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 WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, WRIT OF MANDAMUS

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I. INTRODUCTION

Nevada 5 provides its own version of the facts and its own timeline in support of its Answer. Plaintiffs/Real Parties in Interest Nevada 5 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.[1] Plaintiffs' improvident complaints necessitated multiple motions to dismiss in the underlying case. Plaintiffs *voluntarily* filed their First Amended Complaint on July 13, 2018, waiting until *after* defendants filed their motions to dismiss.[2] After seeing the amended complaint, Defendants moved to dismiss again, arguing claim preclusion, personal jurisdiction, and failure to state a claim.[3] 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.[4]

However, the District Court's initial order did not address certain personal jurisdiction arguments and so Defendants were constrained to move for clarification.

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[1] (PA Vol. I, PET000001-30).

[2] (PA Vol. I, PET000122-160).

[3] (PA Vol. I, PET000166-228).

[4] (PA Vol. VII, PET001437-1445).

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).[5] 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.[6]

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.[7] 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.[8] The District Court also amended its prior ruling and dismissed Nevada 5 *without* prejudice.[9]

[5] (PA Vol. VII, PET001469-1503).

[6] (PA Vol. XI, PET002476-2513).

[7] (PA Vol. VII, PET001504-1523).

[8] (PA Vol. X, PET002333-2352).

[9] (PA Vol. X, PET002325-2332).

Plaintiffs filed their Second Amended Complaint on December 13, 2019.[10] 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.[11] 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.[12] 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.[13] After hearing the motion on the merits for the first time, the District Court denied it.[14] 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*.[15] By this time, Petitioners had answered the

[10] (PA Vol. X, PET002353-2434).

[11] (1 Ans.App. 155-175).

[12] (2 Ans.App. 278-281).

[13] (2 Ans.App. 283-301).

[14] (3 Ans.App. 551-560).

[15] (PA Vol. XI, PET002623-2629).

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.[16] The District Court's denial of that motion forms the basis of the Writ Petition.

The District Court committed clear error in its Order denying Petitioners' Partial Motion for Judgment on the Pleadings. Nevada 5 focuses its Answer on the District Court's prior interlocutory ruling that Nevada 5 has standing. The District Court's prior interlocutory rulings are irrelevant because the operative issue is that the Florida Court issued a ***final*** dispositive ruling on Nevada 5's standing.

Issue preclusion bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment.[17] The determinative issue is that Nevada 5 is a party to the Florida Action, and the Florida Court's ruling precludes Nevada 5 from bringing an action against any party for fraudulent misrepresentations of Hygea's financial performance and intent to go public.

Nevada 5 attempts to differentiate the Florida ruling because causes of action are slightly different in the Florida Action from this action. Nevada 5 conflates the

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[16] (PA Vol. XI, PET002573-2629).

[17] *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356, 196 L. Ed. 2d 242 (2016); *see* Restatement (Second) of Judgments §§ 17, 27, at 148, 250 (1980); 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4416, p. 386 (2d ed. 2002).

meaning of underlying facts giving rise to a cause of action and an actual cause of action. It is irrelevant that Nevada 5's specific claims may slightly differ against the defendants in the Florida Action and Petitioners in this action because the underlying facts are the same.[18] The fact that Nevada 5 did not have identical causes of action in this case and the Florida action is irrelevant as its claims are based on the same set of underlying facts.

Further, it is irrelevant that Petitioners are different than the defendants in the Florida Action. Even though Nevada 5 originally sued all directors in Nevada, the directors in the Florida Action were dismissed from Nevada due to lack of personal jurisdiction. Petitioners remained in Nevada because they signed personal guarantees on the Stock Purchase Agreement ("SPA") with Nevada as the choice of forum, but those contract-based claims are not subject to the Writ Petition. It is irrelevant that Petitioners are not also defendants in the Florida Action, and any third party can invoke issue preclusion. The determinative issue is that Nevada 5 is a party to the Florida Action, and the Florida Court's ruling precludes Nevada 5 from bringing an action against any party for fraudulent misrepresentations of Hygea's

[18] *Mendenhall v. Tassinari*, 133 Nev. 614, 621, 403 P.3d 364, 371 (2017) (citing *Sky View Fin., Inc. v. Bellinger*, 554 N.W.2d 694, 697 (Iowa 1996) (A legal remedy exists where "the events giving rise to the cause of action develop"); *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990) (A claim "accrues when the wrong occurs and a party sustains injuries for which relief could be sought").

financial performance and intent to go public. Nevada 5 has no standing to make these claims against anybody, including but not limited to Petitioners.

Nevada 5 also argues that the Florida ruling was not final and "on the merits," but gives no support for its position. The Florida Order was on the merits, in response to a Rule 12(b)(6) motion. Both Nevada law and Florida law hold that a dismissal with prejudice pursuant to Rule 12(b) is a judgment on the merits. Additionally, this Court recently held that issue preclusion applies to standing.[19]

Nevada 5 argues that Florida law on standing and integration clauses conflicts with Nevada. Nevada 5 again offers no legal support, because it cannot, as both states have very similar laws regarding both topics. The Florida Court in no uncertain terms held that Nevada 5 has no standing because it was not a party to the SPA and because the alleged oral misrepresentations (upon which Nevada 5 has sued Petitioners and the Florida defendants) are in express conflict with the terms of the SPA, which contains an integration clause.

As a last-ditch effort, Nevada 5 requests that this Court apply an exception to the issue preclusion doctrine as in *Glass*. Neither of those exceptions apply here. Nevada 5 urges this Court to adopt one of the exceptions because the issues of standing and the integration clause were decided in Florida based on differing

[19] *Glass v. Select Portfolio Servicing, Inc.,* 2020 WL 3604042, No. 78325, 466 P.3d 939 (Nev. 2020) (unpublished disposition).

Florida law, which is untrue. Nevada 5 also argues that it neither had an opportunity nor a reason to adjudicate in Florida its standing to pursue Petitioners in Nevada. Again, Nevada 5 confuses the issue. The determinative issue is that Nevada 5 is a party to the Florida Action, and the Florida Court's ruling precludes Nevada 5 from maintaining this action in Nevada against Petitioners. Nevada 5 clearly had the opportunity to adjudicate, and did, its standing to pursue fraud claims pursuant to the SPA.

As such, issue preclusion applies and Nevada 5 cannot bring any claims against Petitioners based on the same set of facts that were dismissed with prejudice by the Florida Court.

II. LEGAL ARGUMENT

A. Petitioners Do Not Have a Plain, Speedy, and Adequate Remedy.

This Court has granted writ relief where the district court judge has committed "clear and indisputable" legal error,[20] or an "arbitrary or capricious" abuse of discretion.[21]

> Everyone gets their day in court. But when that day is done, and darkness falls over a case, principles of claim preclusion and issue

[20] *Bankers Life & Cas. Co., v. Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953); *see Smith v. Eighth Jud. Dist. Ct. In & For Cty. of Clark*, 113 Nev. 1343, 1344–45, 950 P.2d 280, 281 (1997) (writ relief may be granted when dismissal is required "pursuant to clear authority").

[21] *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006).

> preclusion bar "parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana v. United States*, 440 U.S. 147, 153 (1979). Those twin doctrines serve important purposes, like protecting against "the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id*. at 153–54.[22]

"In the context of writ petitions, [the Court] review[s] district court orders for an arbitrary or capricious abuse of discretion."[23] "A writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction."[24] "[The Court] review[s] questions of law," such as the interpretation of Nevada's statutes and whether a particular statute precludes subject matter jurisdiction under Nevada common law, "de novo, even in the context of writ petitions."[25]

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[22] *Risby v. Johnson*, 2017 WL 8793329, at *1 (C.D. Cal. June 5, 2017), *aff'd sub nom. Risby v. Nielsen*, 768 F. App'x 607 (9th Cir. 2019) (unpublished disposition).

[23] *Helfstein v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 91, 362 P.3d 91, 94 (2015).

[24] *Id.* (citing NRS 34.320; *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012) ("A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court.")

[25] *Id.*; *see also McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC*, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005) ("Statutory interpretation is a question of law."); *Griffith v. Gonzales-Alpizar*, 132 Nev. Adv. Op. 38, 373 P.3d 86, 87 (2016) ("Subject matter jurisdiction is a question of law subject to de novo review."); *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (noting that this Court has complete discretion to determine whether to consider a petition for a writ of mandamus or prohibition and that even when an arguably adequate remedy exists, this Court may exercise its discretion "under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound

This Court may exercise its discretion to consider writ petitions when the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule or when an important issue of law needs clarification and this Court's review would serve considerations of public policy or sound judicial economy and administration.[26]

Nevada 5 argues that the Writ should not issue because Petitioners have a plain, speedy, and adequate remedy in the form of an appeal from a final judgment. Nevada 5 ignores controlling case law and wrongfully assumes that the District Court's order was correct.

As an initial matter, every litigant has the right to appeal from a final judgment. If that were the only standard, the availability of a writ petition would not exist. Nevada 5 cites to *Hansen v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 116 Nev. 650, 658, 6 P.3d 982, 986 (2000) for the proposition that time and energy expended in litigation is insufficient to deviate from Petitioners being able to appeal from a final judgment, but omits the important fact that *Hansen* involved an analysis of a request to stay pending litigation while a writ of prohibition was pending.

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judicial economy and administration favor the granting of the petition") (internal quotation marks omitted).

[26] *Int'l Game Tech.*, 122 Nev. at 142, 127 P.3d at 1096.

This Court recently denied Petitioners' Emergency Motion for Stay, and therefore Nevada 5 suffers no prejudice as it is permitted to continue the litigation while the Writ Petition is pending.

Nevada 5 ignores the purpose of the issue preclusion doctrine as adopted by Nevada: to prevent parties from re-litigating an issue that has already been decided by another court; to prevent multiple litigation causing vexation and expense to the parties; wasting judicial resources; maintaining consistency; avoiding oppression or harassment of the adverse party; and to lend stability to judgments, thus inspiring confidence in the judicial system.[27] If Petitioners are required to defend these claims until a final judgment is reached, the entire purpose of Nevada's adoption of the issue preclusion doctrine would be undermined.

B. The District Court's Previous Interlocutory Rulings are Irrelevant as to the Florida Court's Final Ruling and this Court's Review.

Nevada 5 argues that the District Court previously entertained and ruled upon arguments regarding Nevada 5's standing and therefore the Florida Court's ruling is inapplicable. While the District Court previously ruled that Nevada 5 has standing,

[27] *Univ. of Nev. v. Tarkanian,* 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994) (describing the purpose of res judicata generally, of which issue preclusion is one of two "species"), *holding modified on other grounds by Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.,* 114 Nev. 823, 963 P.2d 465 (1998).

it also ordered that any second amended complaint must be based on a different nucleus of operative facts from that presented in the First Amended Complaint.[28]

Even though the Second Amended Complaint is not based on a different nucleus of operative facts, that is immaterial to the present Writ Petition before this Court. The District Court's prior interlocutory rulings are irrelevant because the operative issue is that the Florida Court issued a final dispositive ruling on Nevada 5's standing. As a result, Nevada 5 is issue precluded from re-litigating an issue that has already been decided against Nevada 5 by another court.[29]

In the Florida Action, the Court there held that "Nevada 5 does not have standing to maintain this action, which is based entirely on a purportedly fraudulently induced purchase of Hygea Holdings stock by Nevada 5's subsidiary, N5HYG."[30] The Court also held that Nevada 5 is further barred from bringing its fraud claims based on N5HYG's stock purchase.[31]

The Florida Court, in its Omnibus Order, held that Nevada 5 lacked standing to maintain any claims arising out of N5HYG's stock purchase, and also that any claims based on fraud are barred by the stock purchase agreement's integration

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[28] (PA Vol. X, PET002333-2352).

[29] *Thompson v. City of N. Las Vegas*, 108 Nev. 435, 439–40, 833 P.2d 1132, 1134–35 (1992).

[30] (PA Vol. XI, PET002627).

[31] (PA Vol. XI, PET002628).

clause. Petitioners raise the same issues of standing and integration here, based on the exact same stock transaction between Hygea and N5HYG and the exact same stock purchase agreement. The Florida Court's decision on these issues precludes Nevada 5 from relitigating the issues in this case.

C. The Florida Court's Ruling Was a Final Decision on the Merits.

Nevada 5 argues that the Florida Court's ruling was not a decision on the merits but was merely a determination on standing.

The phrase "final judgment on the merits" is often used interchangeably with "dismissal with prejudice."[32] The dismissal for failure to state a claim under Rule 12(b)(6) is a valid final judgment on the merits.[33] "When an issue is properly raised ... and is submitted for determination, ... the issue is actually litigated."[34] Whether the issue was necessarily litigated turns on whether "the common issue was ... necessary to the judgment in the earlier suit."[35]

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[32] *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). *See, e.g., Paganis v. Blonstein,* 3 F.3d 1067, 1071 (7th Cir.1993) (noting that "with prejudice" is an acceptable shorthand for "adjudication on the merits"); *see also Classic Auto Refinishing, Inc. v. Marino (In re Marino),* 181 F.3d 1142, 1144 (9th Cir.1999); 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2373 (1973).

[33] *Landers v. Quality Commc'ns, Inc.*, 130 Nev. 1207 (2014). *Martinez v. WVMF Funding, LLC*, 2020 WL 7488082, No. 79597-COA, 477 P.3d 373 (Nev. App. 2020) (same) (unpublished disposition).

[34] *Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 406, 305 P.3d 70, 72 (2013) (quoting *Restatement (Second) of Judgments* § 27 cmt. d (1982)).

[35] *Id*. (quoting *Tarkanian*, 110 Nev. at 598, 879 P.2d at 1191).

The Florida Order was on the merits, in response to a Rule 12(b)(6) motion. As NRCP 41(b) states, "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, *operates as an adjudication upon the merits*."[36] Rule 41(b)'s mandate was echoed in *Zalk-Josephs Co. v. Wells-Cargo*, 81 Nev. 163, 169 (1965), in which this Court held that a dismissal with prejudice pursuant to Rule 12(b) is a judgment on the merits. Florida law holds the same.[37]

Because the issue of standing was actually and necessarily litigated, it was a decision on the merits.[38] Again, Nevada 5 disingenuously attempts to distract this

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[36] *Id*. (emphasis added.)

[37] *Drady v. Hillsborough Cty. Aviation Auth.*, 193 So. 2d 201, 205 (Fla. 2d DCA 1966) ("The dismissal of a cause of action can either be with prejudice, same being an adjudication on the merits, or without prejudice, which is not an adjudication on the merits and is no bar to a subsequent suit on the same cause of action."); *Hardee v. Gordon Thompson Chevrolet, Inc*., 154 So. 2d 174, 178 (Fla. Dist. Ct. App. 1963) (An order finally dismissing a complaint for failure to state a cause of action is an adjudication on the merits); *Smith v. St. Vil*, 714 So. 2d 603, 605 (Fla. Dist. Ct. App. 1998) (same); Fl. R. Civ. Pr. Rule 1.420(b) (A dismissal of an action or claim for failure to comply with the rules or any order of court is an adjudication on the merits unless the dismissal otherwise specifies).

[38] *Glass,* 2020 WL 3604042, No. 78325, 466 P.3d 939 (quoting *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nevada*, 116 Nev. 415, 419, 997 P.2d 130, 133 (2000). *See Swanson Grp. Mfg. LLC v. Jewell*, 195 F. Supp. 3d 66, 73 (D.D.C. 2016) (court dismissed plaintiffs' previous case based on standing, and due to issue preclusion, the plaintiffs were precluded from relitigating their standing again). *See also Cutler v. Hayes*, 818 F.2d 879, 889 (D.C.Cir.1987) ("[p]rinciples of collateral estoppel clearly apply to standing determinations" and a key inquiry "is whether the issue

Court by arguing that the Florida court's ruling was not on the merits. The issue – standing – was actually litigated and adjudicated on the merits. Nevada 5 attempts to insinuate that the Florida Court did not have jurisdiction and therefore its ruling was not on the merits. The basis of the Florida Court's ruling was that Nevada 5 did not have standing to sue on the underlying facts in any forum. Jurisdiction of the Florida Court was not the issue.

The Florida Court dismissed Nevada 5's claims ***with prejudice***, and a dismissal with prejudice is an adjudication on the merits for purposes of res judicata. The Florida court did not specify that the ruling was not on the merits, and therefore the ruling is on the merits pursuant to both Nevada and Florida law.

D. Florida Has the Same or Similar Laws to Nevada with Respect to (1) Standing Pursuant to Securities Laws and (2) Fraudulent Inducement.

Nevada 5 argues that the Florida Court's ruling on standing is far more restrictive than Nevada. Nevada 5 conveniently omits the relevant statutes, as a comparison of the relevant Florida statute and the Nevada statute demonstrates no material differences.[39] Nevada 5 did not purchase the stock and was not a party to the SPA, and therefore it has no standing under either Florida law or Nevada law.[40]

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presented in the two proceedings is substantially the same.") (internal quotation marks and footnote citation omitted).

[39] *Compare* Fla. Stat. Ann. § 517.211 *with* NRS 90.660.

[40] *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc.*, 460 F. Supp. 2d 1222, 1242 (D. Nev. 2006) ("Section 90.660 expressly limits recovery under Section 90.570 and

Further, both Florida and Nevada hold that integration clauses do not bar claims for alleged oral fraudulent inducement.[41] Yet, the Florida Court correctly determined that Nevada 5 cannot recover in fraud for alleged misrepresentations contradicted in a later contract.[42] Moreover, this Court has concluded that when a fraudulent inducement claim contradicts the express terms of the parties' integrated contract, it fails as a matter of law.[43]

While Nevada 5 attempts to argue that Nevada law differs from Florida law with respect to standing under securities laws and integration clauses, it has provided no support for its arguments, because there is none. Nevada 5 cannot baselessly assert that the Florida Court's determination was pursuant to Florida law and assume

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other provisions to parties who purchase a security. Plaintiff does not dispute that the plain language of the statute limits its scope to those who purchase securities. Rather, it asserts that the Court should infer that the legislature intended to include sellers as well within the ambit of the statute. The Court finds the plain language controlling and declines Plaintiff's invitation take make such an interpretive leap. Therefore, the Court concludes that Plaintiff lacks standing to assert his claims for violation of Nevada security laws.")

[41] *Compare Mejia v. Jurich*, 781 So. 2d 1175 (Fla. Dist. Ct. App. 2001) ("Existence of a merger or integration clause, which purports to make oral agreements not incorporated into the written contract unenforceable, does not affect oral representations which are alleged to have fraudulently induced a person to enter into the agreement.") *with Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (1992) ("Integration clauses in agreements do not bar claims for misrepresentation").

[42] (PA Vol. XI, PET002518).

[43] *Rd. & Highway Builders v. N. Nev. Rebar*, 128 Nev. 384, 386, 284 P.3d 377, 378 (2012).

that a determination under Nevada law would be different. Nevada 5 has provided no authority demonstrating a conflict between the two states. Indeed, the laws are very similar amongst both states on these issues.

E. It is Irrelevant that Nevada 5 Included Additional Causes of Action in this Lawsuit for Violations of Nevada Law and Michigan Law.

Issue preclusion applies "even though the causes of action are substantially different, if the same fact issue is presented."[44] Issue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in the prior case.[45] Issue preclusion applies to prevent relitigation of a specific issue that was decided in a previous suit between the parties, even if the second suit is based on different causes of action and different circumstances.[46]

> Under the doctrine of issue preclusion, "once an issue is actually and necessarily determined by a court of competent jurisdiction, ***that determination is conclusive in subsequent suits based on a different cause of action***." *Shapley v. Nevada Bd. of State Prison Commissioners*, 766 F.2d 404, 408 (9th Cir.1985). The issue in the prior action must be identical to the issue for which preclusion is sought. *Id*. Only a final judgment that is "sufficiently firm" can be

[44] *LaForge*, 116 Nev. at 420, 997 P.2d at 134 (quoting *Clark v. Clark*, 80 Nev. 52, 56, 389 P.2d 69, 71 (1964).

[45] *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 259, 321 P.3d 912, 916–17 (2014); *White v. City of Pasadena*, 671 F.3d 918, 926 (9th Cir.2012) ("Issue preclusion ... bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim") (citation omitted).

[46] *Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713–14 (2008).

> issue preclusive. *See Luben Indus. v. United States*, 707 F.2d 1037, 1040 (9th Cir.1983). The party against whom issue preclusion is asserted must have litigated that issue in an earlier action and lost. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 650, 58 L.Ed.2d 552 (1979).[47]

Nevada 5 argues that while some of the fraud claims are the same, other fraud claims pursuant to Nevada and Michigan law differentiate the cases. Despite being untrue and irrelevant, the underlying facts are the same, which is all that matters.

Nevada 5 does not even attempt to differentiate the substance of the Second Amended Complaint in the Florida action with the Second Amended Complaint in this action, because it cannot. The underlying facts are the same as they both involve fraud allegations based upon N5HYG's stock purchase. The Florida Court's ruling is telling and binding.

> Because the alleged misrepresentations claimed by Nevada 5 concern the precise topic of express representations and warranties in the "SPA", the "SPA's", integration clause bars Nevada 5's claims arising from these alleged misrepresentations.[48]

The Florida Court, in its Omnibus Order, held that Nevada 5 lacked standing to maintain any claims arising out of N5HYG's stock purchase, and also that any claims based on fraud are barred by the SPA's integration clause. Petitioners raise the same issues of standing and integration here, based on the exact same stock transaction between Hygea and N5HYG and the exact same stock purchase

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[47] *Robi v. Five Platters, Inc*., 838 F.2d 318, 326 (9th Cir. 1988) (emphasis added).

[48] (PA Vol. XI, PET002513-2519).

agreement. The Florida Court's decision on these issues precludes Nevada 5 from relitigating the issues in this case.

F. It is Irrelevant that Petitioners Are Not Defendants in the Florida Action.

For issue preclusion to attach, the issue decided in the prior proceeding must be identical to the issue presented in the current proceeding, and have been actually litigated and determined by a valid and final judgment in which the determination was essential to the judgment.[49] The issue preclusion doctrine is premised on "an underlying confidence that the result achieved in the initial litigation was substantially correct."[50]

> Although we require that "the party against whom [issue preclusion] is invoked [be] a party, or in privity with a party, to the prior adjudication," *Dodge v. Cotter Corp.,* 203 F.3d 1190, 1198 (10th Cir.2000), ***issue preclusion can be invoked by any third party***. *See Sil–Flo, Inc. v. SFHC, Inc.,* 917 F.2d 1507, 1521 (10th Cir.1990) (allowing new defendant to assert issue preclusion against plaintiff that brought two claims on essentially the same issue); Restatement (Second) of Judgments § 29 at 291 (***"A party precluded from relitigating an issue with an opposing party ... is also precluded from doing so with another person...."***). ***To decide otherwise would be to "[p]ermit[ ] repeated litigation of the same issue as long as the supply of unrelated defendants holds out," a practice that would "reflect[ ] either the aura of the gaming table or a lack of discipline and of disinterestedness on the part of the lower courts."*** *Blonder–Tongue Labs. v. Univ. of Ill. Found*., 402 U.S. 313,

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[49] *Holt v. Reg'l Tr. Servs. Corp*., 127 Nev. 886, 891, 266 P.3d 602, 605 (2011). *In re Sandoval*, 126 Nev. 136, 140, 232 P.3d 422, 424 (2010) (internal quotations omitted).

[50] *Standefer v. United States*, 447 U.S. 10, 23, n. 18, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980).

329, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971) (internal quotation marks omitted).[51]

It is irrelevant that Petitioners are not defendants in the Florida Action. The determinative issue is that Nevada 5 is a party to the Florida Action, and the Florida Court's ruling precludes Nevada 5 from bringing an action against any party for fraudulent misrepresentations of Hygea's financial performance and intent to go public. Nevada 5 has no standing to make these claims against anybody, including but not limited to Petitioners.

G. It is Irrelevant that Petitioners Signed the SPA as Personal Guarantors.

It also is entirely irrelevant that Petitioners signed the SPA. Nevada 5 argues that Petitioners availed themselves to this Court for fraud-based claims due to their signing of the SPA as guarantors. Not only is that incorrect, but Nevada 5 is also not a party to the SPA, which is why all of its claims were dismissed with prejudice in the Florida Action.

Petitioners are not seeking to dismiss N5HYG's contract-based claims based on issue preclusion, so the venue clause in the SPA does not matter. It is clear from the Florida Court's ruling that it makes no difference that the other former officers and directors did not sign the SPA. It is Nevada 5 that does not have standing to maintain any claims arising out of N5HYG's stock purchase.

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[51] *Park Lake Res. Ltd. Liab. v. U.S. Dep't Of Agr.*, 378 F.3d 1132, 1138 (10th Cir. 2004) (emphasis added).

Specifically, "Nevada 5 does not have standing to maintain this action, which is based entirely on a purportedly fraudulently induced purchase of Hygea Holdings stock by Nevada 5's subsidiary, N5HYG."[52] The SPA was between Hygea and N5HYG, and not Nevada 5; the stock at issue was held at all times by N5HYG, and never by Nevada 5; and N5HYG was the stockholder of record, and not Nevada 5. Therefore, the Florida court ruled that Nevada 5 cannot bring any claims based on the stock transaction at issue against ***any*** party.

H. No Exceptions to the Issue Preclusion Doctrine Apply.

Nevada 5 argues that even if this Court considers *Glass*, it should apply an exception to the issue preclusion doctrine.[53] In *Glass*, this Court held that issue preclusion applies to standing.[54] Nevertheless, this Court detailed the exceptions to the general rule of issue preclusion pursuant to the Restatement (Second) of Judgments § 28 (1982):

> [A]n issue may be relitigated if "[t]here is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest, ... or (c) because the party sought to be precluded ... did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action."[55]

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[52] (PA Vol. XI, PET002517).

[53] *Glass,* 2020 WL 3604042, No. 78325, 466 P.3d 939.

[54] *Id.*

[55] *Id*.

In *Glass*, this Court found the exceptions apply because the lender sought to prove standing for purposes of judicial foreclosure, which is sufficiently different from opposing a quiet title action such that issue preclusion should not apply.[56] This Court went on to state that allowing the plaintiff:

> to quiet title to the property, in which there has been no adjudication on the underlying indebtedness, is clearly counter to public interest. Moreover, we conclude that the time-demand, burden, and incentives of a lender seeking to prove standing for purposes of judicial foreclosure differ sufficiently from the lender's position in opposing a quiet title action, such that issue preclusion should not apply. Thus, we conclude the doctrine of issue preclusion does not preclude SPS from asserting it has standing to enforce the Note.[57]

Neither of these exceptions apply here. Nevada 5 urges this Court to adopt one of the exceptions because the issues of standing and the integration clause were decided in Florida based on differing Florida law. However, as detailed herein, Nevada 5 cannot demonstrate that Florida law differs from Nevada law on those topics.

Nevada 5 also argues that it neither had an opportunity nor a reason to adjudicate in Florida its standing to pursue Petitioners in Nevada. But Nevada 5 misses the mark. The only difference between Petitioners and the defendants in the Florida Action is that Petitioners signed personal guarantees. The determinative

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[56] *Id*.

[57] *Id*.

issue is that Nevada 5 is a party to the Florida Action, and the Florida Court's ruling precludes Nevada 5 from bringing an action against any party for fraudulent misrepresentations of Hygea's financial performance and intent to go public.

Nevada 5 clearly had the opportunity to adjudicate, and did, its standing to pursue fraud claims pursuant to the SPA. As a result, issue preclusion bars Nevada 5 from making these claims, irrespective of whether against Petitioners or the defendants in the Florida Action. Nevada 5 has no standing, and no exceptions to the issue preclusion doctrine apply.

III. CONCLUSION

For the foregoing reasons, this Court should issue a writ of prohibition instructing the District Court to abstain from entertaining Nevada 5's claims against Petitioners beyond taking the steps necessary to dismiss the case or, in the alternative, a writ of mandamus compelling the District Court to dismiss Nevada 5's claims.

Dated: September 10, 2021

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CERTIFICATE OF COMPLIANCE

1. I certify that this reply 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 reply brief complies with the page-or type-volume limitations of NRAP 32(a)(7) and NRAP 21(d) because, excluding the parts of the reply brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,998 words.

3. Finally, I hereby certify that I have read this reply 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 reply brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the reply 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 reply brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: September 10, 2021

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VERIFICATION

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

I, Kory L. Kaplan, declare:

I am counsel for Petitioners named in the foregoing Reply in support of Writ Petition and know the contents thereof; the pleading is true to my own knowledge, except as to those matters stated on information and belief, and as to such matters, I believe them to be true. This verification is made pursuant to NRAP 21(a)(5). Pursuant to NRS 15.010(1) and NRAP 21(a)(5), Petitioners are absent from the county where I reside and the facts within the foregoing Petition are within my knowledge.

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

Executed September 10. 2021

KORY L. KAPLAN, ESQ.

SUBSCRIBED AND SWORN to before me
this 10th day of September, 2021.

NOTARY PUBLIC in and for said
County and State

ALLISON HARDY
Notary Public-State of Nevada
APPT. NO. 19-1844-2
My Appt. Expires 02-11-2023

CERTIFICATE OF SERVICE

I hereby certify that this ***REPLY IN SUPPORT OF WRIT OF PROHIBITION, OR IN THE ALTERNATIVE, WRIT OF MANDAMUS*** was filed electronically with the Nevada Supreme Court on September 10, 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:

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