

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

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Case No. 83157

APPENDIX TO ANSWER OF REAL PARTIES IN INTEREST
VOLUME 3

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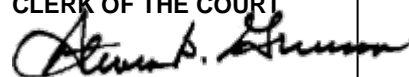
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DISTRICT COURT**CLARK COUNTY, NEVADA**

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 DOES I through X, inclusive, and
ROES I-XXX, inclusive,

Defendants.

CASE NO. A-17-762664-B
DEPT. XXVII

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT,
OR IN THE ALTERNATIVE, MOTION
TO DISMISS**

Date of Hearing: December 9, 2020
Time of Hearing: 10:30 a.m.

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 Reply in support of their Motion
for Summary Judgment, or in the alternative, Motion to Dismiss ("Reply").

This Reply 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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at the time of the hearing.

Dated this 2nd day of December, 2020.

KAPLAN COTTNER

By: /s/ Kory L. Kaplan

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Plaintiff blatantly misrepresents to the Court that the arguments within the Motion were already decided on the merits. Opposition, pp. 1-2. The exact opposite is true.

On January 30, 2020, after the Court had entertained oral argument on Defendants' previously filed Motion for Summary Judgment, the Court took the matter under advisement 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 in chambers. 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 26, 2020 at 9:00 a.m., the Court held a Status Check pursuant to the Order Setting Hearing. *Solely due to Defendant Hygea Holdings Corp.'s pending Chapter 11 Voluntary Petition*, the Court denied Defendants' Motion for Summary Judgment *without prejudice*.

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Indeed, Plaintiff's counsel and Defendants' prior counsel, Maria A. Gall, Esq., exchanged drafts of the proposed Order Denying Defendants' Motion for Summary Judgment without prejudice. *See* Declaration from Maria A. Gall, Esq., ¶ 3, a true and correct copy of which is attached hereto as **Exhibit A**; *see also* Emails between Maria A. Gall, Esq. and Ogonna Brown, Esq., a true and correct copy of which is attached hereto as **Exhibit A-1**. Counsel could not agree on the exact language of the proposed order. Exhibit A, ¶ 4. Specifically, Ms. Brown requested that the proposed Order include language to reflect that the Court's decision to deny the previously filed Motion for Summary Judgment was on the merits. Exhibit A-1. In response, Ms. Gall stated in her edits to Ms. Brown's proposed Order:

The reason for the substantive change is that based on the Court's comment that it was denying the MSJ w/o prejudice to avoid potential issues with the bankruptcy, we do not think it's appropriate for the Order to suggest that its decision reflects the merits of the MSJ in any way. If you disagree, we can just follow the Dept guideline for presenting our competing position and a redline copy.

Id., ¶¶ 5-6.

Because Ms. Brown and Ms. Gall could not come to terms on whether the denial of the previously filed Motion for Summary Judgment was on the merits, the parties submitted competing orders to the Court. Exhibit A, ¶ 7. The Court then signed Defendants' proposed Order, agreeing that the previously filed Motion for Summary Judgment was not denied on the merits and was solely denied "*at this time*" "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." *See* March 26, 2020 Letter from Maria A. Gall to the Court, a true and correct copy of which is attached hereto as **Exhibit A-2**.

Thus, Plaintiff's argument that the Motion should be denied because it raises arguments that were previously brought by Defendants that were denied on the merits is expressly belied by the record. The arguments are now ripe to be heard on the merits.

The 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**

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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.,¹ 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 (“SPA”) 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.

Therefore, Plaintiffs have 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. 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.

Despite Plaintiffs’ argument that the Motion should not be heard until after discovery is closed, nothing precludes Defendants from bringing it now. Especially given the fact that Plaintiffs have violated the Court’s Claim Preclusion Order and that summary judgment is appropriate when claim or issue preclusion bars a claim, the Motion should be heard on the merits at this time. Accordingly, the Court should grant summary judgment and/or dismissal in Defendants’ favor on allegations and claims it previously dismissed with prejudice.

¹ It is unclear whether Plaintiffs are maintaining their claims against Hygea Holdings Corp., despite such claims having been discharged during Hygea’s bankruptcy proceedings. Plaintiffs have not sought to amend their SAC to dismiss Hygea and, instead, have made representations to this Court that they intend to include Hygea as at least a nominal defendant for purposes of discovery.

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II.

LEGAL ARGUMENT

A. Defendants' Motion is Procedurally Proper.

Plaintiffs first argue that the Motion is procedurally improper and that Defendants should be required to attend a Rule 16 conference and answer the SAC. Opp., pp. 8-11. Plaintiffs already attempted that same argument during the status check held on November 5, 2020, which was rejected by the Court:

Mr. Kaplan stated he believes the Rule 16 Conference is premature and request it be continued until after the Court has heard the Motion for Summary Judgment. Ms. Brown gave summary of the last hearing being continued and the Court specifically telling the defendants to have an answer on file by this hearing. This case has been pending for three years and initial disclosures were served on 10/5/20. Ms. Brown further advised she has tried to reach out to Mr. Kaplan on two separate occasions with the Amended Rule 16 Notice and he refused to appear for the 10/20/20 Rule 16 and their efforts to provide the Court with a JCCR and again on 11/4/20. The Motion for Summary Judgment is very similar to what the Court saw previously and believe this is just a delay tactic. This is the fourth pre-answer motion and the second Motion for Summary Judgment. Ms. Brown requested a trial date be set and the close of discovery set for the end of May 2021. Court OVERRULED Ms. Browns objection for the reasons the Civil Rules allow a party to answer or otherwise plead and FIND the Defendants are in compliance with the previous directive. The Mandatory Rule 16 Conference will not go forward and depending on the outcome of the hearing on 12/9/20 the issue will be addressed again.

See Minutes of November 5, 2020 Status Check, already on file herein.

As such, the Motion is procedurally proper and the Court has already ruled that a Rule 16 conference is not required unless the Motion is denied and, if so, after Defendants file a pleading.

B. Nevada 5's Claims Are Based on the Same Nucleus of Operative Fact in the FAC.

Plaintiffs argue that their claims are not precluded because they argue in their SAC that: (1) Nevada 5 was not a party to the SPA, has never been a shareholder in Hygea; (2) Nevada 5 was not a party to the Receivership Action; and (3) Nevada 5's interests were not represented in the Receivership Action. Opp., pp. 11-12. In sum, Plaintiffs generally conclude that "the Receivership Action was a distinct case, unrelated in time and subject matter to this case, and to

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be litigated separately.” *Id.* at p. 12; *see also* SAC, ¶ 23.

However, Plaintiffs’ conclusory allegations that the Receivership Action was separate and distinct do not make it so. Plaintiffs made the same arguments in their Brief in Opposition to Defendants’ Proposed Order (filed Aug. 19, 2019), which were **rejected** by this Court:

Plaintiffs object to Defendants’ Proposed Order, primarily because it:

[...]

purports to apply claim preclusion not only to N5HYG (which was the target of Defendants’ Motion), but also to Nevada 5, which was not a party to the Receiver Action and which the Court expressly permitted to restate its fraud and related claims in a Second Amended Complaint (the subject of Plaintiffs’ Motion).

p. 1:10-17.

Nevada 5 was not even a party to the Receiver Action which formed the basis of Defendants’ claim preclusion argument. Defendants may argue “privity” between N5HYG and Nevada 5. But such “privity” does not exist here for purposes of claim preclusion and Nevada 5 is not bound by any judgment in the Receiver Action.

p. 2:15-18.

Here, the subject matter of the Receiver Action was not within Nevada 5’s interests under subsection (1)(b). First, Nevada 5 was not itself a shareholder and lacked standing to seek a receiver. Defendants convinced the Receiver Court that the Receiver Action plaintiff shareholders lacked standing because they did not hold 10% of Hygea’s shares. Therefore, Defendants cannot, in good conscience, now argue that Nevada 5—which was not a shareholder—had standing to join the Receiver Action. Second, Nevada 5’s interests were not represented in the Receiver Action because its interests lie in recouping the more than \$30 million it lost to Defendants’ fraudulent conduct in 2016—not in having a receiver appointed to oversee the company because of the mismanagement and financial peril crippling Hygea in 2018. Indeed, had a receiver been appointed, it is possible the receiver would have attempted to negotiate and seek a compromise of Nevada 5’s pending claims in this very case. At minimum, that would have been a complicated juxtaposition of interests which Nevada 5 was not obligated to undertake.

p. 3:6-17.

In rejecting Plaintiffs’ arguments and entering Hygea’s proposed Claim Preclusion Order, this Court held that any second amended complaint filed by Nevada 5 **must** be based on a different nucleus of operative facts from that presented in the Amended Complaint. Exhibit A to Motion, ¶

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4 at p. 15:15-17. Nevada 5 attempts to circumvent the Court’s Claim Preclusion Order by baselessly arguing that the underlying factual events are different because the Receiver 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.” Opp., p. 14. But Plaintiffs have failed to allege facts based on a different nucleus of operative facts in violation of the Court’s Claim Preclusion Order.

All claims “based on the same facts and alleged wrongful conduct” that were or could have been brought in the first proceeding are subject to claim preclusion. *G.C. Wallace, Inc. v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, 127 Nev. 701, 707, 262 P.3d 1135, 1139 (2011) (quoting *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1058, 194 P.3d 709, 715 (2008)); see also *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499 (2d Cir. 2014) (“Whether a claim that was not raised in the previous action could have been raised therein depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first.” (internal quotation marks omitted)); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003) (“[I]dentity of claims exists when two suits arise from the same transactional nucleus of facts.” (internal quotation marks omitted)). For example, in *G.C. Wallace*, the Nevada Supreme Court held that a tenant’s default gave rise to both a landlord’s summary eviction action as well as the landlord’s later damages action for breaching the lease because the two actions were “based upon an identical set of facts and could have been brought simultaneously.” 127 Nev. at 707, 262 P.3d at 1139. Claim preclusion generally applies to all grounds of recovery, regardless of the nature or category of damages requested. See *Five Star*, 124 Nev. at 1058, 194 P.3d at 715.

The question of whether two suits are based on the same cause of action “is thought to turn on the essential similarity of the underlying events,” rather than on the specific legal theories invoked. *Davis v. United States Steel Supply*, 688 F.2d 166, 171 (3d Cir.1982) (*en banc*), cert. denied, 460 U.S. 1014, 103 S.Ct. 1256, 75 L.Ed.2d 484 (1983). The focal point of the court’s analysis should be “whether the acts complained of were the same, whether the material facts alleged in each suit were the same and whether the witnesses and documentation required to prove such

allegations were the same.” *United States v. Athlone Industries, Inc.*, 746 F.2d 977, 984 (3d Cir.1984).

[...]

The court finds that the underlying facts in the Conlux cases, and the proof of these facts, overlap to such a degree as to form the same cause of action. The facts underlying both Conlux cases are related in time, space, origin, and motivation, and would form a convenient trial unit. Treating the underlying facts as a unit is appropriate given the parties' understanding of the Conlux companies' business relations. *See Restatement, Second, Judgments* § 24(2) (defining the dimensions of a “claim”); *Gregory v. Chehi*, 843 F.2d 111, 117 (3d Cir.1988). The court therefore finds, pursuant to the doctrine of claim preclusion, that Nippon Conlux is entitled to summary judgment on Mars' remaining cause of action.

Mars, Inc. v. Nippon Conlux Kabushiki-Kaisha, 855 F. Supp. 673, 677-78 (D. Del. 1994), *aff'd*, 58 F.3d 616 (Fed. Cir. 1995).

Whatever the conceptual difficulties inherent in any definition of a “cause of action,” often the presence of a single cause of action is clear. For example, in the two actions involved in this case, as in *Williamson [v. Columbia Gas & Electric Corp.]*, 186 F.2d 464, 470 (3d Cir. 1950):

the acts complained of and the demand for recovery are the same. The only thing that is different is the theory of recovery. The same witnesses and documents will be necessary in the trial in both cases. No material fact is alleged in (the second action) that was not alleged in (the first).... Everything plaintiff was entitled to ask for from defendant was included in (the first action).

Davis v. U.S. Steel Supply, Div. of U.S. Steel Corp., 688 F.2d 166, 171 (3d Cir. 1982)

Here, the only thing different in the SAC is the theory of recovery. Just as in the FAC, (1) the acts complained of and the demand for recovery are the same; (2) the same witnesses and documents will be necessary; (3) no material fact is alleged in the SAC that was not alleged in the FAC; and (4) everything Plaintiffs were entitled to ask from Defendants were already dismissed.

The similarities between the underlying facts of the SAC and the Receiver Action, and thus between the FAC and SAC, are readily apparent from a cursory comparison of the complaints:

FIRST AMENDED COMPLAINT	SECOND AMENDED COMPLAINT
31. In 2016, as part of this offering, Nevada 5's agents were approached about the possibility of an investment in Hygea.	28. In 2016, Nevada 5's agents were approached about the possibility of a substantial capital investment in Hygea.
32. From the beginning of discussions, and at all times pertinent to the allegations in this Complaint, all of Hygea's representatives,	29. From the beginning of discussions, and at all times pertinent to the allegations in this Complaint, Iglesias and Moffly worked

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including Defendants Iglesias and Moffly, acted and held themselves out as agents and representatives of Defendant Hygea.

together to induce Nevada 5 to pay \$30 million for an investment in Hygea. All of Hygea's representatives, including Defendants Iglesias and Moffly, acted and held themselves out as agents and representatives of Defendant Hygea.

34. Defendants made two sets of misrepresentations: they misrepresented Hygea's financial performance, and that after Nevada 5's investment, Hygea would "go public" through the issuance of shares on a public stock exchange. In reality, Defendants' financial performance turned out to be far worse than Defendants had claimed, and the impaired financial performance rendered a public-exchange offering impossible. These representations interlocked with one another, because Hygea's financial situation made a public-exchange offering impossible. Each of the two misrepresentations was an inducement upon which Plaintiffs independently relied. For these and other reasons likely to be uncovered during discovery, all Defendants knew or should have known that Hygea's then-existing financial situation made a public-exchange offering impossible at the time Plaintiffs acquired the shares.

30. Defendants made at least two sets of misrepresentations to Nevada 5: (a) they misrepresented Hygea's financial performance, and (b) they promised that after Nevada 5 paid the \$30 million, Hygea would "go public" through the issuance of shares on a public stock exchange by way of a "reverse takeover" ("RTO"). In reality, Hygea's financial performance turned out to be far worse than Defendants had claimed, and, in turn, the impaired financial performance rendered a public-exchange offering impossible. Each of the two misrepresentations was an inducement upon which Nevada 5 relied in paying Hygea \$30 million. For these and other reasons likely to be uncovered during discovery, Defendants knew or should have known that Hygea's then-existing financial situation made a public-exchange offering impossible at the time of the share purchase.

35. These representations were made to personnel of RIN Capital. RIN Capital served at all relevant times as Plaintiffs' authorized agent; and whose agency on behalf of Plaintiffs was disclosed and known to Defendants. Defendants were aware that the representations they made to RIN Capital would be relied upon by Plaintiffs in deciding whether to make a substantial capital investment in Defendant Hygea. In short, everyone involved understood that anything communicated to RIN Capital equaled a communication to Plaintiffs. These RIN personnel included Dan Miller, Sean Darin, and Chris Fowler.

31. These representations were made to personnel of RIN Capital. RIN Capital served at all relevant times as Nevada 5's authorized agent; and whose agency on behalf of Nevada 5 was disclosed and known to Defendants. Defendants were aware that the representations they made to RIN Capital would be relied upon by Nevada 5 in deciding whether to pay the \$30 million, and Defendants intended for Nevada 5 to rely upon the representations. In short, everyone involved understood that anything communicated to RIN Capital equaled a communication to Nevada 5. These RIN personnel included Dan Miller ("Miller"), Sean Darin ("Darin"), and Christopher Fowler ("Fowler").

37. On July 5, 2016, Dan Miller and Sean Darin had dinner in Miami with Iglesias, Moffly, and a representative of an investment bank, CEA, that was purportedly involved in the transaction. They met the next day at Hygea's office. At the July 6, 2016 meeting,

33. On July 5, 2016, Miller and Darin had dinner in Miami with Iglesias, Moffly, and a representative of an investment bank, CEA, that was purportedly involved in the transaction. They met the next day at Hygea's office. At the July 6, 2016 meeting, Iglesias and Moffly

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1	Iglesias and Moffly represented to Dan Miller and Sean Darin that Hygea was a successful business that was poised for continued growth and a public-exchange offering of its stock.	explained Hygea's business model and represented to Miller and Darin that Hygea was a successful business that was poised for continued growth and a public-exchange offering of its stock.
2		
3		
4	39. At this meeting and in ensuing communications, Iglesias and Moffly stressed that Hygea was profitable; that Hygea was growing; that the financial statements showed a highperforming company; that audited financial statements showing the supposed growth and success were being prepared and would be available soon; and that Hygea was poised for its RTO. As before, the explicit representation and implicit suggestion was that the planned RTO would be exceedingly remunerative to the shareholders at the time of the RTO.	34. At this meeting and in ensuing communications, Iglesias and Moffly stressed that Hygea was profitable; that Hygea was growing; that the financial statements showed a highperforming company; that audited financial statements showing the supposed growth and success were being prepared and would be available soon; and that Hygea was poised for its RTO.
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11	40. Plaintiffs attempted to engage in a due diligence process to decide whether to make that substantial capital investment. On July 26, 2016, Plaintiffs' agent, Sean Darin, sent a due diligence list to Iglesias and Moffly, requesting that Defendants provide certain due diligence documentation and information. On July 27, 2016, Moffly acknowledged receipt of that list and referenced a "data room" and dropbox folder that contained the information Plaintiffs sought.	35. Nevada 5 attempted to engage in a due diligence process to decide whether to make the substantial capital investment Defendants sought. On July 26, 2016, Darin sent a due diligence list to Iglesias and Moffly, requesting that Defendants provide certain due diligence documentation and information. On July 27, 2016, Moffly acknowledged receipt of that list and referenced a "data room" and Dropbox folder that contained the information Nevada 5 sought.
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18	41. Defendants also provided Plaintiffs with documents and financial information on which they intended Plaintiffs would rely in making their decision as to whether to make a capital, equity investment in Defendant Hygea. The financial information provided up until the time of the investment itself encompassed numbers that (even if subject to apparently-reasonable ongoing adjustment) always fell within a relatively-narrow range, and which overall reflected a purportedly healthy company poised for an imminent RTO. For example:	36. Defendants also provided Nevada 5 with documents and financial information on which they intended Nevada 5 would rely in making their decision as to whether to pay the \$30 million to Hygea. The financial information provided reflected a purportedly healthy company poised for an RTO. For example:
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25	a. On or around June 27, 2016, Defendants sent RIN a Confidential Information Memorandum, or "CIM," apparently prepared by CEA, representing certain information about Hygea's financial performance. It represented favorable financial performance	a. On or around June 27, 2016, Darin sent Fowler a Confidential Information Memorandum, or "CIM," apparently prepared by CEA on Hygea's behalf, representing certain information about Hygea's financial performance. RIN obtained the CIM from a
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1 2 3 4 5 6	numbers for 2014 and 2015.	preliminary “data room” to which Hygea and CEA provided RIN access. The CIM represented favorable financial performance numbers for 2014 and 2015, including a 2014 earnings before interest, tax, depreciation, and amortization (“EBITDA”) of \$3,692,173 based on \$52,897,640 in revenue, and a 2015 EBIDTA of \$28,003,053 based on \$239,053,726 in revenue. It projected a 2016 EBITDA of \$46,489,715.
7 8 9	b. On August 2, 2016, Moffly provided Plaintiffs' agent, Dan Miller, with 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 Defendant Hygea's finances.	b. On August 2, 2016, on behalf of all Defendants, Moffly provided Miller with 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.
10 11 12 13 14 15 16 17	c. Plaintiffs were provided access to a purported transaction "data room" on approximately August 9, 2016.	c. RIN, on behalf of Nevada 5, was provided access to the purported transaction “data room” on approximately August 9, 2016. This consisted of a computer folder, or set of computer folders, into which Defendants or their agents would put financial documents, and from which Plaintiffs’ agents could and did access such documents. Between August 9 and the ensuing SPA, such accessing was ubiquitous. The financial representations set forth in the data room files were consistent with the financial representations set forth in detail here.
18 19 20 21 22 23	e. On September 14, 2016, in response to a request from Plaintiffs' agent Dan Miller, Defendant Moffly formally transmitted the CIM, containing information pertinent to a potential investment deal, including updated unaudited financials. It showed favorable financial performance figures for 2013 through 2015.	d. On September 14, 2016, in response to a request from Miller, Moffly, on behalf of all Defendants, formally transmitted the CIM, containing information pertinent to a potential investment deal, including updated unaudited financials to Miller. It showed favorable financial performance figures for 2013 through 2015 including a 2014 EBITDA of \$3.7 million based on \$52.9 million in revenue and a 2015 EBITDA of \$27.1 million based on \$239.1 in revenue.
24 25 26 27 28	f. On or about September 16, 2016, Defendant Moffly sent to Dan Miller a proposed deal structure, representing a purported Cormark valuation of Defendant Hygea at a very high level, and claimed that the company was actually ahead of the very favorable projections underlying the figure.	e. On or about September 16, 2016, on behalf of all Defendants, Moffly sent to Miller a proposed deal structure, representing a purported valuation of Hygea at a very high level, and claimed that the company was actually ahead of the very favorable projections underlying the figure. It included in part: We have an enterprise valuation done by Cormark in Canada (who you

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	can speak with if you like) of approximately \$560MM, which is based on a 10x multiple of 2016 (T9M+F3M – approximately) EBITDA of \$56.9MM (BTW we are ahead of that number and are pushing for \$60MM). Subtracting out all debt of a little less than \$50MM we have a net value of \$510MM In other words, Moffly explicitly represented to Miller that the EBITDA for 2016 would exceed \$56.9 million.
g. In multiple emails on September 20-21, 2016, Defendant Moffly stated that 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."	f. In multiple emails on September 20-21, 2016, on behalf of all Defendants, Moffly stated to Miller that 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."
h. On September 20, 2016, Defendant Moffly sent to Plaintiffs' agent Dan Miller a copy of financials, containing balance sheets, income statements, and a statement of cash flows, purportedly done by CPA firm Rodriguez, Trueba & Co. They once again showed a favorable financial performance over the 2013 through 2015 period.	g. On September 20, 2016, on behalf of all Defendants, Moffly sent to Miller a copy of financials, containing balance sheets, income statements, and a statement of cash flows, purportedly done by CPA firm Rodriguez, Trueba & Co. They once again showed a favorable financial performance over the 2013 through 2015 period, with a 2014 EBITDA of \$3,692,172 and a 2015 EBITDA of \$27,093,697.
i. In response to Plaintiffs' questions about Hygea's physician compensation structure and agreement issues, employee benefits, possible claims for unpaid bonuses, and Defendant Hygea's potential compliance issues, Defendant Hygea's representatives addressed Plaintiffs' questions via phone and email on September 22, 2016. On or about September 22, 2016, Tom Herrmann, Chief Compliance Officer of Defendant Hygea, provided information via a telephone call with Plaintiffs' agents to address Plaintiffs' compliance questions. On September 22, 2016, Plaintiffs received an email from Defendants' agents, providing context regarding existing physician contracts and bonus provisions.	h. In response to Nevada 5's questions about Hygea's physician compensation structure and agreement issues, employee benefits, possible claims for unpaid bonuses, and Hygea's potential compliance issues, Hygea's representatives, including Hygea's corporate counsel, on behalf of all Defendants, addressed Nevada 5's questions via phone and email on or about September 21, 2016. On or about September 22, 2016, Tom Herrmann, Chief Compliance Officer of Hygea, provided information via a telephone call with Nevada 5's agents to address Nevada 5's compliance questions. On September 22 and 25, 2016, Nevada 5's agents, including Miller, received emails from Hygea's corporate counsel, copying Iglesias and Moffly, providing information regarding existing physician contracts, incentive plans, bonus provisions, and other service agreements.
j. On or around September 27, 2016, Defendants provided RIN with an Offering	i. On or around September 27, 2016, on behalf of all Defendants, Moffly provided Miller with

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1	Memorandum with additional, and once again	an Offering Memorandum with additional, and
2	favorable representations as to Hygea's	once again favorable, representations as to
3	financial situation.	Hygea's financial situation, including a 2014
4		EBITDA of \$3.7 million on \$52,897,000 in
5	k. On September 29, 2016, Defendant Moffly	revenue, and a 2015 EBITDA of \$27.1 million
6	sent to Dan Miller an email attaching a capital	on \$246,129,000 in revenue.
7	table structure analysis. The email stated that	
8	this attachment was approved by Cormark and	j. On September 29, 2016, on behalf of all
9	Defendant Hygea's board. It indicated a	Defendants, Moffly sent to Miller an email
10	favorable 2016 EBITDA that turned out to be	attaching a capital table structure analysis. The
11	false; claimed that "EBITDA Is (sic) ahead of	email stated that this attachment was approved
12	schedule used 4 months ago with Cormark"	by Cormark and Hygea's Board. It indicated a
13	when in fact the actual EBIDTA fell far short	favorable 2016 EBITDA, indicating on the
14	of all of the indicated figures; and reflected	spreadsheet, "Hygea 2016 FYE EBITDA –
15	additional misleading valuation information as	Low: \$54.5 [million] – High: \$65.0 [million] –
16	well.	Expected: \$57.5 [million]," and claimed that
17		"EBITDA Is (sic) ahead of schedule used 4
18	l. On October 4, 2016, Defendant Moffly on	months ago with Cormark" when in fact the
19	behalf of Defendant Hygea sent to Dan Miller	actual EBIDTA fell far short of all of the
20	a copy of Hygea's Quality of Earnings Report	indicated figures; and reflected additional
21	("QoE") dated October 3, 2016, which was	misleading valuation information as well.
22	purportedly prepared by third party CLA,	
23	showing once again very favorable	k. On October 4, 2016, Moffly on behalf of all
24	performance figures.	Defendants, sent to Miller a copy of Hygea's
25		Quality of Earnings Report ("QoE") dated
26		October 3, 2016, which was purportedly
27		prepared by third party CLA, showing once
28		again very favorable performance figures,
		including: a 2014 EBITDA of \$4,542,000 on
		\$52,897,000 in revenue, and a 2015 EBITDA of
		\$20,449,000 million on \$185,411,000 in
		revenue.
	m. The October 3, 2016 QoE also showed for	l. The October 3, 2016 QoE also showed for
	Defendant Hygea in the "trailing twelve	Hygea in the "trailing twelve months" from
	months" from June 30, 2015 through June 30,	June 30, 2015 through June 30, 2016 continued
	2016 continued healthy performance.	healthy performance, with an adjusted EBITDA
		of \$39,091,000 over that period on
		\$291,276,000 in revenue.
	n. On October 5, 2016, Defendants Iglesias and	m. On October 5, 2016, Iglesias and Moffly
	Moffly on behalf of Defendant Hygea	provided to Miller and others a verification of
	provided to Dan Miller and others a	Hygea's QoE at the following figures: a 2014
	verification of Defendant Hygea's QoE.	EBITDA of \$4,542,000 on \$52,897,000 in
		revenue, and a 2015 EBITDA of \$20,449,000
		based on \$185,411,000.
	44. Eventually, Nevada 5, in reliance upon	40. Nevada 5 formed N5HYG to consummate
	these representations and omissions, formed	the share purchase by way of the SPA dated
	N5HYG to execute a Stock Purchase	October 5, 2016, which N5HYG executed,
	Agreement dated October 5, 2016, which	along with Hygea, Iglesias, and Moffly. A copy
	N5HYG did. A copy of the Stock Purchase	of the SPA is attached as Exhibit A.
	Agreement is in Defendants' possession.	

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1	47. In the Stock Purchase Agreement, the parties agreed that the price of \$1.28 per share "reflected the fair market value" of the company and that Plaintiffs were buying shares reflecting 8.57 percent of the company. Given that the shares cost \$30 million in aggregate, and that \$30 million is 8.57 percent of about \$350 million, Defendants therefore agreed that the company was worth at least \$350 million.	41. In the SPA, Defendants represented that the price of \$1.28 per share "reflected the fair market value" of Hygea and that the purchased shares reflected 8.57 percent of the company. Given that the shares cost \$30 million in aggregate, and that \$30 million is 8.57 percent of about \$350 million, Defendants therefore agreed that Hygea was worth at least \$350 million.
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7	48. This valuation reflected and was consistent with the range of financial performance that Defendants had represented Hygea to have been achieving.	42. This valuation reflected, and was consistent with, the financial performance that Defendants had represented to Nevada that 5 Hygea had been achieving, which induced Nevada 5's payment of \$30 million.
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10	51. These financial attachments continued the rosy representations; were consistent with ranges of performance previously represented; and constituted Defendants' concluding, warranted representations.	44. These financial attachments continued the rosy representations; were consistent with ranges of performance previously represented; and constituted Defendants' concluding, warranted representations. As discussed above, they verified performance figures of a 2014 EBITDA of 4,542,000 on \$52,897,000 in revenue, and a 2015 EBITDA of \$20,449,000 based on \$185,411,000.
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15	52. Defendant Hygea provided a certificate of satisfaction, dated October 5, 2016 and signed by Defendant Iglesias in his capacity as President and CEO, which stated that "[t]he representations and warranties of Seller made in the Purchase Agreement are true and correct in all respects at and as of the date hereof with the same force and effect as if made as of the date hereof."	45. Hygea provided a certificate of satisfaction, dated October 5, 2016 and signed by Iglesias in his capacity as President and CEO, which stated that "[t]he representations and warranties of Seller made in the Purchase Agreement are true and correct in all respects at and as of the date hereof with the same force and effect as if made as of the date hereof."
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20	53. After Plaintiffs' purchase, Plaintiffs learned that these representations had been incorrect and that Defendants had hidden the truth from them. The information showing that the representations were false and that material facts were omitted is uniquely and exclusively in Defendants' possession, despite their contractual, statutory, and common law obligations to provide the information to Plaintiffs. Nonetheless, despite this improper restriction on information, Plaintiffs have been able to learn certain things about Hygea's true status.	46. After the share purchase, Nevada 5 learned that these representations had been false and that Defendants had hidden the truth from Nevada 5. Much of the information showing that the representations were false and that material facts were omitted is uniquely and exclusively in Defendants' possession, despite their contractual, statutory, and/or common law obligations to disclose accurate information. Nonetheless, despite this improper restriction on information, Nevada 5 has been able to learn certain things about Hygea's true status.
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27	54. First, Plaintiffs learned that the RTO process did not begin immediately upon	47. First, the RTO never happened. Despite subsequent assurances that it would occur, it has
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1	Plaintiffs' investment, and the RTO was not	never happened.
2	completed by the end of 2016 or beginning of	
3	2017 as Defendants promised. Despite	
4	subsequent assurances that it would occur, it	
5	has never happened.	
6	56. Indeed, at the time Plaintiffs invested, all	48. Indeed, at the time of the SPA, Defendants
7	of the Defendants either knew or should have	either knew or should have known that an RTO
8	known that an RTO on the timetable	was impossible given Hygea's financial
9	represented to Plaintiffs was, given Hygea's	distress.
10	financial distress, impossible.	
11	60. But even this "disclosure" was inaccurate.	50. On or about June 29, 2017, Fowler learned
12	At this June 29, 2017 meeting, a senior FTI	that Defendants had begun to backtrack on their
13	representative reported that he had evaluated	prior representations, purporting to disclose a
14	the claimed "corrected" EBITDA for 2016. He	"corrected" EBITDA figure for 2016, which
15	called it "fabricated," and reported that	was far less than that Defendants previously
16	EBITDA was actually about one seventh of the	claimed. However, one outside consultant,
17	"corrected" figure, with the potential for a	having reviewed Hygea's financials, reported to
18	similarly meager increase if Hygea could	Fowler that Defendants were still
19	remedy its severe operational deficiencies.	misrepresenting Hygea's true financial picture.
20		Hygea's actual revenue was closer to \$90
21		million than the \$300 million figure that
22		Defendants' \$50-\$60 million EBITDA
23		representations were based upon. Therefore, it
24		would be virtually impossible for its EBITDA
25		to reach \$50 or \$60 million in EBITDA.
26	62-63. Despite the roadblocks he had faced,	52. Fowler thus learned that Hygea's actual
27	the senior FTI representative was able to	financial performance figures for 2014 through
28	conclude and report to Fowler that "their	2016 were not the same ones Defendants
	numbers," that is, Hygea's financial	provided to Nevada 5 to induce its \$30 million
	performance figures for 2014 through 2016,	investment. Rather, the actual, supportable
	"are not the same as the ones they gave" to	figures were merely a fraction of those
	Plaintiffs during the lead-up to Plaintiffs'	Defendants provided prior to Nevada 5's
	investment. He added that he would not "come	October 5, 2016 payment.
	up with bullshit for [the] auditors," who	
	supposedly would review the financial	
	information. The Senior FTI representative	
	concluded that the EBITDA figures that were	
	supportable were a fraction of those	
	represented by Defendants.	
	66. Defendant Iglesias later claimed that at	53. Defendants knew at the time of their
	least one of his EBITDA figures had been	representations that they were false. For
	based on the assumption that an additional	example, they knew that the EBITDA figures
	\$130 million influx into Hygea would	they represented to Nevada 5 were based upon
	materialize. It did not materialize. None of the	an assumed additional \$130 million influx that
	Defendants ever told Plaintiffs that the	had not materialized, and never did materialize.
	EBITDA figures upon which Plaintiffs relied	
	were premised upon such an assumption until	
	Mr. Iglesias made the shocking admission	

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many months after Plaintiffs' investment.	
76. Defendants have also failed to fulfil numerous other obligations under the Stock Purchase Agreement, some of which were personally guaranteed by Iglesias and Moffly. For example:	55. In addition to their misrepresentations to Nevada 5, Defendants failed to fulfill express obligations to N5HYG under the SPA, which were personally guaranteed by Iglesias and Moffly.
a. Beginning in or around August, 2017, Defendants ceased making the \$175,000 Post-Closing Monthly Payments to Plaintiff N5HYG, and interest thereon, required under Section 6.3 of the Stock Purchase Agreement;	56. For example, 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. 58. However, beginning in or around August 1, 2017, Defendants ceased making the mandatory Post-Closing Monthly Payments to N5HYG.

Plaintiffs' attempt to argue that the nucleus of operative facts of the SAC are different from the FAC and not subject to claim preclusion is disingenuous. A plain comparison of the FAC to the SAC objectively demonstrates that the underlying facts are the same. As the Court stated in its Claim Preclusion Order:

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.**

¶ 22 (emphasis added).

The underlying facts in the SAC are the same and/or substantially similar to the FAC,

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which was dismissed with prejudice. The Court ordered Plaintiffs that any second amended complaint must be based on a different nucleus of operative facts. Plaintiffs failed to do so.

Finally, as predicted, Plaintiffs fall back on 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. 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 to Motion, ¶ 37 at p. 14:5-16.

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.

Exhibit A to Motion, ¶ 34 at p. 13:15-19.

Because this Court has already ruled on this same argument against Plaintiffs, and because Plaintiffs have failed to amend their FAC based on a different nucleus of operative facts, the SAC must also be dismissed with prejudice.

i. Nevada 5's claims are precluded through privity.

Again, Plaintiffs attempt to rehash arguments already made and decided by this Court in the Court's Claim Preclusion Order. Plaintiffs already argued that Nevada 5 was not in privity with N5HYG in its Brief in Opposition to Defendants' Proposed Order. p. 2:16-18 ("Defendants may argue 'privity' between N5HYG and Nevada 5. But such 'privity' does not exist here for purposes of claim preclusion and Nevada 5 is not bound by any judgment in the Receiver Action.").

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The Court already ruled against Plaintiffs’ argument in its Claim Preclusion Order by requiring Nevada 5 to have a different nucleus of operative facts. N5HYG is the wholly-owned subsidiary of Nevada 5, and therefore both are in privity with one another—as the overwhelming weight of authority holds. *See Lufti v. Dow Jones*, 1996 WL 343065 at *2 (S.D.N.Y. June 20, 1996) (unreported) (concluding that parent and subsidiary company were “sufficiently closely related” for purposes of claim preclusion); *see Lake at Las Vegas Investors Grp., Inc. v. Pacific Malibu Dev. Corp.*, 933 F.2d 724, 728 (9th Cir. 1991) (holding that “wholly-owned subsidiary and partnership in which that subsidiary is the general partner may invoke the two dismissals of the subsidiary's parent and claim res judicata.”); *See Mars, Inc. v. Nippon Conlux Kabushiki-Kaisha*, 58 F.3d 616, 619 (Fed.Cir.1995) (parent corporation can invoke claim preclusion when wholly owned subsidiary was named as defendant in prior suit on identical claims) (applying Third Circuit law); *Doe v. Urohealth Systems, Inc.*, 216 F.3d 157, 162 (1st Cir.2000) (similar); *cf. Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 966 (3d Cir. 1991) (wholly owned subsidiary can invoke claim preclusion when parent was named in prior suit).

Because Plaintiffs are in privity and the Court has already ruled against Plaintiffs’ same argument and required that Nevada 5 bring any amended claims based on a different nucleus of operative facts, this argument should also be denied.

ii. Fraud-Based Claims

All of Nevada 5’s fraud-based causes of action 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 same allegations and claims were already dismissed with prejudice in the FAC as they were or could have been made in the Receiver Action.

In an attempt to circumvent the Court’s Claim Preclusion Order, Plaintiffs allege that 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.

Opp., p. 12.

But Plaintiffs’ conclusory statements that the claims are different do not convert their allegations into reality. *See, e.g.*, Claim Preclusion Order, ¶ 22 (“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”). Nevada 5 brings the exact same fraud-based causes of action that were dismissed with prejudice in the FAC and that were or could have been made in the Receiver Action. Again, this argument should be denied.

iii. Contract-Based Claims

Plaintiffs next argue that N5HYG is permitted to bring contract-based claims against Defendants based on Defendants’ failure to pay post-closing monthly payments that were personally guaranteed by Iglesias and Moffly. Plaintiffs concede that these issues were raised in the Receivership Action. Opp., p. 19. However, Plaintiffs argue that because Defendants were required to pay \$175,000 *monthly*, beginning in August 2017, the repeated failure to continue to pay that monthly amount after the Receiver Action concluded constitutes a new action that is not precluded by the Court’s Claim Preclusion Order. Plaintiffs cannot argue that these claims are based on a different nucleus of operative facts than the FAC, and are again precluded by the Court’s Claim Preclusion Order.

Plaintiffs cite to a number of cases mainly outside of Nevada that concern statutes of limitation, not the doctrine of claim preclusion and res judicata. Opp., pp. 20-24. According to Plaintiffs, Hygea’s post-closing payment obligations under the SPA 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.

Plaintiffs first cite to *Pierce v. Metro. Life Ins. Co.*, 307 F. Supp. 2d 325, 328–29 (D.N.H. 2004), which specifically held that the New Hampshire rule “treats each missed or otherwise deficient payment as an independent breach of contract subject to its own limitations period.”

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Opp., p. 20 n.17. Plaintiffs also cite to *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3d 459, 466 (6th Cir. 2013), a case regarding lessors of royalty rights to natural gas alleging underpaid gas royalties, in opposition to the cases cited by Defendant and in support for Plaintiffs' position. Opp., p. 20 n.17. Specifically, Plaintiffs argue that *Lutz* supports their position that their claims should not be construed under the "continuing violation theory" but rather as a "divisible contract," with each missed payment giving rise to a separate cause of action. However, the Sixth Circuit in *Lutz* specifically held that the divisible contract theory is applied to statutes of limitation in the context of gas, oil, and mineral contracts, which is inapplicable to the SPA at issue and does not apply to the context of claim preclusion and res judicata. *Lutz*, 717 F.3d at 466.

The other cases cited by Plaintiffs also relate to only the statute of limitations and not the context of claim preclusion and res judicata, and further support Defendants' position. *See, e.g., Ancala Holdings, L.L.C. v. Price*, 220 F. App'x 569, 572-73 (9th Cir. 2007) ("While the breach continued to occur because American Golf failed to cure the initial breach, it was not 'continuous' in the sense that a separate and discrete obligation to operate the golf course in a certain manner accrued each day."); *Knight v. Columbus*, Ga., 19 F.3d 579, 582 (11th Cir. 1994) (specifically analyzing the statute of limitations related to the payment of overtime to officers under the FLSA); *Harrison v. Bass Enterprises Prod. Co.*, 888 S.W.2d 532, 539 (Tex. App. 1994) (affirming summary judgment on plaintiffs' claims related to unpaid royalties in oil and gas being time barred under the discovery rule); *Hondo Oil & Gas Co. v. Texas Crude Operator, Inc.*, 970 F.2d 1433, 1440 (5th Cir. 1992) (holding that the statute of limitations runs against installments from the time they are due); *Rupe v. Triton Oil & Gas Corp.*, 806 F. Supp. 1495, 1500 (D. Kan. 1992) ("Whether the court considers plaintiffs' action to be one for several breaches or a single breach of a continuing contract, the result is the same. Plaintiffs' cause of action for breach of contract accrued on the date when the first deficient payment was due").

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) (emphasis added); *see also Tarabochia v. Clatsop*

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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.*, 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).

Thus, Plaintiffs’ argument that each breach of the monthly personal guarantee obligations is a separate cause of action is irrelevant. The issue is one of claim preclusion and *res judicata*. N5HYG could have asserted and did assert these claims in the FAC, and therefore is precluded from litigating the same issues. The nucleus of operative facts is the same, despite Plaintiffs’ allegation that the monthly breaches occurred after the Receiver Action.

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, N5HYH 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.

Exhibit A to Motion, ¶ 37 at p. 10:11-17 (emphasis added).

Plaintiffs’ FAC already sought damages on the exact same personally-guaranteed monthly obligations:

Beginning in or around August, 2017, Defendants ceased making the \$175,000 Post-Closing Monthly Payments to Plaintiff N5HYG, and interest thereon, required under Section 6.3 of the Stock Purchase Agreement

FAC, ¶ 76(a), p. 16:6-8.

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[T]hey 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); they have failed to provide the reports required by Section 6.4(c); and have otherwise failed to meet other obligations as required, some of which were also personally guaranteed by Iglesias and Moffly.

FAC, ¶ 142, p. 25:18-22.

N5HYG's claims for indefinite damages of \$175,000 per month cannot exist into perpetuity, especially given the fact that Hygea's Bankruptcy Plan was approved and that N5HYG already sued for damages and rescission. The cause of action accrued, and stopped accruing, on the date N5HYG sought "rescission of the stock purchase agreement based on the same allegations." *Id.*; see *Schwartz v. Wasserburger*, 117 Nev. 703, 707, 30 P.3d 1114, 1116 (2001) ("We therefore hold that under NRS 11.190(1)(b), a cause of action in contract cases involving a wholly anticipatory repudiation accrues either on the date that performance under the contract is due or, if the plaintiff so elects, on the date that the plaintiff sues upon the anticipatory breach.").

Nevertheless, at the most basic reading of the Claim Preclusion Order, N5HYG is precluded from bringing claims for the same personally-guaranteed monthly obligations, whether they accrued recently or before the Receiver Action, as they are based on the same nucleus of operative facts, to wit: that Defendants have failed to pay \$175,000 in post-closing monthly payments required under the SPA to Plaintiffs.

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III.

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 2nd day of December, 2020.

KAPLAN COTTNER

By: /s/ Kory L. Kaplan

KORY L. KAPLAN, ESQ.

Nevada Bar No. 13164

KYLE P. COTTNER, ESQ.

Nevada Bar No. 12722

850 E. Bonneville Ave.

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*Attorneys for Defendants Manuel Iglesias
and Edward Moffly*

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CERTIFICATE OF SERVICE

I hereby certify that the *Defendants' Reply in support of 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 2nd day of December, 2020. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows²:

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

Ogonna M. Brown, Esq. (OBrown@lrrc.com)
LEWIS ROCA ROTHGERBER CHRISTIE LLP

G. Mark Albright, Esq. (gma@albrightstoddard.com)
D. Chris Albright, Esq. (dca@albrightstoddard.com)
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

E. Powell Miller, Esq. (epm@millerlawpc.com)
Christopher Kaye, Esq. (cdk@millerlawpc.com)

/s/ Sunny Southworth
An Employee of Kaplan Cottner

² 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”

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

DECLARATION OF MARIA A. GALL, ESQ.

I, Maria A. Gall, Esq., declare as follows under penalty of perjury:

1. I am over 18 years old and consider myself competent to give testimony in legal proceedings.

2. I am former counsel for Defendants in this action and by virtue of that position have personal knowledge of the statements made in this declaration.

3. Following this Court's denial of Defendants' prior motion for summary judgment without prejudice, I exchanged drafts of the proposed order denying the motion with Plaintiffs' counsel, Ogonna Brown, Esq.

4. Ms. Brown and I could not agree on the exact language of the proposed order.

5. Specifically, in my view, Ms. Brown sought language in her proposed order that may have reflected that the Court's decision to deny the previously filed motion for summary judgment was on the merits. I sought to include language that made clear the denial was not on the merits and, instead, without prejudice to avoid issues with the bankruptcy filed by former defendant Hygea Holdings Corp.

6. Accordingly, I stated in my edits to Ms. Brown's proposed order that "The reason for [my] substantive change is that based on the Court's comment that it was denying the MSJ w/o prejudice to avoid potential issues with the bankruptcy, we do

1 not think it's appropriate for the Order to suggest that its decision reflects the merits
 2 of the MSJ in any way. If you disagree, we can just follow the Dept guideline for
 3 presenting our competing position and a redline copy."

4 7. Ms. Brown and I subsequently submitted competing orders to the Court.

5 8. A true and correct copy of the email correspondence between me and Ms.
 6 Brown is attached as Exhibit A-1.

7 9. A true and correct copy of my March 26, 2020, letter to the Court
 8 including my proposed order, which the Court subsequently entered, is attached as
 9 Exhibit A-2.

10
 11 I declare under penalty of perjury that the foregoing is true and correct.

12 /s/ Maria A. Gall, Esq.

13 Dated: December 1, 2020

14
 15 Submitted by:

16 KAPLAN COTTNER

17 By: /s/ Kory L. Kaplan

18 Kory L. Kaplan, Esq.
 19 Nevada Bar No. 13164
 20 Kyle P. Cottner, Esq.
 Nevada Bar No. 12722
 850 E. Bonneville Ave.
 Las Vegas, Nevada 89101

21 *Attorneys for Defendants Manuel Iglesias*
 22 *and Edward Moffly*

“Exhibit A-1”

“Exhibit A-1”

From: Gall, Maria A. (LV) <GallM@ballardspahr.com>

Sent: Monday, March 16, 2020 3:37 PM

To: Brown, Ogonna <OBrown@lrrc.com>; gma@albrightstoddard.com; cdk@millerlawpc.com; Kevin J. Watts <KWatts@oaklandlawgroup.com>

Cc: Tasca, Joel (LV) <TASCA@ballardspahr.com>; Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>

Subject: RE: N5HYG v. Hygea - Proposed Order Granting Motion to Withdraw (revised)

Ogonna:

I haven't heard back from you, and I think it's past the deadline for order submissions, so we're going to submit our own draft of the MSJ order tomorrow per Dept guideline, as well as a draft of the withdrawal order. Thanks.

Maria

From: Gall, Maria A. (LV)

Sent: Wednesday, March 11, 2020 4:35 PM

To: 'Brown, Ogonna' <OBrown@lrrc.com>; gma@albrightstoddard.com; cdk@millerlawpc.com; Kevin J. Watts <KWatts@oaklandlawgroup.com>

Cc: Tasca, Joel (LV) <TASCA@ballardspahr.com>; Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>

Subject: RE: N5HYG v. Hygea - Proposed Order Granting Motion to Withdraw (revised)

Ogonna:

I think the excerpted quote actually supports our position for the inclusion of language that the Court was denying the motion in light of the bankruptcy. We would want the language included before signing off. But as I said, if you disagree, we can just follow the Dept guideline for presenting our competing position and a redline copy. Please let me know. Thanks.

Maria

From: Brown, Ogonna <OBrown@lrrc.com>

Sent: Wednesday, March 11, 2020 4:22 PM

To: Gall, Maria A. (LV) <GallM@ballardspahr.com>; gma@albrightstoddard.com; cdk@millerlawpc.com; Kevin J. Watts <KWatts@oaklandlawgroup.com>

Cc: Tasca, Joel (LV) <TASCA@ballardspahr.com>; Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>

Subject: RE: N5HYG v. Hygea - Proposed Order Granting Motion to Withdraw (revised)

⚠ EXTERNAL

Maria:

Thank you for following up. We just received the transcript yesterday, which supports our proposed Order. Per the attached order, we have accepted all of your proposed changes with the exception of the language you proposed in the first decretal paragraph (see highlight in the redlined version for your ease of reference.

A copy of the transcript is included for your ease of reference, noting the following language:

"And then, the pending motion, because it is under consideration, because of the Plaintiff's potential for rights in the bankruptcy, to acclaim more interest, I will go ahead and just deny the motion, all motions that are pending, without prejudice."

With these revisions and in light of the transcript, please confirm that you are signing off on the order as revised. Thank you.

Ogonna Brown

Partner

702.474.2622 office

702.949.8398 fax

OBrown@lrrc.com

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3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
lrrc.com

Because what matters
to you, matters to us.

[Read](#) our client service principles

From: Gall, Maria A. <GallM@ballardspahr.com>

Sent: Wednesday, March 11, 2020 1:49 PM

To: Brown, Ogonna <OBrown@lrrc.com>; gma@albrightstoddard.com; cdk@millerlawpc.com; Kevin J. Watts <KWatts@oaklandlawgroup.com>

Cc: Tasca, Joel <TASCA@ballardspahr.com>; Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>

Subject: RE: N5HYG v. Hygea - Proposed Order Granting Motion to Withdraw

[EXTERNAL]

Ogonna:

I'm just following up on the below. Thanks.

Maria

From: Brown, Ogonna <OBrown@lrrc.com>
Sent: Thursday, February 27, 2020 8:22 PM
To: Gall, Maria A. (LV) <GallM@ballardspahr.com>; gma@albrightstoddard.com; cdk@millerlawpc.com; Kevin J. Watts <KWatts@oaklandlawgroup.com>
Cc: Tasca, Joel (LV) <TASCA@ballardspahr.com>; Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>
Subject: RE: N5HYG v. Hygea - Proposed Order Granting Motion to Withdraw

⚠ EXTERNAL

Maria:

I will order the transcript and get back to you. Thank you.

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 Partner
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From: Gall, Maria A. <GallM@ballardspahr.com>
Sent: Thursday, February 27, 2020 1:34 PM
To: Brown, Ogonna <OBrown@lrrc.com>; gma@albrightstoddard.com; cdk@millerlawpc.com
Cc: Tasca, Joel <TASCA@ballardspahr.com>; Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>
Subject: RE: N5HYG v. Hygea - Proposed Order Granting Motion to Withdraw

[EXTERNAL]

Ogonna:

Thanks for the quick turnaround. I accepted all your changes to the proposed order granting the motion to withdraw and have attached a final version. If you are still ok with the draft, can you please sign it and leave it with your front desk for pickup?

We made a few nit changes on your proposed order denying the MSJ, as well as a substantive

change. The reason for the substantive change is that based on the Court's comment that it was denying the MSJ w/o prejudice to avoid potential issues with the bankruptcy, we do not think it's appropriate for the Order to suggest that its decision reflects the merits of the MSJ in any way. If you disagree, we can just follow the Dept guideline for presenting our competing position and a redline copy. Thanks.

Warm regards,
Maria

From: Brown, Ogonna <OBrown@lrrc.com>
Sent: Wednesday, February 26, 2020 10:11 PM
To: Gall, Maria A. (LV) <GallM@ballardspahr.com>; gma@albrightstoddard.com; cdk@millerlawpc.com
Cc: Tasca, Joel (LV) <TASCA@ballardspahr.com>; Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>
Subject: RE: N5HYG v. Hygea - Proposed Order Granting Motion to Withdraw

⚠ EXTERNAL

Maria:

Please see the proposed order denying the motion for summary judgment and our proposed revisions to your order on the motion to withdraw. Thank you.

Ogonna Brown

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 702.949.8398 fax
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 to you, matters to us.

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From: Gall, Maria A. <GallM@ballardspahr.com>
Sent: Wednesday, February 26, 2020 10:23 AM
To: Brown, Ogonna <OBrown@lrrc.com>; gma@albrightstoddard.com; cdk@millerlawpc.com
Cc: Tasca, Joel <TASCA@ballardspahr.com>
Subject: N5HYG v. Hygea - Proposed Order Granting Motion to Withdraw

[EXTERNAL]

Ogonna, et al.—

Attached is a proposed order granting our motion to withdraw as counsel. Please let me know if you

have any comments. If not, can you please sign that you have reviewed the proposed order on the "reviewed by" signature line, and let us know when ready for pickup? Thanks.

Warm regards,
Maria

Maria A. Gall



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“Exhibit A-2”

“Exhibit A-2”

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March 26, 2020

Via E-mail

Judge Nancy L. Allf
Clark County District Court
Department XXVII
200 Lewis Avenue
Las Vegas, Nevada 89101
dept27lc@clarkcountycourts.us

Re: N5HYG, LLC et al. v. Hygea Holdings Corp., et al. Case No. A-17-762664-B

Dear Judge Allf:

Attached are: (1) Ex. A, Defendants' proposed order denying their motion for summary judgment without prejudice; and (2) Ex. B, Ballard Spahr's proposed order granting their motion to withdraw as counsel.

With regard to the proposed summary judgment order, there is disagreement as to the wording of the order, and specifically, Defendants' request to include the following underlined language:

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

With regard to the proposed order on the motion to withdraw, Plaintiffs' counsel had an opportunity to review the order but did not indicate whether Plaintiff had any objections.

Thank you.

Warm regards,

/s/ Maria A. Gall, Esq.

EXHIBIT A

EXHIBIT A

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ORDR

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gallm@ballardspahr.com

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

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

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

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

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

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

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

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

13 **IT IS SO ORDERED.**

14
15 Dated this ____ day of _____, 2020.
16

17 _____
18 HONORABLE NANCY L. ALLF
19 DISTRICT COURT JUDGE
20
21
22
23
24
25
26
27
28

1 Submitted by:

2 BALLARD SPAHR LLP

3
4 By: /s/ Maria A. Gall

5 Joel E. Tasca, Esq.

6 Nevada Bar No. 14124

7 Maria A. Gall, Esq.

8 Nevada Bar No. 14200

9 1980 Festival Plaza Drive, Suite 900

10 Las Vegas, Nevada 89135

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

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EXHIBIT B

EXHIBIT B

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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

ORDER GRANTING MOTION TO WITHDRAW AS COUNSEL

On January 31, 2020, Joel E. Tasca, Esq. and Maria A. Gall, Esq., of the law firm Ballard Spahr LLP, filed a motion on behalf of themselves and Ballard Spahr, asking this Court to allow them to withdraw as counsel from this case and from further representation of Defendants Hygea Holdings Corp., Manuel Iglesias, and Edward Moffly. Although the Court scheduled a hearing on the motion in the ordinary course for March 5, 2020, on February 26, 2020, the Court advanced the motion during its status check of Hygea's recently filed bankruptcy petition. *See Notice of Related Case Filed in Bankruptcy Court* (filed Feb. 19, 2020) & *Order Setting Hearing* (filed Feb. 21, 2020). The following counsel of record appeared at

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1 the February 26 status check: Maria A. Gall, Esq., of Ballard Spahr LLP on behalf of
2 Defendants and Ogonna M. Brown, Esq. of Lewis Roca Rothgerber Christie LLP on
3 behalf of Plaintiffs. In addition, the following counsel appeared telephonically:
4 Felice Yudkin, Esq. and Jacob Frumkin, Esq. of Cole Schotz P.C., on behalf of Hygea
5 as its bankruptcy counsel, and Kevin Watts, Esq., of Oakland Law Group PLLC, on
6 behalf of Plaintiffs. There was no objection from any party to the advancement or
7 granting of the motion to withdraw.

8 Accordingly, for good cause shown, IT IS HEREBY ORDERED that the
9 Motion to Withdraw is GRANTED, and Joel E. Tasca, Esq. and Maria A. Gall, Esq.,
10 on behalf of themselves and Ballard Spahr LLP, including any and all attorneys
11 associated with Ballard Spahr who may have appeared in this case, are withdrawn
12 as counsel for Defendants and relieved of all related responsibilities.

13
14 Dated this ____ day of _____, 2020.

15
16 _____
17 HONORABLE NANCY L. ALLF
18 DISTRICT COURT JUDGE
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1 Submitted by:

2 BALLARD SPAHR LLP

3
4 By: /s/ Maria A. Gall

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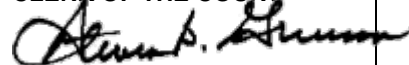
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8 *Former attorneys for Defendants Hygea Holdings*
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Attorneys for Plaintiffs

**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' STATUS REPORT AND
REQUEST FOR JUDICIAL NOTICE**

Plaintiffs Nevada 5, Inc. ("Nevada 5") and N5HYG, LLC ("N5HYG") provide the following Status Report and Request for Judicial Notice relating to matters relevant to Defendants' Motion for


Summary Judgment or, in the Alternative, Motion to Dismiss (the “Motion”), scheduled for hearing on December 9, 2020.

1. By way of its May 8, 2019 Order, this Court ruled that several former directors of Hygea Holdings Corp. (the “Former Director Defendants”) were not subject to the Court’s personal jurisdiction in Nevada with respect to the claims at issue in this case.
2. Therefore, Nevada 5 brought its claims against the Former Director Defendants in Florida, while it continued to pursue its claims against Iglesias and Moffly (and prior to its bankruptcy, Hygea) in this Court.
3. Subsequently, the Former Director Defendants sought coverage from Liberty Mutual Insurance Co. (“Liberty Mutual”) with respect to Nevada 5’s claims against them in Florida. Liberty Mutual denied coverage.
4. The Former Director Defendants thereafter filed a declaratory relief action in the United States District Court for the Southern District of Florida (Case No. 1:20-cv-23508-UU) seeking coverage under the policy (the “Declaratory Action”).
5. Liberty Mutual filed a motion to dismiss the Declaratory Action, asserting (incorrectly) that Nevada 5’s claims against the Former Director Defendants in Florida were as a shareholder that owned more than 5% of Hygea’s stock (thus triggering an exclusion under the policy).
6. On September 14, 2020, the Former Director Defendants opposed the motion to dismiss, arguing (correctly) that Nevada 5 is not the Hygea shareholder under the Stock Purchase Agreement—N5HYG is.
7. Most of the Former Director Defendants in the Declaratory Action were also defendants in the 2018 Receivership Action. It is that Receivership Action upon which Iglesias and Moffly base their renewed argument for claim preclusion against Nevada 5 and N5HYG, by way of their pending Motion.
8. To the extent this Court considers Iglesias and Moffly’s substantive arguments in their pending Motion at the hearing on December 9, 2020, Plaintiffs ask that this Court take

1 judicial notice of the Former Director Defendants' Opposition to Liberty Mutual's
2 motion to dismiss the Declaratory Action (attached hereto at Exhibit 1).
3

4 Submitted by:

5 LEWIS ROCA ROTHGERBER CHRISTIE LLP

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7 By: 
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Lewis Roca
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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on December 7, 2020, I served a copy of **PLAINTIFFS' STATUS REPORT AND REQUEST FOR JUDICIAL NOTICE** 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 “1”

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:20-cv-23508-UU

DANIEL T. MCGOWAN, individually, KEITH COLLINS,)
M.D., individually, GLENN MARRICHI, individually,)
JACK MANN, M.D., individually, and JOSEPH)
CAMPANELLA, individually,)

Plaintiffs,)

vs.)

LIBERTY INSURANCE UNDERWRITERS, INC., an)
Illinois corporation,)

Defendant.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT LIBERTY INSURANCE
UNDERWRITERS, INC.'S MOTION TO DISMISS**

Daniel T. McGowan ("McGowan"), Keith Collins, M.D. ("Collins"), Glenn Marrichi ("Marrichi"), Jack Mann, M.D. ("Mann"), and Joseph Campanella ("Campanella") (McGowan, Collins, Marrichi, Mann, and Campanella, collectively, "Plaintiffs"), hereby submit their Response in Opposition to Liberty Insurance Underwriters, Inc.'s Motion to Dismiss (the "Motion") [D.E. 6] as supported by the following memorandum of law.

I. Introduction

Plaintiffs, having been sued by Nevada 5, Inc. ("Nevada 5") in Florida state court (the "Underlying Action"), sued Defendant for declaratory relief after Defendant refused to provide Director and Officer coverage in response to Plaintiffs' demands. Seemingly ignoring the Federal Rules of Civil Procedure, Defendant now moves to dismiss Plaintiffs' Complaint for declaratory relief, pursuant to Rule 12(b)(6), based on some of the factual allegations in the complaint in the

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Underlying Action. While Defendant attempts to bait this Court into considering these purported “facts” under the guise of “judicial notice,” it remains improper to consider a third-party’s mere unproven allegations, made in another action, when ruling on a motion to dismiss. Rather, at bottom, Plaintiffs adequately state a claim for declaratory relief and the “facts” proffered by Defendant cannot be established and considered until summary judgment. Defendant’s Motion must also fail because the exclusion it relies upon, when strictly construed against it, as required, does not bar coverage. Defendant’s Motion should therefore be denied.

II. The Alleged Facts

This is an action for declaratory relief pursuant to Florida Statutes Chapter 86, arising out of Defendant’s refusal to pay for the defense (in the Underlying Action) of the Plaintiffs – who served on the Board of Directors of Hygea Holdings Corp. (“Hygea”) - pursuant to a Directors and Officers Insurance Policy (the “Policy”) issued by Defendant to Hygea *See* Compl. ¶ 1 [D.E. 1-2].

On May 16, 2019, the “Underlying Action” was filed against Plaintiffs by two parties: N5HYG LLC (“N5HYG”, which was a holder of shares of stock in Hygea) and Nevada 5, which was not a Hygea shareholder. The complaint was thereafter amended to leave only the non-shareholder Nevada 5 as plaintiff, who alleged certain false representations and omissions that, allegedly, induced the purchase of the Hygea stock. *See id.* ¶¶ 16-18. While not an allegation of Plaintiff’s Complaint, paragraph 60 of the complaint in the Underlying Action makes clear that it is N5HYG which is the Hygea shareholder, not Nevada 5. In response to the Underlying Action, Plaintiffs timely notified Defendant of the Action and requested indemnity and defense. *See id.* ¶ 20. However, Defendant denied coverage and refused to defend Plaintiffs, claiming that a “Major Shareholder Exclusion” which was added by endorsement to the Policy applies to bar coverage.

See id. ¶ 21. The Complaint does not allege, however, the percentage of stock, if any, held by Nevada 5, or any other entity or person, at the time the Underlying Action was filed. *See id.*

III. Relevant Law

Pursuant to the Policy, issued in the State of Florida, the substantive law of Florida governs the Policy. *See* Policy § 20.

A. Motion to Dismiss Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), “the Court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff.” *See, e.g., Henley v. Payne*, 945 F.3d 1320, 1326 (11th Cir. 2019). “A court’s review on a motion to dismiss is limited to the four corners of the complaint.” *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (internal quotation marks omitted). Further, “the truth or existence of a fact as alleged is an issue not properly resolved at the motion to dismiss stage.” *See, e.g., Am. Metabolic Testing Labs., Inc. v. Alfa Wassermann Diagnostic Techs., LLC*, No. 17-CV-60119, 2017 WL 7794346, at *3 (S.D. Fla. July 7, 2017); *see also Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP*, 609 F. App’x 972, 976 (11th Cir. 2015) (“[D]isputed issues of fact . . . cannot be resolved on a motion to dismiss.”).

B. Judicial Notice

While courts may take judicial notice of the existence of a complaint in another lawsuit, they may not assume the factual allegations in the judicially noticed complaint to be true. *See, e.g., Verizon Trademark Servs., LLC v. Producers, Inc.*, No. 8:10-CV-665-T-33EAJ, 2011 WL 308237, at *1 (M.D. Fla. Jan. 27, 2011) (“The Court does not take judicial notice of accuracy of the factual allegations contained within the complaint. Rather, the Court takes judicial notice only of the fact that such allegations were advanced in the complaint.”); *see also Facey v. Carrington*

Mortg. Servs., LLC, No. 18-CV-61468-KMM, 2018 WL 7822710, at *1 n.3 (S.D. Fla. Dec. 11, 2018) (“While the Court can take judicial notice of the foreclosure lawsuit, which was referenced in Plaintiffs’ amended complaint . . . the Court cannot assume that the factual allegations contained in Defendant’s foreclosure complaint are true.” (quoting *France v. Ditech Fin., LLC*, No. 817CV3038T24MAP, 2018 WL 1695405, at *3 (M.D. Fla. Apr. 6, 2018))).

IV. Argument

A. **The Motion Improperly Relies on Materials Outside the Four Corners of the Complaint to Address Factual Issues That Are Not Properly Decided on a Motion to Dismiss.**

Initially, the Motion must be denied because it relies extensively on materials outside of the four corners of the Complaint to argue that coverage is barred under the Major Shareholder Exclusion. *See* Mot. at 1-2, 3-5; *see also Wilchombe*, 555 F.3d at 959 (“A court’s review on a motion to dismiss is limited to the four corners of the complaint.”). Defendant’s “three reasons” for why coverage is purportedly barred all require reference to facts outside of the Complaint to establish, as a factual matter, that the Underlying Action falls under the Major Shareholder Exclusion. *See* Mot. at 3. That is because determining whether the Major Shareholder Exclusion is applicable requires the resolution of factual questions such as: (1) who is the beneficial owner of the Hygea shares; (2) whether the percentage of Hygea shares held by Nevada 5 (if any) exceeded 5% at the time the operative complaint in the Underlying Action was brought; (3) if Nevada 5 did not hold the shares, how were the shares held; and (4) if Nevada 5 did not hold the shares, whether the Underlying Action was brought by an entity or individual that would trigger the Major Shareholder Exclusion.

Defendant attempts to sidestep the general rule that a court’s review of a complaint is limited to its four corners on a motion to dismiss by requesting that this Court take judicial notice

of the pleadings filed in the Underlying Action. *See* Mot. at 4 n.2. While a court may take judicial notice of the existence or nature of a pleading in an action before another court, it may not take the allegations of a complaint in another action as true for purposes of evaluating a motion to dismiss. *See, e.g., Verizon Trademark Servs., LLC*, 2011 WL 308237, at *1 (“The Court does not take judicial notice of accuracy of the factual allegations contained within the complaint. Rather, the Court takes judicial notice only of the fact that such allegations were advanced in the complaint.”). That is, however, exactly what Defendant asks this Court to do. *See* Mot. at 5 (quoting the allegations of the Second Amended Complaint in the Underlying Action for the proposition that the Action was brought by an owner of more than 5% of Hygea stock). Further, the operative complaint in the Underlying Action, at paragraph 60, clearly states that the Hygea shareholder is N5HYG, which is NOT the party making claims against the Plaintiffs in the Underlying Action. Because this Court cannot determine whether the Major Shareholder Exclusion is applicable based on the facts alleged in the Complaint, Defendant’s Motion must be dismissed.

B. Plaintiffs State a Claim for Declaratory Relief.

“Florida Statute Section 86.021 provides for a declaration of rights or status where a party to an agreement is in doubt as to his or her rights.” *See, e.g., Tamiami Condo. Warehouse Plaza Ass’n, Inc. v. Markel Am. Ins. Co.*, No. 19-CV-21289, 2019 WL 4863378, at *2 (S.D. Fla. Oct. 2, 2019). “The only relevant inquiry in ascertaining whether the complaint states a claim for declaratory relief is whether or not the plaintiff is entitled to a declaration of rights.” *See, e.g., id.* To be entitled to a declaration of rights, Plaintiff must show the following elements:

- (1) a bona fide, actual, present practical need for the declaration;
- (2) the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts;
- (3) some immunity, power, privilege or right of the complaining party is

dependent upon the facts or the law applicable to the facts;

- (4) there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law;
- (5) the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

Dorleus v. Bank of New York, No. 14-80124-CIV, 2014 WL 1621941, at *2-3 (S.D. Fla. Apr. 23, 2014) (quoting *City of Hollywood v. Petrosino*, 864 So. 2d 1175, 1177 (Fla. 4th DCA 2004)).

Here, Plaintiff alleges that there is a bona fide, present, and practical need for a declaration interpreting the Policy and the Major Shareholder Exclusion due to Defendant's insistence that there is no coverage. *See* Compl. ¶¶ 26-28. The sought-after declaration therefore deals with a present controversy as to the state of facts regarding coverage under the Policy and Major Shareholder Exclusion for the ongoing Underlying Action. *See id.* ¶ 28. Further, the right of Plaintiffs to coverage, defense and indemnity under the Policy is dependent upon the facts and the law applicable to the facts, as stated in the Complaint. *See id.* ¶ 27. It is also evident by Defendant's decision to dispute coverage that it has an adverse and antagonistic interest in the subject matter. *See id.* Finally, there is no dispute that the proper parties are before this Court and that the relief sought is for purposes of determining coverage under the Policy and not for obtaining an impermissible advisory opinion. *See id.* ¶ 28. Plaintiffs are therefore entitled to declaratory relief and this Court should deny the Motion. *See, e.g., Tamiami Condo. Warehouse Plaza Ass'n, Inc.*, 2019 WL 4863378, at *2 ("The only relevant inquiry in ascertaining whether the complaint states a claim for declaratory relief is whether or not the plaintiff is entitled to a declaration of rights.").

C. The Major Shareholder Exclusion is Ambiguous and Should be Interpreted in Favor of Plaintiffs.

The Major Shareholder Exclusion relied upon by Defendant is ambiguous and should therefore be strictly interpreted in favor of Plaintiffs. The Exclusion states that:

The Insurer shall not be liable under any Insuring Clause in this Coverage Part for Loss on account of any Claim made against any Insured:

brought or maintained in any capacity by, on behalf of, or at the behest of any individual, firm, corporation or entity owning 5% or more of the outstanding common shares of the Company, ***either directly or beneficially***.

See Major Shareholder Exclusion [D.E. 1-2 at 38] (emphasis added).

It is well established that “if the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous.” *See, e.g., Cheetham v. S. Oak Ins. Co.*, 114 So. 3d 257, 261 (Fla. 3d DCA 2013). “Ambiguous coverage provisions are construed strictly against the insurer that drafted the policy and liberally in favor of the insured.” *See, e.g., id.* “Likewise, ambiguous insurance policy exclusions are construed against the drafter and in favor of the insured.” *See, e.g., Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). “In fact, exclusionary clauses are construed even more strictly against the insurer than coverage clauses.” *See, e.g., id.*

Here, there is no dispute that Nevada 5, the plaintiff in the Underlying Action, is not the owner of the Hygea shares. *See* Mot. at 5 (“Nevada 5 created NSHYG LLC to hold the 23,437,500 purchased shares of Hygea’s Common Stock, or 8.57% of the outstanding shares.”). Defendant asserts that Nevada 5—the only remaining plaintiff in the Underlying Action—is the “beneficial” owner of the Hygea shares, but the Policy contains no definition of the concept of “beneficial ownership.” Florida decisional law teaches that a beneficial owner is ultimately a natural person—not another artificial entity such as Nevada 5. *See, e.g., Empire World Towers, LLC v. CDR*

Creances, S.A.S., 48 So. 3d 1033, (Mem)–1034 (Fla. 3d DCA 2010), *opinion after grant of cert.*, 89 So. 3d 1034 (Fla. 3d DCA 2012) (quashing order requiring disclosure of “the names of *beneficial owners (e.g. the natural persons)* who ultimately own and control the corporate defendants”) (emphasis added); *see also State v. Atl. Coast Line R. Co.*, 47 So. 969, 978 (1908) (“The provision of the state Constitution forbidding the deprivation or taking of property without due process of law and without compensation extends to property held by corporations, *as natural persons are the beneficial owners of the property*, though it be held and used by a legal corporate entity.”) (emphasis added). With the term “beneficially” undefined by the Policy, the Major Shareholder Exclusion is at a minimum ambiguous as to whether a beneficial owner may include a corporation or just a natural person and must be strictly construed against Defendant. *See, e.g., Cheetham*, 114 So. 3d at 261 (“[I]f the salient policy language is susceptible to two reasonable interpretations, one providing coverage and the other excluding coverage, the policy is considered ambiguous.”); *see also Auto-Owners Ins. Co.*, 756 So. 2d at 34 (“In fact, exclusionary clauses are construed even more strictly against the insurer than coverage clauses.”).

As there is also no dispute that the sole Plaintiff in the Underlying Action is a corporation, Nevada 5, not the natural person who is the ultimate beneficial owner of Nevada 5 or of the Hygea shares, the Major Shareholder Exclusion is inapplicable when construed strictly against Defendant. Defendant’s Motion should therefore be denied.

D. Even if this Court Could Properly Consider Factual Allegations from the Underlying Action, Dismissal is Not Warranted as The Factual Allegations Show That the Shareholder is Not Bringing the Underlying Action.

While this Court may not consider the factual allegations in the Underlying Action in deciding the Motion, in any event, those allegations do not warrant dismissal. Specifically, Paragraph 60 in the operative complaint in the Underlying Action clearly alleges that N5HYG,

which had dropped out as a plaintiff in the Underlying Action, is the shareholder, not the remaining plaintiff, Nevada 5. The operative complaint in the Underlying Action also contains no allegation that Nevada 5 is bringing the underlying action on behalf of N5HYG or that it was the beneficial owner of more than 5% of the outstanding Hygea shares. Accordingly, even if the facts of the operative complaint in the Underlying Action are improperly considered, the Major Shareholder Exclusion does not apply.

V. Conclusion

Because Defendant fails to present a ground for dismissal that does not rely on facts outside of the four corners of the Complaint, its Motion must be denied. Plaintiffs plainly state a claim for declaratory relief. While Defendant attempts to prematurely argue the applicability of the exclusion it relies upon, it should be in no hurry to do so as the provision is ambiguous and should be strictly construed against it.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order denying Defendant's Motion.

Respectfully submitted,

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Counsel for Plaintiffs

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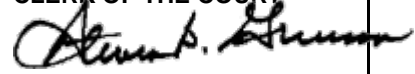
I hereby certify that a true and correct copy of the foregoing was served by Notice of Electronic Filing generated by CM/ECF, on September 14, 2020, on all counsel or parties of record on the Service List below.

By: **David A. Freedman**
David A. Freedman, FBN 161817

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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
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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

**NOTICE OF ENTRY OF ORDER
GRANTING IN PART AND DENYING
IN PART DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, MOTION TO DISMISS**

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Las Vegas, NV 89169

1 NOTICE IS HEREBY GIVEN that the *Order Granting In Part And Denying In Part*
 2 *Defendants' Motion For Summary Judgment, Or In The Alternative, Motion To Dismiss* ("Order")
 3 was entered on December 16, 2020.

4 A copy of said Order is attached hereto.

5
 6 DATED: December 17, 2020

LEWIS ROCA ROTHGERBER CHRISTIE LLP

8 By: /s/ Ogonna Brown

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on December 17, 2020, I served a copy of **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART 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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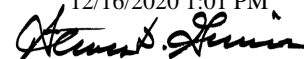
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/s/ Kenya Jackson

An employee of Lewis Roca Rothgerber Christie LLP



CLERK OF THE COURT

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Attorneys for Plaintiffs

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

**ORDER GRANTING IN PART AND
DENYING IN PART 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.

Judge: Hon. Nancy Allf

This matter regarding Defendants Manuel Iglesias and Edward Moffly's (collectively, the "Defendants") Motion For Summary Judgment, or in the Alternative, Motion To Dismiss ("Motion"), filed on November 4, 2020, having come before this Court for hearing on December 9, 2020, at 10:30 a.m. before Department 27 of the Eighth Judicial District Court, in and for Clark County, Nevada, with Honorable Nancy Allf presiding. Kory L. Kaplan, Esq. of the law firm of Kaplan Cottner appeared on behalf of Defendants Manuel Iglesias and Edward Moffly ("Defendants"), and Ogonna M. Brown, Esq. of the law firm of Lewis Roca Rothgerber Christie, LLP appeared on behalf of Plaintiffs, N5HYG, LLC and Nevada 5, Inc. (collectively, the "Plaintiffs"). The Court, having considered the papers and pleadings on file herein, heard oral argument presented by counsel at the hearing on the Motion, incorporates by reference the findings from the hearing, and orders the following:

IT IS HEREBY ORDERED that Defendants' Motion, as it relates to Plaintiffs' Second Amended Complaint, is hereby **DENIED** in its entirety, except that it is **GRANTED** to the limited extent that Plaintiff N5HYG is precluded from obtaining relief for loss of value of its stock in Hygea Holdings Corp.

IT IS FURTHER ORDERED that Plaintiffs concede that N5HYG, LLC's Eleventh Cause of Action (Claim for Books and Records) is moot, due to the bankruptcy of Hygea Holdings Corp., provided however that it shall not impede any discovery pertinent to any other claim.

IT IS FURTHER ORDERED that the Defendants' objection to Plaintiffs' request that the Court take judicial notice of the Former Director Defendants' Opposition to the motion to dismiss, filed on September 14, 2020, in the United States District Court for the Southern District of Florida, pending as Case No. 1:20-cv-23508-UU, in response to Liberty Mutual's motion to dismiss the Declaratory Action, attached as Exhibit "1" to Plaintiffs' Status Report and Request for Judicial Notice filed on December 7, 2020 ("Status Report") is **OVERRULED**.

IT IS FURTHER ORDERED that the Court will take judicial notice of the Plaintiffs' Status Report, as the standard for judicial notice is liberally construed, and the Court is not taking as true any of the facts or statements as set forth in Plaintiffs' Status Report.

...

1 **IT IS FURTHER ORDERED** that Defendants may have violated NRCP 12(g)(2) such that
 2 the Plaintiffs may request relief under NRCP 41.

3 **IT IS SO ORDERED.**

Dated this 16th day of December, 2020

4
 5 December 16, 2020

Nancy L Alf

0B8 7E2 F58F 36CD
 Nancy Alf
 District Court Judge

NB

7 Submitted by:

8 LEWIS ROCA ROTHGERBER CHRISTIE LLP

9 By: /s/ Ogonna M. Brown
 10 OGONNA M. BROWN (SBN 7589)
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 11 (702) 949-8200

12 *Attorneys for Plaintiffs*

14 Reviewed and approved/not approved as to form and
 15 content:

16 KAPLAN COTTNER

17 By: /s/ Kory L. Kaplan
 18 Kory L. Kaplan, Esq. (NBN 13164)
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 19 Las Vegas, Nevada 89101

20 *Attorneys for Defendants Manuel Iglesias*
 21 *and Edward Moffly*

From: Kory Kaplan <kory@kaplancottner.com>
Sent: Tuesday, December 15, 2020 8:15 AM
To: Brown, Ogonna <OBrown@lrrc.com>
Cc: Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>
Subject: RE: Iglesias-Moffly - Order Denying MSJ or in the alternative MTD (KK redline) (KJW redline).docx

[EXTERNAL]

Ogonna,

You may affix my e-signature.

Thanks,
Kory



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From: Brown, Ogonna <OBrown@lrrc.com>
Sent: Monday, December 14, 2020 4:50 PM
To: Kory Kaplan <kory@kaplancottner.com>
Cc: Jackson, Kennya <KJackson@lrrc.com>; Dale, Margaret <MDale@lrrc.com>
Subject: Iglesias-Moffly - Order Denying MSJ or in the alternative MTD (KK redline) (KJW redline).docx

Dear Mr. Kaplan:

Please see the minor revisions to the language you added regarding the mootness of the books and records request. If you have no further comments, please confirm I am authorized to affix your electronic signature. Thank you.

Ogonna Brown

Partner

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COVID-19 questions?

**Connect to our [Rapid Response Team](#)
for answers and resources.**



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to you, matters to us.

[Read](#) our client service principles

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 N5HYG, LLC, Plaintiff(s)

CASE NO: A-17-762664-B

7 vs.

DEPT. NO. Department 27

8 Hygea Holdings Corp.,
9 Defendant(s)

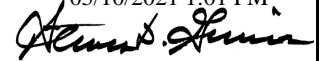
10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 12/16/2020

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ORDR

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Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

Defendants.

CASE NO.: A-17-762664-B

DEPT. NO.: 27

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
PLAINTIFF N5HYG, LLC'S MOTION
FOR PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANTS MANUEL
IGLESIAS AND EDWARD MOFFLY**

Date of Hearing: March 17, 2021

Time of Hearing: 10:30 a.m.

Judge: Hon. Nancy Allf

114400229.1

This matter came on for hearing on March 17, 2021, at 10:30 a.m. before the Honorable Nancy Allf on Plaintiff N5HYG, LLC's ("Plaintiff") Motion for Partial Summary Judgment against Defendants Manuel Iglesias and Edward Moffly¹ ("Motion"), filed on February 11, 2021. On February 25, 2021, Defendants Manuel Iglesias and Edward Moffly ("Defendants") filed their Opposition to the Motion. Plaintiff filed its Reply In Support of the Motion on March 10, 2021. Ogonna M. Brown, Esq. of the law firm of Lewis Roca Rothgerber Christie LLP ("Lewis Roca"), appeared at the hearing on behalf of Plaintiff. Kory L. Kaplan, Esq., of the law firm of Kaplan Cottner, appeared at the hearing on behalf of Defendants.

Following oral arguments, the Court directed the Parties to file supplemental briefs by April 16, 2021, and took the matter under advisement for an in-chambers hearing on April 20, 2021. On April 16, 2021, Defendants filed their Supplemental Briefing in Support of Defendants' Opposition to Plaintiff N5HYG, LLC's Motion for Partial Summary Judgment, and Plaintiff filed its Supplemental Briefing In Support Of Motion For Partial Summary Judgment.

On April 20, 2021, the Court held an in-chambers hearing to issue a ruling on the Motion. The Court, having considered the papers and pleadings on file, including the Parties' Supplemental Briefing, and the oral arguments presented by counsel at the Motion hearing, and good cause appearing therefor, finds the following:

FINDINGS OF FACT

1. On December 13, 2019, Plaintiffs filed their Second Amended Complaint in which Plaintiff N5HYG pled breaches of contract against the Defendants. *See* Second Amended Complaint Eighth Cause of Action – Breaches of Contract, on file herein.

2. On October 5, 2016, Plaintiff N5HYG entered into a Stock Purchase Agreement ("SPA") with Hygea, Iglesias and Moffly.

3. Section 6.3 of the SPA requires Hygea to make "Post-Closing Monthly Payments" to N5HYG in the amount of \$175,000 (plus applicable interest) on the first day of each calendar

¹ Due to Hygea Holdings Corp.'s ("Hygea") February 19, 2020 bankruptcy filing, and the ensuing July 15, 2020 bankruptcy Reorganization Plan's discharge of Hygea from pre-petition claims, this Order does not apply to or against Hygea.

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.

4. SPA Section 1 expressly defines the “Seller Principals” as the Defendants, Iglesias and Moffly.

5. SPA Section 7.4.1 states that Defendants are directly and personally bound to pay “100%” of the Post-Closing Monthly Payments, which each Defendant, jointly and severally, “absolutely and unconditionally guarantee[d].”

6. SPA Section 7.4.1 further states that Defendants’ liability for the Post-Closing Monthly Payments is “primary, direct and unconditional” and “does not require [N5HYG] to resort to any other Person, including [Hygea], or any other right, remedy or collateral.”

7. SPA Section 7.1 requires that Hygea indemnify N5HYG by paying its fees, costs, and expenses—“including actual and reasonable attorneys’ and experts fees and expenses”—incurred for “enforcement of this Agreement” relating to “any breach or violation of, or any failure to perform, any covenant or agreement of [Hygea] or any Seller Principal.”

8. SPA Section 7.4.2 states that Iglesias and Moffly personally and “absolutely and unconditionally guarantee[d], jointly and severally... the prompt and punctual payment” of N5HYG’s attorneys’ fees, costs, and expenses incurred in enforcing the SPA, up to the amount of their pro-rata portions of such fees, costs, and expenses, determined by their pro rata percentages of Hygea’s stock.

9. SPA Section 7.4.2 further states that the guarantee of such attorneys’ fees, costs, and expenses is “primary, direct, and unconditional” and “does not require [N5HYG] to resort to any other Person, including [Hygea], or any other right, remedy or collateral.”

10. Iglesias and Moffly signed the SPA in their personal capacities, including an express acceptance of their primary, direct, absolute, unconditional, and personal contractual obligations and guarantees to N5HYG as the Seller Principals.

...

...

11. Defendants or Hygea made the required monthly payments through July 1, 2017.

12. However, Defendants admit that “in or around August 1, 2017, Hygea Holdings Corp. ceased making Post-Closing Monthly Payments to N5HYG.” *See* Defendants’ Answer at ¶58, on file herein. Neither Hygea nor Defendants made the payment due on August 1, 2017, nor any other payments that subsequently became due.

13. Further, neither of the two “Trigger Events” under SPA Section 6.3 (after which Defendants would no longer incur new Post-Closing Monthly Payment obligations) ever occurred—at least prior to July 2020.

14. First, Defendants admit that Hygea was never listed on any public stock exchange. *See* Answer at ¶57, on file herein.

15. Second, N5HYG remained a Hygea shareholder through July 15, 2020.

16. In February 2020, Hygea filed a voluntary petition for Chapter 11 bankruptcy pending as Case No. 20-10361-KBO in the United States Bankruptcy Court for the District of Delaware (“Hygea Bankruptcy Proceeding”).

17. On July 15, 2020, a Second Amended Plan of Reorganization (“Reorganization Plan”) entered by the Bankruptcy Court essentially wiped out shareholders’ shares in Hygea. At least until that effective date, N5HYG was a Hygea shareholder, and it is entitled to all Post-Closing Monthly Payments due prior to that time.²

18. The Reorganization Plan defines a “Subordinated Claim” as “any Claim subordinated by law or contract including pursuant to section 510(b) of the Bankruptcy Code, which will include, but not be limited to, any claim filed by Nevada 5, Inc. and N5HYG, LLC in the Chapter 11 Cases.” Hygea Bankruptcy Proceeding, ECF No. 382-1, p. 76 of 122.

19. Under Hygea’s bankruptcy Reorganization Plan, which was confirmed by the Bankruptcy Court, holders of Subordinated Claims against the Debtors will not receive or retain any property on account of such Subordinated Claims, and the obligations of the Debtors on account

² Pursuant to NRS § 47, this Court hereby takes Judicial Notice of the Delaware Bankruptcy Court docket and the filings in the Bankruptcy Case referenced herein, which documents are a matter of public record.

of Subordinated Claims will be discharged. Hygea Bankruptcy Proceeding, ECF No. 382-1, p. 82 of 122.

20. Thus, given the subordinated nature of N5HYG's claims under the confirmed Plan, "Subordinated Claims" are discharged as of the July 15, 2020 Effective Date.

21. Further, the Debtor in the Hygea Bankruptcy Proceeding did not assert a counterclaim, file an adversary complaint, or otherwise make active efforts to contest N5HYG's claims, or assert defenses to N5HYG's claims for the Post-Closing Monthly Payments. Rather, N5HYG's claims against Hygea have been discharged under the Plan as "Subordinated Claims."

22. To the extent any of the foregoing Findings of Fact are more properly deemed a Conclusion of Law, they may be so construed.

CONCLUSIONS OF LAW

1. To prevail on a breach of contract claim, a plaintiff must demonstrate: "(1) the existence of a valid contract, (2) that plaintiff performed, (3) that defendant breached, and (4) that the breach caused plaintiff damages." *See* Restatement (Second) of Contracts § 203 (2007).

2. With respect to the first element of the breach of contract claim, the Court hereby **FINDS** that there is no genuine issue of material fact that the SPA is valid, and that each of the Defendants signed the SPA in their personal capacities.

3. With respect to the second element of the breach of contract claim, the Court hereby **FINDS** that there is no genuine issue of material fact that Plaintiff N5HYG fully performed under the SPA.

4. With respect to the second element of the breach of contract claim, the Court hereby **FINDS** that there is no genuine issue of material fact that Plaintiff N5HYG became and remained a Hygea shareholder from the date it executed the SPA until the July 15, 2020 effective date of Hygea's bankruptcy Plan.

5. With respect to the third element of the breach of contract claim, the Court hereby **FINDS** that there is no genuine issue of material fact that pursuant to SPA Sections 6.3 and 7.4, Defendants agreed to be, and are, primarily, directly, and unconditionally liable to pay to N5HYG

1 100% of the Post-Closing Monthly Payments, which Defendants jointly and severally, absolutely,
2 and unconditionally guaranteed in their personal capacities.

3 6. The Court hereby **FINDS** that there is no genuine issue of material fact that the
4 Defendants failed to timely pay any of the Post-Closing Monthly Payments after July 1, 2017,
5 which were due each month on or after August 1, 2017.

6 7. The Court hereby **FINDS** that there is no genuine issue of material fact that Hygea
7 was never listed on any public stock exchange so as to constitute a “Trigger Event” capping off
8 Defendants’ obligations.

9 8. With respect to the fourth and final element of the breach of contract claim, the
10 Court hereby **FINDS** that there is no genuine issue of material fact that N5HYG was damaged as a
11 result of Defendants’ failure to pay the Post-Closing Monthly Payments for any month on or after
12 August 1, 2017.

13 9. Accordingly, this Court **FINDS** that Plaintiff has shown entitlement to summary
14 judgment on a joint and several basis against the Defendants for liability under SPA Section 7.4.1,
15 which states:

16 Notwithstanding anything herein to the contrary, each Seller Principal
17 hereby absolutely and unconditionally guarantees, jointly and severally
18 with all other Seller Principals, the prompt and punctual payment by Seller
19 of 100% of Seller’s payment obligations under Section 6.3. Each Seller
20 principal’s liability under this Section 7.4.1 is primary, direct and
unconditional and shall not require Buyer to resort to any other Person,
including Seller, or any other right remedy or collateral, whether held as
collateral for satisfaction of obligations set forth herein.

21 10. Regarding the Defendants’ defenses relating to purported impossibility,
22 impracticability, or frustration of purpose, this Court **FINDS** that the Defendants have failed to
23 raise a genuine issue of material fact. Pursuant to SPA Section 7.4.1, Defendants expressly agreed
24 their primary, direct, and personal liability for payment of the Post-Closing Monthly Payments was
25 absolute and unconditional.

26 11. This Court further **FINDS** that the Bankruptcy docket and relevant filings reflect
27 that Hygea did not file a counterclaim or commence an adversary proceeding against N5HYG, or
28

1 otherwise actively dispute its obligations under the SPA to make Post-Closing Monthly Payments
2 to N5HYG on the basis of any such defenses.

3 12. This Court **FINDS** that the Post-Closing Monthly Payments are not “dividends” or
4 “distributions,” but are rather contractual obligations for which Defendants are personally,
5 primarily, directly, and unconditionally liable to N5HYG, and which do not require N5HYG to
6 resort to any Hygea or any third party to enforce.

7 13. This Court **FINDS** that a continuance under NRCP 56(d) is unwarranted, as the facts
8 and evidence material to the Court’s decision on the Motion are based upon the terms of the SPA,
9 which are undisputed, as well as Defendants’ admissions that they have not paid the Post-Closing
10 Monthly Payments.

11 14. To the extent any of the foregoing Conclusions of Law are more properly deemed a
12 Finding of Fact, they may be so construed.

13 **ORDER**

14 Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

15 **IT IS HEREBY ORDERED** that Plaintiff N5HYG’s Motion for Partial Summary
16 Judgment as to the joint and several liability of Defendants MANUEL IGLESIAS and EDWARD
17 MOFFLY for their breaches of the SPA and their personal guarantees of the Post-Closing Monthly
18 Payments thereunder is **GRANTED** in its entirety in favor of N5HYG.

19 **IT IS FURTHER ORDERED** that Plaintiff N5HYG may present a separate motion for
20 award of damages, as well as attorneys’ fees and costs, and for entry of a final judgment in favor
21 of N5HYG on its Eighth Cause of Action against Defendants MANUEL IGLESIAS and EDWARD
22 MOFFLY. To the extent Defendants dispute Plaintiff N5HYG’s calculation of damages, attorneys’
23 fees, or costs, they may challenge such calculation by way of written briefing and/or an evidentiary
24 hearing to be scheduled at the earliest convenience of the parties and the Court.

25 ...

26 ...

27 ...

1 **IT IS FURTHER ORDERED** that the Status Check regarding the decision scheduled on
 2 April 20, 2021 in chambers calendar is hereby **VACATED**.

3 **IT IS SO ORDERED.**

4 May 10, 2021

Dated this 10th day of May, 2021

Nancy L Alf

7 Submitted by:

00B C80 3FBA 80CC
Nancy Alf
District Court Judge

NB

8 **LEWIS ROCA ROTHGERBER CHRISTIE LLP**

9 By: /s/ Ogonna Brown

10 OGONNA M. BROWN, ESQ. (NBN 7589)

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12 *Attorneys for Plaintiffs*

13 Reviewed and approved as to form and content:

14 **KAPLAN COTTNER**

15 By: /s/ Kory Kaplan

16 KORY L. KAPLAN, ESQ. (NBN 13164)

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19 *Attorneys for Defendants Manuel Iglesias & Edward Moffly*

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Sent: Friday, May 7, 2021 12:03 PM
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Cc: Jackson, Kennya; Dale, Margaret
Subject: Re: Order Granting Plaintiffs' Partial Motion For Summary Judgment - FINAL

FilingDate: 5/7/2021 12:03:00 PM

[EXTERNAL]


Yes you have my authority

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Sent from my iPhone

On May 7, 2021, at 11:57 AM, Brown, Ogonna <OBrown@lewisroca.com> wrote:

I accepted all of your redlined changes and sent you a clean final version.

Ogonna Brown
 Partner

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From: Kory Kaplan <kory@kaplancottner.com>
Sent: Friday, May 7, 2021 11:57 AM
To: Brown, Ogonna <OBrown@lewisroca.com>
Cc: Jackson, Kennya <KJackson@lewisroca.com>; Dale, Margaret <MDale@lewisroca.com>
Subject: Re: Order Granting Plaintiffs' Partial Motion For Summary Judgment - FINAL

[EXTERNAL]

Ogonna,

Can you direct me to what paragraphs we were disputing? I can't see the changes on my phone.

1 **CSERV**

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5
6 N5HYG, LLC, Plaintiff(s)

CASE NO: A-17-762664-B

7 vs.

DEPT. NO. Department 27

8 Hygea Holdings Corp.,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

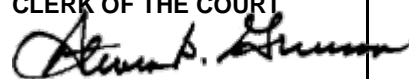
12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
14 system to all recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 5/10/2021

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Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

Defendants.

CASE NO.: A-17-762664-B

DEPT. NO.: 27

**NOTICE OF ENTRY OF ORDER
REGARDING FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER
GRANTING PLAINTIFF N5HYG, LLC'S
MOTION FOR SUMMARY JUDGMENT
AND CERTIFICATION OF FINAL
JUDGMENT ON DAMAGES,
ATTORNEYS' FEES, AND COSTS
AGAINST DEFENDANTS MANUEL
IGLESIAS AND EDWARD MOFFLY**

Judge: Hon. Nancy Allf

115062862.1

1 NOTICE IS HEREBY GIVEN that Findings of Fact, Conclusions of Law, and Order
2 Granting Plaintiff N5HYG, LLC's Motion for Summary Judgment and Certification of Final
3 Judgment on Damages, Attorneys' Fees, and Costs Against Defendants Manuel Iglesias and
4 Edward Moffly ("Order") was entered on July 22, 2021. A copy of the Order is attached.

5 DATED this 22nd day of July, 2021.

6 LEWIS ROCA ROTHGERBER CHRISTIE LLP

7
8 By: /s/ Ogonna Brown
9 OGONNA M. BROWN, ESQ. (NBN 7589)
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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on July 22, 2021, I served a copy of **NOTICE OF ENTRY OF ORDER REGARDING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF N5HYG, LLC'S MOTION FOR SUMMARY JUDGMENT AND CERTIFICATION OF FINAL JUDGMENT ON DAMAGES, ATTORNEYS' FEES, AND COSTS AGAINST DEFENDANTS MANUEL IGLESIAS AND EDWARD MOFFLY** on all parties via the Odyssey Court e-file system as follows:

☒ Electronic Service – By serving a copy thereof electronically via the Odyssey Court electronic system:

N5HYG, LLC

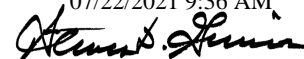
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An employee of Lewis Roca Rothgerber Christie LLP



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**DISTRICT COURT
CLARK COUNTY, NEVADA**

N5HYG, LLC, a Michigan limited liability
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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

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING
PLAINTIFF N5HYG, LLC'S MOTION
FOR SUMMARY JUDGMENT AND
CERTIFICATION OF FINAL
JUDGMENT ON DAMAGES,
ATTORNEYS' FEES, AND COSTS
AGAINST DEFENDANTS MANUEL
IGLESIAS AND EDWARD MOFFLY**

Date of Hearing: July 1, 2021

Time of Hearing: 11:00 a.m.

Judge: Hon. Nancy Allf

115050292.1

This matter came on for hearing on July 1, 2021, at 11:00 a.m. before the Honorable Nancy Allf on Plaintiff N5HYG, LLC's ("Plaintiff" or alternatively, "N5HYG") Motion for Summary Judgment and Certification of Final Judgment on Damages, Attorneys' Fees, and Costs against Defendants Manuel Iglesias and Edward Moffly¹ (the "Motion"), filed on May 28, 2021. On June 11, 2021, Defendants Manuel Iglesias and Edward Moffly ("Defendants") filed their Opposition to the Motion (the "Opposition"). Plaintiff filed its Reply in Support of the Motion (the "Reply"), as well as a Supplement to the Motion (the "Supplement") on June 24, 2021, which Supplement updated the attorneys' fees and costs through May 28, 2021, to reflect additional fees and costs incurred since the Motion was filed. Ogonna M. Brown, Esq. of the law firm of Lewis Roca Rothgerber Christie LLP ("Lewis Roca"), appeared at the hearing on behalf of Plaintiff. Kory L. Kaplan, Esq., of the law firm of Kaplan Cottner, appeared at the hearing on behalf of Defendants.

The Court, having considered the papers and pleadings on file, and the oral arguments presented by counsel at the Motion hearing, and good cause appearing therefor, finds the following:

FINDINGS OF FACT

1. On December 13, 2019, Nevada 5, Inc. and N5HYG filed their Second Amended Complaint ("SAC") against the Defendants for, among other claims, Defendants' breaches of the October 2016 Stock Purchase Agreement entered into by and between Plaintiff N5HYG and Hygea, Manuel Iglesias, and Edward Moffly (the "SPA") for Defendants' failure to make any of the required \$175,000 Post-Closing Monthly Payments on or after August 1, 2017. *See* SAC, on file herein.

2. On May 10, 2021, following oral argument, the Court entered its Findings of Fact, Conclusions of Law, and Order Granting Plaintiff N5HYG's Motion for Partial Summary Judgment Against Defendants Manuel Iglesias and Edward Moffly (the "May 10 Order").

3. The May 10 Order is incorporated herein in its entirety and includes, among other provisions:

¹ Defendant Hygea Holdings Corp. ("Hygea") filed for bankruptcy on February 19, 2020. Because the ensuing July 15, 2020 bankruptcy Reorganization Plan (the "Hygea Bankruptcy Plan") discharged Hygea from pre-petition claims, this Order does not apply to or against Hygea.

- a. **IT IS HEREBY ORDERED** that Plaintiff N5HYG's Motion for Partial Summary Judgment as to the joint and several liability of Defendants MANUEL IGLESIAS and EDWARD MOFFLY for their breaches of the SPA and their personal guarantees of the Post-Closing Monthly Payments thereunder is **GRANTED** in its entirety in favor of N5HYG.
- b. With respect to the fourth and final element of the breach of contract claim, the Court hereby **FINDS** that there is no genuine issue of material fact that N5HYG was damaged as a result of Defendants' failure to pay the Post-Closing Monthly Payments for any month on or after August 1, 2017.
- c. SPA Section 7.4.2 states that Iglesias and Moffly personally and "absolutely and unconditionally guarantee[d], jointly and severally... the prompt and punctual payment" of N5HYG's attorneys' fees, costs, and expenses incurred in enforcing the SPA, up to the amount of their pro-rata portions of such fees, costs, and expenses, determined by their pro rata percentages of Hygea's stock.
- d. **IT IS FURTHER ORDERED** that Plaintiff N5HYG may present a separate motion for award of damages, as well as attorneys' fees and costs, and for entry of a final judgment in favor of N5HYG on its Eighth Cause of Action against Defendants MANUEL IGLESIAS and EDWARD MOFFLY. To the extent Defendants dispute Plaintiff N5HYG's calculation of damages, attorneys' fees, or costs, they may challenge such calculation by way of written briefing and/or an evidentiary hearing to be scheduled at the earliest convenience of the parties and the Court.

4. On May 28, 2021, N5HYG filed its Motion for Summary Judgment and Certification of Final Judgment On Damages, Attorneys' Fees, and Costs, pursuant to NRCP 54, 56, and included supporting Affidavits from Christopher Fowler, Ogonna Brown, Mark Albright, and Christopher Kaye (collectively, the "Motion"). The Motion detailed N5HYG's calculation of the damages N5HYG sought for Defendants' failure to make the Post-Closing Monthly Payments for the months of June 1, 2018 through July 15, 2020, as well as attorneys' fees and costs N5HYG incurred in pursuing its claims under the SAC through March 31, 2021.

5. On June 24, 2021, N5HYG filed its Supplement to Motion for Summary Judgment and Certification of Final Judgment on Damages, Attorneys' Fees, and Costs, including supporting Affidavits from Ogonna Brown, Mark Albright, and Christopher Kaye (collectively, the "Supplement"). The Supplement detailed the additional attorneys' fees and costs incurred by

1 N5HYG in pursuing its claims under the SAC between March 31, 2021 and May 28, 2021. N5HYG
2 incurred those attorneys' fees and costs after filing the Motion.

3 6. Regarding the amount of N5HYG's damages for Defendants' failure to make the
4 Post-Closing Monthly Payments for the months of June 1, 2018 through July 15, 2020, the Motion
5 set forth the following calculation:

- 6 a. \$175,000 per month (per SPA § 6.3), multiplied by 26 months = \$4,550,000;
- 7 b. \$4,550,000 multiplied by the contractual default interest rate under SPA § 6.3 (7.0%
8 annually, accrued on a daily basis, beginning with the first day of the month prior to
9 the payment deadline for each delinquent monthly payment) = \$371,130;
- 10 c. \$4,550,000 + \$371,130 = total damages (before pre- or post-judgment interest) of
11 **\$4,921,130** (the "Damages").

12 7. The calculation of the Damages was further set forth and detailed in the Affidavit of
13 Christopher Fowler (including Exhibit A thereto), which further indicated Mr. Fowler is an
14 authorized representative of N5HYG with personal knowledge of the SPA, § 6.3 of the SPA, and
15 the history of payment (and non-payment) of the Post-Closing Monthly Payments and the
16 associated amounts.

17 8. Defendants opposed the Damages, arguing among other things that Mr. Fowler is
18 not an authorized representative of N5HYG, that others on behalf of N5HYG have personal
19 knowledge of the payment history of the Post-Closing Monthly Payments rather than Mr. Fowler,
20 and that the ledger setting forth the payment history and interest calculations attached as Exhibit A
21 to Mr. Fowler's Affidavit is a legal conclusion and hearsay.

22 9. Regarding the amount of N5HYG's attorneys' fees, the Motion and Supplement set
23 forth attorneys' fees incurred by N5HYG for the legal services of its attorneys at Lewis Roca;
24 Albright, Stoddard, Warnick & Albright; and the Miller Law Firm, PC in litigating the operative
25 SAC through May 28, 2021 in the amount of \$68,281.05, pro-rated by Defendants' respective
26 Hygea share ownership percentages of 20.75% for Iglesias and 9.61% for Moffly (before pre- or
27

1 post-judgment interest, and reserving N5HYG's right to seek additional attorneys' fees incurred
2 after May 28, 2021) (collectively, the "Attorneys' Fees").

3 10. In the Motion, the Supplement, and the accompanying Affidavits of N5HYG's
4 counsel – and notwithstanding the SPA provision requiring Defendants to pay attorneys' fees
5 N5HYG "incurred in enforcing the [SPA]," some of which fees predated the SAC – N5HYG
6 limited the Attorneys' Fees to those attributable to litigating N5HYG's claims under the operative
7 SAC, and:

- 8 a. for those billing entries that relate to matters pertaining to both N5HYG and its Co-
9 Plaintiff Nevada 5's claims, N5HYG sought only to recover its 50% share of those
10 fees;
- 11 b. for those billing entries that relate entirely to N5HYG's claims, N5HYG sought to
12 recover 100% of those fees; and
- 13 c. for those billing entries that relate entirely to Co-Plaintiff Nevada 5's claims,
14 N5HYG sought to recover 0% of those fees.

15 11. As described in the Motion and the Supplement, the invoices from N5HYG's
16 counsel further detailing the entries comprising the Attorneys' Fees, which N5HYG offered to
17 submit for in camera inspection, which the Court deemed unnecessary, were redacted for
18 inapplicable and attorney-client privileged entries.

19 12. Defendants opposed the Attorneys' Fees as unreasonable, arguing that some entries
20 included: block billing and quarter-hour billing; vague descriptions of work; excessive and
21 duplicative billing from multiple law firms, including "two Michigan law firms;" and clerical tasks.
22 Defendants argued that the Attorneys' Fees should be denied entirely or reduced "no less than 50%
23 across the board."

24 13. Regarding the amount of N5HYG's costs, the Motion and Supplement set forth costs
25 incurred by N5HYG in litigating the SAC through May 28, 2021 in the amount of \$2,938.09 (before
26 pre- or post-judgment interest, and reserving N5HYG's right to seek additional costs incurred after
27 May 28, 2021) (collectively, the "Costs").

14. Defendants did not oppose the calculation of the Costs.

15. In addition to its claims for Defendants' breaches of the SPA (the Eighth Cause of Action) (N5HYG's "Breach of Contract Claims"), N5HYG has also asserted claims against Defendants in the SAC for Conspiracy (the Ninth Cause of Action), Concert of Action (the Tenth Cause of Action), and Books and Records (the Eleventh Cause of Action) (N5HYG's "Other Claims"). All of N5HYG's claims as set forth in the SAC relate to Defendants' failures to perform under the SPA or otherwise violating N5HYG's rights as a shareholder in Hygea after it signed the SPA.

16. Co-Plaintiff Nevada 5, Inc. has also asserted claims against Defendants in the SAC, primarily based on alleged statutory and common law fraud and misrepresentation (the "Nevada 5 Claims"). All of the Nevada 5 Claims set forth in the SAC are separate from N5HYG's claims because they relate to Defendants' alleged actions pre-dating the SPA by which Nevada 5 alleges it was induced to pay \$30,000,000 to Hygea.

17. The July 15, 2020 Hygea Bankruptcy Plan (the "Plan") effectively wiped out N5HYG's shares in Hygea and its status as a shareholder in Hygea. N5HYG previously conceded that as a result of the Plan, its claim for Books and Records under the Eleventh Cause of Action in the SAC is moot.

18. The parties have identified no monetary or equitable relief that would still be available to N5HYG under the SAC for its Other Claims upon an award of the Damages, Attorneys' Fees, and Costs N5HYG sought in the Motion and the Supplement for the Breach of Contract Claims.

19. As set forth in the Motion and the Reply, N5HYG sought certification of a judgment awarding it the Damages, Costs, and Attorneys' fees as "final" under NRCP 54(b) on the bases that:

- a. NRCP 54(b) permits certification of finality for one or more, but fewer than all claims when multiple claims or multiple parties exist;

- b. N5HYG's Breach of Contract Claims are distinct from Co-Plaintiff Nevada 5's Claims;
- c. upon the award N5HYG sought on the Breach of Contract Claims, N5HYG identified no monetary or equitable relief that would still be available to it under the SAC for its Other Claims; and
- d. there is no just reason to delay certification of finality.

20. To the extent any of the foregoing Findings of Fact are more properly deemed a Conclusion of Law, they may be so construed.

CONCLUSIONS OF LAW

1. The Court hereby **FINDS** that N5HYG is the prevailing party by way of the May 10 Order, having succeeded in securing summary judgment in its favor with respect to liability on its Breach of Contract Claims against Defendants Iglesias and Moffly, jointly and severally. N5HYG has further prevailed in securing summary judgment in its favor against Defendants Iglesias and Moffly, jointly and severally, with respect to the Damages and the Costs, and also with respect to the Attorneys' Fees according to their obligations under the SPA as appropriately brought before the Court by way of the Motion, the Reply, and the Supplement, and as set forth herein.

2. With respect to the Damages, the Court hereby **FINDS** that there is no genuine issue of material fact that N5HYG has been damaged in the amount of \$4,921,130 for Defendants' failures to pay any of the Post-Closing Monthly Payments between June 1, 2018 and July 15, 2020, for which Defendants Iglesias and Moffly are liable jointly and severally, calculated as follows:

- \$175,000 per month, multiplied by 26 months = \$4,550,000;
- \$4,550,000 multiplied by the contractual default interest rate under SPA § 6.3 (7.0% annually, accrued on a daily basis, beginning with the first day of the month prior to the payment deadline for each delinquent monthly payment) = \$371,130;
- \$4,550,000 + \$371,130 = \$4,921,130.

3. The Court further **FINDS** that the Damages are supported by the plain terms of the SPA, the Affidavit of Christopher Fowler, and Defendants' admissions that they did not pay any of the Post-Closing Monthly Payments on or after August 1, 2017, and the May 10 Order.

4. The Court further **FINDS** that Defendants' arguments in opposition to the Damages do not present a genuine issue of material fact. Defendants present no evidence that Mr. Fowler is not an authorized representative of N5HYG, that he lacks personal knowledge of the payment history of the Post-Closing Monthly Payments, or that the ledger setting forth the payment history and interest calculations attached as Exhibit A to his Affidavit is inaccurate. To the contrary, Defendants admitted they did not pay any of the Post-Closing Monthly Payments for any month on or after August 1, 2017, and the amount of the monthly payments and the interest calculation thereon are expressly provided for within the SPA, which Defendants are individually bound to and personally guaranteed absolutely and unconditionally.

5. With respect to the Attorneys' Fees, the Court hereby **FINDS** that there is no genuine issue of material fact that N5HYG has incurred attorneys' fees in the amount of \$68,281.05 for enforcing its claims in the SAC as of May 28, 2021.

6. The Court further **FINDS** that the Supplement was a reasonable and appropriate means for N5HYG to communicate to Defendants and the Court its request for attorneys' fees and costs between March 31, 2021 and May 28, 2021, which it referenced in and incurred after filing the initial Motion.

7. The Court further **FINDS** that the Attorneys' Fees are appropriately awarded in favor of N5HYG on the basis of the SPA itself, pursuant to SPA Section 7.4.2, whereby Defendants personally guaranteed absolutely and unconditionally their express contractual obligations to pay their respective pro-rata portions of N5HYG's Attorneys' Fees incurred in enforcing its claims, with such portions determined by Defendants' Hygea share ownership percentages as follows: Iglesias at 20.75% and Moffly at 9.61%;

8. The Court further **FINDS** that Defendants' arguments in opposition to the Attorneys' Fees do not present a genuine issue of material fact, nor a basis to eliminate the

Attorneys' Fees or reduce the Attorneys' Fees by 50% across-the-board. Defendants have not identified specific billing entries which they claim are unreasonable or not compensable, and, regardless, based on the Court's own review of the Motion, Reply, Supplement, and the supporting Affidavits and redacted invoices, the Court finds that the Attorneys' Fees are appropriately awarded in favor of N5HYG on the basis of the factors from *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969) applied by Nevada courts in considering attorneys' fee awards, including:

- a. The qualities of N5HYG's attorneys: all of N5HYG's counsel are capable and experienced litigators from recognized law firms. The rates they charged are reasonable and comparable to rates charged and allowed for attorneys and firms practicing in this Court of comparable levels of experience, skill, and success. The billing entries for paralegal time and clerical tasks are also reasonable and compensable. However, the hourly rate allowed for attorneys at the Miller Law Firm, PC is capped at \$400 per hour;
- b. The character of the work done: Counsel's litigation of N5HYG's claims in the SAC required skillful and careful examination and understanding of the intricacies of the Court's rulings relating to the prior complaints, the effect of other litigation on N5HYG's claims, and the interplay and effect of Hygea's bankruptcy proceedings on N5HYG's claims and Defendants' purported defenses; defeating multiple attempts by Defendants to dismiss N5HYG's claims in the SAC alone; and securing summary judgment in N5HYG's favor. Moreover, the billing entries are not excessive or redundant, and N5HYG's counsel collaborated efficiently so as to minimize overlap and reduce costs for their client;
- c. The actual work performed by the attorney: The work required N5HYG's counsel's considerable skill, time, and attention. The pleadings, motions, and related contemporaneous tasks were complex and well-crafted. Moreover, because of those features, the work likely required substantial blocks of time not necessarily given to

convenient separation in tenth-hour segments within the various billing entries. Therefore, the block billing and quarter-hour billing segments are permissible in this case. Further, the redaction of entries was appropriate to preserve attorney-client and/or work product privilege;

d. The result achieved: Counsel for N5HYG achieved a successful result for their client. N5HYG is the prevailing party by way of the May 10 Order, having succeeded in securing summary judgment in its favor with respect to liability on its Breach of Contract Claims against Defendants Iglesias and Moffly, jointly and severally. N5HYG has further prevailed in securing summary judgment in its favor against Defendants Iglesias and Moffly with respect to the Damages, Attorneys' Fees, and Costs. Prior to that, counsel defeated two dispositive motions seeking to dismiss N5HYG's claims in the SAC.

9. With respect to the amount of the Attorneys' Fees awarded hereunder, the Court further **FINDS** that the Miller Law Firm, PC allocated 88.96 hours to N5HYG's claims under the SAC at a rate of either \$425 per hour or \$465 per hour. When a \$400 hourly rate as capped by this Court hereunder is applied to those hours, the attorneys' fees charged by the Miller Law Firm, PC are \$35,580. This figure represents a reduction of \$2,915.75 from the \$38,495.75 N5HYG sought in the Motion and the Supplement for the Miller Law Firm, PC. The total compensable Attorneys' Fees are thus reduced from \$68,281.05 to \$65,365.30 for attorneys' fees incurred by N5HYG through May 28, 2021, for which Defendants are liable as follows, according to their pro-rata share percentages: Iglesias – \$13,563.30 (20.75% of \$65,365.30) and Moffly – \$6,281.60 (9.61% of \$65,365.30). With respect to the Costs, the Court **FINDS** that the Costs presented by prevailing party N5HYG in the Motion, Reply, and Supplement in the amount of \$2,938.09 are reasonable, necessary, and recoverable.

10. With respect to certification of a judgment in favor of N5HYG and against Defendants Iglesias and Moffly for the Damages, Attorneys' Fees, and Costs as "final" under

1 NRCP 54(b), the Court **FINDS** that there is no just reason for delaying certification and entry of
2 judgment.

3 11. The Court further **FINDS** that the existence of N5HYG's Other Claims does not
4 preclude a judgment of finality on its Breach of Contract Claims. NRCP 54(b) expressly provides
5 that an order of finality on one claim is not precluded by the existence of a party's remaining claims:
6 "When an action presents more than one claim for relief... or when multiple parties are involved,
7 the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties
8 only if the court expressly determines that there is no just reason for delay."

9 12. Even if NRCP 54(b) did not allow certification of finality on fewer than all of a
10 party's claims, the Court **FINDS** that entry of the judgment for the Damages, Attorneys' Fees, and
11 Costs on the Breach of Contract Claims hereby ordered effectively addresses the monetary relief
12 available to N5HYG for the Other Claims. Further, the bankruptcy Plan wiped out N5HYG's
13 shares in Hygea as of July 15, 2020, effectively mooted the equitable relief available to it relating
14 to its shareholder rights on its Other Claims. As a result, given the current case posture, N5HYG's
15 Other Claims are effectively moot.

16 13. Therefore, the Court further **FINDS** that certification of a judgment on N5HYG's
17 Breach of Contract Claims as final will serve the interests of judicial economy.

18 14. To the extent any of the foregoing Conclusions of Law are more properly deemed a
19 Finding of Fact, they may be so construed.

20 **ORDER**

21 Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

22 **IT IS HEREBY ORDERED** that Plaintiff N5HYG's Motion for Summary Judgment and
23 for Certification of Final Judgment on Damages, Attorneys' Fees, and Costs is **GRANTED** in all
24 respects while capping the rate chargeable by the Miller Law Firm, PC at \$400 per hour.

25 **IT IS FURTHER ORDERED** that judgment shall be entered awarding Damages in the
26 amount of **\$4,921,130** in favor of N5HYG and against Defendants Iglesias and Moffly, jointly and
27 severally.

IT IS FURTHER ORDERED that judgment shall be entered awarding Attorneys' Fees through May 28, 2021 in the amount of **\$13,563.30** in favor of N5HYG and against Defendant Iglesias, without prejudice to N5HYG's right to seek additional attorneys' fees incurred after May 28, 2021.

IT IS FURTHER ORDERED that judgment shall be entered awarding Attorneys' Fees through May 28, 2021 in the amount of **\$6,281.60** in favor of N5HYG and against Defendant Moffly, without prejudice to N5HYG's right to seek additional attorneys' fees incurred after May 28, 2021.

IT IS FURTHER ORDERED that judgment shall be entered awarding Costs through May 28, 2021 in the amount of **\$2,938.09** in favor of N5HYG and against Defendants Iglesias and Moffly, jointly and severally, without prejudice to N5HYG's right to seek additional costs incurred after May 28, 2021.

IT IS FURTHER ORDERED that each of the foregoing awards shall additionally be subject to pre- and post-judgment interest pursuant to NRS 17.130.

IT IS FURTHER ORDERED that the judgment including the foregoing awards shall be certified as final as to N5HYG's claims only, pursuant to NRCP 54(b), there being no just reason for delay.

IT IS SO ORDERED.

July 21, 2021

Dated this 22nd day of July, 2021

Nancy L Alf

TW

Submitted by:

40B 9CA D2B0 9AD1
Nancy Alf
District Court Judge

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Ogonna Brown
OGONNA M. BROWN, ESQ. (NBN 7589)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Telephone: (702) 949-8200
Email: OBrown@lrrc.com
Attorneys for Plaintiff

1 Reviewed and approved as to form and content:

2 **KAPLAN COTTNER**

3 By: /s/ Kory L. Kaplan

4 KORY L. KAPLAN, ESQ. (NBN 13164)

5 850 E. Bonneville Ave.

6 Las Vegas, Nevada 89101

7 Telephone: (702) 381-8888

8 Email: kory@kaplancottner.com

9 *Attorneys for Defendants Manuel Iglesias & Edward Moffly*

Lord, Nicole

From: Kory Kaplan <kory@kaplancottner.com>
Sent: Wednesday, July 21, 2021 3:06 PM
To: Brown, Ogonna
Cc: Lopez, Kim; Lord, Nicole; Grijalva, Patricia
Subject: RE: FINAL Order and Judgement in Favor of N5HYG

[EXTERNAL]

Ogonna,

You may affix my e-signature.

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@lewisroca.com>
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Cc: Lopez, Kim <KLopez@lewisroca.com>; Lord, Nicole <NLord@lewisroca.com>; Grijalva, Patricia <PGrijalva@lewisroca.com>
Subject: RE: FINAL Order and Judgement in Favor of N5HYG

Kory:

We just noticed that there is a typo in the first paragraph of the "Order" section on p. 11. It should read:

IT IS HEREBY ORDERED that Plaintiff N5HYG's Motion for Summary Judgment and for Certification of Final Judgment on Damages, Attorneys' Fees, and Costs is GRANTED in all respects while capping the rate chargeable by the Miller Law Firm, PC at \$400 per hour.

Thanks, please confirm we are authorized to affix your signature. Thanks.

Ogonna Brown
 Partner

OBrown@lewisroca.com

D. 702.474.2622



From: Brown, Ogonna
Sent: Wednesday, July 21, 2021 1:01 PM
To: 'Kory Kaplan' <kory@kaplancottner.com>
Cc: Lopez, Kim <KLopez@lewisroca.com>; Lord, Nicole <NLord@lewisroca.com>; Grijalva, Patricia <PGrijalva@lewisroca.com>
Subject: FINAL Order and Judgement in Favor of N5HYG

Dear Kory:

Thank you for taking my call. Attached please find the finalized judgment and order incorporating your changes we discussed to page 5 of the order in paragraph 11. Please send me an email authorizing me to affix your electronic signature for submission to the court today.

Ogonna Brown
Partner


OBrown@lewisroca.com
D. 702.474.2622



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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 N5HYG, LLC, Plaintiff(s)

CASE NO: A-17-762664-B

7 vs.

DEPT. NO. Department 27

8 Hygea Holdings Corp.,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

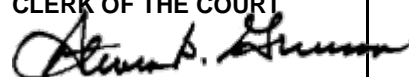
12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
14 recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 7/22/2021

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7/22/2021 5:15 PM
Steven D. Grierson
CLERK OF THE COURT



NJUD

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Rochester, MI 48307

Tel: (248) 841-2200

epm@millerlawpc.com / cdk@millerlawpc.com

Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

vs.

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

Defendants.

CASE NO.: A-17-762664-B

DEPT. NO.: 27

**NOTICE OF ENTRY OF FINAL
JUDGMENT IN FAVOR OF
PLAINTIFF N5HYG, LLC**

Judge: Hon. Nancy Allf

115062666.1

1 NOTICE IS HEREBY GIVEN that Final Judgment in Favor of Plaintiff N5HYG, LLC
2 (“Final Judgment”) was entered against Defendants MANUEL IGLESIAS and EDWARD
3 MOFFLY on July 22, 2021. A copy of the Final Judgment is attached.

4 DATED this 22nd day of July, 2021.

5 LEWIS ROCA ROTHGERBER CHRISTIE LLP

6
7 By: /s/ Ogonna Brown
8 OGONNA M. BROWN, ESQ. (NBN 7589)
9 3993 Howard Hughes Parkway, Suite 600
10 Las Vegas, Nevada 89169
11 Telephone: (702) 949-8200
12 Email: OBrown@lrrc.com
13 *Attorneys for Plaintiffs*
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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on July 22, 2021, I served a copy of **NOTICE OF ENTRY OF FINAL JUDGMENT IN FAVOR OF PLAINTIFF N5HYG, LLC** on all parties via the Odyssey Court e-file system as follows:

☒ Electronic Service – By serving a copy thereof electronically via the Odyssey Court electronic 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
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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	KWatts@oaklandlawgroup.com
Candace Becker	CBecker@oaklandlawgroup.com

Attorney for Manuel Iglesias and Edward Moffly

Kory L Kaplan	kory@kaplancottner.com
Sara Savage	sara@lzkclaw.com
Sunny Southworth	sunny@kaplancottner.com
Carita Strawn	carita@kaplancottner.com



An employee of Lewis Roca Rothgerber Christie LLP

Heather S. Smith

CLERK OF THE COURT

JUDG

OGONNA M. BROWN, ESQ. (NBN 007589)

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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Las Vegas, NV 89169

OBrown@lrrc.com

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Attorneys for Plaintiffs

**DISTRICT COURT
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MOFFLY; and ROES I-XXX, inclusive,

Defendants.

CASE NO.: A-17-762664-B

DEPT. NO.: 27

**FINAL JUDGMENT IN FAVOR OF
PLAINTIFF N5HYG, LLC**

Judge: Hon. Nancy Allf

FINAL JUDGMENT IN FAVOR OF PLAINTIFF N5HYG, LLC

WHEREAS on July 1, 2021, the Court granted Plaintiff N5HYG, LLC's ("Plaintiff")
Motion for Summary Judgment and Certification of Final Judgment on Damages, Attorneys' Fees,

115002721.1

and Costs against Defendants Manuel Iglesias and Edward Moffly¹ (the “Motion”), filed on May 28, 2021. The Court awarded Damages, Attorneys’ Fees, and Costs in favor of Plaintiff and against Defendants Iglesias and Moffly, and ordered that a corresponding judgment in favor of Plaintiff N5HYG be certified as final.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That Plaintiff N5HYG shall recover **\$4,921,130** from Defendants Manuel Iglesias and Edward Moffly, jointly and severally;

2. That Plaintiff N5HYG shall recover Attorneys’ Fees in the amount of **\$13,563.30** from Defendant Manuel Iglesias, without prejudice to N5HYG’s right to seek additional attorneys’ fees incurred after May 28, 2021;

3. That Plaintiff N5HYG shall recover Attorneys’ Fees in the amount of **\$6,281.60** from Defendant Edward Moffly, without prejudice to N5HYG’s right to seek additional attorneys’ fees incurred after May 28, 2021;

4. That Plaintiff N5HYG shall recover Costs in the amount of **\$2,938.09** from Defendants Manuel Iglesias and Edward Moffly, jointly and severally, without prejudice to N5HYG’s right to seek additional costs incurred after May 28, 2021;

5. That each of the foregoing awards shall additionally be subject to pre- and post-judgment interest pursuant to NRS 17.130; and

6. That this Judgment is hereby certified as **FINAL** as to N5HYG’s claims only pursuant to NRCP 54(b), there being no just reason for delay.

IT IS SO ORDERED.

July 21, 2021

Dated this 22nd day of July, 2021

Nancy L Alif

TW

2C9 104 5BCC 839C
Nancy Alif
District Court Judge

¹ Defendant Hygea Holdings Corp. (“Hygea”) filed for bankruptcy on February 19, 2020. Because the ensuing July 15, 2020 bankruptcy Reorganization Plan (the “Hygea Bankruptcy Plan”) discharged Hygea from pre-petition claims, this Final Judgment does not apply to or against Hygea.

Submitted by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Ogonna Brown

OGONNA M. BROWN, ESQ. (NBN 7589)

3993 Howard Hughes Parkway, Suite 600

Las Vegas, Nevada 89169

Telephone: (702) 949-8200

Email: OBrown@lrrc.com

Attorneys for Plaintiffs

Reviewed and approved as to form and content:

KAPLAN COTTNER

By: /s/ Kory L. Kaplan

KORY L. KAPLAN, ESQ. (NBN 13164)

850 E. Bonneville Ave.

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Attorneys for Defendants Manuel Iglesias & Edward Moffly

Lord, Nicole

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[EXTERNAL]

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Thanks,
 Kory



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 Partner

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Ogonna Brown
Partner


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6 N5HYG, LLC, Plaintiff(s)

CASE NO: A-17-762664-B

7 vs.

DEPT. NO. Department 27

8 Hygea Holdings Corp.,
9 Defendant(s)

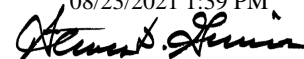
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CLERK OF THE COURT

ORDER

OGONNA M. BROWN, ESQ. (NBN 007589)

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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Las Vegas, NV 89169

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Tel: (248) 841-2200

epm@millerlawpc.com / cdk@millerlawpc.com

Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

N5HYG, LLC, a Michigan limited liability
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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

**ORDER DENYING DEFENDANTS
IGLESIAS AND MOFFLY'S MOTION
FOR STAY OF PROCEEDINGS**

Date of Hearing: August 13, 2021

Time of Hearing: 11:00 a.m. (OST)

Judge: Hon. Nancy Allf

This matter came on for hearing on shortened time on August 13, 2021, at 11:00 a.m.
before the Honorable Nancy Allf on Defendant Iglesias and Defendant Moffly's ("Defendants")

Motion for Stay of Proceedings¹ (the “Motion”) and an Application for Order Shortening Time filed on August 3, 2021. On August 9, 2021, Plaintiffs Nevada 5, Inc. and N5HYG, LLC² (“Plaintiffs” or “Nevada 5”) filed their Opposition to the Motion (the “Opposition”). Defendants did not file a Reply. Ogonna M. Brown, Esq. of the law firm of Lewis Roca Rothgerber Christie LLP (“Lewis Roca”), appeared at the hearing on behalf of Plaintiffs. Kory L. Kaplan, Esq., of the law firm of Kaplan Cottner, appeared at the hearing on behalf of Defendants.

The Court, having considered the papers and pleadings on file, and the oral arguments presented by counsel at the Motion hearing, and good cause appearing therefor, finds:

IT IS HEREBY ORDERED that Defendants’ Motion for Stay of Proceedings is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there has been delay in this case, in part due to Hygea’s bankruptcy, but also due to concerted efforts by Defendants to delay by the filing of Motions to Dismiss;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a stay is not appropriate for the reasons stated on the record and in the interest of the five-year rule given that this case was initiated in October 2017 and because the balance of harms weighs in favor of Plaintiffs; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the object of Defendants’ appeal will not be defeated by denying this stay. Defendants may seek stay relief from the Nevada Supreme Court and are not left without remedy.

IT IS SO ORDERED.

August 23, 2021

Dated this 23rd day of August, 2021

 TW

828 E5F A082 531D
Nancy Alf
District Court Judge

¹ Defendant Hygea Holdings Corp. (“Hygea”) filed for bankruptcy on February 19, 2020. Because the ensuing July 15, 2020 bankruptcy Reorganization Plan discharged Hygea from pre-petition claims, this Order does not apply to or against Hygea.

² This Order is entered without prejudice to the finality of N5HYG’s claims. Final Judgment of N5HYG’s claims was entered on July 22, 2021.

Submitted by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: 
 Ogonna M. Brown, Esq. (NBN 7589)
 3993 Howard Hughes Parkway, Suite 600
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 Email: OBrown@lrrc.com
Attorneys for Plaintiffs

Reviewed and approved as to form and content:

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Attorneys for Defendants Manuel Iglesias & Edward Moffly

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6 N5HYG, LLC, Plaintiff(s)

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15 Service Date: 8/23/2021

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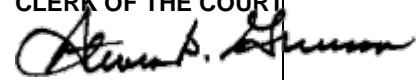
26 Cheritta Grey cgrey@albrightstoddard.com

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15	Carita Strawn	carita@kaplancottner.com

19 If indicated below, a copy of the above mentioned filings were also served by mail
 20 via United States Postal Service, postage prepaid, to the parties listed below at their last
 21 known addresses on 8/24/2021

22	George Albright	801 S. Rancho Dr., #D-4
23		Las Vegas, NV, 89106

Electronically Filed
2/28/2020 2:33 PM
Steven D. Grierson
CLERK OF THE COURT



RTRAN

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
WEDNESDAY, FEBRUARY 26, 2020

**RECORDER'S TRANSCRIPT OF HEARING
HEARING**

For the Plaintiff:

OGONNA M. BROWN, ESQ.
KEVIN WATTS, ESQ.
(appearing via CourtCall)

For the Defendant:

MARIA A. GALL, ESQ.
FELICE YUDKIN, ESQ.
(appearing via CourtCall)

RECORDED BY: BRYNN WHITE, COURT RECORDER

1 Las Vegas, Nevada, Wednesday, February 26, 2020

2
3 [Case called at 9:04 a.m.]

4 THE COURT: Good morning. Please be seated.

5 Calling the case of N5HYG versus Hygea.

6 MS. BROWN: Good morning, Your Honor. Ogonna Brown on
7 behalf of N5HYG, LLC and Nevada 5 Inc.

8 THE COURT: Thank you.

9 MS. GALL: Good morning, Your Honor. Maria Gall from
10 Ballard Spahr on behalf of Defendants.

11 THE COURT: Thank you. Is there anyone on the phone? On
12 the phone, please.

13 MR. WATTS: Good morning, Your Honor -- Good morning,
14 Your Honor. Kevin Watts, also on behalf of Plaintiffs.

15 THE COURT: Thank you.

16 MS. YUDKIN: Good morning, Your Honor. Felice Yudkin,
17 Cole Schotz P.C., bankruptcy counsel to Hygea Holdings Corp.

18 THE COURT: Okay. I set this down for a status check,
19 knowing that there's a chapter 11 in effect. It's not my intent to violate
20 the stay, I just need to know how to go forward on this case. I am -- the
21 question directed to Plaintiff is that you have parties who are
22 non-debtors. Do you intend to proceed as against them, in this matter?

23 MS. BROWN: Well, Your Honor. The Plaintiffs have just
24 recently retained bankruptcy counsel in the Delaware matter, and at this
25 time, while we're valuating the interplay between the bankruptcy and the

1 state court proceedings, we're requesting a 45 day continuation of
2 today's status hearing. So that we --

3 THE COURT: I'm willing to do that, or even give you a longer
4 stay, because in my history as a bankruptcy lawyer, which is in the dark
5 ages now, it usually took longer than 45 days to evaluate what is going
6 to happen in the chapter 11 case.

7 MS. BROWN: If the Court would indulge us that would be
8 wonderful.

9 THE COURT: It would be my inclination to set it down in 90
10 days to stay the case in the meantime. And you guys -- I don't require
11 another appearance, and I know there's a motion to withdraw pending.
12 So I would request a status report in 90 days, as to whether or not the
13 case can be closed for administrative purposes only. Or if the stay could
14 be -- should be continued.

15 At this point what I'd like to do is advance the motion withdraw
16 for the Defendant's counsel as well, so that you needn't make further
17 appearances in the matter.

18 MS. GALL: Understood, Your Honor.

19 THE COURT: Is there any objection to that?

20 MS. BROWN: No objection, Your Honor.

21 THE COURT: All right. So the motion withdraw will be
22 granted, you may present an order.

23 MS. GALL: Thank you.

24 THE COURT: And then, the pending motion, because it is
25 under consideration, because of the Plaintiff's potential for rights in the

1 bankruptcy, to acclaim more interest, I will go ahead and just deny the
2 motion, all motions that are pending, without prejudice.

3 MS. GALL: Understood, Your Honor.

4 MS. BROWN: And, Your Honor. Instead of the denial without
5 prejudice, is it possible to simply stay the formal ruling on that until we
6 understand the interplay?

7 THE COURT: No. I'll just go ahead and deny without
8 prejudice. Because if you intend to proceed as against the individuals,
9 your rights are intact.

10 MS. BROWN: Okay. So the motion for summary judgment is
11 denied without prejudice?

12 THE COURT: Without --

13 MS. BROWN: Thank you.

14 THE COURT: -- everything is without prejudice. So that we
15 don't have any matters that are left hanging in the meantime.

16 MS. BROWN: Thank you. And the denial is as to all parties
17 including the debtor?

18 THE COURT: That's correct.

19 MS. BROWN: Thank you, Your Honor. We'll prepare the
20 order.

21 THE COURT: All right. Were there any other questions or
22 any other comments to make today?

23 MS. GALL: None from us, Your Honor.

24 THE COURT: Very good.

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

1 THE COURT: Thank you both for your appearance.

2 MS. GALL: Thank you.

3 THE CLERK: Do you need a status in 90 days?

4 THE COURT: 90 days. Let me give you just a date for status
5 reports, there won't be a hearing.

6 MS. BROWN: Thank you, Your Honor.

7 THE CLERK: May 26th on chambers calendar.

8 THE COURT: May 26 on the chambers calendar, meaning
9 you need to file something before the 26th. And I understand that the
10 defense counsel has withdrawn, so that'll leave it to Plaintiff's counsel to
11 give me a status.

12 MS. BROWN: Absolutely, Your Honor. Thank you very much.

13 MS. GALL: Understood, Your Honor.

14 THE COURT: Thank you, both.

15 MS. BROWN: Have a good day.

16 THE COURT: You too.

17 [Hearing concluded at 9:08 a.m.]

18 * * * * *

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

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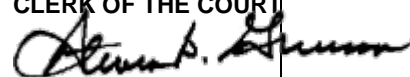
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Court Recorder/Transcriber

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Steven D. Grierson
CLERK OF THE COURT



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DISTRICT COURT
CLARK COUNTY, NEVADA

N5HYG, LLC,)	CASE NO: A-17-762664-B
)	
Plaintiff(s),)	
vs.)	DEPT. XXVII
)	
HYGEA HOLDINGS CORP.,)	
)	
Defendant(s).)	

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
WEDNESDAY, DECEMBER 9, 2020

***RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR IN
THE ALTERNATIVE, MOTION TO DISMISS
MANDATORY RULE 16 CONFERENCE***

APPEARANCES (Via Video Conference):

For the Plaintiff(s): OGONNA M. BROWN, ESQ.

For the Defendant(s): KORY L. KAPLAN, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

1 **LAS VEGAS, NEVADA; WEDNESDAY, DECEMBER 9, 2020**

2 **[Proceedings commenced at 10:31 a.m.]**

3
4 THE COURT: Good morning, everyone. Calling the case of
5 N5HYG versus Hygea. Take appearances please, starting first with
6 the plaintiff. Okay.

7 MS. BROWN: Good morning, Your Honor. Ogonna Brown
8 on behalf of Plaintiff N5HYG, LLC, and Nevada 5 Inc., Bar No. 7589.

9 THE COURT: Thank you.

10 MR. KAPLAN: Good morning, Your Honor. Kory Kaplan on
11 behalf of defendants Manuel Iglesias and Edward Moffly, Bar
12 No. 13164.

13 THE COURT: Thank you. Any other appearances?

14 All right. Then, Mr. Kaplan, these were your motions.

15 MR. KAPLAN: Thank you, Your Honor.

16 Before I begin with the substance of the motion, I'd like to
17 address the, quote/unquote, status report filed by plaintiffs on
18 Monday requesting that the Court take judicial notice of an argument
19 filed in an opposition in Florida unrelated to the current defendants.
20 This is not a property notice --

21 THE COURT: (Indiscernible.)

22 MR. KAPLAN: Thank you. This is not a properly noticed
23 motion. It has nothing to do with this case or my clients and should
24 not be considered by the Court.

25 If the Court does choose to consider it, I believe the

1 purpose of it is in response to defendant's claim preclusion
2 argument. Plaintiffs are trying to make the point that Nevada 5 was
3 not a Hygea stockholder. I don't think anyone disputes that, but the
4 issue isn't whether Nevada 5 was in privity with Hygea; the issue is
5 whether Nevada 5 is in privity with N5HYG.

6 Moving on to the substance of the motion. Despite
7 plaintiff's argument --

8 THE COURT: Let me stop you. Let's deal with this issue
9 about the status report and request for judicial notice before we go to
10 the substance of the arguments.

11 MR. KAPLAN: Okay.

12 THE COURT: Mr. Kaplan, did I -- did you get to say
13 everything you wanted with regard to your request that I not consider
14 the status report?

15 MR. KAPLAN: I did, Your Honor.

16 THE COURT: Thank you.

17 Ms. Brown?

18 MS. BROWN: Thank you, Your Honor.

19 We felt that it would be -- Ogonna Brown on behalf of the
20 plaintiff. We felt it would be helpful for this Court to be aware of what
21 is transpiring in the Florida action as it relates, of course, to the
22 matters that are before this Court today.

23 We simply felt the status report -- as you recall, Iglesias and
24 Moffly's former director co-defendants were dismissed out of the
25 case before this Court for lack of personal jurisdiction. And most of

1 those former director defendants were also defendants in the 2018
2 Receivership Action. And after Nevada 5 reinserted claims against
3 those former director defendants in the Florida state court action,
4 they filed an action in Florida federal court seeking coverage from
5 their insurance carrier.

6 We thought it would be helpful for you to know, of course,
7 that Liberty Mutual filed a Motion to Dismiss the declaratory action
8 asserting, incorrectly, that Nevada 5 claims against the former
9 director defendant in Florida are being brought by a shareholder that
10 owned more than 5 percent of Hygea's stock. (Indiscernible)
11 exclusion under the policy.

12 The former director defendants successfully opposed the
13 Motion to Dismiss. They acknowledged that Nevada 5 is not the
14 Hygea shareholder under the Stock Purchase Agreement; N5HYG is.
15 They dispute that Nevada 5 claims are brought on behalf of N5HYG,
16 and we dispute the characterization that N -- Nevada 5 is a beneficial
17 owner of N5HYG. And these arguments, Your Honor, they were
18 indirectly contrary to defendant's argument that are before this Court
19 today for the claim preclusion based on privity.

20 And we just thought it was important for you to note the
21 distinctions that were drawn and acknowledged by the former
22 director defendants. And this Court may take judicial notice of
23 documents filed in other courts, and it is germane and directly on
24 point for what's before you today, Your Honor. So we simply ask that
25 you take judicial notice. We just want to make you aware, as we

1 made you aware of the bankruptcy proceedings, and now the action
2 that is pending in Florida in terms of the impact on this case. So we
3 do believe it's appropriate.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 And, Mr. Kaplan, do you wish to respond?

7 MR. KAPLAN: Just briefly, Your Honor.

8 I don't think it's germane. It has, you know, the -- it's an
9 argument not based on my client's representations; it's other people.
10 And, again, the issue is -- is not whether Nevada 5 was in privity with
11 Hygea; it's whether Nevada 5 is in privity with N5HYG. And then,
12 again, this is a status report; it's not a properly noticed motion, which
13 I was able to reply.

14 THE COURT: Thank you.

15 I will overrule the objection. The rules with regard to
16 taking judicial notice are very liberal. I will take judicial notice of the
17 filings. I don't take them to be true, just that they've been filed. So
18 with that said --

19 MR. KAPLAN: Understood.

20 THE COURT: Thank you.

21 With that said, Mr. Kaplan, your motion, please.

22 MR. KAPLAN: Thank you, Your Honor.

23 Despite plaintiff's argument to the contrary, just as a
24 preliminary matter, the arguments within the motion have not been
25 decided on the merits. The Court previously denied the prior Motion

1 for Summary Judgment without prejudice solely due to defendant,
2 Hygea Holding Corps (sic), pending Chapter 11 voluntary petition.

3 Indeed, Ms. Brown and Ms. Gall, the prior counsel for
4 defendants, even submitted competing orders after Ms. Brown
5 insisted that the language of the order reflect that the motion was
6 decided on the merits. However, the Court signed defendant's
7 proposed order reflecting that the motion was solely denied given the
8 pending bankruptcy and not on the merits; thus, it is right to be heard
9 now that the bankruptcy plan has been confirmed. So I just wanted
10 to address that point because it was raised in the opposition.

11 The motion concerns mainly the Court's Claim Preclusion
12 Order, entered on December 3rd of last year, which dismissed with
13 prejudice Plaintiff's First Amended Complaint. The order clearly
14 stated that any Second Amended Complaint filed by the plaintiffs
15 must be based on a different nucleus of operative facts from that
16 presented in the First Amended Complaint. However, the Second
17 Amended Complaint filed by the plaintiffs clearly violates the
18 unambiguous terms of the Claim Preclusion Order. It is not based on
19 a different nucleus of operative facts; rather, it regurgitates the same
20 nucleus effects, makes the same claims, and asserts the same causes
21 of action as the First Amended Complaint.

22 Plaintiffs try to allege -- which is now for the third
23 time -- that defendant, Hygea Holding Corp., Manuel Iglesias, and
24 Edward Moffly defrauded one or both plaintiffs into purchasing
25 Hygea's stock by misrepresenting its financial condition and then

1 subsequently breached the Stock Purchase Agreement by failing to
2 make post-closing monthly payments. The Court already dismissed
3 the claims based on such allegations in the First Amended Complaint
4 with prejudice because plaintiffs tried and/or had the opportunity to
5 bring those claims based on these facts in the related receiver action
6 but they failed to do so.

7 So the motion in itself presents one question: Have the
8 plaintiffs violated the Court's Claim Preclusion Order by filing a
9 Second Amended Complaint that is based on the same nucleus of
10 operative facts as the dismissed with prejudice First Amended
11 Complaint? To answer this question, the Court need only review the
12 unambiguous terms of the Claim Preclusion Order and compare the
13 First Amended Complaint with the Second Amended Complaint. It's
14 a very narrow question that can be easily answered.

15 So moving to the first question, whether this Second
16 Amended Complaint is based on a different nucleus of operative fact.
17 The Court already found that plaintiff petitioned the appointment of a
18 receiver based on the allegations in the First Amended Complaint,
19 namely that N5HYG purchased Hygea's stock; and Hygea, through it's
20 officers and directors, misrepresented Hygea's value, failed to make
21 or provide contractually obligated audits of Hygea's financial
22 statements, and failed to make monthly post-closing payments.
23 Similar to their arguments, again, here and statements in their
24 Second Amended Complaint, the Court held that just because the
25 plaintiffs say that the action is based on different facts does not

1 actually make it so.

2 The Court addressed this in Section 22 of the Claim
3 Preclusion Order, which states N5HYG argued in opposition that this
4 action and the receiver action are based on different facts because it
5 said so on the face of its receiver complaint. This argument is not
6 well taken. The mere fact that N5HYG stamped a disclaimer onto the
7 face of its receiver complaint cannot alter the reality that both actions
8 arise from the same core allegations of fact.

9 In 2016, N5HYG purchased Hygea stock and memorialized
10 that purchase in a Stock Purchase Agreement. N5HYG alleges Hygea,
11 through the misconduct of its officers and directors, misrepresented
12 Hygea's value. N5HYG further alleges that Hygea failed to provide
13 contractually obligated audits of Hygea's financial statements and to
14 make monthly post-closing payments.

15 In the receiver action, N5HYG petitioned for the
16 appointment of receiver based on these alleged wrongdoings. In this
17 action, N5HYG seeks damages in rescission of the Stock Purchase
18 Agreement based on the same allegations. Although the remedies
19 N5HYG sought differed in the two actions, the dispositive point for
20 purposes of the claim preclusion inquiry is that the Court -- the core
21 facts underlying both actions are the same. That, again, is Section 22
22 of the Claim Preclusion Order.

23 Despite this, plaintiffs filed their Second Amended
24 Complaint that is pretty much the same in form and substance of the
25 allegations and claims made in the First Amended Complaint and

1 also in the Receiver Actions. Plaintiffs even admit such in their
2 Second Amended Complaint in paragraphs 25 and 26, where they say
3 Nevada 5's claims herein are based upon defendant's conduct, which
4 fraudulently induced Nevada 5 into paying Hygea \$30 million. In
5 paragraph 26, N5HYG's claims herein are based primarily upon
6 defendant's repeated breaches of the SPA occurring on or -- on and
7 after August 1st, 2017.

8 Plaintiffs made the same argument in their brief in
9 opposition to defendant's proposed order, which was filed on
10 August 19th, 2019, which was also rejected by the Court. And that's
11 from pages 1 to 3. And I just want to read some specific portions of
12 that, Your Honor, just because it is the exact same arguments, again,
13 in opposition to this motion.

14 Plaintiffs object to defendant's proposed order primarily
15 because it purports to apply claim preclusion, not only to N5HYG, but
16 also to Nevada 5, which was not a party to the Receiver Action in
17 which the Court expressly permitted to restate its fraud and related
18 claims in a Second Amended Complaint. Nevada 5 was not even a
19 party to the Receiver Action, which formed the basis of defendant's
20 claim preclusion argument, and -- I'll continue reading
21 there -- defendants may argue privity between N5HYG and Nevada 5,
22 but such privity does not exist here for purposes of claim preclusion;
23 and Nevada 5 is not bound by any judgment in the Receiver Action.

24 And, finally, here the subject matter of the Receiver Action
25 was not within Nevada 5's interest under subsection (1)(b). Of

1 course, Nevada 5 was not itself a shareholder and lacks standing to
2 seek a receiver. Defendants convince the receiver court that the
3 Receiver Action -- plaintiff shareholders lack standing because they
4 do not hold ten percent of Hygea's shares; therefore, defendants
5 cannot in good conscience now argue that Nevada 5, which was not a
6 shareholder, had standings to join the Receiver Action.

7 Second, Nevada 5's interest were not represented in the
8 Receiver Action because its interest lie in recouping more than
9 \$30 million it lost to defendant's fraudulent conduct in 2016.

10 In rejecting plaintiff's same arguments that it's making now
11 that it made -- that they made then and answering Hygea's proposed
12 Claim Preclusion Order, this Court held that any Second Amended
13 Complaint filed by Nevada 5 must be based on a different nucleus of
14 operative fact from the First Amended Complaint.

15 Nevada 5 attempts to circumvent that order by arguing that
16 the underlying factual events are different because the Receiver
17 Action pertains to Hygea's mismanagement and financial peril in
18 2018, where Nevada 5's claims here is that it was defrauded into
19 paying \$30 million in 2016. But the -- although the theory might be
20 different, which we're arguing that it's not, plaintiffs have failed to
21 allege facts based on a different nucleus of operative facts, which is in
22 clear violation of the Court's Claim Preclusion Order.

23 Pursuant to the holding in *G. C. Wallis v. Eighth Judicial*
24 *District Court*, all of the claims are based on the same facts and
25 alleged wrongful conduct that were or could have been brought in

1 the first proceeding and are thus subject to claim preclusion. I've
2 cited numerous cases, both within Nevada and outside this
3 jurisdiction, supporting this. The acts complained of are the same.

4 The material facts alleged in the First Amended Complaint
5 and the Second Amended Complaint are the same, and the witnesses
6 and documentation to prove such allegations are the same. The only
7 thing different is the theory of recovery, which does not get plaintiffs
8 past claim preclusion.

9 The similarities between the underlying facts of the Second
10 Amended Complaint and the Receiver Action and, thus, between the
11 First Amended Complaint and Second Amended Complaint are
12 readily apparent from a cursory comparison of the complaints. I
13 spent eight pages of the reply doing a side-by-side comparison of the
14 First Amended Complaint and Second Amended Complaint,
15 demonstrating almost verbatim allegations. So, again, just because
16 plaintiffs stamp a disclaimer saying that they're different on their
17 Second Amended Complaint does not actually make it so, which the
18 Court has already helped. Plaintiffs cannot in good conscience argue
19 that the Second Amended Complaint is based on a different nucleus
20 of operative fact; and, therefore, it's in violation of the Claim
21 Preclusion Order.

22 Moving on to the issue of privity. Plaintiffs in their Second
23 Amended Complaint quote Your Honor at paragraph 13 and -- where
24 they state at the July 17th, 2019, oral argument, the Court held it does
25 not seem that the Nevada 5 dismissal should be without prejudice,

1 but you have to be more specific -- or it does seem that the Nevada 5
2 dismissal should be without prejudice, but you have to be more
3 specific if you replead. You have to differentiate the standing
4 between the different entities. You have to have better allegations
5 supporting fraud and you have to remember the legal standards
6 between parents and subsidiaries.

7 So the Court warned plaintiffs that if Nevada 5 was going
8 to bring action or another action, it had to be based on a different
9 nucleus of operative fact.

10 The Court also cautioned the plaintiffs about the legal
11 standards between parents and subsidiaries; and I believe for this
12 precise reason that if they were going to bring claims that were in
13 privity with N5HYG, then they couldn't be based on the same thing.

14 Moving on to paragraph 16 of their Second Amended
15 Complaint. They state on or about October 5th, 2016, Nevada 5 paid
16 \$30 million to Hygea to purchase shares in Hygea. Paragraph 17,
17 Nevada 5 formed N5HYG as its wholly owned subsidiary to execute a
18 Stock Purchase Agreement and to hold the purchase Hygea shares.
19 And then finally, the paragraph 25, Nevada 5 claims herein are based
20 upon defendant's conduct, which fraudulently induced Nevada 5 in to
21 paying Hygea \$30 million on or about October 5th, 2016. Nevada 5
22 brings its claims on behalf of itself, independently of N5HYG's claims
23 set forth herein -- again, plaintiff's attempt to rehash arguments that
24 they already made and that were already decided by this Court in the
25 Court's Claim Preclusion Order. They already argued that Nevada 5

1 was not in privity with N5HYG in their brief and opposition to
2 defendant's proposed order on page 2, where they stated, and I
3 quote, Defendants may argue privity between N5HYG and Nevada 5,
4 but such privity does not exist here for purposes of claim preclusion;
5 and Nevada 5 is not bound by any judgment in the Receiver Action.

6 The Court ruled against plaintiff's argument in its Claim
7 Preclusion Order and, again, required Nevada 5 to have a different
8 nucleus of operative fact. N5HYG is the wholly owned subsidiary of
9 Nevada 5 and, therefore, both are in privity with one another as the
10 overwhelming weight of authority holds, which was cited heavily in
11 defendant's motion for summary judgment and in the reply. Because
12 they are in privity with one another, and the Court has already ruled
13 against their same argument and required that Nevada 5 bring in the
14 amended claims based on a different nucleus of operative fact, their
15 argument that they're not in privity with each other should, again, be
16 denied by the Court.

17 Moving on to the fraud-based claims. So, again, all of
18 Nevada 5's fraud-based claims stem from the allegations that
19 defendants misrepresented the company's financial condition to
20 plaintiff's agent, RIN Capital, LLC, in the lead-up to the Hygea stock
21 purchase. That's in the Second Amended Complaint, paragraphs 28
22 through 38. These same allegations and claims were already
23 dismissed with prejudice in the First Amended Complaint as they
24 were or could have been made in the Receiver Action. Plaintiffs fall
25 back on literally the same argument that they made in their

1 oppositions to the Motion to Dismiss, the First Amended Complaint,
2 and the Reconsideration Motion, to wit, that the defendant should not
3 get the benefit of claim preclusion because defendants argued during
4 the Receiver Action that it and this action should be treated distinctly.

5 This Court found and held in the Claim Preclusion Order
6 that defendants repeatedly objected to both the Receiver Action and
7 this action proceeding simultaneously, and that's in paragraph 37 of
8 the Claim Preclusion Order.

9 The receiver court did not expressly preserve plaintiff's
10 right to maintain this action and plaintiffs can point to nothing in the
11 record reflecting such preservation, express or otherwise. These are
12 literally the exact same fraud-based claims that were dismissed with
13 prejudice in the First Amended Complaint that were or could have
14 been made in the Receiver Action. So, again, this argument should
15 be denied.

16 Moving on to the contract-based claims. Plaintiffs argue
17 that N5HYG is permitted to bring contract-based claims against
18 defendants, based on their failure to pay post-closing monthly
19 payments that were personally guaranteed by Defendants Iglesias
20 and Moffly. Plaintiffs concede in their opposition on page 19 that
21 these issues were raised in the Receiver Action, but they attempted to
22 distinguish by saying that plaintiffs -- or that defendants were
23 required to pay 175 grand monthly beginning in August 2017. And so
24 the repeated failure to continue to pay that amount after the Receiver
25 Action concluded, constitutes a new action that is not precluded by

1 the Court's Claim Preclusion Order. Again, plaintiffs cannot argue
2 that these claims are based on a different nucleus of operative fact
3 and are, again, precluded by the claims -- the Claim Preclusion Order.

4 According to the plaintiffs, the post-closing payment
5 obligations under the Stock Purchase Agreement are in perpetuity
6 until Hygea goes public. So if Hygea never goes public and plaintiffs
7 are never paid, plaintiffs could sue Hygea and the defendants again
8 and again into perpetuity. This is not how claim preclusion and res
9 judicata work.

10 Plaintiff cites one number of cases discussing the
11 continuing violation theory, but the cases they cite discuss the statute
12 of limitations. It does not permit a plaintiff to avoid the application of
13 res judicata. Defendants have cited cases from outside this
14 jurisdiction directly on that point.

15 So plaintiff's argument that each breach of the monthly
16 personal guarantee obligations as a separate cause of action is
17 irrelevant. The issue is one of claim preclusion and res judicata and
18 not statute of limitations. N5HYG could have asserted, and did
19 assert, these claims in the First Amended Complaint, and therefore, is
20 precluded from litigating the same issues. The nucleus of operative
21 facts is the same, despite their allegation that monthly breaches
22 occurred after the Receiver Action.

23 Drawing the Court's attention to the Claim Preclusion Order
24 at paragraph 37, N5HYG further alleges that Hygea failed to
25 make -- failed to provide contractually obligated audits of Hygea's

1 financial statements and to make monthly post-closing payments. In
2 the Receiver Action, N5HYG petitioned for the appointment of a
3 receiver based on these alleged wrongdoings. In this action, N5HYG
4 seeks damages and rescission of the Stock Purchase Agreement
5 based on the same allegations. Although the remedies N5HYG
6 sought differed in the two actions, dispositive point for purposes of
7 the claim preclusion inquiry is that the core underlying -- both actions
8 are the same -- core facts.

9 Plaintiff's First Amended Complaint already sought
10 damages on the same exact personally guaranteed monthly
11 obligations, and that's in paragraph 76 and 142 of the First Amended
12 Complaint. Their claims for indefinite damages of \$175,000 cannot
13 exist into perpetuity, especially given the fact that Hygea's bankruptcy
14 plan was approved and that N5HYG already sued for damages and
15 rescission. The cause of action has accrued and has stopped
16 accruing on the day that N5HYG sought rescission of the Stock
17 Purchase Agreement based on the same allegations.

18 At the most basic reading of the Claim Preclusion Order,
19 N5HYG is precluded from bringing claims for the same personally
20 guaranteed monthly obligations, whether they accrued recently or
21 before the Receiver Action, because, again, they're based on the
22 same nucleus of operative fact.

23 Briefly turning the Court's attention to the books and
24 records cause of action, plaintiffs can see that this claim should be
25 dismissed as the bankruptcy wiped out N5HYG's equity interest in

1 Hygea, and therefore, there is no standing to bringing this claim. And
2 then, finally, Your Honor, it's unclear whether plaintiffs are
3 maintaining their claims against Hygea Holdings despite such claims
4 having been discharged during the bankruptcy proceedings. They
5 have not sought to amend their Second Amended Complaint to
6 dismiss Hygea, and instead made representations to this Court that
7 they intend to include Hygea as, at least, a nominal defendant for
8 purposes of discovering. So I would just like a little clarification there
9 if Hygea's not dismissed also.

10 And if the Court has no further questions, I have nothing to
11 add.

12 THE COURT: Thank you, Mr. Kaplan.

13 The opposition, please.

14 MS. BROWN: Thank you, Your Honor. Ogonna Brown on
15 behalf of the plaintiff.

16 Your Honor, I know that Mr. Kaplan was not with us when
17 we were before you in January -- January 30th, 2020, but that was the
18 last time we were before this Court on a nearly identical Motion for
19 Summary Judgment and Motion to Dismiss, which this Court denied.

20 And I will note -- we're all counting here -- this is
21 defendant's fourth pre-answer to dispositive motion and over
22 three years in, Your Honor. We've been here for over three years.
23 We've still not had a single answer to this complaint, the motion
24 (indiscernible) action was commenced back in October of 2017.

25 And, Your Honor, we do think it's important because we

1 did argue all of this before with the motions that were filed by the
2 defendants and that were heard extensively by this Court on
3 January 30th, 2020. We've provided for the Court's convenience by
4 highlighting the language that defendant's pulled verbatim from their
5 last motion and their last reply that you entertained on January 30th,
6 2020; and we've identified that for this Court's convenience as
7 Exhibit 19. And in terms of the coding and the color coding we've
8 used, we used yellow to denote the verbatim Motion for Summary
9 Judgment language, and we used blue for the verbatim language that
10 was pulled from the reply that's, again, before you today.

11 And as you recall, Your Honor -- you were there, and I was
12 there, and Ms. Gall was there -- this Court, at the conclusion of the
13 hearing on January 30th, noted that you had a couple of things to
14 review and that you would issue a Minute Order on your in-chamber
15 calendar by February 11.

16 And so you entertained the argument; you reviewed all of
17 the briefing extensively, like I know you always do. And I know that
18 defendant's focused on whether or not the Court expressly denied the
19 motions, you know, on the merits. When, in fact, the real issue is that
20 this Court fully considered defendant's motion after extensive
21 briefing oral argument, and this Court declined to grant defendant's
22 motion.

23 And the defendants identified Hygea Holdings intervening
24 bankruptcy as a reason that the Court denied their prior motion, but
25 Iglesias and Moffly are not debtors, they were not affected by the

1 bankruptcy stay under Section 362 of the Bankruptcy Code. I did not
2 see a motion under (indiscernible) 105 filed on the bankruptcy case,
3 to extend the automatic stay to them individually as guarantors or in
4 any other capacity.

5 And so if they believe that the Court's denial of the prior
6 motion without prejudice was an error or that the stay (indiscernible)
7 their Motion for Summary Judgment, then they could have moved
8 for reconsideration. But they didn't do that, Your Honor. Instead,
9 they sat on their (indiscernible) and then they refiled nearly an
10 identical motion instead of answering the Second Amended
11 Complaint. And I will say, Your Honor, I only point these things out
12 to you because this is not the first time that plaintiffs have
13 encountered serious delay in these proceedings. First, as you recall,
14 going way back, the defendants improperly and removed the case to
15 federal court and that caused us a delay of at least six months. Then
16 there was another delay, of course, when we suffered more lapse in
17 the timing when the defendants moved this Court to transfer the
18 Receivership Action to Carson City, which was -- which was done.

19 And you'll, remember, Your Honor -- and I know it was
20 sometime ago -- but I expressed some concerns about the 5-year rule
21 during the last summary judgment motion hearing that was held
22 before this Court on January 30th. And I also noted -- and I'll reiterate
23 it for opposing counsel's edification -- as this Court's aware,
24 defendants are now faced with the limitations under NRCP 12(g)(2),
25 which prevents a series of pre-answer motions and instead provides

1 the defendant with a sample opportunity to file a dispositive motion
2 before answering the complaint.

3 And I raise this, Your Honor, because, again, we've given
4 you the comparison in Exhibit 19. This is a cut and paste of not just
5 of the motion, but the reply. This has already been entertained by
6 this Court. And you denied it when you could have granted it, at
7 least, as it relates to the non-debtor defendants that are before you
8 today. And we're simply requesting in compliance with NRCP
9 12(g)(2) with this Court's formal ruling that this Court required
10 defendants to answer the complaint so we may finally proceed with
11 discovery, because, of course, everyone will concede that no
12 discovery has ever been conducted in the Receiver Action relating to
13 the misrepresentation made to Nevada 5 that that was not the issue
14 in the Receiver Action. In fact, Nevada 5 has never had the
15 opportunity, Your Honor, to litigate this \$30 million claim for fraud.
16 That is now properly before this Court in the Second Amended
17 Complaint.

18 And, Your Honor, just giving that background, I'd like to
19 turn quickly to the merits. I'm trying not to take too much of your
20 time. I know you're busy.

21 The summary judgment, Your Honor, on the Second
22 Amended Complaint --

23 THE COURT: So -- hang on.

24 MS. BROWN: I'm sorry. Go ahead.

25 THE COURT: I don't want anyone to leave this courtroom,

1 even though it's my kitchen today, thinking you haven't been heard.
2 So you guys take the time you need; and if I need a recess, I'll ask for
3 one.

4 MS. BROWN: Your Honor, I appreciate that very much.
5 And I will try to be brief, but I still have quite a bit to attend to. So
6 thank you for that comment.

7 The summary judgment on the Second Amended
8 Complaint, Your Honor, is, without question, inappropriate given this
9 Court's express ruling that plaintiff, without a fight, was granted leave
10 by this Court to plead a fraud claim, which is exactly what we've
11 done. We've been trying to proceed before this Court, as you know,
12 for over three years to address the merits of the case; and we've been
13 faced with endless efforts to sell the case. And this is just another
14 example.

15 The defendants don't even contest, Your Honor, in their
16 motion or in their reply the specificity of the fraud claim in their
17 motion. And we must take that to mean that the specificity is
18 sufficient and it passes muster under the summary judgment
19 standard, under the Motion to Dismiss standard.

20 And the Second Amended Complaint, Your Honor, alleges
21 the fraud-based claims with specificity arising from the \$30 million
22 that Nevada 5 wired to Hygea. And that is set forth specifically in
23 paragraph 36 and paragraph 37, and (indiscernible) contest that.

24 And you know, Your Honor, that the plaintiffs in this case
25 take your order seriously. I've heard phrases like circumvent or

1 disregard or violate; that is simply not the case. The plaintiffs were
2 very careful to follow this Court's instructions in the reconsideration
3 orders. And, of course, the plaintiffs were very cognizant of this
4 Court's ruling and the Claim Preclusion Order. And we went out of
5 our way to comply with this Court's order. And the Second Amended
6 Complaint respects this Court's rulings and specifically addressed in
7 paragraphs 20 of the Claim Preclusion Order, which is key for
8 allowing us to proceed. And that was based on your statement
9 (indiscernible) of the judgment Section 24 and describes the different
10 nucleus of operative facts.

11 The Second Amended Complaint absolutely differentiates
12 the time, space, and origin of the Receivership Action and those of
13 Nevada 5 claims at paragraph 22. And if you have that before you,
14 Your Honor, that starts on page 3 on line 20. And I will read into the
15 record because I have to preserve the record here.

16 The determinative facts and timeframe of the Receivership
17 Action, parentheses, (the state of financial and managerial affairs at
18 Hygea in May 2018), closed parentheses, are different from those
19 determinative of Nevada 5 claims in this case. And those relate to,
20 and I quote, Representations made to Nevada 5 in 2016. Again, Your
21 Honor, we are observing time, space, and origin. We give respect to
22 paragraph 20 of the Claim Preclusion Order, and we go through great
23 pains in the Second Amended Complaint to recognize that for you.
24 And, Your Honor, Nevada 5 seeks monetary relief of more than
25 \$30 million. This is not the appointment of a receiver to oversee

1 Hygea and to stabilize the company. That was the receivership
2 action; we were not a part of that.

3 Further, Your Honor, the Second Amended Complaint also
4 differentiates this motivation of Nevada 5 from the petitioners and the
5 receivership action. And I direct your attention to paragraph 21 of the
6 Second Amended Complaint; and that starts on page 3 on line 13, if
7 you have that before you. And I quote: The subject matter of the
8 Receivership Action was also not within the interest of Nevada 5.
9 And Nevada 5's interests were not represented in the Receivership
10 Action. The Receivership Action was an effort by shareholders whose
11 interests were to address Hygea's financial peril in 2018 and stabilize
12 the company through a court-appointed receiver -- and I'm still
13 reading from the Second Amended Complaint. Nevada 5's interests
14 are and have been to obtain a more than \$30 million judgment
15 against Hygea and its management for fraudulent conduct in 2016.
16 This claim was never asserted in the Receivership Action or -- plaintiff
17 was outside the scope of the Receivership Action. And that's the end
18 of the quote, Your Honor.

19 In other words, Your Honor, paragraph 21 of the Second
20 Amended Complaint articulates that Nevada 5 seeks monetary relief,
21 more than \$30 million, not the appointment of receiver to oversee
22 Hygea and preserve the company. And we make the statements
23 specifically to observe and respect your order, Your Honor, and make
24 sure that everybody understands that that's what we're doing.

25 And we'll note, Your Honor, that the 14 receivership

1 petitioners have no discernible interest in seeing that Nevada 5 would
2 receive \$30 million from defendants or Hygea. To the contrary, that
3 would never help solve the company's financial woes as is related to
4 the receivership case that was pending in Carson.

5 And, Your Honor, plaintiffs further observed this Court's
6 orders in that the Second Amended Complaint even goes through the
7 trouble to describe how the parties believed and expected the
8 Receivership Action to be treated and tried separately, and that is
9 found in paragraph 23 of the Second Amended Complaint. And I
10 quote: Defendants repeatedly asserted in the Receivership Action the
11 belief and expectation that the Receivership Action was a distinct
12 case, unrelated in time and subject matter to this case and to be
13 litigated separately.

14 And, Your Honor, in our opposition, we identified in a
15 number of exhibits, starting with Exhibit 12 through Exhibit 17, where
16 defendants specifically encouraged this notion throughout the
17 Receivership Action. And the summary begins -- if you would like to
18 read the summary instead of flipping through the Exhibits 12 through
19 17, which I know you've already done -- that summary in the
20 opposition appears on page 16, starting on line 18, and it goes
21 through page 18 through line 9.

22 And, of course, Your Honor, the plaintiffs also went
23 through great effort to respect and comply with this Court's order in
24 drafting the Second Amended Complaint. The receivership Court
25 agreed with the defendant that the relevant time period was

1 May 2018, which defendants even admit in their reply on page 6,
2 where they state that the receiver court agreed with the defense
3 counsel that the relevant timeframe for whether the receivership
4 remedy is appropriate at the time of trial. We're talking about a
5 different timeframe altogether.

6 And contrary to defendant's assertion, Your Honor, what
7 prompted this statement by the Court was defendant's specific
8 objection to any testimony from Defendant Iglesias as it relates to
9 matters predating the Receivership Action, which is specifically this
10 action, Your Honor, which defendants argued was irrelevant.

11 Again, the receiver court defined the (indiscernible) of
12 operative facts in the case finding, only the state of affairs and
13 May 2018 to be relevant, which this Court is absolutely entitled to
14 recognize before you today, Your Honor.

15 (Indiscernible) next the issue of claim preclusion.
16 Summary judgment should also be denied, Your Honor, as the
17 plaintiff's N5HYG's Second Amended Complaint, as the claims
18 asserted are not barred by claim preclusion. They're absolutely not
19 barred by claim preclusion. Rather, the claims asserted have not
20 even accrued during the period of a claim preclusion.

21 The accrual here, Your Honor, is key. Prior efforts of a
22 (indiscernible), including N5HYG, to appoint a receiver simply do not
23 result in a waiver of the shareholder's remaining rights. And that
24 result would be absurd, especially when Nevada 5 was never a party
25 to the Receivership Action. And this Court has already ruled upon the

1 very arguments that are raised by the defendants.

2 As this Court upheld, defendant (indiscernible) to dismiss
3 the First Amended Complaint on the basis of the Receivership Action
4 concerned the (indiscernible) of operative facts, and that Nevada 5
5 lacked standing to bring fraud claims because N5HYG acquired the
6 Hygea stock. Absolutely, we have to -- the Defendant's Motion to
7 Dismiss was granted and denied in part and Nevada 5 was dismissed
8 with prejudice.

9 The party, as a result -- as you recall, this was sometime
10 ago -- filed their motion to reconsider. And on December 3rd, 2019,
11 this Court ruled that Nevada 5 now had the opportunity to replead its
12 claim in addition to which N5HYG claims survive.

13 And by way of remind, Your Honor, during the hearing on
14 the Motion to Reconsider, this Court also held, and I quote: It does
15 not seem that Nevada 5 dismissal should be without prejudice. But
16 you have to be more specific if you replead. You have to differentiate
17 the standing between the different entities. You have to have better
18 allegations supporting fraud. And you have to remember the legal
19 standards between the parents and the subsidiaries. And that, Your
20 Honor, is the transcript -- we've attached Exhibit 2 and paragraph 13.

21 And, Your Honor, we've gone through great pains to
22 ensure that that is evident in the Second Amended Complaint. And
23 we filed the Second Amended Complaint on December 13, 2019, and
24 it relieves any fraud claims by N5HYG. Your Honor, this is a huge
25 departure. It removes any fraud claims by N5HYG. Only Nevada 5 in

1 the Second Amended Complaint proves its fraud claim, and we do it
2 with specificity relating to the \$30 million arising out of defendant's
3 fraudulent conduct regarding representations made in 2016. Again,
4 the time frame is 2016. This was never asserted in the Receivership
5 Action, and it's beyond the scope of the Receivership Action.

6 Instead of disregarding or, you know, violating -- N5HYG
7 stays within the bounds of the Claim Preclusion Order and only
8 alleges breach of contract. And we'll concede, of course, Your Honor,
9 in light of the bankruptcy of the entity, the shareholder claims that the
10 books and records is moot. We're, of course, preserving our ability to
11 conduct discovery in the future, and we do want that information, but
12 in terms of the claim itself, that is moot.

13 Your Honor, also the Second Amended Complaint alleges
14 that breaches occurred under the Stock Purchase Agreement, the
15 missed monthly payments. These breaches of the agreement
16 occurred after the Receivership Action. The Receivership Action
17 focused on the state of affairs in May of 2018. So again, these
18 breaches occurred after the Receivership Action. They are simply
19 different timeframes that we're dealing with, and we allege that in the
20 Second Amended Complaint. As a result of the timing, N5HYG's
21 claims cannot be barred because they postdate the Receiver Action.
22 It's simply a function of time.

23 Turning quickly, Your Honor, to the breaches of the Stock
24 Purchase Agreement. Each breach is alleged as a separate act.
25 N5HYG has sued for each month defendants failed to pay the

1 post-closing monthly payments. Defendants have failed to pay each
2 month since August 1st, 2017, but it's important to note that this
3 includes for each month (indiscernible) the Receivership Action was
4 concluded. But this is all post-receivership, so it is a different
5 timeframe.

6 And just to be clear for the record, Your Honor, N5HYG has
7 not alleged a continuing violation. It has alleged a series of distinct
8 breaches. And the cases we cite provide that they're treated
9 separately as part of a divisible contract. And even, Your Honor, if
10 (indiscernible) to the extent that it's analyzed under a continuing
11 violation theory, res judicata does not apply because two cases
12 cannot be based on the same nucleus of operative fact if the breaches
13 in the second case had not yet happened in the first case; and they
14 had not yet happened in the receivership case.

15 Of course, N5HYG cannot assume during the Receivership
16 Action for breaches of the stock purchase agreement which has not
17 yet occurred. So if I understand defendant's theory, it would mean
18 that unless the party sues before a breach occurs, it can't sue when a
19 breach actually occurs, which really doesn't make sense to me.

20 And, Your Honor, next segue to move to the privity claim
21 preclusion analysis. I think -- and this has been going on for some
22 time -- that defendants simply conflate the notion of privity with claim
23 preclusion. There is no dispute that Nevada 5 was never a party to
24 the Receivership Action, and it's true that we repeat this over and
25 over again because it is key to this Court's analysis. And you got it

1 right when you dismissed it -- when you denied the motion last time.

2 And the real question to ask, Your Honor, is why was
3 Nevada 5 not a party to the Receiver Action? Well, because Nevada 5
4 was not a shareholder and didn't have standing to pursue a
5 Receivership Action in the first instance. And I know, when I listen to
6 the arguments, that defendants, of course, understandably are trying
7 to gloss over the key concepts by making blanket statements that
8 N5HYG brought or could have brought claims in the Receivership
9 Action because they're in privity, and N5HYG sufficiently represented
10 interests of Nevada 5. But, Your Honor, these are just buzz words,
11 and they are not enough. And if you look behind these buzz words
12 that are just glossed over, Nevada 5 could not have been a party to
13 the Receivership Action since it never owned any Hygea shares. It's
14 that simple.

15 And another thing that is never addressed by counsel
16 today is Nevada's Receivership Action statute under NRS
17 78.7650 -- I'm sorry -- NRS 78.650 -- it expressly required the
18 petitioners to be shareholders. And Nevada 5 never met the statutory
19 requirement for (indiscernible) to become a party to the Receiver
20 Action because it was never a shareholder.

21 I also wanted to direct the Court's attention to defendant's
22 reliance upon the *Mendenhall* case. It is misplaced. It did not stand
23 for the proposition that a parent subsidiary relationship equates to
24 privity for claims purposes, for claim preclusions purposes. As the
25 Court will note in *Mendenhall*, the privity existed there because both

1 of the entities in that case signed the contract at issue. And, of
2 course, that is not the case here.

3 And, Your Honor, defendants rely on the privity cases cited
4 on page 18 of their reply; but all of those cases are misplaced
5 because, again, privity arises when the parent sufficiently represents
6 the subsidiary. But, here, Nevada 5 did not even have standing as a
7 nonshareholder to be a party in the Receiver Action. So how could its
8 rights and interests be represented in the Receiver Action?

9 Defendant's privity argument between N5HYG and Nevada 5 does
10 nothing, Your Honor, absolutely nothing to bolster their position
11 because it is wholly undermined by the restatement section of
12 judgment Section 41, finding that no privity for purposes of claim
13 preclusion can exist.

14 And Section 41 specifically refers to the exception to the
15 general privity rule under Section 42, which provides (indiscernible)
16 that if you have an independent claim, you should be able to pursue it
17 and that makes sense.

18 And, Your Honor, this Court has never ruled once that
19 Nevada 5 claim (indiscernible) as we stand here today, the final ruling
20 of this Court -- this Court hasn't ultimately ruled that Nevada 5's
21 claims are barred by defendant's claim preclusion argument.

22 Instead, Your Honor, this Court has ruled, as you recall,
23 that Nevada 5 has standing to pursue its fraud-based claim on the
24 Second Amended Complaint, which makes sense given that it paid
25 \$30 million to Hygea Holdings attorney's trust account. It makes

1 absolute sense. And I knew this Court is aware -- but just by way of
2 reminder -- N5HYG continues to pursue its claims here in Nevada
3 because of the firm selection clause in the contract.

4 And further, Your Honor, Nevada 5 claims a rise from
5 conduct prior to the entry of the Stock Purchase Agreement. It's not a
6 breach of contract claim, but a fraudulent inducement claim. And
7 defendants assert that claim preclusion prevents Nevada 5's
8 amended complaint. But, again -- and I'm hammering this over and
9 over again -- this Court expressly allowed Nevada 5 to file a Second
10 Amended Complaint. And in any event, to the extent claim
11 preclusion is deemed applicable by this Court, I think it's important to
12 note that it should really be narrowly applied.

13 And I'm a little bit troubled, Your Honor, that in the reply
14 the defendants completely ignored Nevada 5's argument that the
15 Nevada Supreme Court recently ruled and undermined defendant's
16 broad construction of the Claim Preclusion Order. As a result, the
17 scope of the Claim Preclusion Order should be very narrowly applied
18 given defendant's silence on the impact of the Nevada Supreme
19 Court's ruling, and they are willing to concede this point.

20 And, Your Honor, plaintiff has long maintained that claim
21 preclusion does not apply because the Receivership Action was
22 disposed of on grounds for a lack of subject matter jurisdiction. And
23 this was not touched upon at all by counsel during the argument or in
24 the reply. But the Nevada Supreme Court has since recently made
25 clear in considering an appeal relating to the Receivership Action,

1 that NRS 787 -- 78.650's 10 percent ownership requirement is
2 jurisdictional and they cite the search (indiscernible), and that subject
3 matter jurisdiction cannot be conferred by estoppel.

4 I think it's also important, Your Honor, for this Court to note
5 that the Supreme Court would consider the jurisdictional question
6 sua sponte even if appellants raise the issue. Also, Your Honor, I
7 want to just point out that in the reply, the defendants raise a new
8 theory for the first time involving the conflict of anticipatory
9 repudiation, which is simply not appropriate in the reply.

10 And in conclusion, Your Honor, this Court never
11 ruled -- again, I say this again -- this Court never ruled that Nevada 5's
12 claims were barred by defendant's claim preclusion argument. To
13 the contrary, this Court ruled that Nevada 5 could replead its claims in
14 the Second Amended Complaint.

15 Nevada 5 has a very different interest. It is a distinct entity
16 that has suffered its own harms and holds its own claim for
17 \$30 million; and that is a lot of money, Your Honor. And Nevada 5
18 simply has never had its day in Court. We're simply asking, Your
19 Honor, that Nevada 5 have its day in court, for the plaintiffs to
20 proceed; and we ask that based on the records before this
21 Court -- which you've already considered extensively, and this is the
22 second round of oral arguments -- we simply ask that this Motion for
23 Summary Judgment and the Motion to Dismiss be denied and that
24 we be allowed to proceed with discovery and to litigate the claims
25 that are properly before this Court.

1 Your Honor, do you have any questions for me?

2 THE COURT: Do you intend to proceed against Holdings?

3 MS. BROWN: Your Honor, we cannot proceed against
4 Holdings, and I know that we discussed it at one of the status
5 hearings. We're simply preserving our right to obtain documents
6 from the organized entity and from anybody has documents in terms
7 of discovery. But even nominally, it doesn't make sense. So, Your
8 Honor, no, we don't intend to proceed against Holdings in any way.
9 We don't want to, of course, violate the injunction order, and it's not
10 necessary.

11 I hope that answers your question. Thank you.

12 THE COURT: It does.

13 And I just dropped my paperwork, so I'm going to go off
14 the screen for a second. Okay.

15 Mr. Kaplan, your reply, please.

16 MR. KAPLAN: Thank you, Your Honor. I'll be brief.

17 Just because this lawsuit has been ongoing for a number
18 of years, does not require it to go further as proven by the Court's
19 language in the Claim Preclusion Order. This Court did entertain the
20 arguments prior, but this Court refused to sign plaintiff's proposed
21 order that the Court's denial of the prior Motion for Summary
22 Judgment was on the merits. Although, counsel's right, I was not
23 present during that hearing, I have reviewed all of the filings and
24 transcripts in this case. This Court expressly stated that the motion
25 was denied without prejudice due to the pending bankruptcy at that

1 time. So there's no reason that it cannot be heard and entertained
2 now.

3 Defendants -- and counsel stated this numerous
4 times -- defendants are not disputing that the Court granted Nevada 5
5 leave to plead fraud-based claims. They can have their day in court,
6 but the Court expressly stated that any amended complaint needs to
7 be based on a different nucleus of operative facts from that presented
8 in the First Amended Complaint. I have not heard or read anything
9 from plaintiffs that actually differentiates the nucleus of operative
10 facts. Counsel is stating, you know, time periods, some was before,
11 some was after. But that's not true and that was actually already
12 raised. And plaintiffs are really only changing their theories of
13 recovery, which does not get them past the claim preclusion
14 argument.

15 In their Second Amended Complaint at paragraph 22,
16 which Ms. Brown read to the Court, it states that the determinative
17 facts and timeframe in the Receivership Action, the state of financial
18 and managerial affairs at Hygea in May 2018, are different from those
19 determinative of Nevada 5's claims in this case, which were
20 representations made to Nevada 5 in 2016.

21 The Court's Claim Preclusion Order at -- also paragraph
22 22 -- you know, again, states that the fact that plaintiffs stamp a
23 disclaimer on to the face of a complaint, cannot alter the reality that
24 both actions arose from the same core allegations of fact. That is
25 exactly the case here. They're arguing the same thing -- the

1 side-by-side comparison for eight pages on the reply demonstrates
2 that. And just because they say in their Second Amended Complaint,
3 this is based on a different nucleus of operative fact, does not actually
4 make it so.

5 In their Second Amended Complaint in paragraph 23,
6 plaintiffs write: Defendants repeatedly asserted in the Receivership
7 Action their belief and expectation that the Receivership Action was a
8 distinct case unrelated in time and subject matter to this case and to
9 be litigated separately. They already argued that. They -- defendants
10 argued during the Receiver Action that it and this action should be
11 treated distinctly. This Court found and held in its Claim Preclusion
12 Order at paragraph 37 that defendants repeatedly objected to both
13 Receiver Action and this action proceeding simultaneously. This
14 Court stated at paragraph 37, in fact, at pages 19 and 20 at this
15 opposition brief N5HYG by a list of statements Hygea made during
16 the course of the Receiver Action that show Hygea objected over and
17 over to N5HYG bringing the Receiver Action in one form while it's
18 contracted misrepresentation claims ended in this action. In addition,
19 Hygea pleaded claim splitting as a defense in the Receiver Action.

20 Breaches of the monthly obligations, the post-closing
21 monthly obligations that were breached after the Receiver
22 Action -- counsel is stating, you know, that's a new cause of action.
23 Your Honor, those are going to be breached into perpetuity. You
24 know, it's -- to payment -- payment until Hygea goes public. Counsel
25 did not really address my arguments related to the claims plaintiff

1 cited that talk about those breaches, this ongoing violation relate to
2 statute of limitations, not claim preclusion or res judicata. They
3 already did raise breaches of the post-closing monthly payment
4 obligations then. They had already occurred, and I've already cited to
5 this in my motion and in my reply.

6 Just because they continue to occur does not make them
7 new causes of action. It changes the statute of limitations date, but it
8 does not make them a new cause of action. They are still based on
9 the same nucleus of operative fact.

10 The Court even addressed this in the Claim Preclusion
11 Order at paragraph 22, where the Court specifically references in
12 2000 -- well, both cases -- both the receiver, complaint, and the First
13 Amended Complaint arose from the same core of allegations of fact.
14 And in that, the Court references the failure to make monthly
15 post-closing statements -- payments. Just because they continue to
16 accrue -- and, Your Honor, again, they are going to continue to
17 accrue -- they were already dismissed. It is the basis of the Claim
18 Preclusion Order.

19 Just to briefly address counsel's argument related to the
20 NRS Chapter 78, N5HYG already argued that it could have
21 brought -- or it could not have brought its receivership claims while
22 the action was removed to federal court. There's no case that says
23 federal courts are prohibited from exercising diversity or
24 supplemental jurisdiction over claims grounded in NRS 78.650 and
25 .630, or at the least, appoint equity receivers. This was addressed.

1 The Court has already ruled on this exact same argument -- plaintiffs
2 have already argued this prior to the Claim Preclusion Order that they
3 could not have been part -- that Nevada 5 could not have been a party
4 in Receivership Action, and the Court denied it. The Court heard that
5 argument. The Court ruled against that.

6 The Court has already said, yes, you can have your day in
7 Court. You can bring new claims. But irrespective of the
8 specificity -- I don't need to address the specificity of the fraud-based
9 claims because they are grounded in the same nucleus of operative
10 fact. There is nothing different from this Second Amended Complaint
11 to the First Amended Complaint other than the theory of recovery,
12 and that is not a basis to preclude granting of summary judgment
13 based on claim preclusion.

14 And unless the Court has any other questions, I think
15 everything has been discussed and briefed in sufficient detail.

16 THE COURT: Thank you, both.

17 The matter's now submitted. This is the Defendant's
18 Motion for Summary Judgment, or in the alternative, Motion to
19 Dismiss. It will be granted in one small part only with regard to the
20 claims of loss of equity and will be denied in the balance.

21 This motion, Mr. Kaplan, is almost identical to the motion I
22 denied in January of 2020, and I'm concerned that there may be a
23 violation here of NRS 12(g)(2) by delaying the proceedings.

24 I will consider relief from Rule 41 to the plaintiff bring that
25 to my attention. In the past, I understand that this case has a long

1 and very tortured history, and unfortunately for me, I have to do a
2 new timeline every time we have a hearing because it -- it's been now
3 three or four law clerks. But very clearly, Nevada 5 is not barred
4 here -- clearly has standing. I granted leave to assert those fraud
5 claims. I compared the Second Amended Complaint with the first
6 and the specificity is appropriate. I find that there's no bar due to the
7 Receivership Action and that the Claim Preclusion Order here is not
8 applicable, because a nucleus of operative facts is very carefully been
9 written to the Second Amended Complaint. Every cause of action is
10 available under Nevada law. All of them have been adequately
11 pled -- Nevada or Michigan or Florida law, and they have all been
12 adequately pled. So for those reasons, the motion is dismissed.

13 Ms. Brown will prepare the order, and you may incorporate
14 the findings by reference if you wish. Mr. Kaplan will have the ability
15 to review and approve the order. I will not -- I will not accept or
16 review a competing order.

17 So if you have issues, Mr. Kaplan, with regard to the form
18 of order, bring that to my attention through the law clerk. I'll either
19 sign -- I always review -- I'll either sign, interlineate, or schedule a
20 telephonic if you have issues with regard to the form.

21 Any questions?

22 MR. KAPLAN: Just on that, Your Honor, to the extent there
23 are differences with respect to the proposed order and mine, you said
24 to bring to the attention to your law clerk.

25 THE COURT: Write a letter or an email to the law clerk, put

1 it in writing. We filed that on what we call a left-side filing so it's part
2 of record.

3 MR. KAPLAN: Okay.

4 THE COURT: Okay. Now any other questions?

5 MS. BROWN: No, Your Honor. Thank you. We'll prepare
6 an order for counsel to review. This is Ogonna Brown on behalf of
7 plaintiff. Thank you very much for your time today.

8 THE COURT: Thank you both, guys. Both stay safe and
9 healthy.

10 MR. KAPLAN: Thank you, Your Honor. Thank you for your
11 time.

12 MS. BROWN: Thank you, Your Honor.

13 THE COURT: Brynn, will you turn off your recorder?

14 MS. BROWN: Your Honor? Your Honor, I'm
15 sorry -- Ogonna Brown -- one more thing?

16 THE COURT: Yes.

17 MS. BROWN: In connection with the loss of equity motion,
18 the portion that you granted, does that relate to the books and
19 records claims? Just in avoidance of doubt.

20 THE COURT: I didn't think so. I think it was only with
21 regard to last -- the loss of the value of the stock.

22 MS. BROWN: Thank you very much, Your Honor, for
23 clarifying.

24 THE COURT: Okay. Now, will the court recorder just let
25 me know and turn off the recorder.

1 THE COURT RECORDER: I'm going to need to shut down
2 the -- my computer because the -- my computer froze. So that's the
3 only way I can shut off the recorder and kick you off of BlueJeans.

4 THE COURT: Well, then. I was just going to apologize to
5 you guys because I had a cat appear in the hearing this morning. I
6 promise to both of you it didn't distract me.

7 MS. BROWN: Thank you, Your Honor.

8 MR. KAPLAN: Thank you, Your Honor.

9 MS. BROWN: Have a good day and stay safe everybody.

10 THE COURT: Stay safe and healthy both of you.

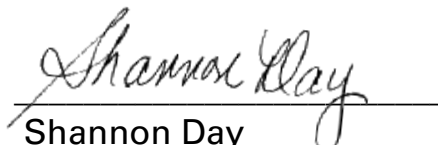
11 MR. KAPLAN: Thank you.

12 MS. BROWN: Thank you.

13 [Proceedings concluded at 11:32 a.m.]

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

23
24 
25 Shannon Day
Independent Transcriber