IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE, DEPT. 27,

Respondents,

And

DANIEL E. WOLFUS,

Real Parties in Interest.

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A-17-756971-B

PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

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RULE 26.1 DISCLOSURE

The undersigned associated counsel of record certifies that the following are persons or entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson are individuals and currently represented by the law firm of HOLLAND & HART LLP before the district court and this Court.

2. Kenneth A. Brunk is an individual and currently represented by the law firms of MOYE WHITE LLP and SANTORO WHITMIRE before the district court and this Court.

3. Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein are individuals and are currently represented by the law firm of GREENBERG TRAURIG, LLP before the district court and this Court.

Dated this 11th day of June 2018.

/s/ David Freeman

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding under NRAP 17(a)(10) and (11) because it raises a principal issue of statewide public importance and of first impression involving Nevada common law. The writ petition does not fall into one of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

I. INTRODUCTION AND STATEMENT OF RELIEF SOUGHT

This Petition is necessitated by the district court's wrongful exercise of subject matter jurisdiction over Plaintiff's derivative claims on behalf of a Canadian corporation. The district court ignored controlling authority and failed to explain how it suddenly could exercise subject matter jurisdiction over Plaintiff's derivative claims when it concluded mere months ago that it did not have such authority.

The Petition also presents a novel issue of first impression in Nevada as to the district court's allowing Plaintiff to proceed with what are commonly referred to as "holder" claims—claims alleging that a party was wrongfully induced to hold rather than purchase or sell stock—despite the fact that "holder" claims have never been recognized in Nevada, have been expressly rejected in federal securities cases, and categorically rejected in the vast majority of other jurisdictions in the United States.

First, as the district court correctly concluded in dismissing Plaintiff's *First Amended Complaint for Damages* (the "FAC"), the district court lacks subject matter jurisdiction over Plaintiff's claims for breach of fiduciary duty and aiding and abetting Midway's breach of fiduciary duty. These claims, as alleged in Plaintiff's *Second Amended Complaint for Damages* (the "SAC"), are inherently derivative in nature under the Direct Harm test adopted by this Court in *Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 59, 401 P.3d 1100 (2017), and British Columbia law vests exclusive jurisdiction in the Supreme Court of British

Columbia to adjudicate derivative claims. Because the district court lacks subject matter jurisdiction over Plaintiff's derivative fiduciary duty claims, the district court's decision to deny the *Motion to Dismiss the Second Amended Complaint* and the joinders thereto (collectively, the "Motion") and allow the derivative claims to proceed in the SAC was clearly erroneous, in complete disregard of the law and contradicts its prior decision.

Second, Plaintiff's purported "holder" claims have never been recognized in Nevada. Claims that are based upon a party who alleges it was induced to hold onto stock, as opposed to sell stock, are commonly referred to as "holder" claims. Plaintiff's claims for fraud and negligent misrepresentation are asserted under a "holder" theory of liability. However, the vast majority of jurisdictions in the United States have explicitly rejected "holder" claims because they, among other reasons, involve speculative allegations concerning hypothetical transactions, promote improper windfalls, and fail to allege damages proximately caused by the alleged misstatements. Nevertheless, the district court disregarded the majority view and authorized Plaintiff to pursue such "holder" claims without any explanation as to why it concluded such claims were recognizable under Nevada law. The district court's decision to allow Plaintiff to proceed with his "holder" claims presents an issue of first impression in Nevada, was clearly erroneous and not supported by the law in this jurisdiction or the vast majority of other jurisdictions.

The district court's implicit legal determinations that (1) it had subject matter jurisdiction over Plaintiff's derivative claims and (2) that "holder" claims are cognizable in Nevada, were not only clearly erroneous, but they require extraordinary relief via a writ of prohibition or mandamus as they cannot be corrected on appeal. Without issuance of a writ, Petitioners will be required to litigate claims the district court has absolutely no authority to hear, much less remedy. At that point, the harm from the district court's misapplication of the governing legal principles will be complete and incurable. The only possible means of correcting the district court's legal errors is by immediate issuance of a writ by this Court.

Moreover, writ relief is necessary because the district court's recognition of a "holder" theory of liability presents an issue of first impression, is not supported by Nevada law, and the district court's apparent refusal to apply the rule rejecting "holder" claims, as promulgated by the vast majority of other jurisdictions, is simply egregious. This Court should clarify Nevada law with respect to "holder" claims in order to promote judicial economy and sound administration in future cases.

Accordingly, Petitioners respectfully request that this Court (1) issue a writ of prohibition or mandamus, (2) vacate the district court's erroneous denial, in part, of the motion to dismiss, and (3) instruct the district court to grant the motion because

it lacks subject matter jurisdiction over Plaintiff's derivative claims and cannot recognize a "holder" theory of liability under Nevada law.

II. ISSUES PRESENTED BY THIS WRIT PETITION

1. Whether the district court erred in exercising subject matter jurisdiction over Plaintiff's claims for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty on behalf of a Canadian corporation when British Columbian law vests exclusive jurisdiction in the Supreme Court of British Columbia to adjudicate derivative claims.

2. Whether the district court erred in recognizing Plaintiff's "holder" claims for common law fraud and negligent misrepresentation when such "holder" claims have never been recognized in Nevada and have been categorically rejected by the vast majority of jurisdictions in the United States.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Midway.

Non-party Midway Gold Corp. ("Midway") was a publicly traded Canadian Corporation incorporated under the Company Act of British Columbia[1] with its

[1] The Business Corporations Act of British Columbia ("BCA") replaced the former Company Act of British Columbia on March 29, 2004.

principal executive offices located in Englewood, Colorado.[2] IV PA0611 ¶ 23.[3] Midway was engaged in the business of exploring and mining gold, primarily from mines located in Nevada and Washington. IV PA0613 ¶ 30. Midway filed for Chapter 11 bankruptcy on June 22, 2015. IV PA0634 ¶ 95.

Plaintiff, a California resident, became an outside director of Midway in November 2008. IV PA0607 ¶ 7; PA0612 ¶ 26. In 2009, Plaintiff became Chairman of the Board and the Chief Executive Officer of Midway, serving in both capacities until May 18, 2012 when he was replaced by Defendant Kenneth Brunk ("Brunk"). IV PA0612 ¶ 27.

Plaintiff began purchasing common stock of Midway in the open market in February 2008. IV PA0613 ¶ 29. Plaintiff also acquired Midway stock option grants pursuant to an employee stock option plan on January 7 and September 10, 2009. *See* V PA0854 (SEC Form 4 for January 7, 2009); PA0856 (SEC Form 4 for

[2] Plaintiff has not brought any claims or lawsuits arising out of the same set of facts against Midway or its Board of Directors in the provincial courts of British Columbia, the place of Midway's incorporation.

[3] All subsequent citation to Petitioner's Appendix will simply refer to the volume number and the page number or numbers referenced—e.g., "VI PA0603-PA0748."

September 10, 2009).[4] As of May 1, 2012, Plaintiff and his family owned over 1,629,117 shares of Midway common stock. IV PA0613 ¶ 29.[5]

B. The 2011 Pan Mine Feasibility Study.

At the time Plaintiff became Chairman of the Board and CEO, Midway had properties in the exploratory stage where gold mineralization had been identified. IV PA0613 ¶ 30. One of these properties was the Pan Mine property located at the northern end of the Pancake mountain range in Western Pine County, Nevada. IV PA0614 ¶ 32. Prior to May 2010, Midway decided to convert from a purely exploration company into a gold mining production company using the Pan Mine project as its initial production mine. IV PA0614 ¶ 35.

In November 2011, when Plaintiff was still Midway's Chairman and CEO, Midway reported by press release filed with the SEC the results of a feasibility study for the Pan Project prepared by an independent contractor, Gustavson Associates (the "2011 Pan Mine Feasibility Study"). IV PA0617 ¶ 44; PA0670. On December 20, 2011, Midway filed the 2011 Pan Mine Feasibility Study with the SEC. IV

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[4] This Court may take judicial notice of the SEC Forms 4. NRS 47.130; *In re MGM Mirage Sec. Litig.*, 2:09-CV-01558-GMN, 2013 WL 5435832, at *4 (D. Nev. Sept. 26, 2013) (citing *In re Amgen Inc. Sec. Litig.*, 544 F. Supp. 2d 1009, 1023-24 (C.D. Cal. 2008)) (observing that the court may take judicial notice of SEC filings).

[5] As of December 23, 2014, and after the sale of some shares (at a profit), the combined shareholdings of Plaintiff and/or his assignors were 2,402,251 shares of Midway common stock. IV PA0613 ¶ 29.

PA0617 ¶ 45. The 2011 Pan Mine Feasibility Study is attached as Exhibit 1 to the SAC. IV PA0652-683.

C. The Hale Transaction.

Plaintiff claims that, as CEO and Chairman of the Board of Midway, he was primarily involved in securing capital for Midway to fund its operations. IV PA0619-620 ¶ 49. In 2012, while Plaintiff was still Midway's Chairman and CEO, Hale Capital Partners, LP ("HCP") offered to secure a $70 million private placement of preferred stock. *Id.* Plaintiff purportedly opposed the proposed HCP transaction, while Brunk was an ardent supporter. *Id.*

On May 18, 2012, Midway's Board of Directors voted to terminate Plaintiff as its Chairman and CEO and replaced him with Brunk. IV PA0620-621 ¶ 50. Plaintiff, however, continued to serve as a director until June 2013, continued to receive board packages consisting of all information provided to all directors for Board meetings, and participated in the Board meetings until his departure in June 2013. *Id.*

On November 21, 2012, Midway announced via a press release and a Schedule 8-K filed with the SEC, that the Company had reached an agreement whereby certain investor entities (INV-MID, LLC, as lead investor, and EREF-MID II, LLC and HCP-MID, LLC, as investors) would acquire $70 million in Series A Preferred Shares of Midway for $70 million, pursuant to certain stipulations and

agreements. IV PA0622 ¶ 54. This transaction closed on December 13, 2012. IV PA0622-623 ¶ 55. That day, Martin M. Hale, Jr. ("Hale"), HCP's CEO and portfolio manager, was appointed to Midway's Board of Directors, and Nathanial Klein ("Klein") resigned his directorship.[6] IV PA0619-620 ¶ 49; PA0622-23 ¶ 55. Klein was reelected to Midway's Board of Directors on June 20, 2013, IV PA0623 ¶ 58, but later resigned from the Board on November 4, 2014. IV PA0634 ¶ 92. Trey Anderson ("Anderson") was appointed to serve as a director, filling the spot vacated by Klein.[7] *Id.*

D. Midway's Alleged Misrepresentations and Omissions.

Plaintiff claims that, by December 13, 2013, Midway's management and its Board (including the D&O Defendants[8]) knew the Pan Mine was being built and operated in ways that were materially different from those assumed in the 2011 Pan Mine Feasibility Study, but that Midway's directors and officers failed to inform

[6] Klein, a Vice President at HCP, was previously appointed to Midway's Board of Directors in August 2012. IV PA0621 ¶ 51.

[7] Hale, Klein, and Anderson are collectively referred to as the "Hale Defendants." The district court dismissed INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC from the underlying action with prejudice.

[8] Richard D. Moritz ("Moritz"), Bradley J. Blacketor ("Blacketor"), Timothy Haddon ("Haddon"), Richard Sawchak ("Sawchak"), John W. Sheridan ("Sheridan"), Frank Yu ("Yu"), Roger A. Newell ("Newell") and Rodney D. Knutson ("Knutson") are collectively referred to herein after as the "D&O Defendants."

investors of the material impact on cash flows as a result of those differences. IV PA0625-626 ¶ 65. Plaintiff generally alleges that "from and after May 18, 2012, Wolfus carefully read and considered all press releases by Midway and the public filings made by Wolfus usually within a day or two following their release" in order to decide whether to purchase additional shares or sell his shares. IV PA0620-621 ¶ 50; PA0626-627 ¶ 66; PA0632-633 ¶ 87; PA0644-645 ¶ 129; PA0645 ¶ 130; PA0645-646 ¶ 131. Plaintiff alleges he was primarily concerned with the status of the Pan Mine project and the likelihood the project would profitably mine gold and be revenue positive. *Id.* Plaintiff claims he determined from those public statements and the absence of the 2013 Undisclosed Facts[9] and 2014 Undisclosed Facts[10] that

[9] Plaintiff alleges Brunk, Moritz, Blacketor, Newell, Sheridan, Yu, Knutson, Hale and Klein failed to disclose that (1) Midway was unable to raise sufficient cash to complete the Pan Mine project in the manner set forth in the 2011 Pan Mine Feasibility Study, as well as fund on-going operations until the Pan Mine project produced sufficient revenues to cover these expenses; (2) the Hale Defendants blocked any consideration of the sale of Midway's material assets to generate additional revenue; (3) Midway did not seek the proper permits and did not have the necessary facilities to process the gold solution once leaching was completed; and (4) there would be a considerable delay before the facilities were constructed and permitted for operations. IV PA0625-626 ¶ 65.

[10] Plaintiff alleges Brunk, Blacketor, Sawchak, Sheridan, Yu, Haddon, Hale and Klein failed to disclose that Midway (1) had a mining contractor poised to begin loading ore directly on the leach pads at the Pan Mine despite Midway not having a qualified person on site to supervise the loading; (2) did not have the permits authorizing it to deviate from the 2011 Pan Mine Feasibility Study; and (3) did not have the necessary facilities to process the gold solutions once leaching had been completed. IV PA0632 ¶ 86.

profitable mining operations would result in a substantial increase in the value of his Midway shares. IV PA0644-646 ¶¶ 129-136. The SAC does not contain any allegations about any public statements by Midway from December 1, 2014 until the announcement that it was filing for bankruptcy on June 22, 2015.

E. Plaintiff Exercises His Stock Options in January and September 2014.

In late December 2013 and in early January 2014, Plaintiff alleges he "needed to decide whether to exercise some of his Midway stock options which would soon be expiring." IV PA0626-627 ¶ 66. Plaintiff alleges that "in order to make this investment decision, Wolfus carefully reviewed and considered Midway's press releases and public filings, primarily those that were issued after he ceased to be Midway's Chief Executive Officer."[11] *Id.*

The only stock purchase alleged to have been made by Plaintiff in 2014 was the ***exercise of stock options*** granted to Plaintiff pursuant to an employee stock option plan on January 7 and September 10, 2009. IV PA0613 ¶ 29, PA0626-627 ¶ 66, PA0628 ¶ 69, PA0632-633 ¶ 87; V PA0854 (SEC Form 4 for January 7, 2009); PA0856 (SEC Form 4 for September 10, 2009). On January 23, 2014, Plaintiff

[11] Notably, the SAC does not specify which press releases or SEC filings Plaintiff reviewed at that time other than "all". Nor does Plaintiff point to any specific misrepresentation by any Defendant contained in the filings upon which he purportedly relied.

exercised stock options by purchasing 200,000 shares at $0.56/share for $112,000 Canadian Dollars ($100,636 USD). IV PA0637 ¶ 102. At that time, Midway's common stock was selling at $1.27 US dollars per share and its price was rising. *Id.*

Plaintiff claims that following his exercise of stock options on January 23, 2014, "thereafter and on a daily basis checked the market price of Midway's stock." IV PA0628 ¶ 70. He further contends that when Midway's stock reached a high on February 14, 2014, of $1.39, he decided to continue to hold his shares. *Id.* The SAC also alleges that, at the time he made this decision to exercise his expiring options and not to sell his shares, he was unaware of the 2013 Undisclosed Facts or that the Pan Mine project was not fully permitted and that, had he known, he and his family members would have sold all of the Midway shares at that time. IV PA0628 ¶ 70; PA0638 ¶ 106; PA0640 ¶ 111; PA0641 ¶ 117.

In late August and early September 2014, Plaintiff alleges that he again "needed to decide whether or not to exercise some of his options which would soon be expiring." IV PA0632-633 ¶ 87. Plaintiff claims to have reviewed the press releases and SEC filings "primarily those that were issued after he purchased shares in January 2014."[12] *Id*.

[12] Notably, the SAC does not specify which press releases or SEC filings Plaintiff reviewed at that time. Nor does Plaintiff point to any specific misrepresentation by any Defendant contained in the filings upon which he purportedly relied.

On September 5, 2014, Plaintiff contends he notified Midway, once again, of his intent to ***exercise some of the stock options*** granted to him in 2009 pursuant to Midway's stock option plan. IV PA0632-633 ¶ 87; V PA0854 (SEC Form 4 for January 7, 2009); PA0856 (SEC Form 4 for September 10, 2009).[13] On September 19, 2014, Plaintiff consummated his stock option exercise by purchasing 1,000,000 shares directly from Midway at a purchase price of $0.86/share for $860,000 Canadian Dollars ($783,778 USD). IV PA0633 ¶ 89; PA0639 ¶ 107.[14]

F. The Midway Bankruptcy.

The SAC generally alleges that from mid-September 2014 until the announcement of the voluntary petition for bankruptcy on June 22, 2015, Midway's press releases and SEC filings provided only favorable information concerning the Pan Mine project. IV PA0633-634 ¶¶ 90-94. As a result of the Midway Bankruptcy, all or virtually all of Midway's assets have been sold and there are no funds or recoveries by any common shareholders of Midway. Thus, the value of any common stock held by any Midway shareholder, once Midway filed bankruptcy, became worthless. IV PA0634 ¶ 96.

[13] *See supra* n.3.

[14] At the time of this exercise, Midway's common stock was trading at US$1.01.

G. The First Amended Complaint.

On June 30, 2017, Plaintiff, a California resident and former Chairman and CEO of Midway, a bankrupt Canadian corporation with its principal place of business in Englewood, Colorado, filed the FAC[15] against Midway's former officers, directors, and certain of Midway's investors, claiming the Defendants[16] violated California state securities law, breached fiduciary duties, aided and abetted Midway's breach of fiduciary duty, committed fraud and made negligent misrepresentations to the investing public when Midway purportedly failed to disclose certain material facts regarding the operations of its Pan Mine project in certain press releases and SEC filings. *See, generally,* II PA0136-269. Plaintiff claimed he relied on Midway's public disclosures when, on two occasions in 2014, he exercised stock options granted to him years earlier at below market prices. II PA0154-155 ¶¶ 60-63; PA0159-160 ¶¶ 80-82; PA0328 (SEC Form 4 for January 7, 2009); PA0330 (SEC Form 4 for September 10, 2009). Relying on the false clarity of hindsight, Plaintiff alleged that had he known certain allegedly undisclosed facts, he would not have exercised the stock options in 2014; rather, he would have

[15] On June 15, 2017, Plaintiff initiated the underlying action by filing a *Complaint for Damages*; however, the Complaint was amended before a responsive pleading was filed pursuant to NRCP 15(a). I PA0001-135.

[16] The D&O Defendants, Brunk and Hale Defendants are collectively referred to hereinafter as the "Defendants" or "Petitioners."

omnisciently sold his common stock when Midway's stock reached its peak. II PA0164-166 ¶ 101 and 106.

H. The District Court Correctly Dismisses the FAC For Lack of Subject Matter Jurisdiction.

On January 5, 2018, the district court entered an order granting Defendants' Motion to Dismiss the Amended Complaint without prejudice for lack of subject matter jurisdiction. See Order Granting Defendants' Motions to Dismiss Amended Complaint Without Prejudice (filed Jan. 5, 2018) (the "Order Dismissing the FAC"). See, generally, III PA0586-602. The Court correctly concluded that Plaintiff's claims, which were premised on harm caused by the reduction in value of shares of stock, were inherently derivative in nature under the Direct Harm test adopted by the Nevada Supreme Court in *Parametric Sound Corp.*, 133 Nev. Adv. Op. 59. III PA0598-599 ¶¶ 33-38. The Court further concluded it lacked subject matter jurisdiction because, under the internal affairs doctrine, British Columbian law vests exclusive jurisdiction in the Supreme Court of British Columbia to adjudicate Plaintiff's derivative claims. III PA0599-600 ¶¶ 39-42. Nevertheless, the district court granted Plaintiff leave to file a second amended complaint. III PA0602.

I. The Second Amended Complaint.

On February 5, 2018, Plaintiff filed the SAC alleging the same five causes of action against Defendants. *See, generally,* IV PA0603-748. However, in the SAC, Plaintiff's third iteration of the complaint, Plaintiff alleges his claims are direct, not

derivative, under a "holder" theory of liability and that non-party Midway and each of the Defendants is liable for inducing Plaintiff to exercise his stock options in January 2014 and September 2014 and inducing Plaintiff and his assignors, to hold and not sell all their shares in February 2014. IV PA0606-607 ¶ D-E. By way of the SAC, Plaintiff sought to recover the amounts he paid to exercise the expiring stock options in addition to the market value of the stock he and his family owned in February 2014 when Midway's shares traded at their peak. IV PA0641 ¶ 117, PA0643 ¶ 130. Defendants moved to dismiss the SAC. V PA0749-856.

J. The District Court Enters the Order Ignoring the Issue of Subject Matter Jurisdiction and Granting, In Part, and Denying, In Part, The Motion to Dismiss the Second Amended Complaint.

On May 18, 2018, the Court issued a Minute Order dismissing Plaintiff's California state securities claims with prejudice, dismissing certain Defendants with prejudice for lack of personal jurisdiction, and ordering jurisdictional discovery. *See, generally,* VI PA1031-1033. Without providing any oral or written findings or reasoning whatsoever, the district court reversed its position from the Order Dismissing the FAC and found that Plaintiff's claims for (1) breach of fiduciary duty, (2) aiding and abetting a breach of fiduciary duty, (3) fraud and (4) negligent misrepresentation were "sufficiently pled" in the SAC. VI PA1032. Counsel for Defendants was instructed to prepare and submit the Order of the Court. VI PA1033.

On June 6, 2018, the district court entered an order granting in part[17] and denying in part the Defendants' Motions to dismiss and joinders (the "Order Regarding the SAC"). VI PA1044-1056. The district court was completely silent throughout oral argument, in its Minute Order, and in the Order Regarding the SAC as to why it had suddenly reversed itself, concluding it now has subject matter jurisdiction over Plaintiff's derivative claims for breach of fiduciary duty and aiding and abetting, when it previously concluded that it did not have such authority. *See, generally*, VI PA0989-1030; PA1031-1033; PA1044-1056. The district court was also silent as to why it authorized Plaintiff to proceed with its fraud and negligent misrepresentation claims under a "holder" theory of liability when "holder" claims have never been recognized in Nevada and categorically rejected in the vast majority of other jurisdictions in the United States. *See id.*

IV. REASONS WHY THE WRIT SHOULD ISSUE

A. Standard of Review.

This Court has original jurisdiction to issue writs of prohibition and mandamus. *Friedman v. Eighth Judicial Dist. Court*, 127 Nev. 842, 853, 264 P.3d

[17] The district court correctly dismissed ***with prejudice*** Plaintiff's claim as a matter of law that Defendants had violated certain California state securities laws finding, under the plain language of Cal. Corp. Code 25017(e), neither the exercise of the right to purchase shares nor the issuance of securities pursuant thereto is an offer or sale. The sale or offer is deemed to occur at the time of the offer or sale of the right to purchase the share.

1161, 1169 (2011) (citing Nev. Const. art. 6, § 4). A writ may issue "in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.330. "A writ of mandamus is available 'to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station,' or to control manifest abuse of discretion." *State of Nevada v. Dist. Ct. (Anzalone)*, 118 Nev. 140, 146, 42 P.3d 233, 237 (2002) (quoting NRS 34.160). "A writ of prohibition 'serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction.'" *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 676, 263 P.3d 224, 227 (2011) (*citing Stephens Media v. Dist. Ct.*, 125 Nev. 849, ____, 221 P.3d 1240, 1246 (2009) (*quoting Sonia F. v. Dist. Ct.*, 125 Nev. 38, ____, 215 P.3d 705, 707 (2009)); *see also* NRS 34.320. This Court reviews issues involving subject matter jurisdiction under a *de novo* standard of review. *Castillo v. United Fed. Credit Union*, 134 Nev. Adv. Op. 3, 409 P.3d 54, 57 (Nev. 2018).

1. The Writ Must Issue to Prevent the District Court From Improperly Exercising Subject Matter Jurisdiction When it Has None.

"[A] writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction." *Bd. of Review, Nevada Dep't of Employment, Training & Rehab., Employment Sec. Div. v. Second Judicial Dist. Court in & for County of Washoe*, 396 P.3d 795, 797 (Nev. 2017); *see also State v. Eighth Judicial*

Dist. Court ex rel. County of Clark, 118 Nev. 140, 146–47, 42 P.3d 233, 237 (2002) (quoting NRS 34.320) (a writ of prohibition may issue to "arrest [] the proceedings of any tribunal ... when such proceedings are without or in excess of the jurisdiction of such tribunal.").

Here, the district court exercised subject matter jurisdiction over Plaintiff's derivative breach of fiduciary duty claims despite previously recognizing it was without jurisdiction. *Compare* VI PA1052 ¶ 24 *with* III PA598-599 ¶¶ 33-38. As demonstrated below, no matter how Plaintiff attempts to explain them, the breach of fiduciary duty claims are inherently derivative in nature under the Direct Harm test adopted by this Court in *Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 59, 401 P.3d 1100 (2017), and British Columbian law vests exclusive jurisdiction in the Supreme Court of British Columbia to adjudicate derivative claims. Because the district court lacks subject matter jurisdiction over Plaintiff's derivative fiduciary duty claims, the district court's decision to deny the Motion and allow the claims to proceed in the SAC was clearly erroneous, in complete disregard of the law and contradicts its prior decision.

"Prohibition lies to restrain the district court's unauthorized exercise of jurisdiction[,]" *Westpark Owners' Ass'n v. Dist. Ct.*, 123 Nev. 349, 356, 167 P.3d 421, 426 (2007), especially when invoking jurisdiction upsets the dictates of nationwide public policy. *Mineral County v. State, Dep't of Conserv.*, 117 Nev. 235,

243, 20 P.3d 800, 805 (2001). Without issuance of a writ, Petitioners will be required to litigate claims the district court has absolutely no authority to hear, much less remedy. At that point, the harm from the district court's misapplication of the governing legal principles will be complete and incurable. The only possible means of correcting the district court's legal errors is by immediate issuance of a writ by this Court. While discretionary, issuing the requested writ to ensure that the district court complies with subject matter jurisdiction jurisprudence is entirely proper. *See Friedman*, 127 Nev. at 854; *see also Bd. of Review, Nevada Dep't of Employment, Training & Rehab., Employment Sec. Div. v. Second Judicial Dist. Court*, 396 P.3d 795, 797 (Nev. 2017) (concluding that a petition for extraordinary relief was properly before it where the "case presents an issue of subject matter jurisdiction, necessitating our immediate consideration, and warrants discussion based on the merits.").

2. The Writ Should Issue Because It Presents Novel and Important Issues That Can Only be Addressed on Writ Review.

Writ relief is also available to review a district court's refusal to dismiss a lawsuit where an important issue of law needs clarification, and considerations of sound juridical economy and administration militate in favor of granting the petition. *Beazer Homes Nevada, Inc. v. District Court*, 120 Nev. 575, 579, 97 P.3d 1132 (2004); *see also Buckwalter v. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (recognizing that this Court may "entertain a writ petition challenging the

denial of a motion to dismiss . . . where, as here, the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law."); *see also Parametric Sound Corp.*, 401 P.3d at 1102 (granting a petition for a writ of mandamus directing the district court to dismiss derivative claims after clarifying Nevada law on the distinction between direct and derivative claims).

Plaintiff's purported fraud and negligent misrepresentation claims, which are based on a "holder" theory of liability (IV PA0606 ¶¶ C-D), have never been recognized in Nevada. Furthermore, the vast majority of jurisdictions in the United States have explicitly rejected "holder" claims because they, among other things, involve speculative allegations concerning hypothetical transactions, improper windfalls, and fail to allege damages proximately caused by the alleged misstatements. Nevertheless, the district court disregarded the majority view and authorized Plaintiff to pursue such "holder" claims without offering any explanation as to why it concluded such claims were suddenly recognizable under Nevada law, and thereby rendering Nevada an "outlier" among the majority of jurisdictions. Writ relief is necessary because the district court's recognition of a "holder" theory of liability presents an issue of first impression, is not supported by Nevada law, and the district court's apparent refusal to apply the rule rejecting "holder" claims, as promulgated by the vast majority of other jurisdictions, is egregious. This Court

should clarify Nevada law with respect to "holder" claims in order to promote judicial economy and sound administration in future cases.

3. Writ Relief is Warranted Because the District Court Lacks Subject Matter Jurisdiction Over Plaintiff's Derivative Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty Claims.

The district court exceeded the bounds of its jurisdictional authority when it failed to dismiss Plaintiff's breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims in the Order Regarding the SAC. Plaintiff's claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty are derivative claims related to the Defendants' internal management of Midway, a Canadian corporation. As a result, the internal affairs doctrine requires the district court to apply the law of the jurisdiction where the corporation was incorporated (here, British Columbia, Canada), to determine whether it has subject matter jurisdiction to hear the claims. The Business Corporations Act ("BCA"), which governs British Columbia corporations such as Midway, provides that the Supreme Court of British Columbia has exclusive jurisdiction over derivative claims involving British Columbia corporations. Accordingly, the district court has no subject matter jurisdiction over Plaintiff's derivative breach of fiduciary duty claims and committed reversible error by failing to dismiss the same.

a) Nevada Recognizes the Internal Affairs Doctrine

The Nevada Supreme Court has held that the "most significant relationship test governs choice of law issues in tort actions unless another, more specific section of the Second Restatement applies to the particular tort." *Gen. Motors Corp. v. Eighth Judicial Dist. Court*, 122 Nev. 466, 134 P.3d 111, 116 (2006) (emphasis added). With regard to claims of breach of fiduciary duty by the directors or officers of a corporation, there is a more specific section that applies, namely, section 309. Restatement (Second) of Conflict of Laws § 309 (1971). Section 309 states that, in general, "the local law of the state of incorporation will be applied to determine the existence and extent of a director's or officer's liability to the corporation, its creditors and shareholders . . . ." *Id.* This rule embodies the widely accepted choice-of-law principle often referred to as the "internal affairs doctrine."[18] The internal affairs doctrine is well established and generally followed throughout this country,

[18] *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 224 (1997); *see also Batchelder v. Kawamoto*, 147 F.3d 915, 920 (9th Cir. 1998) (noting that, under the internal affairs doctrine, "the rights of shareholders in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated"); *Vaughn v. LJ Int'l, Inc.*, 94 Cal. Rptr. 3d 166, 225 (Cal. Ct. App. 2009) (applying internal affairs doctrine in concluding that the British Virgin Islands Business Companies Act governed appellant's standing to bring his derivative claims against British Virgin Islands corporation and its directors in California).

including in Nevada.[19] Because Midway is a British Columbian corporation, Plaintiff's common law claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty are governed by Canadian law.

b) The BCA Vests Exclusive Jurisdiction in the Supreme Court of British Columbia to Adjudicate Plaintiff's Derivative Claims.

The district court lacks subject matter jurisdiction to hear Plaintiff's derivative claims because exclusive jurisdiction is vested in the Supreme Court of British Columbia pursuant to Canadian law. Specifically, Plaintiff's derivative claims fail to satisfy two separate and necessary preconditions for bringing an action on behalf of a British Columbian corporation: (1) providing notice to the directors prior to initiating the action; and (2) obtaining judicial permission from the Supreme Court of British Columbia to bring the derivative action prior to filing suit.[20] *See* BCA §§ 232 & 233.

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[19] *See, e.g., Fagin v. Doby George, LLC*, 525 Fed. App'x 618, 619 (9th Cir. 2013) (affirming a Nevada federal district court's dismissal of a shareholder derivative action for lack of subject matter jurisdiction where, after applying the internal affairs doctrine, plaintiffs failed to obtain leave to assert said claims from Canada's Yukon Supreme Court); *see also Dictor v. Creative Mgmt. Servs., LLC.*, 223 P.3d 332, 335 (Nev. 2010) (noting that Nevada has adopted the RESTATEMENT (SECOND) OF CONFLICT OF LAWS as the relevant authority for its choice-of-law jurisprudence in tort cases); *see also Hausman v. Buckley*, 299 F.2d 696, 702 (2d Cir. 1962) (internal affairs doctrine "is well established and generally followed throughout this country").

[20] As set forth above, the internal affairs doctrine requires the district court to look to Canadian law.

For derivative claims involving corporations that are incorporated in British Columbia, the BCA requires the shareholder complainant to obtain leave of the Supreme Court of British Columbia[21] prior to asserting derivative claims against the company's directors. *See* BCA § 232(2). The Supreme Court of British Columbia may grant the complainant leave to assert the derivative claims if, among other things, notice of the application for leave has been provided to the company. *See* BCA § 233(1). In other words, a mandatory precondition to bringing a derivative suit under the BCA is to apply for and obtain leave of the Supreme Court of British Columbia to do so. Failure to comply requires dismissal of the action. United States courts, including the District of Nevada and the Ninth Circuit, have similarly recognized they lack jurisdiction to hear shareholder claims against Canadian corporations and their directors. *E.g.*, *Fagin v. Doby George, LLC*, 525 Fed. App'x 618 (9th Cir. 2013) (affirming dismissal from the District of Nevada for lack of subject matter jurisdiction).[22]

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[21] The BCA states that derivative proceedings must be heard by "the court," which is defined as "the Supreme Court." BCA § 1(1). The B.C. Interpretation Act clarifies that the term "Supreme Court" refers only to the "Supreme Court of British Columbia." B.C. Interpretation Act, R.S.B.C. (1996), chapter 238 § 29.

[22] *See also Taylor v. LSI Logic Corp*., 715 A.2d 837 (Del. 1998), *overruled on other grounds by Martinez v. E.I. DuPont de Nemours & Co., Inc.*, 86 A.3d 1102, 1112 n. 42 (Del. 2014); *Locals 302 & 612 of Int'l Union of Operating Engineers - Employers Const. Indus. Ret. Tr. v. Blanchard*, 04 CIV. 5954 (LAP), 2005 WL 2063852 (S.D.N.Y. Aug. 25, 2005); *Hollinger Int'l, Inc. v. Hollinger Inc.*, 2007 WL 1029089, *10 (N.D. Ill. Mar. 29, 2007) (denying motion to amend complaint as

Here, Plaintiff failed to make application to and did not obtain leave from the Supreme Court of British Columbia to bring a derivative action on behalf of Midway. Because British Columbia law applies to Plaintiff's claims, and because Sections 232 and 233 of the BCA requires Plaintiff to seek leave of the Supreme Court of British Columbia prior to bringing derivative claims the district court cannot properly exercise jurisdiction over Plaintiff's derivative claims.[23]

c) Plaintiff's Fiduciary Duty Claims are Derivative Under the Direct Harm Test.

Plaintiff asserts claims for breach of fiduciary duty and aiding and abetting Midway's breach of fiduciary duty against the D&O Defendants, the Hale Defendants, and Brunk arising out their purported failure to disclose certain facts regarding the progress (or lack thereof) of the Pan Mine project prior to Plaintiff's stock option exercises in 2014. IV PA0640-641 ¶¶ 114-115. Plaintiff's breach of fiduciary duty claims, as repleaded in the SAC, remain derivative under the Direct

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futile because plaintiff "has not adequately explained why this Court has jurisdiction to hear its rescission claims premised on the [Canada Business Corporations Act], when the CBCA itself provides that those claims must be heard only in certain enumerated Canadian courts").

[23] Alternatively, the Ninth Circuit has found when dealing with similar issues of exclusive jurisdiction rendered under the analogous Alberta (Canada) Business Corporations Act, derivative claims must be dismissed for failure to state a claim. *Seismic Reservoir 2020, Inc. v. Paulsson*, 785 F.3d 330, 335-36 (9th Cir. 2015). Under either scenario, pursuant to NRCP 12(b)(1) for lack of subject matter jurisdiction or NRCP 12(b)(5) for failure to state a claim, Plaintiff's derivative claims do not survive a motion to dismiss. *See infra* Section III(B).

Harm test adopted by the Nevada Supreme Court in *Parametric Sound Corp. v. Eighth Judicial Dist. Court,* 133 Nev. Adv. Op. 59, 401 P.3d 1100 (2017).

Plaintiff goes to great lengths in the SAC to argue that none of his claims are brought derivatively on behalf of Midway. *See* IV PA0604-607 ¶¶ 2-6; PA0640-641 ¶ 114. But Plaintiff's failure to label his claims "derivative" is of no moment. The Court may not simply accept a plaintiff's conclusory allegation of direct harm. *See, e.g., Feldman v. Cutaia, ("Feldman I")* 956 A.2d 644, 659-60 (Del. Ch. 2007), *aff'd* ("Feldman II") 951 A.2d 727, 733 (Del. 2008) (recasting a derivative claim as direct is "disfavored by Delaware courts"). Courts determining whether a claim is direct or derivative must "look to the body of the complaint, not to the plaintiff's designation or stated intention." *Id.*; *see also Sweeney v. Harbin Elec., Inc.*, No. 3:10-cv-00685-RCJ-VPC, 2011 WL 3236114, **2-3 (D. Nev. July 27, 2011).

While Plaintiff alleges in the SAC that he does ***not*** seek damages for "diminution," that is exactly the type of damages he seeks. Despite Plaintiff's attempt to replead his claims, the SAC still alleges diminution in value of Plaintiff's stock holdings as a result of the Defendants' purported concealment of corporate mismanagement, which diminution would have been suffered by every other Midway shareholder. It is undisputed that a diminution in stock value is an injury

that does not give a stockholder standing to sue on his own behalf.[24] In such a case, the wrong is "entirely derivative, since [a]ny devaluation of stock is shared collectively by all the shareholders, rather than independently by the plaintiff or any other individual shareholder." *Lee v. Marsh & McLennan Companies, Inc.*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 24, 2007 WL 4303514 (N.Y. Sup. Ct. 2007);[25] *see also In re Amerco Derivative Litig.*, 127 Nev. 196, 226, 252 P.3d 681, 702 (2011) (shareholders in derivative action alleged that Board's actions prevented corporation from "realizing the amount of profit it would have obtained" causing the company ***and*** shareholders to suffer harm).

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[24] *See Manzo v. Rite Aid Corp.*, 28 Del. J. Corp. L. 819, 2002 WL 31926606, at *6 (Del.Ch. Dec. 19, 2002) (to "the extent that plaintiff was deprived of accurate information upon which to base investment decisions, and as a result, received a poor rate of return on her Rite Aid shares, she experienced an injury suffered by all Rite Aid shareholders in proportion to their pro rata share ownership," this would give rise to a derivative claim.); *In re Imaging3, Inc.*, 634 F. App'x 172, 175 (9th Cir. 2015) ("The claims in Vuksich's state court litigation [for stock loss] do not allege that Vuksich suffered an injury distinct from that suffered by other shareholders, and none of his claims would allow him to recover any damages directly.").

[25] Canadian law on these issues is analogous. *See, e.g.*, *Goldex Mines Ltd. v. Revill*, [1974] O.J. No. 2245 (finding that a personal or direct action is one "not arising simply because the corporation itself has been damaged, and as a consequence of the damage to it, its shareholders have been injured."); *Burt v. McLaughlan*, [1992] A.J. No. 841 (noting the "clear acceptance" in Canadian law that "an action by a shareholder to recover for the decrease in the value of his shares is a derivative action rather than a personal action").

In *Parametric*, the Nevada Supreme Court concluded 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)?'", 401 P.3d at 1107-08 (quoting *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d. 1031, 1033 (Del. 2004)). The Direct Harm test does not permit Plaintiff to personally and directly recover for the diminution in value caused by purported corporate mismanagement. The Direct Harm test provides that such claims can only be asserted derivatively.[26] Just as the district court correctly concluded with regard to the allegations in Plaintiff's FAC, the fiduciary duty allegations of the SAC describe classic injury inflicted on the corporation and identifies losses common to all Midway shareholders who held Midway stock at the time of its bankruptcy filing.[27] *See* III PA0598 ¶ 37. Nothing

[26] *See Manzo v. Rite Aid Corp.*, 28 Del. J. Corp. L. 819, 2002 WL 31926606, at *6 (Del. Ch. Dec. 19, 2002) (to "the extent that plaintiff was deprived of accurate information upon which to base investment decisions, and as a result, received a poor rate of return on her Rite Aid shares, she experienced an injury suffered by all Rite Aid shareholders in proportion to their pro rata share ownership," this would give rise to a derivative claim.); *In re Imaging3, Inc.*, 634 F. App'x 172, 175 (9th Cir. 2015) ("The claims in Vuksich's state court litigation [for stock loss] do not allege that Vuksich suffered an injury distinct from that suffered by other shareholders, and none of his claims would allow him to recover any damages directly.").

[27] *See Rivers v. Wachovia Corp*, 665 F.3d 610 (4th Cir. 2011) (citing *Kagan v. Edison Bros. Stores, Inc.*, 907 F.2d 690, 692 (7th Cir. 1990) ("[T]he nub of the

in this regard changed with the filing of the SAC. In the SAC, Plaintiff still seeks a recovery for injuries to the corporation, which resulted in the loss of the market value of his stock. Accordingly, the Plaintiff's fiduciary duty claims are derivative and the district court made reversible error when it failed to dismiss the claims for lack of standing.

Finally, it would be an unfair result if Plaintiff, a former corporate insider, is permitted to maintain a direct action to circumvent the predicate shareholder derivative suit procedural requirements of Rule 23.1 to recover his investment in Midway. *See generally* A.L.I., Principles of Corporate Governance: Analysis and Recommendations, § 7.01 (1992). In addition, disguising derivative claims as direct is a particularly appealing strategy to those plaintiffs who seek to circumvent the recovery priorities of corporate creditors established in the bankruptcy code.[28]

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problem is that the investors' injury flows not from what happened to them ... but from what happened to [the company]."); *Capital Z Financial Services Fund II, L.P. v. Health Net, Inc.,* 43 A.D.3d 100, 109, 840 N.Y.S.2d 16, 23 (1st Dep't 2007) (plaintiffs' allegation of loss of entire amount invested in stock to finance corporation's purchase of another corporation stated derivative not direct claim because plaintiff's claim would require showing that corporation in which they invested went bankrupt, making their loss only incidental to the "financial ruin" stemming from acquisition).

[28] *See Kagan v. Edison Bros. Stores, Inc*., 907 F.2d 690, 692 (7th Cir. 1990) (noting that direct recovery improperly circumvents creditors in bankruptcy proceedings); *Mid–State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333, 1335–37 (7th Cir. 1989) (same). Even irrespective of the bankruptcy context, allowing direct recovery when the action is properly a derivative one fails to protect corporate creditors because the proceeds avoid the legal ordering of creditors and investors.

Because the breach of fiduciary duty claims are derivative, the internal affairs doctrine required the district court to apply the law of British Columbia to determine whether it has subject matter jurisdiction to hear the derivatively asserted claims. The BCA expressly provides that the Supreme Court of British Columbia has exclusive jurisdiction over derivative claims involving British Columbia corporations such as Midway. The district court, nevertheless, exceed its jurisdictional powers when it usurped the authority of the Supreme Court of British Columbia by denying the Motion to the extent it authorized Plaintiff to bring the derivative claims in a Nevada court. As a result, it is imperative that this petition be issued the district court prevented from overstepping its legal bounds.

4. Writ Relief is Warranted Because Nevada Has Never Recognized "Holder" Claims and the Vast Majority of Jurisdictions in the United States Have Rejected the Same.

The district court's erroneous decision to allow Plaintiff to proceed with his novel "holder" claims is unsupported by the law because "holder" claims have never been recognized in Nevada and have been categorically rejected in the vast majority of other jurisdictions in the United States. In the SAC, Plaintiff asserted claims for common law fraud and negligent misrepresentation committed by non-party

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See Kagan, 907 F.2d at 692. ("Recovery by the corporation ensures that all of the participants—stockholders, trade creditors, employees and others—recover according to their contractual and statutory priorities.")

Midway and each of the Defendants for inducing Plaintiff to exercise his stock options in January 2014 and September 2014 and inducing Plaintiff and his assignors, to hold and not sell all their shares in February 2014. *See* IV PA0644-649 ¶¶ 127-147. However, the State of Nevada has never recognized a "holder" theory of liability for such claims.

Furthermore, the vast majority of jurisdictions in the United States have categorically rejected holder claims. *See, e.g., Tradex Global Master Fund SPC, Ltd v. Titan Capital Group III, LP*, 944 N.Y.S.2d 527, 529 (N.Y. App. Div. 2012) ("under New York law, such a 'holder claim' would be precluded"); *Lagermeier v. Boston Scientific Corp.*, 2011 WL 2912642 at *6 (D. Minn. 2011) ("Nor is such a [holder] claim cognizable under Minnesota common law"); *The Calibre Fund, LLC v. BDO Seidman, LLP*, 2010 WL 4517099 at *5 (Conn. Super. 2010) ("A decision not to sell but to hold onto securities may be regrettable, but such decisions must always be made without the power of hindsight... . failure to sell claims are 'too speculative to be actionable"); *WM High Yield Fund v. O'Hanlon*, 2005 WL 6788446 at *13 (E.D. Pa. 2005) ("the Court declines to find that the Pennsylvania Supreme Court would find a cause of action in fraud for investors who were allegedly injured by holding securities"); *Rivers v. Wachovia Corp.*, 665 F.3d 610, 619 (4th Cir. 2011) (holding that holder claims are "too speculative to litigate" as they "involve only a hypothetical transaction"). The Supreme Court of the United

States has also refused to recognized "holder" claims in the context of federal securities laws. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729-31 (1975)("Standing to bring a claim under SEC Rule 10b-5 is "limited to actual purchasers or sellers of securities."). The district court should have likewise rejected Plaintiff's attempt to allege "holder" claims because California law does not apply to a Canadian publicly-traded corporation headquartered in Colorado, and there is no legal citation in the record before the district court suggesting that a "holder" theory of liability would be viable in Canada.

But even if the district court had concluded, despite its silence during oral argument and in the Order Regarding the SAC, that Plaintiff was authorized to pursue "holder" claims under California law, (1) Plaintiff's claims arising out of the exercise of stock options are not "holder" claims; (2) Plaintiff failed to sufficiently allege reliance and causation for both fraud and negligent misrepresentation claims; and (3) Plaintiff failed to plead scienter with the required specificity under Rule 9(b).

a) California Law Does Not Apply to Plaintiff's "Holder" Claims

The district court completely ignored choice of law in its Order. In recognizing a "holder" claim, however, the Court appears to have implicitly concluded that California's substantive law governs Plaintiff's claims because he resides in California. This is patently erroneous. Under such a conclusion, each jurisdiction's substantive decision to recognize "holder" claims would apply only to

its own residents. The natural result would be a "race to the bottom," because each jurisdiction could deprive only its own residents of such claims. No jurisdiction, as a matter of substantive law, could uniformly prohibit such claims. For this reason, only the law of the state of incorporation can establish "reliable and efficient corporate laws," *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 181 (Del. 2015), that protect the control of a corporation's board of directors over litigation based on injury to the corporation. As set forth above, because Midway is a Canadian corporation, with its principal place of business in Colorado, Canadian substantive law governs Plaintiff's fraud and misrepresentation claims, not California law.

b) Plaintiff's Claims Arising Out of the Exercise of Stock Options are Not "Holder" Claims Under Small v. Fritz

Even if California's "holder" cases apply, (they do not), Plaintiff's claims related to the exercise of stock options are not "holder" claims. California law defines a "holder" claim as "a cause of action by persons wrongfully induced to *hold* stock instead of selling it." *Small v. Fritz*, 30 Cal.4th 167, 171, 65 P.3d 1255 (Cal. 2003) (emphasis in original). Therefore, the fact that Plaintiff *acquired* stock via exercise of the stock options negates any claim of "holding." *Id.* at 184, 65 P.3d at 1265 (distinguishing holder actions from other suits in which investors claim damages from the purchase or sale of stock). Because the exercise of stock options

cannot form the basis for a "holder" claim, the district court clearly erred in allowing Plaintiff to maintain his "holder" claims related to the exercise of his stock options.

c) Even if the Court Were To Apply California Law, Plaintiff Fails to Sufficiently Allege Reliance or Causation

Even if California's "holder" cases apply, the district court ignored the requirement that the Plaintiff must allege the elements of his fraud and negligent misrepresentation claims under a "holder" theory of liability with the particularity required by California law. Plaintiff alleges that he decided to hold his Midway shares after he exercised his stock options in reliance upon Midway's allegedly false statements in press releases and SEC filings concerning the Pan Mine's prospects, a so-called "holder's action," based on *Small v. Fritz*, 30 Cal.4th 167, 184 (2003). A complaint alleging fraud and negligent misrepresentation in a "holder action" must also be pleaded with sufficient particularity, meaning that the plaintiff must plead "facts which show how, when, where, to whom, and by what means the representations were tendered." *Lazar*, 12 Cal. 4th at 645, 909 P.2d at 981 (quotation omitted); *see also Small*, 30 Cal. 4th at 184, 65 P.3d at 1265 (holding that complaint for negligent misrepresentation in a holder action must be "pled with the same specificity required in a holder's action for fraud."); NRCP 9(b) ("[I]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). *See also Anderson v. Aon Corp.,* No. 06 C 06241, 2011 WL 4565758, at *4 (N.D. Ill. Sept. 29, 2011), *aff'd*, 674 F.3d 895 (7th Cir. 2012).

In *Small*, the California Supreme Court specifically recognized the risk of meritless and vexatious strike suits being filed in order to extract a settlement, and the risk that such cases would be dependent on uncorroborated oral testimony. 30 Cal. 4th at 177, 180, 184. The Court held that such risks mandate a "device to separate meritorious and non-meritorious cases, if possible in advance of trial," and therefore require plaintiffs to show specific reliance on the challenged statements. *Id.* at 184. ***Thus, the court expressly limited "holder claims" to "stockholders who can make a bona fide showing of actual reliance upon the misrepresentations."*** *Id.* at 184-85. Conclusory assertions that plaintiff relied on the alleged misrepresentations are insufficient. As the Court stated:

> In a holder's action a ***plaintiff must allege specific reliance*** on the defendant's representations: for example, that if the plaintiff had read a truthful account of the corporation's financial status the ***plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place***. The plaintiff ***must allege actions***, as distinguished from unspoken and unrecorded thoughts and decisions, that would ***indicate that the plaintiff actually relied*** on the misrepresentations. Plaintiffs who cannot plead with sufficient specificity to show a bona fide claim of actual reliance do not stand out from the mass of stockholders who rely on the market....

Id. (emphasis added).

(1) Plaintiff's "Holder" Claim for Fraud Was Insufficiently Plead As a Matter of Law.

The district court erred by not dismissing Plaintiff's claims for failure to allege the elements of his fraud "holder" claim with the requisite particularity. Plaintiff's

primary allegations of fraud are that the officers and directors of Midway (other than himself) knew the Pan Mine was being built and operated in ways that were materially different from those assumed in the Pan Mine 2011 Study, but the D&O Defendants, the Hale Defendants and Brunk did not inform investors of the material impact on cash flows as a result of those differences.[29] Apart from his assertions that Midway omitted material facts regarding the development and operation of the Pan Mine in its press releases and SEC filings, Plaintiff identifies no other circumstances or facts, which support an inference of intent or scienter relevant to Plaintiff's claims. Plaintiff lists certain "Undisclosed Facts" allegedly known by Defendants but not disclosed to the public generally or to him (IV PA0625-627 ¶¶ 65-66; PA0628 ¶ 70; PA0632 ¶ 86), but Plaintiff has not alleged how any of the "Undisclosed Facts" demonstrate Defendants' knowledge of any alleged misrepresentations. Even more significantly, Plaintiff fails to explain with specificity how each of these alleged omissions contributed to Midway's filing of bankruptcy; each appears to relate more to Midway's purported mismanagement than fraud. Midway's mismanagement (as opposed to its fraud) is insufficient to

[29] In California, the elements of fraud are: (1) misrepresentation; (2) knowledge of falsity (or "scienter"); (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 173, 132 Cal. Rptr. 2d 490, 65 P.3d 1255, 1258 (2003) (*citing Lazar v. Superior Court,* 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981, 984 (1996)).

support allegations in a "holder" action. *See Anderson*, 614 F.3d at 367 (explaining that any alleged fraud merely "deferred the time when the stock's price accurately reflected the value of Aon's business").

Plaintiff also failed to sufficiently allege that he relied on any false representations regarding the Pan Mine. Plaintiff merely alleges he relied on Midway's press releases and SEC filings "primarily those which were issued after he ceased to be Midway's Chief Executive Officer" (IV PA0626-627 ¶ 66) in choosing to exercise his stock options on January 23, 2014 at $.56/share when the market price was $1.27 and "its price was rising." IV PA0637 ¶ 102. In order to successfully plead "a bona fide claim of actual reliance," a plaintiff in a holder action "must allege specific reliance on the defendant's representations: for example, that if the plaintiff had read a truthful account of the corporation's financial status the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place." *Small*, 30 Cal.4th at 184, 65 P.3d at 1265.

Courts addressing California's holder's claims since *Small* have noted the difficulty plaintiffs face in meeting this standard. *See Anderson v. Aon Corp.*, 614 F.3d 361, 367 (7th Cir. 2010) (remanding holder's action for application of California law while noting that under Small plaintiff had "a difficult road ahead" to show actual reliance and causal connection between reliance and alleged injury); *see*

also In re Nat'l Century Fin. Enters., 846 F. Supp. 2d 828, 884 (S.D. Ohio 2012) ("holder claims are generally disfavored and recognized only in limited circumstances"). Like the plaintiff in *Anderson,* Plaintiff failed to show the required causal connection between his reliance on Midway's representations and his injury.

In *Anderson*, the Northern District of Illinois, applying California law on remand, dismissed plaintiff's claim because he did not "sufficiently explain when exactly he relied on th[e] representations; how many [] shares he would have sold, had he known of the company's financial troubles; or when he would have executed that sale." *Anderson*, 2011 U.S. Dist. LEXIS 111217, at *19 (N.D. Ill. Sept. 29, 2011). The Court further noted that under insider trading laws, plaintiff would not be permitted to trade ahead of the stock price decline that allegedly would have been caused by the release of accurate information. *Id*. at *19-20; *Anderson*, 614 F.3d at 367 (same). On a second appeal, the Seventh Circuit affirmed dismissal with prejudice for failure to "explain how [plaintiff] could have avoided a loss on the shares he held, had [defendant] made an earlier disclosure." *Anderson v. Aon Corp*., 674 F.3d 895, 897 (7th Cir. 2012).

Just like the plaintiff in *Anderson*, Plaintiff here insists that he "carefully followed the public announcements and filings by Midway" (IV PA0632-633 ¶ 87), and recites almost every public announcement by Midway following his departure as CEO. But Plaintiff does not sufficiently explain when exactly he relied on those

representations to hold his stock; how many Midway shares he would have sold had he known the impact on the company's financials, or when he would have executed each such sale. Nor does he sufficiently explain how he could have known to sell his shares in February 2014 when Midway stock hit an all-time high. In this case, Plaintiff does not stand apart from the millions of other stockholders who lost money when Midway's declared bankruptcy in 2015. As such, he cannot maintain a claim against Defendants based on the pleading requirements set forth in *Small v. Fritz*.

(2) Plaintiff's "Holder" Claim for Negligent Misrepresentation Was Insufficiently Plead As a Matter of Law.

Similarly, the district court erred by not requiring Plaintiff to allege the elements of his negligent misrepresentation "holder" claim with the requisite particularity.[30] First, the SAC fails to allege a misrepresentation of a past or existing material fact by any of the Defendants. Rather, Plaintiff merely lists certain "Undisclosed Facts" allegedly known by Defendants but not disclosed to the public

[30] To state a claim for negligent misrepresentation, the plaintiff must establish: "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC,* 158 Cal. App. 4th 226, 243, 70 Cal. Rptr. 3d 199, 213 (Cal. Ct. App.2007) (citing *Shamsian v. Atlantic Richfield Co*., 107 Cal. App. 4th 967, 983, 132 Cal.Rptr.2d 635, 647 (Ct.App.2003)). Under California law, the tort of negligent misrepresentation is a "species of deceit." *See Bily v. Arthur Young & Co*., 3 Cal. 4th 370, 407, 11 Cal. Rptr. 2d 51, 834 P.2d 745 (1992).

generally or to him (IV PA0625-627 ¶¶ 65-66; PA0628 ¶ 70; PA0362 ¶ 86). There are no allegations regarding which statements, if any, in Midway's press releases and SEC filings are misleading. Nor does Plaintiff sufficiently allege how any Defendant made such alleged misrepresentations of a past or existing material fact "without reasonable ground for believing it to be true." On these grounds alone, the claim for negligent misrepresentation should be dismissed. *Cansino v. Bank of America*, 224 Cal. App. 4th 1462, 1469, 169 Cal. Rptr. 3d 619 (2014) ("Statements or predictions regarding future events are deemed to be mere opinions which are not actionable.") (citation omitted); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 835, 121 Cal. Rptr. 2d 703 (2002) ("An essential element of a cause of action for negligent misrepresentation is that the defendant must have made a misrepresentation as to a past or existing material fact.") (citation omitted).

Second, Plaintiff's allegations regarding alleged omissions or "Undisclosed Facts" (or failure to disclose by Defendants) cannot be counted as false representations for purpose of the negligent misrepresentation claim. While the courts in some states have held that failure to disclose where there is a duty to disclose may suffice to support a negligent misrepresentation claim, the California Court of Appeal held in *Wilson v. Century 21 Great Western Realty*, 15 Cal. App. 4th 298, 18 Cal. Rptr. 2d 779 (1993) that based on the California statutory language, negligent misrepresentation specifically requires a "positive assertion." *Id.* at 306,

18 Cal. Rptr. 2d 779; *see also In re Daisy Sys.*, 97 F.3d at 1181; *Byrum v. Brand*, 219 Cal. App. 3d 926, 942, 268 Cal. Rptr. 609 (1990).

Even if the district court erroneously concluded California law applied to Plaintiff's fraud and negligent misrepresentation claims, the district court failed to require Plaintiff to sufficiently allege the elements of his "holder" claims, much less with the particularity required by California law.

V. CONCLUSION

For all the foregoing reasons, this Court should (1) issue a writ of prohibition or mandamus, (2) vacate the district court's erroneous denial, in part, of the motion to dismiss and joinders thereto, and (3) instruct the district court to grant the Motion because it lacks subject matter jurisdiction over Plaintiff's derivative claims and cannot recognize a "holder" theory of liability under Nevada law.

Dated this 11th day of June 2018.

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VERIFICATION

I, David J. Freeman, declare:

1. I am an associate for the law firm of HOLLAND & HART LLP and counsel for Defendants Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson, who are among the Petitioners in the above-entitled case;

2. I verify that I have read the foregoing **PETITION FOR WRIT OF PROHIBITION, OR ALTERNATIVELY MANDAMUS** that the same is true to the best of my own knowledge, except for those matters therein stated on information and belief, and, as to those matters, I believe them to be true.

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

EXECUTED this 11th day of June, 2018, in Clark County, Nevada.

/s/ David Freeman
DAVID J. FREEMAN

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 14.0.7173.5000 (32-bit), in Times New Roman 14-point font, double spaced.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 13,188 words.

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 this 11th day of June 2018.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 11th day of June, 2018, a true and correct copy of **PETITION FOR WRIT OF PROHIBITION, OR ALTERNATIVELY MANDAMUS** was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System or by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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