IN THE SUPREME COURT OF THE STATE OF NEVADA

MANUEL IGLESIAS and EDWARD MOFFLY,

Petitioners,

v.

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

Respondents,

and

N5HYG, LLC, and NEVADA 5, INC.,

Real Parties in Interest.

Supreme Court No. 83157

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

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PURSUANT TO NRAP 27(e)

Action is needed by September 6, 2021

If this Court does not stay the underlying case by September 6, 2021, the purpose of the writ—which seeks to preclude the underlying case entirely due to issue preclusion—will be defeated. September 6 is when Petitioners must respond to Plaintiffs' *initial* 197 discovery requests (and gather information and draft responses well prior to that date). These initial requests will undoubtedly be followed by more requests. Without a stay, Petitioners will be forced to expend a substantial amount of money in a case that is foreclosed by issue preclusion based on a final ruling by a Florida court dismissing with prejudice Plaintiff's claims based on the same facts. This Court should issue the stay so writ relief is meaningful.

I. REPLY TO PLAINTIFFS' VERSION OF THE FACTS

Plaintiffs/Real Parties in Interest Nevada 5, Inc. and its wholly owned subsidiary N5HYG, LLC (collectively, "Plaintiffs") filed their initial Complaint against Petitioners, Hygea, and 12 other Hygea directors on October 5, 2017. The case was removed by former defendant Ray Gonzalez and remanded on June 14, 2018. Plaintiffs—in an obvious attempt to distract this Court from the merits of Petitioners' stay motion—try to make hay of the fact that post-remand, the federal court awarded Plaintiffs $25,000—less than 10% of their requested attorneys' fees—under a statute that mandates fees when removal is not "objectively reasonable." Plaintiffs' characterization of this as a "sanction" against Petitioners, when Petitioners merely consented to Mr. Gonzalez's removal, is at best a stretch.

Indeed, if sanctions are relevant here, then it must be particularly relevant to know that the First Judicial District Court sanctioned Plaintiff N5HYG in an amount of over $700,000 for maintaining *in bad faith* a related case against Petitioners, Hygea, and certain of its directors. The district court exercised its discretion under NRS 18.010 to impose such sanctions against Plaintiff N5HYG. This Court then upheld the district court's discretion to impose those sanctions. *See* Case No. 76969.

Plaintiffs, however, ignore this and engage in revisionist history, forgetting that it was their improvident complaints that necessitated multiple motions to dismiss in the underlying case. As an initial matter, Plaintiffs *voluntarily* filed their First Amended Complaint on July 13, 2018, waiting until *after* defendants filed their motions to dismiss. After seeing the amended complaint, Defendants moved to dismiss again, arguing claim preclusion, personal jurisdiction, and failure to state a claim. The motions were meritorious, as they were granted, in part at first, and fully after reconsideration. In its initial dismissal order, the District Court held, among other things, that Nevada 5 lacked standing to assert any of the claims set forth in the First Amended Complaint and that all of the claims asserted by Nevada 5 in the First Amended Complaint were dismissed with prejudice. *See* **Exhibit 1**.

However, the district court's initial order did not address certain personal jurisdiction arguments and so Defendants were constrained to move for clarification. Their clarification motion was meritorious, given that on May 10, 2019, the District

Court held that it did not have jurisdiction over the 12 director-defendants (not including Petitioners). This led Plaintiffs to file the near-duplicate Florida lawsuit against the 12 directors, as well as Hygea's wholly owned subsidiary, Hygea Health Holdings, Inc. *See* **Exhibit 2**.

Unfortunately, the District Court's initial and clarifying orders erred in deciding the claim preclusion against Defendants. Defendants pointed out the error in a reconsideration motion, including how the District Court missed and/or misconstrued case law on claim preclusion from this Court. On December 3, 2019, the District Court held that the First Amended Complaint was *entirely* dismissed with prejudice on the basis of claim preclusion, and that any second amended complaint must be based on a different nucleus of operative facts from that presented in the First Amended Complaint. *See* **Exhibit 3**. The District Court also amended its prior ruling and dismissed Nevada 5 without prejudice. *See* **Exhibit 4**.

Plaintiffs filed their Second Amended Complaint on December 13, 2019. Petitioners filed a Motion for Summary Judgment based largely on the fact that the Second Amended Complaint was *not* based on a different nucleus of operative facts. However, before the motion could be heard, Hygea filed for bankruptcy on February 19, 2020, and after a Rule 16 conference, the District Court denied the Motion for Summary Judgment without a hearing and without prejudice given the bankruptcy.

See **Exhibit 5**. At that conference, *Plaintiffs* elected to stay the case against Petitioners until after Hygea completed its reorganization.

After Hygea's reorganization plan was confirmed, Plaintiffs reinitiated the case, and on November 4, 2020, Petitioners renewed the Motion for Summary Judgment as the District Court previously denied the motion *without prejudice* due to Hygea's bankruptcy. After hearing the motion on the merits for the first time, the District Court denied it. In the meantime, the Florida court in the case against the 12 directors issued its final ruling dismissing Petitioners' near duplicate claims against the directors *with prejudice*. By this time, Petitioners had answered the Second Amended Complaint, but based on the intervening Florida ruling, Petitioners brought a Partial Motion for Judgment on the Pleadings arguing that the Florida ruling constituted issue preclusion. The District Court's denial of that motion forms the basis of the Writ Petition. The District Court's related finding that there has been "some efforts" to delay is untrue and unsupported by the record. *See* **Exhibit 6**.

II. REPLY TO PLAINTIFFS' MISGUIDED LEGAL ARGUMENT

The purpose of the Writ Petition is that Nevada 5's claims should be dismissed with prejudice and the case should not be allowed to proceed. If the stay is denied, the entire purpose is defeated as the case will then move forward. Plaintiffs' only argument to the contrary is that issue preclusion does not apply and the Writ Petition should be denied. Plaintiffs provide no evidence of prejudice from the stay.

Plaintiffs baldly assert that they are in danger of irreparable harm as memories fade, and therefore they are at risk of losing testimony and evidence. Plaintiffs not only overemphasize the "irreparable harm" factor in the stay analysis, they provide no evidence of actual irreparable harm—*viz*., that there is any cognizable risk that evidence will be lost. As this Court has held, "[a]lthough irreparable or serious harm remains part of the stay analysis, this factor *will not generally play a significant r*ole in the decision whether to issue a stay. Normally, the only cognizant harm threatened to the parties is increased litigation costs and delay." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004).

Nevada 5 also misconstrues the 5-year rule, as applied to this case. The five-year rule is not at issue if a stay is granted, in addition to the previous stay due to Hygea's bankruptcy. *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct*., 131 Nev. 865, 873, 358 P.3d 925, 930 (2015).

Finally, a movant does not always have to show a probability of success on the merits, but must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Hansen v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (internal citations omitted). The Writ Petition challenges the District Court's denial of Petitioners' Partial Motion for Judgment on the Pleadings and raises a pure question of law based upon issue preclusion.

Dated: August 27, 2021

KAPLAN COTTNER

By: /s/ Kory L. Kaplan
KORY L. KAPLAN (NV Bar No. 13164)
850 E. Bonneville Ave.
Las Vegas, Nevada 89101
Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 27(d)(2) because it does not exceed 5 pages.

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

requirements of the Nevada Rules of Appellate Procedure.

Dated: August 27, 2021

KAPLAN COTTNER

By: /s/ Kory L. Kaplan
KORY L. KAPLAN (NV Bar No. 13164)
850 E. Bonneville Ave.
Las Vegas, Nevada 89101
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that this ***REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PURSUANT TO NRAP 27(E)*** was filed electronically with the Nevada Supreme Court on August 27, 2021, and served electronically on participants registered with the Eflex system; any parties listed below not registered with Eflex will be mailed a copy of the foregoing via regular U.S. Mail:

Ogonna M. Brown, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy.,
Suite 600
Las Vegas, NV 89169

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

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

Robert L. Eisenberg, Esq.
LEMONS, GRUNDY & EISENBERG
6005 Plumas Street, Third Floor
Reno, Nevada 89519
Attorneys for Plaintiffs

/s/ Sunny Southworth
An employee of Kaplan Cottner

INDEX OF EXHIBITS TO REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PURSUANT TO NRAP 27(e)

Exhibit	Document
1	November 26, 2018 Decision and Order
2	May 10, 2019 Findings of Fact, Conclusions of Law and Order
3	December 3, 2019 Findingsof Fact, Conclusions of Law, and Order Granting Defendants' Motion for Reconsideration Re: Claim Preclusion
4	December 3, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Reconsideration Re; Nevada 5, Inc.
5	May 15, 2019 Order Denying Defendant's Motion for Summary Judgment Without Prejudice
6	August 20, 2021 Transcript of Proceedings Re: Defendants' Motion for Stay of Proceedings

“Exhibit 1”

November 26, 2018 Decision and Order

“Exhibit 1”

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * *

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

DECISION AND ORDER

COURT FINDS after review that the Motion to Dismiss Amended Complaint on Behalf of Defendant Ray Gonzalez ("Gonzalez Motion") and the Motion to Dismiss the First Amended Complaint and to Strike Supplemental Pleadings and Jury Demand ("Hygea Motion") were filed on August 17, 2018. The Gonzalez Motion and the Hygea Motion (collectively, the "Motions") were set for hearing before the Court on October 3, 2018.

COURT FURTHER FINDS after review that the Court heard oral arguments on the Gonzalez Motion and the Hygea Motion on October 3, 2018. The Court took the matter under submission and set a Status Check for November 6, 2018 on Chambers Calendar for the Court to release a Decision on the Motions. Thereafter, the November 6, 2018 Status Check was continued to November 20, 2018.

COURT FURTHER FINDS after review that "[t]o survive dismissal, a complaint must contain some set of facts, which, if true, would entitle the plaintiff to relief." *In re Amerco Derivative Litig.*, 127 Nev. 196, 210–11 (2011), *citing Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

///

///

///

COURT FURTHER FINDS after review that, with respect to the claims by Plaintiff Nevada 5, Inc., "wrongdoing to a subsidiary does not confer standing upon the parent company, even where the parent is the sole shareholder of the subsidiary." *In re Neurontin Mktg. & Sales Practices Litig.*, 810 F. Supp. 2d 366, 370 (D. Mass. 2011).

COURT FURTHER FINDS after review that "a subsidiary is a 'separate corporation,' and thus the parent company 'has no standing to assert [the subsidiary's] legal rights'." *Clarex Ltd. v. Natixis Sec. Am. LLC*, No. 12 CIV. 0722 PAE, 2012 WL 4849146, at *6 (S.D.N.Y. Oct. 12, 2012), citing to *Hudson Optical Corp. v. Cabot Safety Corp.*, No. 97–9046, 1998 WL 642471, at *3 (2d Cir. Mar. 25, 1998).

COURT FURTHER FINDS after review that Plaintiff Nevada 5, Inc. lacks standing to assert any of the claims set forth in the Amended Complaint.

THEREFORE, COURT ORDERS for good cause appearing and after review that with respect to the claims by Plaintiff Nevada 5, inc., the Motions are hereby **GRANTED IN PART** and all of the claims asserted in the Amended Complaint by Plaintiff Nevada 5, Inc. are hereby **DISMISSED WITH PREJUDICE**.

COURT FURTHER FINDS after review that, with respect to the Nevada Securities Act claims, "90.460, 90.570, ... and 90.660 apply to a person who sells or offers to sell a security or investment advisory service if:(a) An offer to sell is made in this State; or (b) An offer to purchase is made and accepted in this State." NRS 90.830(1).

COURT FURTHER FINDS after review that Plaintiff's Amended Complaint has failed to allege that either (a) an offer to sell is made in Nevada; or that (b) an offer to purchase is made and accepted in Nevada. *See Prime Mover Capital Partners, L.P. v. Elixir Gaming Techs., Inc.*, 793 F. Supp. 2d 651, 669–70 (S.D.N.Y. 2011).

///

///

COURT FURTHER FINDS after review that "an offer to sell or to purchase is made in [Nevada], whether or not either party is present in [Nevada], if the offer: (a) Originates in [Nevada]; or (b) Is directed by the offeror to a destination in [Nevada] and received where it is directed...." NRS 90.830(3).

COURT FURTHER FINDS after review that Plaintiff's Amended Complaint has failed to allege that an offer to sell or to purchase either (a) originated in Nevada, or (b) was directed to a destination in Nevada and received therein.

THEREFORE, COURT FURTHER ORDERS for good cause appearing and after review that the Motions are hereby **GRANTED IN PART** and the First, Third and Fifth Causes of Action in Plaintiff's Amended Complaint are hereby **DISMISSED** without prejudice as to all Defendants.

COURT FURTHER FINDS after review that, with respect to federal securities fraud claims, a "court may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015) (internal citations and quotations omitted). Further, "[w]hile presentation of matters outside the pleadings will convert the motion to dismiss to a motion for summary judgment, ...such conversion is not triggered by a court's consideration of matters incorporated by reference or integral to the claim, ... as where the complaint 'relies heavily' on a document's terms and effect." *Id.*

COURT FURTHER FINDS after review that a private cause of action exists against a "person who ... offers or sells a security in violation of [15 U.S.C.A. § 77e]." 15 U.S.C.A. § 77l(a)(1).

///

///

COURT FURTHER FINDS after review that a private cause of action exists when a party sells a security "by means of a prospectus or oral communication, which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made...." 15 U.S.C.A. § 77l(a)(2).

COURT FURTHER FINDS after review that "it is clear that for § 12(a)(2) to apply there must be a public offering." *Artist Hous. Holdings, Inc. v. Davi Skin, Inc.*, No. 2:06 CV 893 RLH LRL, 2007 WL 951947, at *2 (D. Nev. Mar. 28, 2007).

COURT FURTHER FINDS after review that an exemption from liability exists for "transactions by an issuer not involving any public offering." 15 U.S.C.A. § 77d(a)(2).

COURT FURTHER FINDS after review that in determining whether a private offering exists, the Court should consider "(1) the number of offerees; (2) the sophistication of the offerees; (3) the size and manner of the offering; and (4) the relationship of the offerees to the issuer." *S.E.C. v. Murphy*, 626 F.2d 633, 644–45 (9th Cir. 1980) (internal citations and quotations omitted).

COURT FURTHER FINDS after review that the Stock Purchase Agreement dated October 5, 2016 and referenced in the Amended Complaint contemplates only a private sale of securities, and that the sale of securities described by Plaintiffs' Amended Complaint does not constitute a public offering. *Id.*

COURT FURTHER FINDS after review that in order to state a claim for control person liability, a plaintiff must allege the following: "(1) a primary violation of federal securities laws ...; and (2) that the defendant exercised actual power or control over the primary violator." *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000).

///

///

COURT FURTHER FINDS after review that Plaintiffs have failed to allege both (1) a primary violation of federal securities laws, and (2) that the Defendants exercised actual power or control over the primary violator or one another.

THEREFORE, COURT FURTHER ORDERS for good cause appearing and after review that the Motions are hereby **GRANTED IN PART** and the Second, Fourth and Six Causes of Action in Plaintiffs' Amended Complaint are hereby **DISMISSED** without prejudice as to all Defendants.

COURT FURTHER FINDS after review that, with respect to the fiduciary duty claims, "plaintiffs [cannot] prosecute a claim for breach of fiduciary duty that essentially restated their claim for breach of contract." *Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 832–33 (Del. Ch. 2006) ("because the dispute related to obligations expressly governed by contract, the fiduciary claims must be dismissed.").

COURT FURTHER FINDS after review that "to distinguish between direct and derivative claims, Nevada courts ... should consider only (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Parametric Sound Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 401 P.3d 1100, 1108 (Nev. 2017), *citing Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

COURT FURTHER FINDS after review that "directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640 (2006); *see also Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 399 P.3d 334, 342 (Nev. 2017).

COURT FURTHER FINDS after review that Plaintiffs' Amended Complaint has failed to state a direct claim against the Defendants for Breach of Fiduciary Duty. *Id.* at 1107-1108.

COURT FURTHER FINDS after review that Plaintiffs' Amended Complaint has failed to state a derivative claim against the Defendants for Breach of Fiduciary Duty as Plaintiffs have failed to adequately plead demand futility. *In re Amerco Derivative Litig.*, 127 Nev. 196, 218–19, 252 P.3d 681, 697-698 (2011), *citing to Aronson v. Lewis*, 473 A.2d 805, 814 (Del.1984).

THEREFORE, COURT FURTHER ORDERS for good cause appearing and after review that the Motions are hereby **GRANTED IN PART** and the Twelfth, Thirteenth, Fourteenth and Fifteenth Causes of Action in Plaintiffs' Amended Complaint are hereby **DISMISSED** without prejudice as to all Defendants.

COURT FURTHER FINDS after review that "[i]n actions involving fraud, the circumstances of the fraud are required by NRCP 9(b) to be stated with particularity. The circumstances that must be detailed include averments to the time, the place, the identity of the parties involved, and the nature of the fraud or mistake." *Brown v. Kellar*, 97 Nev. 582, 583–84, 636 P.2d 874 (1981); *see also In re Daou Sys., Inc.*, 411 F.3d 1006, 1027–28 (9th Cir. 2005).

COURT FURTHER FINDS after review that Plaintiffs' Amended Complaint has failed to plead these causes of action with sufficient particularity as required by NRCP 9(b).

THEREFORE, COURT FURTHER ORDERS for good cause appearing and after review that the Motions are hereby **GRANTED IN PART** and the Seventh, Ninth and Twentieth Causes of Action in Plaintiff's Amended Complaint are hereby **DISMISSED** without prejudice as to all Defendants.

COURT FURTHER FINDS after review that Plaintiffs have failed to plead a non-exculpated claim against the Director Defendants. *In re Cornerstone Therapeutics Inc, Stockholder Litig.*, 115 A.3d 1173, 1179 (Del. 2015).

THEREFORE, COURT FURTHER ORDERS for good cause appearing and after review that the Motions are hereby **GRANTED IN PART** and the Eighth Cause of Action is hereby **DISMISSED** without prejudice as to the Director Defendants.

COURT FURTHER ORDERS for good cause appearing and after review that, with respect to the Eight Cause of Action, the Hygea Motion is **DENIED IN PART** as to Defendant Hygea Holdings Corp.

COURT FURTHER FINDS after review that "[a] cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179 (2009).

COURT FURTHER FINDS after review that Plaintiffs' Amended Complaint failed to plead that such relationship exists wherein payment was collected by any of the Director Defendants.

THEREFORE, COURT FURTHER ORDERS for good cause appearing and after review that the Motions are hereby **GRANTED IN PART** and the Twenty-First Cause of Action is hereby **DISMISSED** without prejudice as to the Director Defendants.

COURT FURTHER ORDERS for good cause appearing and after review that the Hygea Motion and the Gonzalez Motion are **DENIED IN PART** with respect to the Sixteenth, Seventeenth, Eighteenth and Nineteenth Causes of Action.

///

///

///

COURT FURTHER ORDERS for good cause appearing and after review that the Hygea Motion is **DENIED IN PART** with respect to the request to strike supplemental pleadings and **GRANTED IN PART** with respect to the request to strike the jury demand set forth in the Plaintiffs' Amended Complaint.

COURT FURTHER ORDERS for good cause appearing and after review Defendants are directed to prepare and submit an order containing detailed findings of fact and conclusions of law ("Order") based upon the Courts decision as set forth hereinabove. Defendants are further ordered to provide opposing counsel with the proposed Order at least one (1) week prior to submitting the Order to the Court, to allow opposing counsel to review the Order as to form.

COURT FURTHER ORDERS for good cause appearing and after review that Plaintiff is hereby GRANTED leave of thirty (30) days from the filing of the Order in order to amend the Amended Complaint. Defendants shall have twenty (20) days from the service of any amended complaint in order to file an Answer or otherwise respond thereto.

DATED this 21 day of November, 2018.

Nancy L Allf

NANCY ALLF
DISTRICT COURT JUDGE

HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE
DEPT XXVII

“Exhibit 2”

May 10, 2019 Findings of Fact, Conclusions of Law and Order

“Exhibit 2”

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

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 3, 2018, two motions to dismiss came before this Court for hearing: (1) the Motion to Dismiss the First Amended Complaint and to Strike Supplemental Pleadings and Jury Demand brought by Defendant Hygea Holdings Corp. ("Hygea"), Defendants Manuel Iglesias and Edward Moffly (the "Guarantor Defendants"), and Defendants Daniel T. McGowan, Frank Kelly, Martha Mairena Castillo, Lacy Loar, Glenn Marrichi, Dr. Keith Collins, M.D., Dr. Jack Mann, M.D., Joseph Campanella, and Carl Rosenkrantz (the "Non-Guarantor Defendants" and together with the Guarantor Defendants, the "Individual Hygea Defendants") (collectively, the "Hygea Defendants") and (2) the Motion to Dismiss Amended Complaint brought by Defendant Ray Gonzalez. The Hygea Defendants joined the arguments made by Mr. Gonzalez and vice versa. Defendant Richard Williams, who is proceeding pro se, joined in both Motions.[1] The Individual Hygea Defendants, Mr. Gonzalez, and Mr. Williams are referred to herein as the "Director Defendants."

Maria A. Gall and Kyle A. Ewing of the law firm Ballard Spahr LLP appeared on behalf of the Hygea Defendants. Stavroula E. Lambrakopoulos of the law firm K&L Gates LLP and Robert Cassity and Sydney Gambee of the law firm Holland & Hart LLP appeared on behalf of Gonzalez. Christopher D. Kaye of the Miller Law Firm, G. Mark Albright of the law firm Albright, Stoddard, Warnick & Albright, Ogonna M. Brown of the law firm Lewis Roca Rothgerber Christie LLP, and Robert L. Eisenberg of the law firm Lemons, Grundy & Eisenberg appeared on behalf of Plaintiffs N5HYG, LLC and Nevada 5, Inc.

On November 21, 2018, the Court entered a Decision and Order resolving the motions to dismiss with regard to all arguments other than claim preclusion and personal jurisdiction. On December 3, 2018, the Hygea Defendants moved for clarification of the Court's determination with regard to claim preclusion and Mr.

[1] The Court recognizes that Plaintiffs have also named The Estate of Howard Sussman, M.D. as a defendant in this lawsuit but did not serve The Estate until November 29, 2018.

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

Gonzalez moved for clarification with regard to personal jurisdiction. On December 12, 2018, the Court heard oral argument on the motions for clarification, at which time the Hygea Defendants joined in the motion for clarification made by Mr. Gonzalez. Ms. Gall and Mr. Ewing appeared on behalf of the Hygea Defendants. Ms. Lambrakopoulos and Ms. Gambee appeared on behalf of Mr. Gonzalez. Mr. Kaye and Mr. Albright appeared on behalf of Plaintiffs. On December 14, 2018, the Court issued a minute order resolving the issue of claim preclusion and the issue of personal jurisdiction as to Mr. Gonzalez and directed Defendants to prepare and submit an order containing detailed findings of fact and conclusions of law based upon the Court's decision as clarified. On April 24, 2019, the Court issued a second minute order directing Defendants to revise and resubmit their proposed order to contain findings related to the Court's lack of personal jurisdiction over the Non-Guarantor Defendants.

The Court now having considered the motions and briefing related thereto, all pleadings and papers on file in this matter, having heard from the parties and thereafter taken this matter under advisement, hereby finds as follows:

///

///

///

///

///

///

///

///

///

///

///

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

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

FINDINGS OF FACT

On October 5, 2017, Plaintiffs filed their original Complaint commencing this action. On November 16, 2017, Mr. Gonzalez filed a Notice of Filing Notice of Removal, notifying this Court and the other parties that he had removed this action to the U.S. District Court for the District of Nevada. On June 8, 2018, Plaintiffs filed a Notice of Entry of Order of Certified Copy of Order Remanding Case to District Court, notifying this Court and the other parties that the U.S. District Court had remanded this case to the Eighth Judicial District Court for Clark County, Nevada. On July 13, 2018, Plaintiffs filed the First Amended Complaint and Jury Demand.

The Amended Complaint alleges the following pertinent facts:

1. Hygea is a Nevada corporation that is in the business of acquiring and managing physician practices.

2. N5HYG is a Michigan limited liability company; Nevada 5, a Nevada corporation, is the sole member of N5HYG. Nevada 5 formed N5HYG to execute a Stock Purchase Agreement dated October 5, 2016.

3. None of the Director Defendants reside in Nevada.

4. On October 5, 2016, N5HYG entered into a Stock Purchase Agreement with Hygea, pursuant to which N5HYG purchased 23,437,500 shares of Hygea's common stock, which at that time constituted an 8.57% ownership interest in Hygea's common stock issued and outstanding.

5. All Director Defendants approved Hygea's entry into the Stock Purchase Agreement.

6. Defendants Iglesias and Moffly personally guaranteed certain of Hygea's obligations under the Stock Purchase Agreement.

7. Hygea's obligations to N5HYG under the Stock Purchase Agreement include certain monthly payments of $175,000, the delivery of certain financials, the opportunity to receive notice of the issuance of new shares and purchase additional shares so that N5HYG could maintain its 8.57% ownership interest in Hygea, and

the right to appoint a member to Hygea's board of directors and to designate a non-voting observer of the board.

8. Plaintiffs allege that Defendants made misrepresentations during the course of negotiating the Stock Purchase Agreement and that Hygea subsequently breached its obligations under the Agreement.

9. Plaintiffs further allege that each of the Director Defendants, at various points in time, have mismanaged Hygea in breach of their alleged fiduciary duties to N5HYG.

Plaintiffs brought the following twenty-one causes of actions against Defendants based on the alleged misrepresentations and breaches: (1) statutory securities fraud under NRS Chapter 90 (the "Nevada Securities Act"), (2) statutory securities fraud under the Securities Act of 1933 (the "1933 Act"), (3) failure to register securities under the Nevada Securities Act, (4) failure to register securities under the 1933 Act, (5) control person liability under the Nevada Securities Act, (6) control person liability under the 1933 Act, (7) common law fraud, (8) negligent misrepresentation, (9) silent fraud/material omission, (10) breach of contract, (11) rescission of contract, (12) breach of fiduciary duty and waste of corporate assets, (13) breach of the duty of candor, (14) breach of the duty of loyalty, (15) minority shareholder oppression, (16) tortious interference with contract, (17) civil conspiracy, (18) concert of action, (19) unjust enrichment, (20) constructive fraud, and (21) accounting.

The Hygea Defendants moved to dismiss all the foregoing causes of action based on the doctrine of claim preclusion, an argument in which Messrs. Gonzalez and Williams joined. The Non-Guarantor Defendants and Mr. Gonzalez also moved to dismiss themselves from this action pursuant to N.R.C.P. 12(b)(2) based on the Court's lack of personal jurisdiction, arguments in which Mr. Williams joined. The Hygea Defendants further moved to dismiss all but the Tenth and Eleventh Causes of Action and Mr. Gonzalez moved to dismiss the entirety of the Amended Complaint

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

based on Plaintiffs' failure to state a claim upon which relief can be granted, including based on N.R.C.P. 9(b) and N.R.C.P. 23.1, arguments in which Mr. Williams joined.

CONCLUSIONS OF LAW

THE APPLICABILITY OF CLAIM PRECLUSION

The Court first turns to the Motion made by the Hygea Defendants based on claim preclusion. Typically, in order for claim preclusion to apply, a defendant must demonstrate that "(1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, or the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a good reason for not having done so." *Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80, 82 (Nev. 2015), *reh'g denied* (July 23, 2015).

The Hygea Defendants premise their claim preclusion argument on the case styled *Claudio Arellano, et al. v. Hygea Holdings Corp., et al.,* Case No. 18-OC-00071-1B, which was brought before the First Judicial District Court of the State of Nevada in and for Carson City (the "Receivership Action" before the "Receivership Court"). Plaintiff N5HYG was the lead plaintiff in the Receivership Action and Hygea and most of the Non-Guarantor Defendants were defendants thereto. The Receivership Action was filed on or around January 26, 2018, while this case was removed to the U.S. District Court for the District of Nevada. The plaintiffs to the Receivership Action sought the appointment of a receiver over Hygea pursuant to NRS 78.650, 78.630 and/or 32.010. On May 14, 2018, the Receivership Case proceeded to a trial on the merits.

On May 16, 2018, the defendants to the Receivership Action moved at the close of plaintiffs' evidence for judgment as a matter of law under N.R.C.P. 50(a) with

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

respect to all claims. After hearing argument from the parties, the Receivership Court denied the request for a receiver under NRS 78.630 after finding that there was insufficient evidence that Hygea had been and was then being conducted at a great loss and greatly prejudicial to the interest of its creditors and stockholders. The Receivership Court further denied the plaintiffs' request for a receiver in part under NRS 78.650 after finding that there was no evidence that Hygea had willfully violated its charter, that Hygea's directors had been guilty of fraud or collusion in its affairs, that Hygea abandoned its business, that Hygea had become insolvent, or that Hygea was not about to resume its business with safety to the public. The Receivership Court, however, found that there was some evidence for the remaining bases to appoint a receiver under NRS 78.650(1) and the case proceeded to the defense on those remaining bases.

At the conclusion the defense and after closing arguments, the Receivership Court orally announced its preliminary findings of fact and conclusions of law on the record and rendered judgment in favor of the defendants. The Receivership Court later entered written findings of fact and conclusions of law. Therein, the Receivership Court concluded that the plaintiffs had failed to establish by a preponderance of the evidence that they held one-tenth of the issued and outstanding stock of Hygea and thus failed to establish that the Receivership Court had jurisdiction to appoint a receiver under NRS 78.650(1). Accordingly, the Receivership Court denied the plaintiffs' amended complaint and petition for appointment of a receiver. The Receivership Court, however, also made conclusions on the substantive merits of the plaintiffs' petition under NRS 78.650(1)(b)–(e) and (i), concluding that no good cause existed to appoint a receiver over Hygea. Accordingly, it denied plaintiffs' amended complaint and petition for the appointment of a receiver and entering judgment in the defendants' favor.

As an initial matter, a court's decision whether or not to appoint a receiver is not a final decision for purposes of claim preclusion. *See Johnson v. Steel, Inc.*, 100

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

Nev. 181, 678 P.2d 676 (1984). Moreover, based on the Receivership Court's finding that it lacked jurisdiction to appoint a receiver under NRS 78.650(1), this Court finds that Receivership Court did not render a final judgment for purposes of determining claim preclusion. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008). Accordingly, this Court denies the motion to dismiss based on claim preclusion.

THE COURT'S JURSIDICTION OVER DEFENDANTS

The Court next turns to the Motions made by the Non-Guarantor Defendants and Mr. Gonzalez, and in which Mr. Williams joined, to dismiss themselves from this action pursuant to N.R.C.P. 12(b)(2) for lack of personal jurisdiction by this Court. The Court refers to the Non-Guarantor Defendants and Messrs. Gonzalez and Williams as the "Personal Jurisdiction Defendants" for purposes of addressing this argument.

Nevada's long-arm statute provides for personal jurisdiction on any basis that is consistent with the federal Constitution. NRS 14.065; *Judas Priest v. District Ct.*, 104 Nev. 424, 426, 760 P.2d 137, 138 (1988). Due process requires that a defendant have certain minimum contacts with the forum state such that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Baker v. District Ct.*, 116 Nev. 527, 531, 999 P.2d 1020, 1023 (2000). The burden of establishing personal jurisdiction rests with Plaintiffs. *See, e.g., Abbott-Interfast Corp. v. District Ct.*, 107 Nev. 871, 873, 821 P.2d 1043, 1044 (1991). "In order for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1781 (2017) (citation omitted). Plaintiffs must establish each element of a three-prong test required for specific personal jurisdiction: (1) that the defendant "purposefully avail[ed] himself of the privilege of" conducting activities in Nevada; (2) that the claims arise or relate to such activities

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

in Nevada; and (3) that "the exercise of jurisdiction comports with fair play and substantial justice," *i.e.* it must be "reasonable." *Catholic Diocese, Green Bay v. John Doe 119*, 131 Nev. Adv. Op. 29, 349 P.3d 518, 520 (2015).

Further, Plaintiffs must show that the Personal Jurisdiction Defendants' involvement with Nevada "was more than simply being a . . . director . . . of one of the state's corporations." *See Southport Lane Equity II, LLC v. Downey*, 177 F. Supp. 3d 1286, 1294–95 (D. Nev. 2016). Indeed, Plaintiffs must sufficiently allege that the directors of a Nevada corporation took purposeful action to harm that corporation. *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 458-59, 282 P.3d 751, 755 (2012). Further, even "after the district court determines that an officer or director directly harmed a Nevada corporation, it must also determine whether it is reasonable to exercise personal jurisdiction." *Consipio*, 282 P.3d at 756 n.4; *Southport Lane*, 177 F. Supp. 3d at 1294-95.

The Amended Complaint alleges that Nevada 5 formed N5HYG to purchase securities from Hygea pursuant to a Confidential Information Memorandum and a Stock Purchase Agreement ("SPA"). Hygea is incorporated in Nevada but has no offices, personnel, or operations there. All of Hygea's operations are in Florida or surrounding states. Although Plaintiff Nevada 5 is a Nevada citizen, there is no allegation that it has any operations in this state; its sole officer is based in Michigan.[2] Plaintiff N5HYG is incorporated in Michigan and there are no allegations of any connection to Nevada other than the corporate citizenship of its sole member, and the corporate citizenship of the company—Hygea—whose shares comprise its sole assets. The Amended Complaint asserts that, during the course of discussions involving the purchase of Hygea stock and the exchange of certain financial information, Defendants made "two sets of misrepresentations" that "interlocked

[2] As noted below in this order, the Court finds that Nevada 5 lacks standing to bring this action and is therefore dismissed as a party.

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

with one another"—one as to Hygea's financial performance and the other as to its intention to take Hygea public via a reverse takeover ("RTO") that never occurred. Plaintiffs assert that these misrepresentations were made solely to personnel of its agent, RIN Capital, a Michigan entity based in Michigan. In the few instances where a location of communications is identified, it is in Florida. The Personal Jurisdiction Defendants are alleged to have approved the October 4, 2016, resolution of the Board authorizing Hygea's officers to enter into negotiations and the SPA with RIN Capital, a Michigan entity. The Amended Complaint, however, is otherwise silent as to any particular allegations regarding the Personal Jurisdiction Defendants' actions with respect to either the SPA or the state of Nevada.

The Court considered an affidavit submitted by Mr. Gonzalez in support of his motion containing facts relating to personal jurisdiction.[3] Plaintiffs neither sought nor conducted any discovery relating to personal jurisdiction, and therefore the affidavit of Mr. Gonzalez is unrebutted. Mr. Gonzalez has never conducted any business related to Hygea (or otherwise) in Nevada. Mr. Gonzalez has resided in Florida since 1972, is registered to vote in Florida, and holds a Florida driver's license. Mr. Gonzalez does not and has not ever owned or rented property in Nevada, does not own any assets in the state, has never traveled to Nevada to conduct business, and otherwise does not have any other "continuous and systematic" contacts with this forum so as to make him "at home" in Nevada. Mr. Gonzalez served as a member of Hygea's Board of Directors for a brief period from February 2016 until October 2016. Any business that he conducted related to Hygea took place in Florida. He did not oversee any offices, facilities, bank accounts, or personnel in Nevada because Hygea has none in Nevada. Mr. Gonzalez did not have any interaction with the Plaintiffs or their representatives in connection with the

[3] A Defendant may submit affidavits as to matters of personal jurisdiction on a motion to dismiss under Rule 12(b)(2). *See Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1156 (2014) (quotation omitted).

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

transactions described in the Amended Complaint. He resigned from the Board soon after the Board approved the stock purchase at issue.

In response, Plaintiffs presented three documents. First, they submitted the October 2016 Resolution that Hygea's managers "be authorized to negotiate, finalize and execute agreements for the sale of shares to RIN Capital or its designee". The Resolution indicates that certain of the Personal Jurisdiction Defendants were present at the meeting that adopted the Resolution and that those in attendance voted for it. Second, Plaintiffs referenced the SPA. Except for Messrs. Iglesias and Moffly, none of the Director Defendants signed or was a party to the SPA. The SPA contained a provision titled "Seller's Knowledge" that defined the knowledge of the "Seller" (i.e. Hygea), to include knowledge of the Board Members. Plaintiffs argued that this provision supported that all of the Director Defendants were aware of Hygea's actual condition. Third, Plaintiffs submitted a declaration from RIN executive Chris Fowler that quoted an email sent by Mr. Moffly (and not received by any of the Director Defendants) in which Mr. Moffly purportedly stated that certain financials were approved by Hygea's board. Similarly, neither the provision in the SPA nor the email quoted in the Fowler declaration (neither of which were created by the Personal Jurisdiction Defendants) demonstrate any action by the Personal Jurisdiction Defendants involving Nevada.

The remaining Personal Jurisdiction Defendants did not submit affidavits relating to personal jurisdiction, but this matters not because it is Plaintiffs who bear the burden of setting forth a *prima facie* case of personal jurisdiction. *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 692, 857 P.2d 740, 743 (1993) ("When a challenge to personal jurisdiction is made, the plaintiff has the burden of introducing competent evidence of essential facts which establish a prima facie showing that personal jurisdiction exists.") Plaintiffs have failed to meet this burden. Plaintiffs did not establish that the Personal Jurisdiction Defendants created or approved the

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

October 2016 resolution[4] in Nevada or that such Defendants had any knowledge that a Nevada citizen was involved in the transactions at issue, let alone purposefully directed harm toward a Nevada citizen. Purposeful direction requires that the defendant took an act expressly aimed at the forum state. *See In re W. States Wholesale Nat. Gas Litig.*, 605 F. Supp. 2d 1118, 1140 (D. Nev. 2009).

The Court lacks personal jurisdiction over the Personal Jurisdiction Defendants in this matter. In particular, the Court finds, based on the foregoing, that (1) the Personal Jurisdiction Defendants have not, merely through their service as directors, purposely availed themselves of the privilege of serving the market in Nevada or established the necessary minimum contacts therein; (2) the causes of action asserted against the Personal Jurisdiction Defendants do not arise from their purposeful contact with Nevada or from conduct targeting Nevada; and (3) exercising jurisdiction over the Personal Jurisdiction Defendants and requiring them to appear in this action would be unreasonable and would fail to comport with traditional notions of fair play and substantial justice. *Catholic Diocese, Green Bay v. John_Doe 119*, 131 Nev. Adv. Op. 29, 349 P.3d at 520.

Accordingly, the Motions made by the Non-Guarantor Defendants and Mr. Gonzalez pursuant to N.R.C.P. 12(b)(2), and joined by Mr. Williams, are granted, and they are dismissed from this action for lack of personal jurisdiction by this Court.

PLAINTIFFS' FAILURE TO STATE A CLAIM

The Court now turns to Defendants' Motions based on "failure to state a claim upon which relief can be granted." N.R.C.P. 12(b)(5). In construing a motion to dismiss for failure to state a claim, "[a]ll factual allegations of the complaint must be accepted as true." *Vacation Village v. Hitachi Am.*, 110 Nev. 481, 484, 874 P.2d 744,

[4] In fact, Plaintiffs have shown by the October 2016 Resolution that at least one Personal Jurisdiction Defendant, Carl Rosenkrantz, and another alleged director, Howard Sussman, were not in attendance for the October 4, 2016 meeting at which the Resolution was adopted and thus neither could have even voted for the Resolution.

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

746 (1994) (citation omitted). However, "the allegations must be legally sufficient to constitute the elements of the claim asserted." *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (citation omitted). A complaint should be dismissed where a party can prove no set of facts that, if true, would entitle it to relief. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

As an initial matter, this Court addresses whether Plaintiff Nevada 5 has standing to assert any claims, certain amended pleadings made in Plaintiffs' Amended Complaint, and Plaintiffs' demand for a jury trial.

Nevada 5 Inc.'s Standing as a Plaintiff

Plaintiff Nevada 5 is Plaintiff N5HYG's parent company. Plaintiffs argue that Nevada 5 is a proper party-plaintiff for five reasons: (1) Defendants' alleged misrepresentations were made to Nevada 5, through its agent RIN Capital, LLC; (2) Nevada 5 formed N5HYG to purchase Hygea stock based on Defendants' misrepresentations; (3) Nevada 5 should be considered to have purchased Hygea stock because, in the context of alleged securities fraud, the term "buyer" is expanded to include anyone involved in the buying process; (4) Hygea conceded in its insurance coverage action that Nevada 5 has claims against Hygea and is now estopped from arguing otherwise; and (5) Defendants have not argued that Nevada 5 failed to plead its claims. The Court is not persuaded by these arguments.

Plaintiffs' allegations concern the damages N5HYG allegedly suffered as a result of the stock it purchased based on Defendants' alleged misrepresentations. If Nevada 5 has been harmed by virtue of its subsidiary's purchase, then Nevada 5's damages are merely derivative and duplicative of those purportedly suffered by N5HYG. This Court joins the courts of other jurisdictions, which have specifically found that alleged wrongdoing to a subsidiary does not confer standing upon the parent corporation, even where the parent is the sole shareholder of the subsidiary. *See In re Neurontin Mktg. & Sales Practices Litig.*, 810 F. Supp. 2d 366, 370 (D.

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

Mass. 2011) (citation omitted)); *Clarex Ltd. v. Natixis Securities America*, LLC, 2012 WL 4849146; *BNP Paribas Mortg. Corp. v. Bank of Am.*, N.A., 778 F. Supp. 2d 375, 420 (S.D.N.Y. 2011); *Diesel Sys. Ltd. v. Yip Shing Diesel Eng'g Co.*, 861 F. Supp. 179, 181 (E.D.N.Y. 1944).

The Court also declines Plaintiffs' invitation to expand the meaning of "buyer" to include a stockholder's parent corporation. As set forth by the Stock Purchase Agreement, which is incorporated by reference to the First Amended Complaint and of which the Court takes judicial notice, only one party-plaintiff purchased Hygea stock, that being N5HYG. There is no allegation that Nevada 5 purchased or ever owned or possessed Hygea stock. The Court further rejects Plaintiffs' argument that Defendants are estopped from arguing that Nevada 5 has no claims. The Court takes judicial notice of the fact that Hygea, in an action to enforce insurance coverage, pointed out the existence of Nevada 5's claims in this lawsuit. This, however, does not mean that Hygea concurrently took the position that Nevada 5 has standing to bring such claims, as would be required for estoppel to apply. *Cf. NOLM, Ltd. Liab. Co. v. Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004).

For the foregoing reasons, the Court dismisses with prejudice Nevada 5 as a party to this action.

Plaintiffs' Supplemental Pleadings

The Hygea Defendants argue that because Plaintiffs' Amended Complaint contains a number of new allegations setting transactions or occurrences that have happened since the original Complaint, Plaintiffs were obligated to seek this Court's permission prior to serving the Amended Complaint under N.R.C.P. 15(d). The Court disagrees, because the Court construes those new allegations as relating back to Plaintiffs' allegations in the original complaint. Plaintiffs accordingly amended the original complaint as a matter of course under N.R.C.P. 15(a). For the foregoing reasons, the Court denies Defendants' request to strike such allegations.

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

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

Plaintiffs' Demand for a Jury Trial

Pursuant to N.R.C.P. 38(b), "[a]ny party may demand a trial by jury of any issue triable of right by a jury by serving as required by Rule 5(b) upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than the time of the entry of the order first setting the case for trial." In their Amended Complaint, Plaintiffs made a demand for a jury trial. The Hygea Defendants moved to strike the demand, arguing the Plaintiffs had waived their right to a jury trial by virtue of the Stock Purchase Agreement. In their Opposition to the Motions to Dismiss, Plaintiffs declined to oppose this argument and at the October 3, 2018, oral argument withdrew the jury demand. For the foregoing reasons, the Court strikes Plaintiffs' demand for a jury trial.

The Court now addresses Plaintiffs' causes of action.

The First, Third, and Fifth Causes of Action Under the Nevada Securities Act

Plaintiffs assert three claims under Nevada's Securities Act: one for securities fraud under NRS 90.570 (First Cause of Action), a second for failure to register under NRS 90.460 (Third Cause of Action), and a third for control person liability under NRS 90.660 (Fifth Cause of Action). A claim arises under these statutes only "if (a) an offer to sell is made in this State; or (b) an offer to purchase is made and accepted in this State." NRS 90.830(1). An offer to sell occurs in Nevada only if the offer "(a) originates in this State; or (b) is directed by the offeror to a destination in this State and received where it is directed . . . ." NRS 90.830(3). *See also Prime Mover Capital Partners, L.P. v. Elixir Gaming Techs., Inc.*, 793 F. Supp. 2d 651, 669 (S.D.N.Y. 2011).

The Amended Complaint fails to allege that an offer to sell or to purchase either originated in Nevada or was directed by Hygea to a destination in Nevada and received therein. For instance, the Amended Complaint makes no allegation that Hygea has operations in Nevada; that either Plaintiff or their agent, RIN Capital, LLC, received any offer to buy Hygea securities that originated in Nevada; that any

Defendant directed an offer to a destination in Nevada; that Plaintiffs or RIN correspondingly received such an offer in Nevada; or that any act whatsoever occurred in, originated from, or was in any way associated with Nevada. Instead, the only location where the Amended Complaint asserts that the misrepresentations were made to RIN is Florida. .

For the foregoing reasons, the Court dismisses without prejudice Plaintiffs' First, Third, and Fifth Causes of Action with respect to all Defendants.

The Second, Fourth, and Sixth Causes of Action Under the 1933 Act

Plaintiffs assert three claims under the 1933 Act: one for securities fraud (Second Cause of Action), a second for failure to register (Fourth Cause of Action), and a third for control person liability (Sixth Cause of Action).

With regard to Plaintiffs' claim in the Second Cause of Action for federal securities fraud, the Court construes the Amended Complaint as making this claim under Section 12(a)(2) of the 1933 Act. A claim under Section 12(a)(2) requires the existence of a public offering. *Artist Hous. Holdings, Inc. v. Davi Skin, Inc.*, No. 2:06-cv-893-RLH-LRL, 2007 U.S. Dist. LEXIS 25364, at *5 (D. Nev. Mar. 27, 2007). In determining whether Plaintiffs have alleged the existence of a public offering, the Court examines the Amended Complaint's allegations regarding "(1) the number of offerees; (2) the sophistication of the offerees; (3) the size and manner of the offering; and (4) the relationship of the offerees to the issuer." *S.E.C. v. Murphy*, 626 F.2d 633, 644–45 (9th Cir. 1980) (internal citations and quotations omitted). In making this examination, the Court again takes judicial notice of the Stock Purchase Agreement and considers it as part of the Amended Complaint. A "court may . . . consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiffs claim: and (3) no party questions the authenticity of the document." *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927,930 (2015) (internal citations and quotations omitted). Further, "[w]hile presentation of matters outside the pleadings

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

will convert the motion to dismiss to a motion for summary judgment . . . such conversion is not triggered by a court's consideration of matters incorporated by reference or integral to the claim . . . as where the complaint 'relies heavily' on a document's terms and effect." *Id.*

Plaintiffs allege that Defendants undertook a public offering. However, this is a legal conclusion that the Court need not accept as true. It is also belied by Plaintiffs' specific allegations, which clearly describe a private sale of securities. For instance, the Amended Complaint alleges and the Stock Purchase Agreement identifies a bilateral transaction that involved one purchaser (N5HYG) and one seller (Hygea) and does not allege any other offerees. *See Murphy*, 626 F.2d at 645 ("[T]he more offerees, the more likelihood that the offering is public." (citation and quotation marks omitted)). The Amended Complaint and the Stock Purchase Agreement support that N5HYG is a sophisticated entity that used RIN to obtain direct access to Hygea representatives and to request and review a large amount of confidential financial data during the course of privately negotiating the Agreement between the two parties. *See id.* at 647 (that "all the offerees have relationships with the issuer affording them access to or disclosure of the sort of information about the issuer that registration reveals" supports a finding that an offering is private). The Amended Complaint also indicates that the stock at issue was offered directly to N5HYG, through RIN, and not by way of a securities exchange. *See id.* at 646 ("If an offering is small and is made directly to the offerees rather than through the facilities of public distribution such as investment bankers or the securities exchanges, a court is more likely to find that it is private."). Accordingly, the Court concludes that the Amended Complaint and the Stock Purchase Agreement describe a sale of securities that constitutes a private offering.

With regard to Plaintiffs' claim in the Fourth Cause of Action for failure to register securities, the Court construes the Amended Complaint as making this claim under Section 12(a)(1) of the 1933 Act, which provides "the exclusive federal cause of

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

action for failure to register public or private securities . . . ." *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 916 (6th Cir. 2007). However, Section 4(a)(2) of the 1933 Act provides a safe harbor from registration for "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(a)(2). As set forth above, the Amended Complaint supports that Hygea sold the securities at issue to N5HYG pursuant to a private offering. Accordingly, Plaintiffs have failed to state a claim under Section 12(a)(1) of the 1933 Act.

With regard to Plaintiffs' claim in the Sixth Cause of Action for control person liability, the 1933 Act provides for "control person" liability where there is "(1) a primary violation of federal securities laws . . .; and (2) [] the defendant exercised actual power or control over the primary violator." *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000). Plaintiffs, however, have failed to adequately plead both that there was any primary violation of the 1933 Act and that Defendants exercised actual power or control over the primary violator or one another. Allegations that merely establish a person as a director of a company alleged to be the primary violator are insufficient. Rather, a plaintiff must set forth "specific factual allegations indicating how [the alleged] control was manifested" by, for instance, including facts "supporting that the defendant was either involved in the day-to-day business of the primary violator or connected to the fraudulent act in some way." *Richardson v. Oppenheimer & Co. Inc.*, No. 2:11-cv-02078-GMN-PAL, 2014 U.S. Dist. LEXIS 43419, at *34 (D. Nev. Mar. 31, 2014). Plaintiffs, here, have done neither.

For the foregoing reasons, the Court dismisses without prejudice Plaintiffs' Second, Fourth, and Sixth Causes of Action with respect to all Defendants.

The Twelfth, Thirteenth, Fourteenth, and Fifteenth Causes of Action for Breach of Fiduciary Duty

Plaintiffs assert a number of claims for breach of fiduciary duty against the Director Defendants, including for waste (Twelfth Cause of Action), breach of the

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

duty of candor (Thirteenth Cause of Action), breach of the duty of loyalty (Fourteenth Cause of Action), and minority shareholder oppression (Fifteenth Cause of Action). Because the Director Defendants had no fiduciary relationship with N5HYG prior to its becoming a Hygea stockholder, the Court construes these claims as being based on those allegations of misconduct that occurred after October 5, 2016 (the date of the Stock Purchase Agreement).

Certain of Plaintiffs' post-October 5 allegations include Hygea's alleged failure to go public, to provide financials, and to make post-closing monthly payments. Such contentions, however, merely repeat Plaintiffs' claim for breach of contract. Although the Nevada Supreme Court has not yet addressed the issue, the Court is persuaded by Delaware law that Plaintiffs cannot "prosecute a claim for breach of fiduciary duty that essentially restate[s] their claim for breach of contract." *Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 832–33 (Del. Ch. 2006). As Delaware courts have explained, claims for breach of fiduciary duty cannot "proceed in parallel with breach of contract claims unless there is an independent basis for the fiduciary duty claims apart from the contractual claims." *CIM Urban Lending GP, LLC v. Cantor Commer. Real Estate Sponsor, L.P.*, No. 11060-VCN, 2016 Del. Ch. LEXIS 47, at *7 (Del. Ch. Feb. 26, 2016). Accordingly, Plaintiffs cannot maintain their claims for breach of fiduciary duty based on the same allegations that serve as the basis for their breach of contract claim.

The Court, however, finds that certain of Plaintiffs' allegations for breach of fiduciary duty exist independent of the obligations under the Stock Purchase Agreement. Such contentions include Plaintiffs' allegations of the Director Defendants' disorganized accounting, ineffective management, and failure to oversee Hygea's compliance with federal laws and securities regulations. The Court must decide whether these allegations describe claims for breach of fiduciary duty that are derivative in nature, as Defendants urge, or direct in nature, as Plaintiffs urge. If the claims are derivative in nature, N.R.C.P. 23.1 and NRS 41.520(2) require that

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

Plaintiffs make a demand upon Hygea's board of directors prior to initiating suit or plead with particularity why demand would have been futile. *See Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 59, 401 P.3d 1100, 1105 (2017); *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 633-34, 137 P.3d 1171, 1179 (2006).

"[T]o distinguish between direct and derivative claims, Nevada courts . . . should consider only '(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?'" *Parametric Sound* 401 P.3d at 1107 (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)). In order to maintain a direct claim, both questions must be answered in favor of the suing stockholder. *See id.* at 1106. Here, Plaintiffs' allegations that exist independent of their claim for breach of contract describe what can only be called a derivative claim for mismanagement. For instance, Plaintiffs allege that the Director Defendants had "the highest fiduciary obligations in the management and administration of the affairs of Hygea . . . ." Plaintiffs allege that such mismanagement led to Hygea's "current distress." However, any alleged harm from these actions would have been suffered by the company (Hygea). Plaintiffs' injury would only be derivative of the alleged harm to the company, which would affect all stockholders equally. Any recovery for such an injury would also be made to the company. Accordingly, Plaintiffs' claims for breach of fiduciary duty are derivative in nature under the test adopted by *Parametric Sound.*

Plaintiffs admittedly did not make any demand on Hygea's board of directors prior to bringing their derivative claims for breach of fiduciary duty. Plaintiffs, thus, were obligated to plead with particularity why a demand would have been futile and thus excused. In determining demand futility, a court must decide whether, "under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent or (2) the challenged transaction was otherwise

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

the product of a valid exercise of business judgment." *Shoen*, 122 Nev. at 637, 137 P.3d at 1182. Plaintiffs allege that demand would be futile for three reasons: (1) the demand would be for the Board to authorize a lawsuit against themselves, among others who are not currently on the Board; (2) the Board has shown an inclination "to fight tooth and nail against Plaintiffs," including by having "vigorously contested the receivership action"; and (3) the Board has "longstanding deference to Mr. Iglesias and Hygea's management generally." The Court is not persuaded that such allegations meet the standard for excusing demand.

Courts have consistently held that "[a]llegations of mere threats of liability through approval of the wrongdoing or other participation . . . do not show sufficient interestedness to excuse the demand requirement." *Shoen*, 122 Nev. at 639-40, 137 P.3d at 1183. "Interestedness because of potential liability can be shown only in those 'rare case[s] . . . where defendants' actions were so egregious that a substantial likelihood of director liability exists.'" *Shoen*, 122 Nev. at 640, 137 P.3d at 1184. Plaintiffs have not met that burden here and the Court therefore rejects the assertion that demand is excused because of any potential liability among the Director Defendants.

Moreover, Plaintiffs' conclusory allegation that the Board's "vigorous contest" of the receivership action demonstrates its "deference" to Mr. Iglesias does not amount to sufficient particularized facts that would show that a majority of the board is beholden to directors who would be liable. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 219, 252 P.3d 681, 698 (2011). Such an allegation also could not apply to those Director Defendants who were not members of the Board at the time that the receivership action was contested and not parties to that lawsuit (i.e., Defendants Gonzalez, Loar, Rosencrantz, Williams, and the Estate of Howard Sussman). Accordingly, the Court concludes that Plaintiffs' obligation to have made a demand on Hygea's board of directors is not excused.

///

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

Even if the Court found Plaintiffs' allegations sufficient to excuse demand or to state a direct claim for breach of fiduciary duty (in which case demand would not be necessary), pursuant to NRS 78.138(7), "a director or officer is not individually liable to the corporation or its stockholders . . . unless . . . [i]t is proven that (1) [t]he director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and (2) [s]uch breach involved intentional misconduct, fraud or a knowing violation of the law." *See also Shoen*, 122 Nev. at 640, 137 P.3d at 1184 ("directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law.")

To allege a breach of fiduciary duty, a plaintiff must overcome the business judgment rule codified at NRS 78.138(3), pursuant to which directors and officers benefit from the presumption that "in deciding upon matters of business . . . [they] act[ed] in good faith, on an informed basis and with a view to the interests of the corporation." *Id.* "To rebut the rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty—good faith, loyalty or due care." *Cede II*, 634 A.2d at 361. *See also Shoen*, 122 Nev. at 635-36, 137 P.3d at 1181 (explaining that the business judgment rule "applies only in the context of valid interested director action, or the valid exercise of business judgment by disinterested directors in light of their fiduciary duties").

The duty of loyalty and good faith mandates that the best interests of the corporation and its shareholders takes precedence over any interest possessed by a director and not shared by the stockholders generally. *Shoen*, 122 Nev. at 632, 137 P.3d at 1178. "Classic examples of director self-interest in a business transaction involve either a director appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by the shareholders

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

generally." *Cede II*, 634 A.2d at 362. Plaintiffs have not pled any facts that establish that any Director Defendant was self-interested in any transaction at issue.

Meanwhile, the duty of care demands that directors of a company act on an informed basis. *Shoen*, 122 Nev. at 632, 137 P.3d at 1178. *See also Cede II*, 634 A.2d at 368. Directors violate the duty of care when they "fail[] to inform themselves fully and in a deliberate manner before voting as a board upon a transaction." *Cede II*, 634 A.2d at 368. Plaintiffs have not pled any facts explaining how any Director Defendant failed to inform him- or herself in any transaction at issue.

Even if Plaintiffs had sufficiently pled a breach of fiduciary duty to overcome the business judgment rule, Plaintiffs have not sufficiently alleged intentional misconduct, fraud, or a knowing violation of the law in connection with the alleged breach. For the reasons set forth below, Plaintiffs have not sufficiently pled fraud as to any point in time, but in particular as to that timeframe after Plaintiff N5HYG became a Hygea stockholder. Nor have Plaintiffs made sufficient allegations of intentional misconduct or a knowing violation of the law. Accordingly, Plaintiffs' claims for breach of fiduciary duty—whether brought derivatively or directly—fail to overcome the protection of the business judgment rule and Nevada's exculpatory provision.

For the foregoing reasons, the Court dismisses without prejudice Plaintiffs' Twelfth, Thirteenth, Fourteenth, and Fifteenth causes of action with respect to all Defendants.

<u>The Seventh, Ninth, and Twentieth Causes of Action For or Grounded In Fraud</u>

The Court next addresses Plaintiffs' claims that are for or grounded in fraud, those being the claims for common law fraud (Seventh Cause of Action), silent fraud/material omission (Ninth Cause of Action), and constructive fraud (Twentieth Cause of Action). N.R.C.P. 9(b) demands that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." "Malice, intent, knowledge, and other condition of mind of a person may be averred

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

generally." *Id.* The Nevada Supreme Court has explained that "[t]he circumstances that must be detailed include averments to the time, the place, the identity of the parties involved, and the nature of the fraud or mistake." *Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874, 874 (1981). Moreover, when suing more than one defendant—as Plaintiffs do here—the Court is persuaded that N.R.C.P. 9(b), like its federal counterpart, requires a plaintiff to "differentiate [her] allegations . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007). Stated differently, a plaintiff cannot "lump" the defendant at issue with other defendants. *See id.*

In short, Plaintiffs' allegations do not provide any Defendant with the notice needed to defend him-, her-, or itself against the claims for or grounded in fraud. With regard to Hygea, Mr. Iglesias, and Mr. Moffly, Plaintiffs assert that these defendants misrepresented Hygea's financial performance and plans to "go public." Plaintiffs, however, do not identify the allegedly inaccurate financial figures with any specificity or explain how the financial figures were wrong. Even if such allegations met the heightened pleading standard of Rule 9(b), they are belied by Plaintiffs' admission that the representations made by Hygea, Iglesias, and Moffly encompassed numbers that were subject to *ongoing adjustment* and that the last financial report Plaintiffs received only *could have* been inaccurate. The Court need not accept contradictory allegations as true.

As to the remaining defendants, Plaintiffs plead no facts that these defendants ever made any representation to Plaintiffs or were involved in any interactions where those defendants could have possibly omitted any information. Plaintiffs' assertions that these defendants knew or should have known that the information Plaintiffs received from Hygea, Mr. Iglesias, and Mr. Moffly was false does not meet Rule 9(b)'s requirements or provide any individualized allegations as to each Defendant's role in the alleged fraud.

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

For the foregoing reasons, the Court dismisses without prejudice Plaintiffs' Seventh, Ninth, and Twentieth causes of action with respect to all Defendants.

The Eighth Cause of Action for Negligent Misrepresentation

In their Eighth Cause of Action, Plaintiffs make a claim for negligent misrepresentation against all Defendants. A claim for negligence under Nevada law must be based on an existing duty of care, and to set forth a claim for negligent misrepresentation, a plaintiff must plead that (1) the defendant supplied information while in the course of his business, profession or employment, or any other transaction in which he had a pecuniary interest; (2) the information was false; (3) the information was supplied for the guidance of the plaintiff in his business transactions; (4) the defendant failed to exercise reasonable care or competence in obtaining or communicating the information; (5) the plaintiff justifiably relied upon the information by taking action or refraining from it; and (6) as a result of his reliance upon the accuracy of the information, the plaintiff sustained damage. *See Jordan v. State ex rel. Dept. of Motor Vehicles and Public Safety*, 110 P.3d 30, 51 (Nev. 2005); *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998).

Plaintiffs do not plead the existence of any relationship between them and Defendants that would have given rise to a duty of care prior to N5HYG's execution of the Stock Purchase Agreement. Therefore, the Court construes Plaintiffs' claim for negligent misrepresentation to be based on representations purportedly made by Defendants *after* N5HYG executed the Stock Purchase Agreement, at which time N5HYG would have been in a fiduciary relationship with the Director Defendants and in a contractual relationship with Hygea.

Directors and officers of Nevada corporations cannot be personally liable for negligent acts or omissions in their official capacities given Nevada's exculpatory statute. *See* NRS 78.138(7); *see also In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173, 1179 (Del. 2015). Here, Plaintiffs allege that the

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

Director Defendants negligently made misrepresentations in their capacities as directors and/or officers of Hygea. Mere negligence, however, is insufficient to overcome Nevada's exculpation statute, which requires allegations of intentional misconduct, fraud, or knowing violation of the law. *See* NRS 78.138(7). For the foregoing reasons, the Court dismisses without prejudice Plaintiffs' Eighth Cause of Action against the Director Defendants.

The same analysis, however, does not apply to Plaintiffs' claim of negligent misrepresentation against Hygea. The Amended Complaint alleges a contract between N5HYG and Hygea, that being the Stock Purchase Agreement. This allegation could give rise to a duty of care owned by Hygea, with respect to which the exculpation statute cannot foreclose liability given that it applies only to the personal liability of directors and officers. Although Defendants urge the Court to dismiss Plaintiffs' negligent misrepresentation claim against Hygea based on the economic loss doctrine, the Court is persuaded that "negligent misrepresentation is a special financial harm claim for which tort recovery is permitted because without such liability the law would not exert significant financial pressures to avoid such negligence." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 206 P.3d 81, 88 (Nev. 2009). The Supreme Court of Nevada, therefore, has held that there are "exceptions to the economic loss doctrine for negligent misrepresentation claims in a certain category of cases when strong countervailing considerations weigh in favor of imposing liability." *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 302 P.3d 1148, 1153 (Nev. 2013) (internal quotations omitted). "These types of cases encompass economic loss sustained, for example, as a result of ... negligent misstatements about financial matters." *Id.*

For the foregoing reasons, the Court dismisses without prejudice Plaintiffs' Eighth Cause of Action with respect to the Director Defendants, but the Court denies the dismiss the Eighth Cause of Action with respect to Hygea.

///

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

The Sixteenth Cause of Action for Tortious Interference

In its Sixteenth Cause of Action, Plaintiff N5HYG makes a claim for tortious interference against all Director Defendants. To set forth a claim for tortious interference with a contract, a plaintiff must plead "(1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage." *J.J. Industries, LLC v. Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003). The Court finds that Plaintiffs' allegations set forth these elements under Nevada's notice pleading standard.

Defendants argue that N5HYG's claim for tortious interference fails as a matter of law because officers, directors, employees, and agents of a company cannot tortiously interfere with their own company's contracts. The Court agrees that such is the law under *Bartsas Realty, Inc. v. Nash*, 81 Nev. 325, 402 P.2d 650, 651 (1965). However, Plaintiffs alternatively plead that, for purposes of the tortious interference claim, the Director Defendants took these actions outside the scope of their agency with Hygea. The Court—construing all allegations and inferences in Plaintiffs' favor—finds under Nevada's notice pleading standard that Plaintiffs have sufficiently pled that the Director Defendants may have tortiously interfered in Hygea's alleged breach of the Stock Purchase Agreement while acting outside the scope of their agency.

For the foregoing reasons, the Court denies the motions as they relate to the Sixteenth Cause of Action.

The Seventeenth and Eighteenth Causes of Action for Conspiracy and Concert of Action

In their Seventeenth and Eighteenth Causes of Action, Plaintiffs set forth claims for conspiracy and concert of action against all Defendants. To set forth a claim for civil conspiracy, a plaintiff must plead (1) a combination of two or more persons; (2) who intend to accomplish an unlawful objective together; (3) the

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

association acts by a concert of action by agreement, understanding, or "meeting of the minds" regarding the objective and the means of pursuing it, whether explicit or by tacit agreement; (4) the association intends to accomplish an unlawful objective for the purpose of harming another; and (5) causation and damages. *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983). The Court finds that Plaintiffs' allegations set forth these elements under Nevada's notice pleading standard.

Defendants argue that the claims for civil conspiracy and concert of action fail as a matter of law due to the intracorporate conspiracy doctrine, which provides that "[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." *Collins v. Union Federal Sav. & Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983). *See also U-Haul Co. of Nevada, Inc. v. U.S.*, Case No. 2:08-cv-0729-KJD-RJJ, 2012 WL 3042908, at *3 (D. Nev. July 25, 2012); *Rebel Communications, LLC v. Virgin Valley Water Dist.*, Case No. 2:10-cv-0513-LRH-PAL, 2010 WL 363176, at *2 (D. Nev. 2010).

Plaintiffs respond that the Director Defendants were not *per se* agents or employees of Hygea in their role as directors. However, Plaintiffs expressly plead that the Director Defendants were acting in their capacity as Hygea officers and directors in their dealings with Plaintiffs. Again, the Court does not need to reach this issue. As with the tortious interference claim, Plaintiffs alternatively plead that for purposes of the civil conspiracy and concert of action claims, the Director Defendants took their actions outside the scope of their agency with Hygea. The Court—construing all allegations and inferences in Plaintiffs' favor—concludes that such pleading is sufficient to defeat a motion to dismiss under Nevada's notice pleading standard.

For the foregoing reasons, the Court denies the motions as they relate to the Seventeenth and Eighteenth Causes of Action.

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

The Nineteenth Cause of Action for Unjust Enrichment

Plaintiffs' Nineteenth Cause of Action asserts unjust enrichment against the Director Defendants. "Unjust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another. Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. Money paid through misapprehension of facts belongs, in equity and good conscience, to the person who paid it." *Nev. Indus. Dev. v. Benedetti*, 103 Nev. 360, 363 n.2, 741 P.2d 802, 804 (1987). To the extent any alleged unjust enrichment represents a value that Defendants received from the Company (and for which recovery would inure to the Company), the claim would be derivative for the reasons explained above. Further, a claim for unjust enrichment does not lie when a contract governs the transaction. *Villa v. First Guar. Fin. Corp.*, No. 2:09-CV-02161, 2010 WL 2953954, at *5 (D. Nev. July 23, 2010).

Additional proceedings and discovery may reveal that some or all of the Director Defendants did not receive any benefit directly from Plaintiff that was not also governed by the Stock Purchase Agreement. However, the Court finds that Plaintiffs' allegations, taken as true, set forth enough at this stage to support a non-derivative claim for unjust enrichment under Nevada's notice pleading standard. For the foregoing reasons, the Court denies the motions as they relate to the Nineteenth Cause of Action.

The Twenty-First Cause of Action for Accounting

In the Twenty-First Cause of Action, Plaintiff N5HYG seeks an accounting from the Director Defendants. To set forth a cause of action for an accounting, a plaintiff must plead "that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179, 92 Cal. Rptr. 3d 696, 715 (2009). Courts have found the requisite relationship exists

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

where there is a contract pursuant to which payment is collected by one party and the other party is entitled to payment by the collecting party. *See Wolf v. Superior Court*, 107 Cal. App. 4th 25, 130 Cal.Rptr.2d 860 (Cal. Ct. App. 2003). Plaintiffs, however, have not pled the existence of a relationship, contractual or otherwise, between N5HYG and the Director Defendants pursuant to which the Director Defendants collected any payment. Accordingly, Plaintiffs have failed to set forth a claim for accounting.

For the foregoing reasons, the Court dismisses without prejudice Plaintiffs' Twenty-First Cause of Action.

***

Plaintiff N5HYG is hereby granted thirty (30) days from the Court's filing of this Order to amend the Amended Complaint. If Plaintiff N5HYG does not intend to amend the Amended Complaint, it shall so notify the Court and Defendants by filing a notice of the same. Defendants shall have twenty (20) days from the service of such notice or any second amended complaint to answer or otherwise respond.

Dated this 8 day of May, 2019.

Nancy L Allf

HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE

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

Respectfully submitted by:

BALLARD SPAHR LLP

By: /s/ Maria A. Gall
Joel E. Tasca, Esq.
Maria A. Gall, Esq.
Kyle A. Ewing, Esq.
1980 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135

Julian W. Friedman (admitted pro hac vice)
919 3rd Avenue, Floor 37
New York, New York 10022

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

HOLLAND & HART LLP

By: /s/ Stavroula E. Lambrakopoulos
Robert Cassity, Esq.
Sydney R. Gambee, Esq.
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Stavroula E. Lambrakopoulos, Esq. (admitted pro hac vice)
Jeffrey T. Kucera, Esq. (admitted pro hac vice)
Theodore L. Kornobis, Esq. (admitted pro hac vice)
K&L GATES LLP
1601 K Street, NW
Washington, D.C. 20006

Attorneys for Defendant Ray Gonzalez

/s/ Richard Williams
Richard Williams, appearing pro per

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

“Exhibit 3”

December 3, 2019 Findingsof Fact, Conclusions of Law, and Order Granting Defendants’ Motion for Reconsideration Re: Claim Preclusion

“Exhibit 3”

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

Julian W. Friedman
(admitted *pro hac vice*)
New York Registration No. 1110220
1675 Broadway, 19th Floor
New York, New York 10019
Telephone: (212) 223-0200
Facsimile: (212) 223-1942
friedmanj@ballardspahr.com

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.: 27

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Typically for claim preclusion to apply, a defendant must demonstrate three things: that "(1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, or the defendant can demonstrate that he or she would have been included as a defendant in the earlier suit and the plaintiff fails to provide a good reason for not having done so." *Weddell v. Sharp*, 131 Nev. Adv. Op. 28, 350 P.3d 80, 82 (Nev. 2015), *reh'g denied* (July 23, 2015).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24. The Court now addresses the third element for claim preclusion, which asks whether (i) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, or (ii) the defendant can demonstrate he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a good reason for not having done so. *Weddell*, 350 P.3d at 82.

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

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

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

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

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

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

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

30. The Court is not persuaded by this argument. Forum selection clauses are presumptively enforceable, but if they lead to an unreasonable result, *such as claim-splitting*, a court can decline to enforce the clause. *See Tandy Comput. Leasing, Div. of Tandy Elecs. v. Terina's Pizza*, 105 Nev. 841, 844, 784 P.2d 7, 8 (1989). N5HYG did not even try to bring all its claims in one forum.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

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

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

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

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

Dated this 27 day of Nov., 2019.

Nancy L Allf

HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE

BD

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

Submitted by:

BALLARD SPAHR LLP

By: _____

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

Julian W. Friedman
(admitted pro hac vice)
New York Registration No. 1110220
1675 Broadway, 19th Floor
New York, New York 10019

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

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

“Exhibit 4”

December 3, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiff’s Motion for Reconsideration Re: Nevada 5, Inc.

“Exhibit 4”

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

Julian W. Friedman
(admitted *pro hac vice*)
New York Registration No. 1110220
1675 Broadway, 19th Floor
New York, New York 10019
Telephone: (212) 223-0200
Facsimile: (212) 223-1942
friedmanj@ballardspahr.com

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.: 27

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION RE: NEVADA 5, INC.

Plaintiffs' Motion for Reconsideration Regarding the Dismissal of Nevada 5, Inc. (hereinafter the "Motion") came on for hearing in Department 27 of this Court on July 17, 2019, with the Honorable Nancy Allf presiding. Christopher D. Kaye, Esq. of The Miller Law Firm, Ogonna M. Brown, Esq., of Lewis Roca Rothberger Christie LLP, and G. Mark Albright, Esq. of Albright, Stoddard, Warnick & Albright appeared on behalf of Plaintiffs; Maria Gall, Esq. and Kyle A. Ewing, Esq., of Ballard Spahr LLP appeared on behalf of Defendants Hygea Holdings Corp., Manuel Iglesias, and Edward Moffly; and Stavroula E. Lambrakopoulos, Esq. of K&L Gates LLP and Jon Pearson, Esq., of Holland & Hart LLP appeared on behalf of Defendant Ray Gonzalez (collectively, "Defendants").

The Court, having considered the Motion, the oppositions, the replies in support, and after hearing oral argument on the Motion, the Court finds as follows:

1. In its Findings of Fact, Conclusions of Law, and Order filed May 10, 2019, the Court dismissed with prejudice Plaintiff Nevada 5, Inc. ("Nevada 5") as a party to this action for lack of standing; the Court granted the other Plaintiff, N5HYG, LLC, leave to file a Second Amended Complaint.

2. Plaintiffs timely filed the Motion pursuant to Local Rule 2.24(b), which provides that: "[a] party seeking reconsideration of a ruling of the court, other than any order which may be addressed by motion pursuant to N.R.C.P. 50(b), 52(b), 59 or 60, must file a motion for such relief within 10 days after service of written notice of the order or judgment unless the time is shortened or enlarged by order."

3. Plaintiffs' Motion principally sought for the Court to reconsider its dismissal of Nevada 5 with prejudice and provide Nevada 5 the opportunity to re-plead its claims by way of the Second Amended Complaint.

4. N.R.C.P. 15(a)(2) provides, "The court should freely give leave [to amend] when justice so requires."

5. The Court finds that justice otherwise requires that Nevada 5 be provided the opportunity to re-plead its claims in the Second Amended Complaint.

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

Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiffs' Motion for Reconsideration Regarding the Dismissal of Nevada 5 is hereby GRANTED.

2. The Court RECONSIDERS its dismissal of Nevada 5 with prejudice and AMENDS its ruling such that Nevada 5 is dismissed WITHOUT PREJUDICE.

3. Plaintiffs are hereby GRANTED LEAVE to include Nevada 5 as a Plaintiff in their Second Amended Complaint.

Dated this 27 day of NOV, 2019.

Nancy L Allf

HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE

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

Submitted by:

BALLARD SPAHR LLP

By: _____

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

Julian W. Friedman
(admitted pro hac vice)
New York Registration No. 1110220
1675 Broadway, 19th Floor
New York, New York 10019

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

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

“Exhibit 5”

May 15, 2019 Order Denying Defendant’s Motion for Summary Judgment Without Prejudice

“Exhibit 5”

ORDR

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

Dated this 15th day of April, 2020.

Nancy L Allf

HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE

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

Submitted by:

BALLARD SPAHR LLP

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

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

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

“Exhibit 6”

August 20, 2021 Transcript of Proceedings Re:Defendants’ Motion for Stay of Proceedings

“Exhibit 6”

Electronically Filed
8/20/2021 2:34 PM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE NANCY ALLF,
DISTRICT COURT JUDGE

FRIDAY, AUGUST 13, 2021

TRANSCRIPT OF PROCEEDINGS RE:
DEFENDANTS' MOTION FOR STAY OF PROCEEDINGS

APPEARANCES:

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

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

RECORDED BY: VANESSA MEDINA, COURT RECORDER

LAS VEGAS, NEVADA, FRIDAY, AUGUST 13, 2021

[Proceeding commenced at 11:44 a.m.]

MS. BROWN: Good morning, Your Honor. Ogonna Brown on behalf of Nevada 5 Inc. and N5HYG, LLC. Bar Number 7589, from the law firm of Lewis Roca.

THE COURT: Thank you.

MS. BROWN: Good to see everybody.

THE COURT: And for the defendants, please?

MR. KAPLAN: Good morning, Your Honor. Kory Kaplan on behalf of Defendants Manuel Iglesias and Edward Moffly.

THE COURT: All right. So Mr. Kaplan, you can have five minutes, Ms. Brown five minutes, and then Mr. Kaplan, you can have two minutes to wrap it up.

MR. KAPLAN: Thank you, Your Honor.

As this Court's aware, a writ is an extraordinary remedy that's not routinely entertained by the Nevada Supreme Court. However, in this case, the Nevada Supreme Court has chosen to entertain the writ. As a result, the defendants here request a stay of the proceedings until it is ruled upon by the Nevada Supreme Court. If this isn't a case where a stay should be granted, I can't think of any other situation where it would be.

As this Court recalls, it recently denied Defendants' Partial Motion for Judgment on the Pleadings, seeking to dismiss all of Plaintiffs' causes of action based upon issue preclusion arising out

of the Florida Circuit Court's dismissal with prejudice of Nevada 5's claims due to its lack of standing and the immigration clause. As a result of that denial by this Court, Defendants filed a writ.

On July 30th, less than two weeks ago, the Nevada Supreme Court issued an order directing an answer, requiring that Plaintiffs file and serve an answer, including authorities, against issuance of the requested writ.

Because the Nevada Supreme Court did not deny the writ and order the plaintiffs to respond, the Nevada Supreme Court entirely held that Defendants do not have a plain, speedy, and adequate remedy of law in the form of an appeal.

As this Court is aware, this Court should consider four factors in determining whether to grant the stay. Not all of the factors need to weigh in favor of the defendants, and one or two factors strongly in favor of the defendants can be sufficient to grant the stay.

The first is that the purpose of the writ will be defeated if the stay is denied. That's exactly the case here. The purpose of the writ is to deny -- or dismiss Plaintiffs' complaint in full. That's the purpose. Allowing the plaintiffs to continue the litigation as if there were no writ would frustrate the purpose of the writ, because the claim shouldn't be.

The second factor, that Defendants will suffer irreparable harm. Now, even though irreparable or serious harm remains part of the stay analysis, the *Mikohn Gaming* case states that this factor

will generally not play a significant role in the determination of whether to issue a stay. But as I stated in our motion, Defendants would still be subjected to continue discovery, attorneys' fees, the impending trial, and even a potential judgment prior to the Nevada Supreme Court's ruling.

The third factor: The plaintiffs will not suffer irreparable harm. A mere delay in pursuing discovery and litigation does not constitute irreparable harm. That might -- *Mikohn Gaming* says that. Plaintiff can point to nothing other than their speculation that this -- that there's an increased risk of evidence being lost if the stay is granted, but that's mere speculation.

And then the final factor is whether Defendants will be successful. Now, obviously, this Court made its decision. I'm not trying to convince Your Honor that the ruling was incorrect here; that is now for the Nevada Supreme Court to decide. However, when looking for a stay pending an appeal or writ, a movant doesn't always have to show a probability of success on the merits, just that the movant must present a substantial case on the merits when a serious legal question is involved, and show that the balance of equities weighs heavily in favor of granting the stay.

The Ninth Circuit has held the same and recognized that one interchangeable formulation of the standard is whether there are serious legal questions raised.

Both the standard for the writ relief and the underlying merits demonstrate that there is a great likelihood that the writ will

be granted. First, the Supreme Court has concluded that the writ will be granted when the rights of dismissal is clear. There's clearly a serious legal inquiry here, as it involves the Issue Preclusion Doctrine. And again, because the Nevada Supreme Court did not deny the writ and order the plaintiff to answer, the Nevada also -- Nevada Supreme Court also views the merit in the writ. Thank you.

THE COURT: Thank you.

And the opposition, please.

MS. BROWN: Yes, Your Honor. I'm just trying to set my clock so that --

THE COURT: He only used four minutes.

MS. BROWN: Okay. Sorry, Your Honor.

Your Honor, as you know, I made an appearance initially for Nevada 5 Inc. and Nevada -- N5HYG LLC. And I just did that to the extent the defendants' Motion to Stay is directed to both of the plaintiffs. And in that case, N5HYG joins in Nevada 5's opposition. But you'll note that you already -- we did [indiscernible] you already ruled in our favor for N5HYG LLC on July 22nd, 2021.

Your Honor, here the Motion to Stay should be denied, given the procedural posture of this case. First, the defendants' reliance upon the Supreme Court's request for an answer to the defendants' Petition for a Writ, Your Honor, is really misplaced. It's no indication of the merits of the Petition for Writ; it is simply a request for an answer. It's not a signal that Defendants will prevail.

Second, the Nevada Supreme Court in *Mikohn Gaming*

versus McCrea has expressly rejected the reasons articulated by Defendants as the basis for the stay request; time, expense, inconvenience of discovery on basis of potential mootness.

The Nevada Supreme Court ruled that litigation cause do not rise to irreparable harm. So that simply doesn't factor in here for the defendants.

Nevada 5 commenced this action for this Court nearly four years ago, Your Honor, October 2017. It's been nearly four years. And it's arising from the defendants' fraudulent inducement to pay $30 million relating to stock purchase. You know all about this, I won't go into the details.

But I believe this is a record for Your Honor. Defendants have filed five dispositive motions; they filed their answer for their first time in January of 2021. And they talk about costs and, you know, attorneys' fees? That's where the costs and attorneys' fees lie, I believe, in this case, not answering the discovery that we just recently served. You had the mandatory Rule 61 conference, Your Honor, discovery's underway. We simply want to proceed and adjudicate this case.

And, yes, the witness memories are an issue. This transaction occurred in 2016, Your Honor. That's the genesis of the case, October 5th, 2016, when Nevada 5 paid Hygea $30 million to purchase the stock. So, of course, Hygea filed for bankruptcy, time is coming and going, and the more time that passes, we're absolutely at risk of losing information and gathering information

and evidence.

And it's really surprising, Your Honor, that Defendants are seeking to stay the case, because this Court has repeatedly ruled over and over that Nevada 5 has standing and the right to pursue $30 million claims against the Nevada's -- defendants in Nevada. You ruled on December 9th that we have standing, you ruled on March 17th that we have standing of 2021. And December 9th is 2020. I know it's been a while, but we absolutely have standing and the right to bring the claims against the defendants in the state of Nevada.

And I know this Court previously really parsed out the issues in terms of issue preclusion and the motion that was brought by the defendants. And you noted that it related to different situated parties in Florida. It related to Florida law, that doesn't comply here with Nevada. And it remains unclear why Defendants elected to wait three months to bring a petition for the writ. And now it's on shortened time.

And they really are unable to cite to a single statement, Your Honor, made by the Supreme Court in support of their argument, that their request for an answer is a foregone conclusion as to the merits of the petition. Request for an answer is not the same thing as your getting the petition granted. So those are two different things, and I think they're conflating that. And you can look at the order, which is attached to Exhibit B to their motion.

And, simply put, Your Honor, Defendants have failed to

meet their burden under any one of the four elements that must be met before a stay may be granted, because Defendants have failed to demonstrate that the balance of equity heavily favors delaying this case, which is already four years old. If I extrapolate forward, Your Honor, if this Court denies the stay request, it doesn't interfere with their goal. Defendants can still file an appeal if they would like to, to the extent we get there. But in the avoidance of [indiscernible] the Nevada Supreme Court has not issued a writ.

Additionally, Defendants reserve their right to appeal, which provides Defendants with a remedy that they may seek. We don't even know if they will.

Lastly, Your Honor, they're not likely to prevail on the merits, because they must present a substantial case on the merits with a serious legal question that's involved, and they haven't demonstrated that. It is their burden. Defendants haven't demonstrated that the balance of the equities weighs heavily in their favor. This is a very high burden. And there's no serious legal question or substantial cases on the merits that tips in their favor.

And, simply put, Your Honor, based on the procedural posture of the case, the timeline, we request that the Motion for Stay be denied.

THE COURT: Thank you.

And the reply, please.

MR. KAPLAN: Thank you, Your Honor. Just real briefly.

Counsel mentioned that the case is four years old and that

the costs and attorneys' fees have, you know, already been substantial. That's not Defendants' issue that the first couple complaints were dismissed.

Additionally, as you recorded, as Your Honor's aware, there was a bankruptcy that automatically stayed the case.

The requesting of an answer is not the same as the writ being granted. I agree. I didn't say that the writ is meritorious. I said that the Nevada Supreme Court did not deny it. A writ is an extraordinary remedy and they did not deny it. They want to hear it. That's all I'm asking is for a brief stay until the Nevada Supreme Court hears it.

THE COURT: Thank you.

This is the defendants' Motion for a Stay Pending Appeal. And I'm going to deny the motion for the following reasons.

One, there's been so much delay in this case. The complaint goes back to October 5 of 2017. And partly delayed, of course, due to the bankruptcy in Florida. But there have been some efforts by the defendants to delay this case by the filing of Motions to Dismiss.

I find that the balance of harm would go to the plaintiffs here, who are entitled to get their case to trial and are obligated to do so within five years.

I find that the object of the appeal would not be defeated by the denial of a stay. And you also, Mr. Kaplan, have the remedy of requesting the stay from the Nevada Supreme Court.

So for those reasons, the motion will be denied.

Ms. Brown to prepare the order.

Mr. Kaplan, I assume you wish to approve the form of a simple order?

MR. KAPLAN: Yes, Your Honor.

THE COURT: Good enough. Thank you both. Stay safe and stay healthy.

MS. BROWN: Thank you, Your Honor.

MR. KAPLAN: Thank you, Your Honor.

[Proceeding concluded at 11:55 a.m.]

/ / /

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability. Please note: Technical glitches in the BlueJeans system resulting in audio/video distortion and/or audio cutting out completely were experienced and are reflected in the transcript.

Shawna Ortega, CET*562