown, Esq. If you have any questions or concerns please feel free to contact Ms. Brown at (702) 474-2622 or by emailing her at obrown@lrrc.com.

Thank you,
Kennya Jackson
Legal Secretary
702.474.2623 office
702.949.8398 fax

KJackson@lrrc.com

COVID-19 questions?
Connect to our Rapid Response Team
for answers and resources.

Lewis Roca
ROTHGERBER CHRISTIE

Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
lrrc.com

EXPERIENCE
AMPLIFIED

Because what matters
to you, matters to us.
Read our client service principles

This message and any attachments are intended only for the use of the individual or entity to which they are addressed. If the reader of this message or an attachment is not the intended recipient or the employee or agent responsible for delivering the message or attachment to the intended recipient you are hereby notified that any dissemination, distribution or copying of this message or any attachment is strictly prohibited. If you have received this communication in error, please notify us immediately by replying to the sender. The information transmitted in this message and any attachments may be privileged, is intended only for the personal and confidential use of the intended recipients, and is covered by the Electronic Communications Privacy Act, 18 U.S.C. §2510-2521.

EXHIBIT “11”

From: Kory Kaplan <kory@kaplancottner.com>
Sent: Tuesday, October 20, 2020 7:35 AM
To: Jackson, Kennya; meidclaw@yahoo.com; Ted@drvn.com
Cc: Brown, Ogonna; Dale, Margaret
Subject: RE: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly

[EXTERNAL]

Ms. Jackson,

As I stated to Ms. Brown on Friday, I was just retained on this matter and am in the process of coming up to speed on this case. Nevertheless, no answer has been filed by my clients, and therefore your unilateral notice of early case conference is premature. Again, we can schedule an early case conference within 30 days after my clients' first pleading as required by NRCP 16.1.

Thank you,
Kory

KAPLAN COTTNER
Kory L. Kaplan, Esq.
850 E. Bonneville Ave.
Las Vegas, NV 89101
Tel (702) 381-8888
Fax (702) 832-5559
www.kaplancottner.com

From: Jackson, Kennya <KJackson@lrrc.com>
Sent: Monday, October 19, 2020 4:19 PM
To: Kory Kaplan <kory@kaplancottner.com>; meidclaw@yahoo.com; Ted@drvn.com
Cc: Brown, Ogonna <OBrown@lrrc.com>; Dale, Margaret <MDale@lrrc.com>
Subject: A-17-762664-B // N5HYG, LLC et al. v. Manuel Iglesias and Edward Moffly

Good afternoon:

This email is being sent to you at the request of Ogonna Brown, Esq. If you have any questions or concerns please feel free to contact Ms. Brown at (702) 474-2622 or by emailing her at obrown@lrrc.com.

Thank you,

Kennya Jackson
Legal Secretary
702.474.2623 office
702.949.8398 fax
KJackson@lrrc.com

Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
lrrc.com

Because what matters
to you, matters to us.
Read our client service principles

EXHIBIT "12"

Electronically Filed
2/22/2018 1:24 PM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

CLAUDIO ARELLANO, et al., Plaintiff(s), vs. HYGEA HOLDINGS CORP., Defendant(s).	Case No. A-18-768510-B DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, FEBRUARY 21, 2018

TRANSCRIPT OF PROCEEDINGS RE:
ALL PENDING REQUESTS FOR ORDERS SHORTENING TIME AND ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff(s): CHRISTOPHER D. KAYE, ESQ.
GEORGE M. ALBRIGHT, ESQ.
OGONNA M. BROWN, ESQ.
KEVIN WATTS, ESQ.

For the Defendant(s): MARIA A. GALL, ESQ.
KYLE A. EWING, ESQ.

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER

I would like also to point out that if we replace the word "must" in 78.650 and 630 -- I'm sorry, if we replace the word "may" with "must" in those statutory provisions, then it essentially reads like a command to an agree shareholder. A shareholder must file for an appointment of a receiver. That's not what the statutory scheme was meant to say. The statutory scheme was merely meant to provide a basis to an aggrieved shareholder or creditor to apply for a receivership as a remedy if they met certain statutory criteria, which we offer does not exist here, Your Honor.

With respect to the stock purchase agreement, that stock purchase agreement was entered into between Hygea and one of the -- I haven't even counted up all the plaintiffs, I think it's over a dozen plaintiffs.

THE COURT: I think there are 14. I did.

MS. GALL: One of those plaintiffs -- and so, one, even if the stock purchase agreement applied here, which we offer it does not, it cannot bind Hygea to litigate in Clark County with the remainder of the plaintiffs.

Secondly, to the extent the statute is subject matter jurisdiction and not venue, you can't contract around subject matter jurisdiction.

Finally, we would offer that -- that provision in the stock purchase agreement does not apply at all here, because it applies to personal jurisdiction and venue requirements when an action rises in connection with that stock purchase agreement. This action does not

arise in connection with a stock purchase agreement. There has been no breach of contract or fraud based on the agreement. There have been no claims brought based on the agreement. And the agreement clearly states that its requirements apply or the personal jurisdiction and venue requirements apply when a dispute arises in connection with the agreement.

Therefore, Your Honor, we would submit that the statutes are jurisdictional, we would ask this court to dismiss this case based on lack of subject matter jurisdiction. If this court is inclined to believe that the statutes apply to venue, we would ask this court that -- we would submit that this court cannot proceed further until it decides the venue issue.

Thank you very much.

THE COURT: Thank you.

This is the defendant's Motion to Dismiss the complaint for lack of jurisdiction. Without ruling now on any issue with regard to venue, the motion is denied. The -- the complaint itself references the stock purchase agreement, so I find that it's relevant in determining the issue of whether or not this court has jurisdiction. It does under 8.111, as well as I find also under NRS 78.650 and 630 that venue -- without determining venue, that jurisdiction at least is appropriate at this point.

So before we argue the receiver motion, I have other matters at 10:00. I'd like to recess this hearing, give you a chance to -- to regroup just a minute so that you can come in and argue the issues with regard to the receivership request. There are three matters, I think

Now, I know we're going to have an evidentiary hearing, so I'm not sure how much more -- because Plaintiffs' counsel made so many accusations, some of which weren't even in his moving papers. I'm not certain what to address. I -- I do know I have in my notes here that he talked about breach of the -- the SPA. Well, they have a litigation against Hygea for that. It's pending before Judge Mahan. There's not a claim for breach of the SPA here. And in any event a breach -- a breach of contract isn't even a basis for a receivership.

I just want to make sure, Your Honor, I address everything. And I think where that brings us, Your Honor, is -- is that it would be an unprecedented and really extraordinary remedy for this court to appoint a receiver. Even a temporary receiver or an interim receiver on the mere basis of owed back taxes.

In fact, the weighing of the equities that this court will be required to do prior to issuing a receivership shows that there is no basis to appoint a receiver. In fact, if a receiver is appointed, Hygea will be rendered insolvent nearly immediately, and the value of Hygea's shareholders will be destroyed by a loss of the HMO plan contracts. Under those contracts, once a receivership is put into place, the contracts can be cancelled.

Indeed, the only individual standing to benefit from the appointment of a receiver are Plaintiff N5HYG and its beneficial owners, Ren and Mr. Bhagvala, who we believe are trying to devalue the company and purchase it for pennies on the dollar.

Now, that is not speculation. If you look at Mr. Williams'

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Shawna Ortega, CET*562

EXHIBIT "13"

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CLAUDIO ARELLANO, et al.,

Plaintiffs,

v.

HYGEA HOLDINGS CORP., et al.,

Defendants.

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

DEFENDANTS' TRIAL STATEMENT PURSUANT TO FJDCR 10

2Ans.App.422

request that the receiver "oversee, conduct, review, and verify audits for all periods of time from 2014 to the present, inclusive, so that there is a seamless period of time as to which audits have been conducted from the last audit in 2013 through the present and going forward." Hygea is not a public company and is not required by any state or federal law to conduct an audit. If Plaintiff N5HYG believes it has a contractual right to an audit, then it should seek to enforce that purported right through its breach of contract claim pending in federal court.

Fifth, while a receiver could be empowered to "otherwise investigate the past and current affairs of Hygea," Plaintiffs do not explain the purpose of this power. At least two Plaintiffs—N5HYG and Claudio Arellano—have separate lawsuits pending against Hygea and its former and current officers and directors. Plaintiffs cannot purport to use any receiver as a mechanism for seeking discovery to support their claims in such litigations when they purport that they seek the receiver only to maintain the status quo and protect Hygea's going concern status, as they have argued was the reason they brought this lawsuit since the outset of the case.

Sixth, and finally, Plaintiffs do not identify the cost of the receivership, and contrary to their representations at the first hearing in this lawsuit, Plaintiffs seek to impose these unidentified costs on Hygea. Thus, Defendants are left to speculate on the financial burden, although Defendants submit that it is not unreasonable to presume that the burden would be high. For instance, given that that proposed receiver will apparently be running the entirety of Hygea, it would not be unreasonable to assume that he or she will work at least 60 hours per week. At a rate of $500/hour, the receiver alone would cost $30,000/week. In addition, the receiver will undoubtedly be represented by counsel, which would impose yet another cost on the receivership.

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EXHIBIT "14"

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

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

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT

VOLUME I

PAGES 1 - 280

DATE: Monday, May 14, 2018

TIME: 9:00 a.m.

LOCATION: Carson City District Court
885 E. Musser Street
Carson City, Nevada

REPORTER: Daren Bloxham RPR/CSR-685

representation that at the time that Stock Purchase Agreement was entered into, that plaintiffs on a non-fully diluted basis held 8.57 percent of the company's stock, and that time is October 2016.

However, Hygea is not a corporation frozen in time. And even if, as plaintiffs argue, Hygea should be estopped from arguing that N5HYG holds anything less than 8.57 percent of the issued and outstanding stock, it does not matter, Your Honor, because in such case, plaintiffs would at most collectively hold 9.94 percent of Hygea's issued and outstanding stock.

Moreover, Your Honor, what we will see and what we will see as a repeating theme throughout this lawsuit is that if plaintiffs had an issue about the issued and outstanding stock, they have a remedy at law. They can bring a breach of contract action.

If they feel that Hygea has violated that antidilution provision, which as plaintiffs' counsel just stated, it merely provides a preemptive right, then they can bring a lawsuit for breach of contract against Hygea. But a receivership action is not the forum to enforce their contractual rights.

Moreover, Your Honor, even if the Court were to assume that plaintiffs had standing, the evidence will demonstrate to the Court that -- that there is no

That they are disgruntled shareholders who, with respect to N5HYG, gave up their board seat and gave up the opportunity to influence the management that they now complain of and second guess.

What it will also show is that plaintiffs have less drastic remedies for their grievances, including remedies at law, such as making a proper books and records request.

We heard a lot in the opening statement about how Hygea has not been transparent. There are statutes that provide -- if you meet the standing requirements in Nevada that provide you access to certain books and records and that even provides you access to the financials of a company. Those statutes have not been properly employed by plaintiffs.

Also, we heard a lot about the audited financial -- I apologize. The 2014 and 2015 audits, which plaintiff, N5HYG, has repeatedly argued they are entitled to under the Stock Purchase Agreement.

Well, the Stock Purchase Agreement is a contract. And if they seek to enforce that contract or if they believe that Hygea has violated the contract, then they should bring a breach of contract claim seeking to enforce that right.

But a receivership action and the

extraordinary and harsh remedy of a receivership is not the proper basis to enforce their rights -- their purported rights under a contract.

Moreover, we've heard about -- we've heard plaintiffs complain about this purported mismanagement of the company. However, again, they have a legal remedy. They can bring a breach of fiduciary duty action.

And in Nevada, the threshold of breach of fiduciary duty is high, not mere negligence. It is looked at against the background of the business judgment role. And only if that presumption is overcome, then the Court must make a determination that the directors or officers engaged in misconduct that was intentional, that was knowing, or that constituted fraud. And there is no evidence of that here, Your Honor.

Finally, Your Honor, plaintiffs complain of debt, and they complain of the Bridging debt. But what plaintiffs do not say and what they have not been able to explain and what they will not be able to explain throughout the course of this trial is what a receiver is going to do to bring more money into a company. A receiver does not bring more money into a company.

When all the evidence is looked at together,

the stock register reflecting the names and the shareholders and amount of stock owned by each of the shareholders?

A. Not a complete stock register.

MS. GALL: Objection, Your Honor; lack of foundation.

THE COURT: Sustained.

Q. (By Mr. Viar) Have you ever been provided what was represented to you by anyone from Hygea to be a complete and accurate list of the shareholders of the company?

A. No, I did not receive one.

MR. VIAR: Your Honor, I move for the admission of just the first page of Exhibit 20.

MS. GALL: Your Honor, I object based on relevance because it's the same objection as before. This is not a breach of contract action.

MR. VIAR: Again, Your Honor -- I'm sorry.

THE COURT: Exhibit -- the first page of Exhibit 20 is admitted.

MR. VIAR: Thank you, Your Honor. I just want to go back to Exhibit 19 since we're on evidence. This was the email to and from Manuel Iglesias, the CEO at the time of Hygea, and move for entry of 19.

THE COURT: Ms. Gall?

MR. VIAR: Before I go there, Your Honor, I'd like to move for the admission of Exhibit 22 as a business record.

THE COURT: Ms. Gall?

MS. GALL: It's hearsay. I assume Mr. Viar is claiming the business record hearsay objection.

THE COURT: 22 is admitted.

Q. (By Mr. Viar) Turn to Exhibit 36 in your book.

A. Yes, I am there.

Q. What is reflected here in Exhibit 36?

A. This is a letter from myself as board observer for N5HYG to Manuel Iglesias at Hygea Holdings on October 26th, 2017.

Q. Can you just read the two middle paragraphs, please, into the record.

A. "Incredibly, despite the agreement, you denied N5HYG this promised investor protection by refusing to allow me to observe the October 23rd meeting.

"When I tried to join the call or observe, you stated that due to advice of counsel, I would not be allowed to observe, this despite the fact that the agreement is clear that I am allowed to observe.

"I tried several times to remain on the call, but you demanded that I hang up and threatened to

IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

MANUEL IGLESIAS; AND EDWARD MOFFLY Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA; IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE, Respondents, and N5HYG, LLC; AND NEVADA 5, INC., Real Parties in Interest	**Case No. 83157**

APPENDIX TO ANSWER OF REAL PARTIES IN INTEREST VOLUME 2, PART 2

ROBERT L. EISENBERG (SBN 950)
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ATTORNEYS FOR REAL PARTIES IN INTEREST N5HYG, LLC and NEVADA 5, INC.

reschedule the meeting if I did not. This was a blatant violation of the Stock Purchase Agreement.

"In fact, it constitutes a breach of the contract by both you and by Hygea. What is more, you should not hide behind your lawyers or blame advice of counsel for the violation.

"It appears that you are breaching the contract in retaliation for N5HYG's efforts to enforce the agreement, but N5HYG's efforts to protect itself and enforce its rights certainly give you no reason to commit additional violations of the contract."

Q. Did you at the time that you wrote that letter, did you believe you had a contractual right to attend the Hygea board of directors meetings?

A. Yes, we certainly did.

Q. Has your access to Hygea financial information improved since you were excluded from the October 2017 board of directors meeting?

A. No. It's gotten worse.

Q. Has Hygea had additional board meetings since October 2017 which you have been excluded from?

A. I believe so.

Q. Has Hygea made additional promises as recently as April of this year regarding audited financial statements?

C E R T I F I C A T E

STATE OF NEVADA)

COUNTY OF CLARK)

I, Daren S. Bloxham, a Certified Shorthand Reporter and Registered Professional Reporter, do hereby certify: That I reported the proceedings commencing on the 14th of May, 2018.

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

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

Witness my signature at Las Vegas, Nevada, on this 15th day of May, 2018.

Daren Bloxham

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

EXHIBIT "15"

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

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

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT

BEFORE THE HONORABLE JAMES E. WILSON JR.

VOLUME III

PAGES 414 - 648

DATE: Wednesday, May 16, 2018
TIME: 9:00 a.m.
LOCATION: Carson City District Court
885 E. Musser Street
Carson City, Nevada

REPORTER: Daren Bloxham RPR/CSR-685

showing the corporation is managing its debts. I think Mr. Iglesias provided an explanation as to why those checks bounced and how the corporation immediately covered those checks.

But most importantly, Your Honor, I think what we haven't seen any evidence of -- of any of these claims under 78.650 or 630 that are relevant today. The majority of evidence that plaintiffs have put on concern the time period when the lead plaintiff, N5HYG, was looking to become an investor in Hygea and purported misrepresentations that may have been made by Mr. Iglesias and Mr. Moffly during that 2016 time period.

In addition, we have heard complaints from plaintiff about the audits, a lot about the audits, which is reflected in a Stock Purchase Agreement between N5HYG and Hygea. But, again, that is a breach of contract claim, not a basis for the appointment of a receivership.

Plaintiffs have presented absolutely no evidence or, at best, scant evidence of what is happening today at Hygea. Your Honor, I believe that is the relevant time period for this Court to consider. For these reasons, we move for judgment as a matter of law or, alternatively, judgment on partial findings.

C E R T I F I C A T E

STATE OF NEVADA)

COUNTY OF CLARK)

I, Daren S. Bloxham, a Certified Shorthand Reporter and Registered Professional Reporter, do hereby certify: That I reported the proceedings commencing on the 16th of May, 2018.

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

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

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

Daren Bloxham

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

EXHIBIT "16"

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

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

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT

BEFORE THE HONORABLE JAMES E. WILSON JR.

VOLUME IV

PAGES 649 - 893

DATE: Thursday, May 17, 2018

TIME: 9:00 a.m.

LOCATION: Carson City District Court
885 E. Musser Street
Carson City, Nevada

REPORTER: Daren Bloxham RPR/CSR-685

And they're trying to bootstrap in that 8.57 percent based on a representation that was made in October of 2016, almost -- I'll say fairly a year and a half ago, to have this Court calculate the 10 percent shareholding.

And they base this on, Your Honor, an antidilution provision of the Stock Purchase Agreement. However, they have not provided any authority whatsoever that merely because a private ordering, a contract between Hygea and N5HYG, contains an antidilution provision, that plaintiff is automatically conferred 8.57 percent stock ownership and, thereby, all plaintiffs collectively 10 percent stock ownership.

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

78.650 says nothing about dilution, whether

COUNTY OF CLARK)

I, Daren S. Bloxham, a Certified Shorthand Reporter and Registered Professional Reporter, do hereby certify: That I reported the proceedings commencing on the 17th of May, 2018.

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

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

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

Daren Bloxham

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

EXHIBIT "17"

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

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

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT

BEFORE THE HONORABLE JAMES E. WILSON JR.

VOLUME V

PAGES 894 - 975

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

REPORTER: Daren Bloxham RPR/CSR-685

Page 911

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

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

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

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

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

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

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

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

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

That large payment, which Hygea will receive,

Page 913

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

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

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

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

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

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

Page 914

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

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

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

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

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

stock purchase.

But, again, plaintiff N5HYG can then seek damages for such misrepresentations through its securities claim in federal court. Plaintiffs have a legal remedy for each and every one of their complaints.

Indeed, defendants submit that the Court must ask about plaintiffs' true motivation in filing this action when they already had an action pending, and when they were also readily receiving, as we saw from Mr. Dragelin, confidential information from one of Hygea's agents, not one of their agents.

Plaintiffs are seeking, clearly seeking, to do in this courtroom what they cannot or they have chosen not to do in Hygea's boardroom, including by their own admitted relinquishment of a board seat.

N5HYG, if it believed that the directors were engaged in mismanagement, it could have taken its board seat, and it could have directly influenced the management of the corporation, but it chose not to do so.

The Court should also look at the proposed order for an appointment of a receiver that plaintiffs submitted. It is incredibly telling about their motivation for filing this lawsuit.

The proposed order, which was filed on May 9, provides that the receiver is to open the books and records of the corporation to the stockholders and to complete the 2014 and '15 audited financial statements. Those requirements benefit one stockholder - N5HYG.

In short, the plaintiffs, in particular N5HYG, come to this Court asking for equity, but they do not show that they come with clean hands. And with respect to equity, the Court must engage in a balancing of equities. And plaintiffs have not shown that that balance weighs in their favor.

As to the appointment of a receiver, the Nevada Supreme Court in Hines v. Plante, 99 Nev. 259, 661 P.2d 880, has stated this. I think it is very important, Your Honor. "The appointment of a receiver is a harsh and extreme remedy which should be used sparingly and only when the securing of ultimate justice requires it."

A corollary of this rule is that if the desired outcome may be achieved by some method other than appointing a receiver, then this course should be followed.

The reasons for the above rules are fundamental. Appointing a receiver to supervise the affairs of a business is potentially costly, as the

receiver typically must be paid for his or her services.

A receivership also significantly impinges on the right of the individuals or corporations to conduct their business affairs as they see fit and may endanger the viability of a business.

The existence of a receivership can also impose a substantial administrative burden on the Court. Justice here does not demand appointment of a receiver; rather, what justice demands is that this Court ask a very simple question: Would Hygea do better under a receiver than under its current management?

Hygea -- what we have seen is Hygea is solvent. Hygea is managing its debts. Hygea is operating under the direction of a well-qualified and active board of directors, including through a slate of new C-suite executives.

Indeed, the appointment of a receiver would not only add to Hygea's expenses during a time of cash constraint, but it would almost certainly render an otherwise solvent corporation insolvent, achieving the exact opposite result that the plaintiffs purport to seek.

In short, as Mr. Iglesias and Drs. Collins

and Mann have testified, and even Dr. Gaylis, one of plaintiffs' witnesses has testified, if a receiver is appointed, Hygea would stand to risk losing its contracts with HMO plans, all of whom have a contractual right to terminate the contract with Hygea in the case that a receiver is appointed to manage the company's affairs.

It's also demonstrated, if an HMO canceled its contract with Hygea, the Medicare Advantage patient panel associated with that HMO would be immediately and automatically reassigned to another provider, and Hygea would permanently lose its ability to generate revenue by optimizing capitation for that particular patient panel.

Even more alarming, if that patient panel is reassigned, the new medical management organization to which the patient panel would be reassigned will have the right to receive all surpluses going forward, even those that are properly attributable to the coding and services provided by Hygea from 2016 through 2018.

In other words, the free cash flows associated with revenue and accounts receivable already booked by Hygea would be immediately and irrevocably assigned to a third party because the money follows the patient panel.

C E R T I F I C A T E

STATE OF NEVADA)
COUNTY OF CLARK)

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

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

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

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

Daren Bloxham

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

EXHIBIT "18"

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

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

Plaintiffs,

-vs- Case No. 18 OC 00071 1B

HYGEA HOLDINGS CORP,

Defendant.

_____/

TRIAL TRANSCRIPT

VOLUME II

PAGES 281 - 413

DATE: Tuesday, May 15, 2018
TIME: 1:00 p.m.
LOCATION: Carson City District Court
885 E. Musser Street
Carson City, Nevada

REPORTER: Daren Bloxham RPR/CSR-685

THE COURT: I thought you said we're doing this in lieu of?

MR. KAYE: Your Honor, my apologies if I was unclear. I think there was a suggestion from defense --

THE COURT: Okay.

MR. KAYE: -- that we could have done a deposition. I'm saying this is better for everyone.

THE COURT: Okay.

MS. GALL: Your Honor, I believe there is a substantive difference.

THE COURT: That's why I asked.

MS. GALL: Yes. If I put Mr. Iglesias up, I will control the scope of his direct, and their cross will be limited to the scope of his direct. If they put him up as an adverse witness, they can open it up to anything they want, subject, of course, to any objections I may make and what this Court will rule on.

As we heard yesterday, I don't think it's any secret, plaintiffs are incredibly interested about the allegations of representations made in the time period leading up to when N5HYG became a shareholder in this lawsuit, which we do not believe is relevant here, and which essentially are the allegations in the securities lawsuit pending before Judge Mayhan in federal court.

And, therefore, if they put Mr. Iglesias up, they can open up it up to anything they want to ask, not confined by the terms of my direct examination.

THE COURT: As long as it's relevant and -- and maybe I need to be a little more sensitive to relevance objections. If -- I mean, it strikes me as correct that it doesn't really matter what went on before. What we're looking at is what's going on now.

MS. GALL: Right.

THE COURT: So if I am a little more sensitive to that, what's the difference?

MS. GALL: Your Honor, I always defer to you. The other thing I would ask for is if this has nothing to do with the securities litigation, I would ask for a protective order that prohibits his testimony in this litigation from being used in the other litigation.

THE COURT: Mr. Kaye?

MR. KAYE: Your Honor, a couple of responses. Once again, if I can state this is -- the issues at play in the securities litigation specifically are not the reasons that we're looking to put Mr. Iglesias in on our direct.

And I think the Court really previewed something I was going to say. If counsel has objections to questions, counsel can make objections to

C E R T I F I C A T E

STATE OF NEVADA)

COUNTY OF CLARK)

I, Daren S. Bloxham, a Certified Shorthand Reporter and Registered Professional Reporter, do hereby certify: That I reported the proceedings commencing on the 15th of May, 2018.

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

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

Witness my signature at Las Vegas, Nevada, on this 16th day of May, 2018.

Daren Bloxham

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

EXHIBIT "19"

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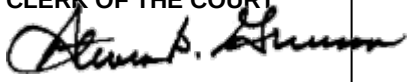

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Yellow highlights = verbatim argument from prior MSJ

Blue highlights = verbatim argument from prior Reply

Green highlights = inaccurate references to moving party, copied from prior MSJ / Reply

DISTRICT COURT

CLARK COUNTY, NEVADA

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, Plaintiffs, vs. HYGEA HOLDINGS CORP., a Nevada corporation; MANUEL IGLESIAS; EDWARD MOFFLY, and DOES I through X, inclusive, and ROES I-XXX, inclusive, Defendants.	CASE NO. A-17-762664-B DEPT. XXVII **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION TO DISMISS** **HEARING REQUESTED** Date of Hearing: Time of Hearing:

Defendants, Manuel Iglesias ("Iglesias") and Edward Moffly ("Moffly," collectively with Iglesias, the "Defendants"), by and through their attorneys, Kory L. Kaplan, Esq. and Kyle P. Cottner, Esq., of the law firm of Kaplan Cottner, hereby file this Motion for Summary Judgment, or in the alternative, Motion to Dismiss ("Motion").

This Motion is made and based on the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, and any oral argument the Court may choose to entertain

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Case Number: A-17-762664-B

at the time of the hearing.

Dated this 4th day of November, 2020.

KAPLAN COTTNER

By: /s/ Kory L. Kaplan
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This Motion concerns the Court's Findings of Fact, Conclusions of Law, and Order Granting Defendants' Motion for Reconsideration Re: Claim Preclusion (the "Claim Preclusion Order"), entered on December 3, 2019. The Claim Preclusion Order ***DISMISSED WITH PREJUDICE*** Plaintiffs' First Amended Complaint ("FAC"). It further provided—in no unclear terms—that "[a]ny second amended complaint filed by [Plaintiff] N5HYG and/or Nevada 5, Inc. must … be based on a different nucleus of operative facts from that presented in the [First] Amended Complaint." Plaintiffs' Second Amended Complaint ("SAC") violates the unambiguous terms of the Claim Preclusion Order. The SAC is not based on a different nucleus of operative facts from the FAC; rather, it regurgitates the same nucleus of facts, makes the same claims, and asserts the same causes of action as the FAC.

In short, by their SAC, Plaintiffs N5HYG, LLC ("N5HYG") and/or NEVADA 5. INC. ("Nevada 5") try to allege for the third time that Defendants Hygea Holdings Corp., Manuel Iglesias, and Edward Moffly defrauded one or both Plaintiffs into purchasing Hygea stock by misrepresenting its financial condition and then subsequently breached the stock purchase

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agreement by failing to make post-closing monthly payments. The Court dismissed the claims based on such allegations in the FAC with prejudice because Plaintiffs tried and/or had the opportunity to bring claims based on these facts in the related Receiver Action but failed to do so.

The Motion presents one question: have Plaintiffs violated the Court's Claim Preclusion Order by filing a SAC that is based on the same nucleus of operative facts as the dismissed-with-prejudice FAC? To answer this question the Court need only (1) review the unambiguous terms of the Claim Preclusion Order, which states: "[a]ny second amended complaint filed by [Plaintiff] N5HYG and/or Nevada 5, Inc. must … be based on a different nucleus of operative facts from that presented in the [First] Amended Complaint"; and (2) compare the FAC with the SAC. It is a narrow question.

Plaintiffs' attempt to revive the same allegations in the SAC is inappropriate, particularly in the face of the Claim Preclusion Order, which expressly prohibits them from doing so. Accordingly, the Court should grant dismissal and/or summary judgment in Defendants' favor on allegations and claims it previously dismissed with prejudice.

II.

STATEMENT OF FACTS

This Motion merits a brief explanation of how the parties have arrived at the Claim Preclusion Order and Second Amended Complaint that are the subject of this Motion.

A. The Filing and Removal of this Action.

On October 5, 2017, Plaintiffs Nevada 5 and N5HYG filed this Action, which arises from N5HYG's purchase of Hygea stock. Nevada 5 is N5HYG's parent company. Plaintiffs alleged a purported fraudulent course of conduct by Defendants in connection with N5HYG's stock purchase. Plaintiffs contended that, during the course of discussions leading up to N5HYG's execution of the stock purchase agreement between it and Hygea, Defendants made two sets of misrepresentations—one as to Hygea's financial performance and the other as to the intention to take Hygea public via a reverse takeover that never occurred. Based on these allegations, Plaintiffs set forth a veritable "kitchen-sink" of claims, not only for breach of contract, but also for twenty more causes of action, including securities fraud, common law fraud, breach of fiduciary duty, and

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conspiracy. On November 16, 2017, former defendant Ray Gonzalez removed this Action to federal court on the basis that Plaintiffs had pled federal securities law claims. Upon removal and the filing of Defendants' motion to dismiss, the federal court automatically stayed all discovery in this Action under the Private Securities Litigation Reform Act.

B. The Filing and Trial of the Receiver Action.

On January 26, 2018, while this Action was pending in federal court and discovery stayed, Plaintiff N5HYG filed another state court action against Hygea in which it requested the appointment of a receiver over the company. The parties refer to that case as the Receiver Action. N5HYG argued for the appointment of a receiver based upon, among other things: the supposed misrepresentations of Defendants Hygea, Iglesias, and Moffly in connection with N5HYG's purchase of Hygea stock; their alleged breaches of the stock purchase agreement between N5HYG and Hygea, including $175,000 in post-closing monthly payments; and their failure to provide N5HYG with Hygea's books and records. On May 14, 2018, the Receiver Action proceeded to trial. After a week-long trial, the court entered judgment in favor of Hygea and its directors on all claims.

C. Hygea's Claim Preclusion Motion and the Court's Claim Preclusion Order in this Action

On June 6, 2018, the federal court remanded this Action. Defendants subsequently filed a motion to dismiss the FAC based on claim preclusion and failure to state a claim on which relief can be granted. Although the Court dismissed a significant number of Plaintiffs' claims based on their pleading failures, the Court initially denied dismissal based on claim preclusion. On June 17, 2019, Defendants filed a motion for reconsideration, which persuaded the Court that it should vacate its decision with regard to claim preclusion and enter a new decision granting dismissal of the FAC based on claim preclusion. *See* Claim Preclusion Order, a true and correct copy of which is attached hereto as **Exhibit A**.

On December 3, 2019, the Court issued its Claim Preclusion Order, which found that both the Receiver Action and the FAC arose from the same core allegations, namely that N5HYG purchased Hygea stock and memorialized that purchase in a stock purchase agreement; Hygea,

through the misconduct of its officers and directors, misrepresented Hygea's value; and Hygea failed to provide contractually obligated audits of Hygea's financial statements and to make monthly post-closing payments. *Id.* ¶ 22 at p. 10:4-17.

Accordingly, the Court dismissed the FAC **with prejudice** and ordered that:

> Any second amended complaint filed by N5HYG and/or Nevada 5, Inc. **must** … be based on a different nucleus of operative facts from that presented in the Amended Complaint.

Id. ¶ 4 at p. 15:15-17 (emphasis added). This holding is consistent with the Court's oral pronouncement at the end of the reconsideration hearing, where it explained that it was only allowing Plaintiffs leave to replead because "[t]here might be some other causes of action that still exist," and agreeing with defense counsel that "the causes of action that [were] previously pled, those are dismissed, then, under claim preclusion." Transcr. of Proceedings (filed July 22, 2019), pp. 35:25-36:9, already on file herein.

The Court also sets forth what "nucleus of operative facts" means in its Claim Preclusion Order, adopting the approaches taken by the Restatement and the federal courts in the absence of direct Nevada authority.

> 19. As the U.S. Court of Appeals for the Seventh Circuit explained, "[U]nder well-established claim-preclusion doctrine, [] common nucleus of operative facts **means the claims are the same even though they involve different legal theories**." *Matrix IV, Inc. v. Am. Nat'l Bank & Tr. Co.*, 649 F.3d 539, 548 (7th Cir. 2011). Citing to another Seventh Circuit case, the court further explained that "**a 'claim' consists of the underlying factual events** rather than the legal theories advanced." *Id.*
>
> 20. Other federal circuits are in accord. For instance, the Second Circuit, quoting from the Restatement (Second) of Judgments § 24, has held that "[t]o ascertain whether two actions spring from the same 'transaction' or 'claim,' we look to **whether the underlying facts are 'related in time, space, origin, or motivation**, and whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations ....'" *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 108 (2d Cir. 2000).
>
> 21. The comments and illustrations to the Restatement also explain that "[t]hough no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the

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> second action should ordinarily be held precluded. But the opposite does not hold true; **even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.**" Restat 2d of Judgments, § 24.

Exhibit A ¶¶ 19-21 at pp. 9:10-10:3 (emphasis added).

Further, the Court found that Plaintiff petitioned the appointment of a receiver based on the allegations in the FAC, namely that: (1) N5HYG purchased Hygea stock; and (2) Hygea, through its officers and directors, misrepresented Hygea's value, failed to provide contractually obligated audits of Hygea's financial statements, and failed to make monthly post-closing payments:

> 22. N5HYG argued in Opposition that this Action and the Receiver Action are based on different facts because it said so on the face of its Receiver Complaint. This argument is not well taken. The mere fact that N5HYG stamped a "disclaimer" onto the face of its Receiver Complaint cannot alter the reality that both actions arose from the same core allegations of fact: in 2016, N5HYG purchased Hygea stock and memorialized that purchase in a stock purchase agreement; N5HYG alleges Hygea, through the misconduct of its officers and directors, misrepresented Hygea's value; N5HYG further alleges that Hygea failed to provide contractually obligated audits of Hygea's financial statements and to make monthly post-closing payments. In the Receiver Action, N5HYG petitioned for the appointment of a receiver based on these alleged wrongdoings. In this Action, N5HYG seeks damages and rescission of the stock purchase agreements based on the same allegations. Although the remedies N5HYG sought differed in the two actions, the dispositive point for purposes of the claim preclusion inquiry is that the core facts underlying both actions are the same.

Exhibit A ¶ 22 at p. 10:4-17.

Despite this, Plaintiffs filed their SAC that parrots in form and substance the allegations and claims made in the FAC (and in the Receiver Action). Plaintiffs even admit such:

> 25. **Nevada 5's claims herein are based upon Defendants' conduct which fraudulently-induced Nevada 5 into paying Hygea $30 million on or about October 5, 2016**. […]
>
> 26. **N5HYG's claims herein are based primarily upon Defendants' repeated breaches of the SPA occurring on and after August 1, 2017**, and include breaches occurring after conclusion of the Receivership Action. […]

SAC ¶¶ 25-26 at p. 4:1-6 (emphasis added), already on file herein.

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D. Defendants' Previous Motion for Summary Judgment

Defendants Iglesias, Moffly, and Hygea Holdings Corp. previously filed a Motion for Summary Judgment on January 13, 2020. *See* Defendants' Motion for Summary Judgment filed on January 13, 2020, already on file herein. On January 21, 2020, Plaintiffs N5HYG, LLC and Nevada 5, Inc. filed their Opposition to Defendants' Motion for Summary Judgment. *See* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment filed on January 21, 2020, already on file herein. Defendants filed their Reply In Support of the Motion for Summary Judgment on January 27, 2020. *See* Defendants' Reply in Support of Motion for Summary Judgment filed on January 27, 2020, already on file herein.

The Court considered the papers and pleadings on file and heard oral argument presented by counsel at the hearing on the Motion for Summary Judgment on January 30, 2020. The Court took the matter under submission and set a Status Check for February 11, 2020 for the Court to issue a Minute Order with its decision. On February 11, 2020 the Court continued the Status Check to February 25, 2020. On February 19, 2020, Defendants filed a Notice of Related Case Filed in Bankruptcy Court in connection with Defendant Hygea Holdings Corp.'s Chapter 11 Voluntary Petition commenced in the United States Bankruptcy Court for the District of Delaware, Case No. 20-10361-KBO ("Bankruptcy Proceeding"). On February 21, 2020, this Court *sua sponte* issued an Order Setting Hearing to schedule a Status Check as to the effect of the Bankruptcy Proceeding on the above-entitled case for February 26, 2020 at 9:00 a.m.

On February 26, 2020 at 9:00 a.m., the Court held a Status Check pursuant to the Order Setting Hearing. Given Defendant Hygea Holdings Corp.'s pending Chapter 11 Voluntary Petition, the Court denied Defendants' Motion for Summary Judgment ***without prejudice***. *See* Notice of Entry of Order Denying Defendants' Motion for Summary Judgment without Prejudice filed on April 15, 2020, already on file herein. The Court also stayed the matter for ninety (90) days as a result of the Bankruptcy Proceeding. *Id*. The Court also scheduled a status hearing for May 26, 2020 and ordered Plaintiffs to file a status report prior to the May 26, 2020 hearing. *Id.*

On May 20, 2020, Plaintiffs filed a Status Report advising the Court, among other things, that the Bankruptcy Proceeding remained pending. *See* Plaintiff's Status Report pursuant to April

15, 2020 Order filed on May 20, 2020, already on file herein. On May 26, 2020, the Court continued the Status Check to September 1, 2020 on chambers calendar and directed the parties to file status reports in advance of the Status Check. On August 31, 2020, Plaintiffs filed a Status Report advising the Court, among other things, that the Delaware Bankruptcy Court entered an Order confirming the Second Amended Plan of Reorganization for Defendant Hygea Holdings Corp. on June 15, 2020 that became effective on July 15, 2020. *See* Status Report filed on August 31, 2020, already on file herein. Plaintiffs advised that the Plan discharged Defendant Hygea Holdings Corp. from pre-petition claims to collect a debt and therefore Plaintiffs do not intend to pursue claim to collect a debt from Hygea Holdings Corp. *Id*. As such, only Defendants Manuel Iglesias and Edward Moffly remain despite Plaintiffs' attempt to name Hygea Holdings Corp. again in the SAC.

The Court set a Mandatory Rule 16 Conference for October 1, 2020. On October 1, 2020, Defendants Iglesias and Moffly represented that they were in the process of obtaining new counsel. The Court provided them with the opportunity to respond to the SAC by November 5, 2020.

Because Defendants' previous Motion for Summary Judgment was denied without prejudice due to Hygea Holdings Corp.'s pending Bankruptcy Proceeding, and because the Second Amended Plan of Reorganization was approved, the Motion is now ripe to be heard on the merits with respect to Defendants Manuel Iglesias and Edward Moffly.

III.

LEGAL ARGUMENT

A. Legal Standard for Motion for Summary Judgment to Nev. R. Civ. Proc. 56.

Summary judgment is appropriate under NRCP 56 only "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc*., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id*. "A factual dispute is genuine when

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the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.*

The purpose of a summary judgment is not to deprive the litigants of their right to trial by jury if factual issues really exist. *Caughlin Ranch Homeowners Ass'n v. Caughlin Club*, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993). As such, when reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence must be viewed in a light most favorable to the nonmoving party. *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 137, 206 P.3d 572, 575 (2009). When the plaintiff cannot recover as a matter of law, the defendant is entitled to summary judgment. *Harrington v. Syufy Enterprises*, 113 Nev. 246 (1997) (citing *Van Cleve v. Kietz-Mill Minit Mart*, 97 Nev. 414, 633 P.2d 1220 (1991)). NRCP 56 mandates the entry of summary judgment upon motion, after adequate time for discovery, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). Several Nevada cases have properly applied the *Celotex*-type analysis in affirming the lower court's grant of summary judgment because the claimant did not come forward with any evidence that dispelled the movant's demonstration of the lack of material issues of fact. *See Charles v. J. Steven Lemmons & Associates*, 104 Nev. 388, 760 P.2d 118 (1988); *Elley v. Stephens*, 104 Nev. 413, 760 P.2d 768 (1988); *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588 (1992); *Billingsley v. Stockmen's Hotel, Inc*., 111 Nev. 1033, 901 P.2d 141 (1995).

Whatever quantum of proof would apply at the trial on the merits applies at the summary judgment stage. The mere existence of some evidence in support of Plaintiff's claim is not enough. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242,106 S.Ct. 2505 (1986). In *Anderson*, the United States Supreme Court stated that the trial judge must "bear in mind the actual quantum and quality of proof necessary to support liability" when inquiring into the existence of a genuine issue of material fact. *Id*. at 252. If, for example, "the existence presented in the opposing affidavits is of insufficient caliber or quantity," then no genuine issue of material fact is raised. *Id*. at 254.

Plaintiff cannot avoid the entry of summary judgment by fabricating an issue or raising a sham issue. *Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965); *Dzack v. Marshall*, 80 Nev. 345,

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393 P.2d 610 (1964). Plaintiff is not entitled to have the motion for summary judgment denied on the mere hope that at trial it will be able to discredit Defendants' evidence. Plaintiff must be able to point out to the court something indicating the existence of a triable issue of fact. *Thomas v. Bokelman*, 86 Nev. 10, 462 P.2d 1020 (1970); *Bair v. Berry*, 86 Nev. 26, 464 P.2d 469 (1970); *Leggett v. Estate of Leggett*, 88 Nev. 140, 494 P.2d 554 (1972); *Hickman v. Meadow Wood Reno*, 96 Nev. 414,633 P.2d 1220(1981); *Collins v. Union Federal Savings & Loan Association*, 99 Nev. 284,662 P.2d 610 (1983) (the opposing party is not entitled to build a case for trial "on the gossamer threads of whimsy, speculation and conjecture"); *Michaels v. Sudeck*, 107 Nev. 332, 810 P.2d 1212 (1991); *Bulbman*, 108 Nev. 105, 825 P.2d 588. To establish entitlement to judgment as a matter of law, the defendant need only negate one element of the plaintiff's case. *Harrington*, *supra* (citing *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589 (1991)).

Of note, applying review appropriate to summary judgment does not lessen the "demanding" substantive law that applies to independent actions seeking review from judgment. *Bonnell v. Lawrence*, 128 Nev. 394, 401, 282 P.3d 712, 716 (2012) (internal quotations omitted). The policy supporting the finality of judgments recognizes that, "'in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered.'" *NC–DSH*, 125 Nev. at 653, 218 P.3d at 858 (quoting *Hazel–Atlas Co. v. Hartford–Empire Co*., 322 U.S. 238, 244, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *abrogated on other grounds by Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976)). Similar to a qualified immunity or other privilege defense, the bar against relitigation of already-decided issues is, in essence, "an entitlement not to stand trial or face the other burdens of litigation" and "should be resolved at the earliest possible stage in litigation." *Butler v. Bayer*, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007) (internal quotations omitted).

"Summary judgment is appropriate when [claim or] issue preclusion bars a claim." *Bonnell*, 128 Nev. at 401, 282 P.3d at 716 (quoting *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 43, ——, 245 P.3d 547, 548 (2010)).

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B. Legal Standard for Motion to Dismiss Pursuant to Nev. R. Civ. Proc. 12(b)(5).

A party may move for dismissal of claims when a pleading fails to state a claim upon which relief may be granted. *See* Nev. R. Civ. P. ("NRCP") 12(b)(5). A NRCP 12(b)(5) motion must be granted if the claimant would be entitled to no relief under the facts set forth in the pleading. *See Morris v. Bank of America Nevada*, 110 Nev. 1274, 1277, 886 P.2d 454, 457 (1994) (citing *Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985)). A pleading must contain: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief." *See* NRCP 8(a).

The meaning of a "short and plain statement of the claim" has been clarified in Nevada case law. "Notice pleading" requires plaintiffs to set forth facts which support a legal theory. *See Liston v. Las Vegas Metropolitan Police Dept.*, 111 Nev. 1575, 1579, 908 P.2d 720, 723 (1995) (citing *Swartz v. Adams*, 93 Nev. 240, 245, 563 P.2d 74, 77 (1977)). "[C]onclusory allegations are not considered as expressly pleaded facts or factual inferences." *In re Amerco Derivative Litig*., 127 Nev. Adv. Op. 17, 252 P.3d 681, 706 (2011) (citing *Brehm v. Eisner*, 746 A.2d 244, 255 (Del.2000)). Further clarity as to what specific facts are necessary is provided by the mandate that a sufficient pleading must give fair notice of both the nature and the basis of the claim. *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979); *see also Western States Constr. v. Michoff*, 108 Nev 931, 936, 840 P.2d 1220, 1223 (1992) (same).

For purposes of a Rule 12(b)(5) motion, the claimant's allegations are generally assumed to be true and viewed in the light most favorable to the claimant. *See e.g., Hynds Plumbing v. Clark Co. Sch. Dist.*, 944 Nev. 776, 777, 587 P.2d 1331, 1332 (1978). However, the court need not accept as true any unreasonable inferences or unwarranted deductions of fact. *See Mirrin v. Justices of the Supreme Court of Nevada*, 415 F. Supp. 1178, 1190 (D. Nev. 1976). In other words, the court and the defendant should not be placed in a position to guess as to the factual basis of any element of a claim, where the plaintiff has the responsibility to set forth facts establishing its alleged right to relief. When it appears to a certainty that, under the facts set forth in the complaint, the plaintiff could prove no set of facts that would entitle him to the remedy sought, dismissal is appropriate. *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720, 734 (2003). A court may

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consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

C. Nevada 5 Impermissibly Tries to Bring Claims Based on The Same Allegations of Fraud and Misrepresentation in The FAC.

Despite the Court's clearly worded Claim Preclusion Order, Plaintiff Nevada 5 tries to assert the below fraud-based causes of action, all of which stem from allegations that Defendants misrepresented the Company's financial condition to Plaintiffs' agent, RIN Capital, LLC, in the lead-up to the Hygea stock purchase (*see* SAC ¶¶ 28-38 at pp. 4:14-10:5). These are **the exact same allegations and claims made in the DISMISSED WITH PREJUDICE First Amended Complaint** and that were or could have been made in the Receiver Action.

- Florida Statutory Securities Fraud
- Control Person Liability under the Florida Securities Act
- Michigan Statutory Securities Fraud
- Control Person Liability under the Michigan Securities Act
- Common Law Fraud
- Negligent Misrepresentation
- Silent Fraud/Material Omissions
- Civil Conspiracy
- Concert of Action

Hygea anticipates that Plaintiffs will argue that Nevada 5 was not a party to the Receiver Action and is thus permitted to bring the above claims, even if based on the same nucleus of facts in the FAC and/or the Receiver Action. *See* SAC ¶¶ 19-23 at p. 3:10-25. But Plaintiffs made this same argument in their brief advocating for the entry of their competing claim preclusion order, which this Court rejected. Plaintiffs' Brief in Opposition to Defendants' Proposed Order (filed Aug. 19, 2019), pp. 1:14:17; 1:23-4:17, already on file herein. In fact, the Court decided the issue when it entered Hygea's proposed Claim Preclusion Order, holding that "[a]ny second amended complaint filed by N5HYG **and/or Nevada 5**, **must** … be based on a different nucleus of operative

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facts from that presented in the Amended Complaint." Exhibit A ¶ 4 at p. 15:15-17) (emphasis added). Plaintiffs' effort to include the same allegations and claims as they did in the FAC is in direct violation of that holding and an impermissible attempt to seek reconsideration of the Court's Claim Preclusion Order.

D. N5HYG Impermissibly Tries to Bring Claims Based on The Same Allegations of Breach of Contract in The FAC.

In the meantime, Plaintiff N5HYG tries to assert a claim for breach of contract based on Hygea's alleged failure to pay $175,000 in post-closing monthly payments starting in August 2017. (SAC ¶ 26 at p. 4:4-8 & ¶ 132 at p. 23:17-20). N5HYG, however, brought a breach of contract claim based on the post-closing monthly payments in the FAC, complaining that "[b]eginning in or around August, 2017, Defendants ceased making the $175,000 Post-Closing Monthly Payments to Plaintiff N5HYG, and interest thereon, requires under Section 6.3 of the Stock Purchase Agreement." (FAC ¶ 76(a) at p. 16:6-8; *see also* FAC ¶ 142 at p. 25:12-23 (stating as part of the Tenth Cause of Action for breach of contract: "they have failed to make the $175,000 Post-Closing Monthly Payments to Plaintiff N5HYG, and interest thereon (which payments and interest were personally guaranteed by Iglesias and Moffly)). N5HYG's effort to include the same allegations and claims in the SAC violates the Claim Preclusion Order.

Hygea anticipates that Plaintiffs will argue that the alleged failure to pay the post-closing payments is a continuing violation, falling outside claim preclusion resulting from the Receiver Action. (*See* SAC ¶ 26 at p. 4:4-8). Although Nevada has yet to squarely address the issue, other jurisdictions hold that the continuing violation theory "applies to avoid claims that would otherwise be barred by the statute of limitations; it does not permit a plaintiff to avoid the application of res judicata." *Carlson v. Ameriprise Fin.*, No. 08-5303 (MJD/JJK), 2009 U.S. Dist. LEXIS 132440, at *31 (D. Minn. May 21, 2009); *see also Tarabochia v. Clatsop Cty., Oregon*, No. 3:16-CV-01457-TC, 2018 WL 2225354, at *2 (D. Or. Mar. 19, 2018), *report and recommendation adopted*, No. 3:16-CV-01457-TC, 2018 WL 2223319 (D. Or. May 15, 2018) (a breach of contract occurs when a party fails to perform under the contract; the party does not commit a "new" breach each consecutive day afterward); *see Zibbell v. Marquette Cty. Res. Mgmt.*,

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No. 2:12-cv-302, 2013 WL 625062, at *11 (W.D. Mich. Feb. 20, 2013) ("Where it is obvious that the alleged ongoing unlawful conduct is actually the defendant continuing on the same course of conduct ..., the court reviewing the second or subsequent lawsuit must conclude that the plaintiff is simply trying to relitigate the same claim ..."); *see also Dubuc v. Green Oak Twp.*, 312 F.3d 736, 748-49 (6th Cir. 2002) (declining to recognize a recurring issue of wrongdoing based on later misconduct or to extend the continuing violation theory to the doctrine of claim preclusion in a § 1983 context).

Plaintiffs could have asserted and did assert these claims in the FAC, and therefore are precluded from litigating the same issues. Additionally, Plaintiffs' claims for indefinite damages of $175,000 per month cannot exist into perpetuity, especially given the fact that Hygea's Bankruptcy Plan was approved.

E. N5HYG Impermissibly Tries to Bring A Books and Records Claim.

N5HYG also tries to bring a books and records claim against Iglesias and Moffly (presumably this pre-petition claim is not being made against Hygea). N5HYG, however, is no longer a Hygea stockholder, as the bankruptcy wiped out N5HYG's equity interest in Hygea. Accordingly, N5HYG does not have standing to assert a claim for Hygea's books and records. Even if N5HYG had standing, Iglesias and Moffly are no longer officers or directors of Hygea and thus have no ability to control provision of its books and records. Moreover, according to the bankruptcy confirmation plan, Hygea's assets, to include its books and records, transferred to the reorganized debtors.

F. Nevada 5 Is Just as Claim Precluded as N5HYG Because the Two Are Indisputably in Privity With One Another.

Plaintiffs are likely to argue that Nevada 5 was not a party to the Receiver Action and is thus permitted to bring claims based on the same nucleus of operative facts as the FAC and Receiver Action. This is the same argument the Court expressly rejected when it entered its Claim Preclusion Order over Plaintiffs' objections that Nevada 5 should be permitted to bring claims based in fraud arising from the purchase of Hygea stock. Now Plaintiffs effectively ask the Court to ignore (1) the undisputed fact that N5HYG is the wholly-owned subsidiary of Nevada 5, and

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thus the two are in privity with one another for purposes of claim preclusion; (2) as well as well-defined Nevada law applying claim preclusion to those in privity with one another. *Mendenhall v. Tassinari*, 403 P.3d 364, 369 (Nev. 2017) (applying claim preclusion to parent company found to be in privity with its subsidiary entity); FAC ¶ 24 ("All of [N5HYG's] membership shares are owned by Plaintiff Nevada 5, Inc."); *Nevada Contractors Ins. Co. v. Risk Servs.-Nevada, Inc.*, 132 Nev. 1011 (2016) (claim preclusion applied because the parties in the new case were the same to or in privity with the parties in the previous case); *see FQ Men's Club, Inc. v. City of Reno*, 441 P.3d 1090 (Nev. 2019) (Privity can "encompass a relationship in which 'there is substantial identity between parties, that is, when there is sufficient commonality of interest.'" (citing *Mendenhall*, 133 Nev., Adv. Op. 78, 403 P.3d at 369 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003) (internal quotation marks omitted))); *Sparks Nugget, Inc. v. Comm'r of Internal Revenue*, 458 F.2d 631, 639 (9th Cir. 1972) (This may include "a close corporation and its sole or controlling stockholder." (internal quotation marks omitted)); *see also Weddell v. Sharp*, 131 Nev. 233, 240 n.2, 350 P.3d 80, 85 (2015) (when considering whether a plaintiff had "good reasons" to justify a second suit against a new defendant, many, if not most, federal courts focus on whether the new defendant had a "close and significant relationship" with the defendant in the first suit); *see also Russell v. SunAmerica Secs., Inc.*, 962 F.2d 1169, 1175–76 (5th Cir.1992) (concluding that the relationship between two defendants was "close enough" to apply nonmutual claim preclusion); *Fowler v. Wolff*, 479 F.2d 338, 340 (8th Cir.1973) (recognizing that defendants' relationship with each other was "so close" that nonmutual claim preclusion should be applied).

Additionally, the Court held in its Claim Preclusion Order that the claim-preclusion doctrine consists of the underlying factual events rather than the legal theories advanced. Exhibit A ¶¶ 19-20 at p. 9:10-23. Plaintiffs' new legal theory of Nevada 5 has no bearing on the fact that the claims are precluded as the underlying facts are "related in time, space, origin, or motivation." *Id.*; *Waldman v. Vill. Of Kiryas Joel*, 207 F.3d 105, 108 (2d. Cir. 2000). The Court should not accept Plaintiffs' invitation.

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G. Nevada 5 Effectively Concedes that Its Fraud-Based Claims Arise from the Same Nucleus of Operative Facts as the FAC And the Receiver Action.

Plaintiffs may argue, as they did in their previously filed Opposition to the Motion for Summary Judgment, that the SAC is a "radical departure" from the FAC (Opp. Filed on January 21, 2020, p. 14:22-23, already on file herein) and based on a different nucleus of operative facts both from the FAC and the Receiver Action because the SAC says it is. *Id.* at p. 16:2-19 (citing to SAC ¶¶ 21-22). Plaintiffs, however, cannot just "wish" a legal conclusion into reality. Plaintiffs have provided absolutely no explanation as to how Nevada 5's fraud-based claims are based on facts different from those that Plaintiffs asserted in the FAC or that N5HYG asserted or could have asserted in the Receiver Action. They hardly could, given that the SAC is based on the allegations that Defendants Iglesias and Moffly misrepresented Hygea's financial status in the lead-up to the stock purchase—the exact same allegations Plaintiffs made in the FAC.

Instead, Plaintiffs can only fall back on literally the same argument they made in their oppositions to the Motion to Dismiss and the Reconsideration Motion: that Defendants should not get the benefit of claim preclusion because Defendants argued during the Receiver Action that it and this Action should be treated distinctly. This is just another way for Plaintiffs to argue that Defendants acquiesced to claim-splitting and proceeding in two different fora. But, Defendants did no such thing. Indeed, as this Court found and held in its Claim Preclusion Order, Defendants repeatedly objected to both the Receiver Action and this Action proceeding simultaneously:

> [The Court's] examination of the Receiver record reveals that Hygea repeatedly objected to N5HYG simultaneously proceeding on the same facts in two different fora. In fact, at pages 19 and 20 of its Opposition brief, N5HYG provided a list of statements Hygea made during the course of the Receiver Action that show Hygea objecting over-and-over to N5HYG bringing the Receiver Action in one forum while its contract and misrepresentation claims pended in this Action. In addition, Hygea pleaded claim-splitting as a defense in its Receiver Answer."

Exhibit A ¶ 37 at p. 14:5-16.

Plaintiffs likely will also try to suggest that the Receiver Court expressly preserved their right to maintain this Action, and therefore, claim preclusion is inapplicable. The Court has already decided the applicability of claim preclusion, and Plaintiffs' attempt to raise this argument

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(whether again or anew) is inappropriate and untimely. Even if the Court considered the argument, it is baseless. The Receiver Court did not expressly preserve Plaintiffs' right to maintain this Action, and Plaintiffs can point to nothing in the record reflecting such preservation, express or otherwise.

Plaintiffs again will likely point only to the Receiver Court's statement that it considered the relevant timeframe for the Receiver Action to be "what's going on now" (i.e., the time of the Receiver Trial). But this statement had nothing to do with a preservation of Plaintiffs' right to maintain this Action, much less an express preservation. Rather, the Receiver Court's statement concerned whether under NRS 78.650(4) "good cause exists" to appoint a receiver and when that good cause must exist, at the time of trial or otherwise. Given that NRS 78.650(4) speaks of good cause in the present tense – "exists" – the Receiver Court agreed with defense counsel that the relevant timeframe for whether the receivership remedy is appropriate is at the time of trial. It decided nothing else.

H. N5HYG's Breach of Contract Claims for Post-Closing Payments Are Just as Barred as Any Other Contract-Based Claim.

Plaintiffs will also likely argue that Defendants' alleged failure to pay post-closing payments purportedly provided for under the Stock Purchase Agreement is a continuing contractual violation, purportedly falling outside any claim preclusion. (*See* SAC ¶ 26 at p. 4:4-8). In support of this proposition, Plaintiffs cited in their previous Opposition a number of cases about how claims based on continuing contractual violations escape otherwise applicable statutes of limitation. Opp. filed on January 21, 2020, pp. 22:1-24:10, already on file herein. But, as Plaintiffs admit, these cases concern statutes of limitation, not the doctrine of claim preclusion and res judicata.

As set forth in Defendants' opening brief, the continuing violation theory "applies to avoid claims that would otherwise be barred by the statute of limitations; **it does not permit a plaintiff to avoid the application of res judicata**." *Carlson v. Ameriprise Fin.*, No. 08-5303 (MJD/JJK), 2009 U.S. Dist. LEXIS 132440, at *31 (D. Minn. May 21, 2009) (emphasis added). Claim preclusion (res judicata) is a doctrine designed to promote finality of judgments and judicial

efficiency by demanding that litigants bring all claims based on the same nucleus of operative facts in one proceeding. If the continuing violation theory applied as an exception to claim preclusion, the doctrine's underlying policy of judicial efficiency would be eviscerated. Indeed, Plaintiffs' proposition to the contrary leads to an absurd result. According to Plaintiffs, Hygea's post-closing payment obligations under the Stock Purchase Agreement are in perpetuity until Hygea "goes public;" thus, if Hygea never "went public" and never paid, Plaintiffs could sue Hygea again and again (in third, fourth, fifth lawsuits!). That is not how claim preclusion and res judicata work.

IV.

CONCLUSION

For the foregoing reasons, this Court should grant Defendants' Motion for Summary Judgment, or in the alternative, Motion to Dismiss, in its entirety.

Dated this 4th day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the *Defendants' Motion for Summary Judgment, or in the alternative, Motion to Dismiss* submitted electronically for filing and/or service with the Eighth Judicial District Court on the 4th day of November, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows[1]:

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[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

“Exhibit A”

“Exhibit A”

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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

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION RE: CLAIM PRECLUSION

2Ans.App.472

The Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Reconsideration Re: Claim Preclusion, was filed in the above-entitled matter on December 3, 2019, a copy of which is attached as Exhibit A.

Dated: December 3, 2019

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I certify that on December 3, 2019, a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION RE: CLAIM PRECLUSION** was served on the following parties through the Court's e-service system:

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EXHIBIT A

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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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION RE: CLAIM PRECLUSION

On May 10, 2019, the Court entered its Findings of Facts, Conclusions of Law, and Order on the Hygea Defendants' Motion to Dismiss. The Hygea Defendants had asked this Court to dismiss the Amended Complaint, as a threshold matter, on the basis of claim preclusion. They premised their argument on the case styled *Claudio Arellano, et al. v. Hygea Holdings Corp., et al.*, Case No. 18-OC-00071-1B, which Plaintiff N5HYG, LLC, initially filed in this Court, asking for the appointment of a receiver over Hygea pursuant to NRS 78.650, 78.630 and/or 32.010 (the "Receiver Action"). This Court transferred the Receiver Action to the First Judicial District Court of the State of Nevada in and for Carson City (the "Receiver Court.") N5HYG was the lead plaintiff in in the Receiver Action, and Hygea and most of the named defendants to this Action were defendants in the Receiver Action.

N5HYG asked for the appointment of a receiver for several reasons, including based on alleged director mismanagement. As discussed further in the Court's Findings and Conclusions, below, N5HYG argued that the directors had mismanaged Hygea because they misrepresented Hygea's financial position, inducing N5HYG to purchase stock in the company, and then allowed Hygea to breach the stock purchase agreement by failing to provide contractually required audits, post-closing payments, and a board and observer seat.

On May 14, 2018, the Receiver Action proceeded to a trial on the merits. At the end of trial, the Receiver Court denied the appointment of a receiver after concluding that it did not have jurisdiction to appoint a receiver because N5HYG had failed to show that it and its co-plaintiffs held 10% of Hygea's stock issued and outstanding. *See* Receiver Action, Amended Findings of Fact and Conclusions of Law (the "Receiver Judgment") (issued Oct. 29, 2018), p. 21:13–18. The Receiver Court also made substantive findings on the merits of N5HYG's claims and ultimately determined that there was not good cause for a receiver, even if the Receiver Court had the power to provide that remedy. *See id.* at p. 21:19–22:6.

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Based on the Receiver Judgment, the Hygea Defendants moved to dismiss this case for claim preclusion, arguing that the claims in this case arise from the same nucleus of operative facts at issue in the Receiver Action. The Court initially denied the motion to dismiss based on the first element of claim preclusion alone. Specifically, the Court found that "a court's decision whether or not to appoint a receiver is not a final decision for purposes of claim preclusion," and also that, "based on the Receivership Court's finding that it lacked jurisdiction to appoint a receiver under NRS 78.650(1) ... that Receivership Court did not render a final judgment for purposes of determining claim preclusion." Findings of Fact, Conclusions of Law, and Order ("FFCO") (issued May 10, 2019), pp. 3:27–28 & 4:1–3. Hygea timely moved for reconsideration of these findings and asked for clarification on the remaining elements of claim preclusion.

On July 17, 2019, Hygea's Motion for Reconsideration came before the Court for hearing. Maria A. Gall and Kyle A. Ewing of the law firm Ballard Spahr LLP appeared on behalf of Hygea. Stavroula E. Lambrakopoulos of the law firm K&L Gates LLP and Jon Pearson of Holland & Hart LLP appeared on behalf of former Defendant Ray Gonzalez. Christopher D. Kaye of the Miller Law Firm, G. Mark Albright of the law firm Albright, Stoddard, Warnick & Albright, Ogonna M. Brown of the law firm Lewis Roca Rothberger Christie LLP, and Robert L. Eisenberg of the law firm Lemon, Grundy & Eisenberg, appeared on behalf of Plaintiffs N5HYG, LLC and Nevada 5, Inc.

The Court is persuaded that the Reconsideration Motion presents complex factual and legal issues that warrant reconsideration and clarification of the Court's FFCO denying the claim preclusion argument. Now having reconsidered those issues, the Court is persuaded that it should revisit its decision, vacate the FFCO with regard to claim preclusion, and enter a new decision and order for that ground granting dismissal of the Amended Complaint based on claim preclusion. Thus, after considering the Reconsideration Motion, its Opposition and Reply, the other

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pleadings and papers on file, and the oral argument of counsel, the Court hereby VACATES the FFCO and GRANTS the Reconsideration Motion, consistent with the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Typically for claim preclusion to apply, a defendant must demonstrate three things: that "(1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, or the defendant can demonstrate that he or she would 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*, 131 Nev. Adv. Op. 28, 350 P.3d 80, 82 (Nev. 2015), *reh'g denied* (July 23, 2015).

2. The first element of claim preclusion requires a judgment that is both (1) final and (2) on the merits. *Id.* In its FFCO, this Court found that (1) "a court's decision whether or not to appoint a receiver is not a final decision for purposes of claim preclusion," and that (2) "based on the Receivership Court's finding that it lacked jurisdiction to appoint a receiver, the Receivership Court did not render a final judgment for purposes of claim preclusion." FFCO, 3:27–4:4. With regard to the latter finding, the Court takes this opportunity to clarify that it meant to say: "the Receivership Court did not render a *judgment on the merits* for purposes of claim preclusion." This clarification and distinction is relevant to the Court's analysis, below.

3. In its Reconsideration Motion, Hygea argued that the Court's finding that "a court's decision whether or not to appoint a receiver is not a final decision," FFCO, 3:27–28, contravenes the Supreme Court's decision in *Lynch v. Awada*, 2018 Nev. Unpub. LEXIS 882, 427 P.3d 123 (Sept. 28, 2018). After reviewing *Awada* and its related litigations, the Court agrees and finds *Awada* highly persuasive to its

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decision to grant reconsideration and dismiss the Amended Complaint based on claim preclusion.

4. In *Awada*, John Lynch successfully brought a first action seeking the equitable remedies of dissolution of an LLC and appointment of a receiver to wind up its affairs. *See id.* at *1. Mr. Lynch sought dissolution and appointment of a receiver because the LLC members were misappropriating and diverting royalty payments that belonged to the LLC. *Id.* at 5. *See also Lynch v. Awada*, District Court Case No. A-16-744849-C, 2017 Nev. Dist. LEXIS 1639, ¶¶ 1A & 1B (Nov. 4, 2017) (Delaney, J.). Mr. Lynch took the receiver action to trial, after which the district court entered its findings of facts and conclusions of law. *See id.* ¶¶ 10 & 11.

5. Mr. Lynch then brought a second action seeking damages based on the same facts. Judge Delaney, writing for the "damages" court, granted summary judgment based on claim preclusion after finding that the receiver action barred further claims based on the same facts. *See Awada*, 2018 Nev. Unpub. LEXIS 882, at *1–2. Mr. Lynch appealed, arguing that he could not have brought his "damages" claims in the receiver action—the same argument N5HYG makes here. The Nevada Supreme Court, however, said such argument "lacks merit." *Awada*, 2018 Nev. Unpub. LEXIS 882, at *7.

6. Instead, the Nevada Supreme Court affirmed Judge Delaney, holding that "ancillary claims may be raised in dissolution actions" seeking the appointment of a receiver, because "barring a petitioner from asserting supplemental claims in a special proceeding and requiring a separate [damages] action would produce additional and unnecessarily formalistic practice." *Id.* (internal quotations omitted.)

7. This Court is thus persuaded that *Awada* confirms two things: (1) N5HYG could have brought the damages claims it pursues in this Action in the Receiver Action; and (2) an order *disposing of* a receiver action by granting or denying the appointment of a receiver *is* a final judgment for purposes of claim preclusion.

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8. In Opposition, N5HYG argued that *Awada* is unpublished, not binding, and in any event, cannot be squared with *Johnson v. Steel, Inc.*, 100 Nev. 181, 678 P.2d 676 (1984), which this Court cited in support of its earlier decision to deny claim preclusion. The Court has reread *Johnson* and is persuaded that it previously overlooked pertinent facts that distinguishes *Johnson* from this Action. Also, *Awada* may be unpublished, but it is highly persuasive given that it is the only Nevada Supreme Court case to address the very issue before the Court.

9. The Court agrees with Hygea that *Johnson* is inapposite because it concerned an *interlocutory* order denying the appointment of a temporary receiver. A careful reading of *Johnson* demonstrates that the plaintiff there brought a derivative claim for breach of fiduciary duty and asked for a receiver *pendente lite*—i.e., while the action was pending. As explained by the *Johnson* court, "[t]he use of a receiver *pendente lite* is an ancillary remedy used to preserve the value of assets pending outcome of the principal case. The appointment determines no substantive rights between the parties but is merely a means of preserving the status quo. Accordingly, an order appointing a receiver or denying a motion to appoint a receiver [pendente lite] is not a final judgment on the merits." *Johnson*, 100 Nev. at 183, 678 P.2d at 678.

10. In contrast to the plaintiff in *Johnson*, N5HYG did not seek a receiver *pendente lite*. N5HYG sought a management receiver to take the stead of Hygea's officer and directors based on their alleged mis-, mal-, and nonfeasance and gross mismanagement. Further, the Receiver Judgment was not an interlocutory order; it was a final order denying N5HYG's claims.

11. The Receiver Judgment was also a judgment on the merits. The Court agrees with Hygea that a distinction exists between a court's jurisdiction to hear a party's claims and a court's jurisdiction to grant a remedy on those claims, where only a lack of the former renders a court without *subject matter* jurisdiction to enter a judgment on the merits.

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12. Although there is not a Nevada Supreme Court case addressing this distinction, the Court finds the California Supreme Court's decision in *Abelleira v. Dist. Court of Appeal*, 109 P.2d 942 (1941), persuasive. The Nevada Supreme Court cited approvingly to *Abelleira* in *Landreth v. Malik*, 125 Nev. Adv. Rep. 61, 221 P.3d 1265, 1269–70 (2009).

13. In *Abelleira*, the California Supreme Court explained that "jurisdiction" has multiple meanings and that a court may have "jurisdiction over the subject matter and the parties in the fundamental sense, [but] no 'jurisdiction' ... to give certain kinds of relief." 109 P.2d 942, 947–48 (1941) (emphasis added). The California Supreme Court provided a couple salient examples where this distinction may be applied: (1) "a probate court, with jurisdiction of an estate, and therefore over the appointment of an administrator, nevertheless acts in excess of jurisdiction if it fails to follow the statutory provisions governing such appointment"; and (2) "[a] court with jurisdiction over a cause may hear and determine it and give judgment, but it cannot award costs in a situation not provided by statute." *Id.* Just like these examples, the Receiver Court heard, determined, and rendered judgment on N5HYG's receiver claims, but it could not appoint a receiver because N5HYG failed to show it held the statutory prerequisite of 10% of Hygea stock issued and outstanding.

14. N5HYG did not meaningfully dispute this distinction. N5HYG instead argued that the Receiver Court disavowed subject matter jurisdiction when it relied on *Searchlight Dev. v. Martello*, 84 Nev. 102 (1968), in rendering its decision. The Receiver Court, however, did not rely on *Searchlight* for the proposition that it lacked subject matter jurisdiction; in fact, the term "subject matter" is entirely absent from the Receiver Judgment. The Receiver Court relied on *Searchlight* only for the proposition that "the time at which the Court must determine whether Plaintiffs hold the requisite one-tenth of the Company's shares issued and outstanding is at the time at which the Court is considering the stockholders'

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application for the appointment of a receiver." Receiver Judgment, 17:14–17. *See also id.* at 17:6–11.

15. This Court also cannot discount the fact that the Receivership Court exercised substantial jurisdiction over N5HYG's claims, including through a week-long trial. By entering judgment at the conclusion of trial, the Receiver Court itself decided it had subject matter jurisdiction. Stated differently, the Receiver Court could not have entered judgment in Hygea's favor without at least implicitly finding that it had jurisdiction to hear and decide N5HYG's claims. This principle is well-settled. In *Stoll v. Gottlieb* the U.S. Supreme Court explained that "[e]very court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter." 305 U.S. 165, 171–72 (1938).

16. Notably, had the Receiver Court found that it lacked subject matter jurisdiction to hear and determine N5HYG's claims, it would have had to dismiss—not deny—the claims under Rule 12(h), which demands that "[i]f the court determines *at any time* that it lacks subject matter jurisdiction, the court *must dismiss* the action." N.R.C.P. 12(h). The Rule's use of the word "must" expresses a requirement and leaves no discretion. *See* NRS 0.025(c).

17. For these reasons, the Court finds that the Receiver Judgment is a final judgment, on the merits. The Court also finds that the Receiver Court's judgment as a matter of law, or more aptly a judgment on partial findings, rendered after N5HYG's case-in-chief, was also a final judgment, on the merits. This judgment disposed of N5HYG's claims under NRS 78.630 in total and NRS 78.650, in part, without mentioning jurisdiction.

18. The Court now addresses the second element of claim preclusion, which asks whether this Action is based on the same claims or any part of them that were or could have been brought in the Receiver Action. *Weddell*, 350 P.3d at 82. Courts often employ the term "common nucleus of operative facts" when analyzing this element. In fact, Judge Delaney used this term in the *Awada* district court

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proceedings, explaining that allegations underlying John Lynch's "damages" case "involve[d] the same common nucleus of operative facts contained in the [Receivership] Action—that royalty payments were unaccounted for or were being diverted by managers (Awada) from Tyche." *Lynch v. Awada*, District Court Case No. A-16-744849-C, 2017 Nev. Dist. LEXIS 1639, ¶¶ 14 (Nov. 4, 2017) (Delaney, J.) The Nevada Supreme Court, however, has not yet had occasion to directly address what "nucleus of operative facts" means in the context of claim preclusion, and so the Court also reviews guidance from other courts on how this standard has been applied.

19. As the U.S. Court of Appeals for the Seventh Circuit explained, "[U]nder well-established claim-preclusion doctrine, [] common nucleus of operative facts means the claims are the same even though they involve different legal theories." *Matrix IV, Inc. v. Am. Nat'l Bank & Tr. Co.*, 649 F.3d 539, 548 (7th Cir. 2011). Citing to another Seventh Circuit case, the court further explained that "a 'claim' consists of the underlying factual events rather than the legal theories advanced." *Id.*

20. Other federal circuits are in accord. For instance, the Second Circuit, quoting from the Restatement (Second) of Judgments § 24, has held that "[t]o ascertain whether two actions spring from the same 'transaction' or 'claim,' we look to whether the underlying facts are 'related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations ....'" *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 108 (2d Cir. 2000).

21. The comments and illustrations to the Restatement also explain that "[t]hough no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does

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not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series." Restat 2d of Judgments, § 24.

22. N5HYG argued in Opposition that this Action and the Receiver Action are based on different facts because it said so on the face of its Receiver Complaint. This argument is not well taken. The mere fact that N5HYG stamped a "disclaimer" onto the face of its Receiver Complaint cannot alter the reality that both actions arose from the same core allegations of fact: in 2016, N5HYG purchased Hygea stock and memorialized that purchase in a stock purchase agreement; N5HYG alleges Hygea, through the misconduct of its officers and directors, misrepresented Hygea's value; N5HYG further alleges that Hygea failed to provide contractually obligated audits of Hygea's financial statements and to make monthly post-closing payments. In the Receiver Action, N5HYG petitioned for the appointment of a receiver based on these alleged wrongdoings. In this Action, N5HYG seeks damages and rescission of the stock purchase agreement based on the same allegations. Although the remedies N5HYG sought differed in the two actions, the dispositive point for purposes of the claim preclusion inquiry is that the core facts underlying both actions are the same.

23. In fact, based on the Receiver Trial Transcript, it appears that N5HYG's attorney admitted during the Receiver Trial that the Receiver Action was based, at least in part, on the same facts that form the basis for N5HYG's damages claims in this Action: the communications between N5HYG (or its agents) and Hygea, as well as the information provided to Hygea prior to N5HYG's stock purchase. In response to Hygea's objection that N5HYG not be permitted to elicit testimony on matters in dispute in this Action, N5HYG's counsel explained as follows: "I do think that the fact of the representations and the information provided in 2016 does have some probative value here [in the Receiver Action] because if there were inaccuracies or if there was anything misleading about that information, that

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gets to misfeasance, malfeasance, and nonfeasance criteria." Receiver Tr. Transcr., p. 289:2–7.

24. The Court now addresses the third element for claim preclusion, which asks 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 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*, 350 P.3d at 82.

25. There is no dispute that N5HYG was a plaintiff in the Receiver Action. There is also no dispute that Hygea, Iglesias, and Moffly, and most of their original co-defendants, were defendants to the Receiver Action.

26. N5HYG argued in Opposition that the plaintiffs between the two actions are not the same because N5HYG "banded together" with thirteen other stockholders in the Receiver Action, all of whom are absent here. N5HYG cited *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1243 (W.D. Wash. 2009), in support of its argument. *Rey*, however, is inapposite. There, it was the presence of additional and non-related plaintiffs in a *second* lawsuit based on *entirely different facts* that resulted in the Washington court's denial of claim preclusion. N5HYG offers no authority for the proposition that it can bring a second lawsuit based on the same facts as the first and escape the consequences of claim preclusion because its former co-plaintiffs are not present in the later lawsuit.

27. For these reasons, the Court finds that the parties and/or their privies are the same in this Action as they were in the Receiver Action, including all named co-defendants who, as current and/or former officers and/or directors, stand in privity with Hygea (even if they were not named in the Receiver Action, although most were).

28. N5HYG also asserted a number of defenses to claim preclusion that the Court addresses and rejects.

29. First, N5HYG argued that Hygea is estopped from asserting claim

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preclusion because N5HYG could not have brought its damages claims in the Receiver Action due to the parties' stock purchase agreement, which has a forum selection clause for Clark County, Nevada. N5HYG points out that under NRS 78.650, the Receivership Action had to proceed in Carson City, Nevada (where Hygea's Nevada registered agent sits). N5HYG says that Hygea is equitably estopped from arguing otherwise because it reaped the benefits of the stock purchase agreement by accepting its contract price.

30. The Court is not persuaded by this argument. Forum selection clauses are presumptively enforceable, but if they lead to an unreasonable result, *such as claim-splitting*, a court can 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). N5HYG did not even try to bring all its claims in one forum.

31. N5HYG also misapplies equitable estoppel. In *Teriano v. Nev. State Bank (In re Harrison Living Tr.)*, the Nevada Supreme Court explained that "[e]quitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." 121 Nev. 217, 223, 112 P.3d 1058, 1061–62 (2005). The Supreme Court then set forth four elements for equitable estoppel: "(1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped."

32. N5HYG provides no explanation about how the foregoing elements support its argument that Hygea should be equitably estopped from arguing that N5HYG should have brought its "damages" claims in the Receivership Action. Certainly N5HYG fails to show that it was "ignorant of the true state of facts" or "relied to [its] detriment" on Hygea's conduct when it was fully apprised of its own claims and was the party that moved the Receiver Action forward. *Cf. id.*

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33. N5HYG also argues that Hygea is judicially estopped from arguing claim preclusion because it took the position that the Receivership Action had nothing to do with the parties' stock purchase agreement; won a transfer of venue based on this argument; and so cannot say differently now. As an initial matter, the Court transferred venue of the Receiver Action to Carson City because of the mandatory venue provision found in NRS 78.650 and 78.630. Even if the stock purchase agreement affected the Court's decision to transfer venue, it is not clear how Hygea obtained an advantage from the venue change, and N5HYG identifies none. As the Nevada Supreme Court explained in *NOLM, Ltd. Liab. Co. v. Cty. of Clark*, "judicial estoppel should be applied only when a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage. Judicial estoppel does not preclude changes in position that are not intended to sabotage the judicial process." 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (bracket in original) (internal quotations omitted).

34. N5HYG also argued that it could not have brought its receivership claims while this Action was removed to federal court. N5HYG provides no support for this argument. Also, there is no case that says federal courts are prohibited from exercising diversity or supplemental jurisdiction over claims grounded in NRS 78.650 and 78.630, or cannot, at the very least, appoint equity receivers.

35. N5HYG next argued that Hygea acquiesced to claim splitting when Hygea argued that N5HYG should not be allowed to advance its contract and misrepresentation theories in the Receiver Action. The Court is not persuaded by this argument for several reasons.

36. First, there was nothing for Hygea to acquiesce to, because a party is always free to split its claims between a federal and state court. The rule that permits simultaneous litigation in state and federal court of overlapping, and even identical cases, is deeply rooted in the federalist system. As the U.S. Supreme Court wrote in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,

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"[t]he state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." 398 U.S. 281, 295 (1970). N5HYG, however, proceeded at the risk of claim preclusion.

37. Second, N5HYG misconstrues what constitutes "acquiescence" in the context of claim-splitting. As the comments to the Restatement indicate, "acquiescence" means a defendant's *failure to object* to the claim-splitting. Restatement (Second) of Judgments § 26 cmt. a (1982) ("The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim."). The Court's examination of the Receiver record reveals that Hygea repeatedly objected to N5HYG simultaneously proceeding on the same facts in two different fora. In fact, at pages 19 and 20 of its Opposition brief, N5HYG provided a list of statements Hygea made during the course of the Receiver Action that show Hygea objecting over-and-over to N5HYG bringing the Receiver Action in one forum while its contract and misrepresentation claims pended in this Action. In addition, Hygea pleaded claim-splitting as a defense in its Receiver Answer.

38. N5HYG also tried to direct this Court's attention to the fact that it did not seek damages in the Receiver Action and so would be prejudiced if it cannot do so here. But N5HYG's failure to ask for money—*because it chose to split its claims*—is not Hygea's fault. The relevant question for claim preclusion is whether N5HYG *could have* brought a cause of action for breach of contract or misrepresentation in the Receivership Action? It could have, but chose not to.

39. N5HYG's final defensive argument is that forcing stockholders who band together for purposes of standing to seek a receiver to bring all potential damages claims would lead to unwieldy litigation. This is not a cognizable defense, and N5HYG does not cite to any authority for the proposition that "unwieldy" litigation is a defense to claim preclusion. Also, what N5HYG proposes cuts directly against the doctrine of claim preclusion, which proposes that litigants must bring all

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claims that *arise from the same nucleus of operative facts* in the same action or face dismissal of the later action. Its argument is also in direct tension with Nevada's liberal joinder rules. *See* N.R.C.P. 18(a) & (b).

ORDER

Based on the foregoing findings of fact and conclusions of law, the Court hereby ORDERS as follows:

1. The Court's May 8, 2019, Findings of Fact, Conclusions of Law, and Order regarding claim preclusion is VACATED in its entirety.

2. Hygea's Motion for Reconsideration, Clarification, and alternatively, a Stay is GRANTED, in part, consistent with the foregoing findings of facts and conclusions of law, and DENIED, in part, as moot to the extent Hygea alternatively asked for a stay.

3. The Amended Complaint is DISMISSED WITH PREJUDICE on the basis of claim preclusion.

4. Any second amended complaint filed by N5HYG and/or Nevada 5, Inc., must, therefore, be based on a different nucleus of operative facts from that presented in the Amended Complaint.

Dated this 27 day of NOV., 2019.

Nancy L. Allf

HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE

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