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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS,

Plaintiff,

v.

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; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25.

Defendants.

CASE NO.: A-17-756971-B
DEPT. NO.: XXVII

REPLY MEMORANDUM IN SUPPORT OF THE D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Defendants 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") (collectively, the

"D&O Defendants"), by and through their attorneys of record, HOLLAND & HART LLP, hereby submit this reply memorandum (the "Reply") in support of the D&O Defendants' Motion to Dismiss Amended Complaint *First Amended Complaint for Damages* (the "Motion").

The Reply is supported by the attached Memorandum of Points and Authorities, together with the declarations, the exhibits, the pleadings and papers on file herein, and any oral argument this Court may allow.

DATED this 25th day of October, 2017.

By /s/ David J. Freeman
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I.

INTRODUCTION

Plaintiff's Opposition to Motions to Dismiss (the "Opposition" or "Opp.") does not even address the arguments and authorities in the D&O Defendants' Motion to Dismiss (the "Motion") establishing that this Court lacks subject matter jurisdiction. In their Motion, the D&O Defendants demonstrated that because the claims are derivative, this Court lacks subject matter jurisdiction because (1) British Columbia law endows its Supreme Court with exclusive jurisdiction over derivative claims involving British Columbia corporations and (2) the derivative claims would otherwise be the property of Midway's bankruptcy estate under the Bankruptcy Code and the terms of Midway's *Second Amended Joint Chapter 11 Plan of Liquidation*. Instead of addressing these points, Plaintiff merely denies his claims are "derivative" and simply states that he can proceed because his claims are direct. But this Court may not simply accept Plaintiff's conclusory allegation of direct harm. Plaintiff's claims are derivative under the Direct Harm test recently adopted by the Nevada Supreme Court in *Parametric Sound Corp. v. Eighth Judicial Dist. Court* because Plaintiff's alleged injury—the diminution in the value of his stock—is not independent of any injury suffered by all other Midway shareholders.

Plaintiff's Opposition further ignores the explicit language of the California Corporations Code, which states that the purchase or sale of a security in the context of a stock option is deemed to occur as a matter of law at the time the options are granted—not when the options are ultimately exercised. Nor can the D&O Defendants be liable as "control persons" under the California statute because the Complaint fails to plead a requisite primary violation. Moreover, California state securities law cannot be applied extraterritorially to a Canadian corporation where the underlying transaction did not occur in California. Thus, even if the California state securities law claim is not derivative, it still fails as a matter of law and must be dismissed.

Finally, the Court lacks personal jurisdiction over the D&O Defendants (other than Mr. Yu). Plaintiff fails to meet his burden of demonstrating that the Defendants' actions giving rise to the claims occurred in or were directed toward Nevada. Plaintiff cannot impute to the D&O Defendants the contacts of Midway, a Canadian corporation with mining operations in Nevada. Accordingly, the Court should dismiss the Complaint for lack of personal jurisdiction over the D&O Defendants.

II.

LEGAL ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction Because Plaintiff's Claims Are Derivative On Behalf Of A Bankrupt, Canadian Corporation.

1. Plaintiff Lacks Standing to Assert Derivative Claims.

Plaintiff fails to (and indeed cannot) refute his lack of standing to assert ***derivative*** claims on behalf of Midway.[1] As explained in the Motion, Plaintiff lacks standing to assert ***derivative*** claims on behalf of Midway under the internal affairs doctrine[2] because British Columbia law endows its Supreme Court with exclusive jurisdiction over ***derivative*** claims involving British Columbia corporations. *See* Business Corporations Act ("BCA") §§ 232 & 233).[3] Moreover, this Court lacks subject matter jurisdiction over the ***derivative*** claims because

[1] Plaintiff's failure to contest his lack of standing to assert ***derivative*** claims on behalf of Midway should be deemed an admission. *See* EDCR 2.20 ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.").

[2] Plaintiff does not contest that this case concerns the internal management of a Canadian corporation and that, as a result, the internal affairs doctrine requires this Court to apply the law of the jurisdiction where the corporation was incorporated (British Columbia, Canada) to determine whether it has subject matter jurisdiction to hear the claims. *See 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").

[3] The Ninth Circuit and District of Nevada recognize that courts lack jurisdiction to hear shareholder derivative claims against Canadian corporations and their directors. *See 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).

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they are property of the Midway bankruptcy estate by virtue of the bankruptcy code and the terms of Midway's *Second Amended Joint Chapter 11 Plan of Liquidation*.[4] *See* 11 U.S.C. § 541(a); *see also Lapidus v. Hecht,* 232 F.3d 679, 682 (9th Cir. 2000) ("[a] bankruptcy court may enjoin a derivative claim brought by shareholders *because the claim is property of the bankruptcy estate*.") (emphasis added)); *see also* Mot. Ex. J § IX.H.1(a)-(c) ("[The] Liquidating Trustee shall have the exclusive right to institute, prosecute, abandon, settle or compromise any Retained Causes of Action.").

Plaintiff contends that this Court has subject matter jurisdiction over all claims asserted in the Complaint simply ***because he says the claims are direct rather than derivative*** in nature. Opp. at 8:21-10:12. But 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"). Rather, the focus is on the essential nature of the claims. *See Kramer v. W. Pac. Indus.*, 546 A.2d 348, 352 (Del. 1988) ("Whether a cause of action is individual or derivative must be determined from the nature of the wrong alleged and the relief, if any, which could result if plaintiff were to prevail.").

As demonstrated in the Motion and below, Plaintiff's claims for breach of fiduciary duty, aiding and abetting, fraud and negligent misrepresentation are derivative under the Direct Harm test adopted by the Nevada Supreme Court in *Parametric Sound Corp. v. Eighth Judicial District Court*, 133 Nev. Adv. Op. 59, 401 P.3d 1100 (2017) ("Parametric"). Accordingly, this Court lacks subject matter jurisdiction over these claims.

2. Plaintiff's Claims Are Derivative Under the Direct Harm Test.

Plaintiff points out in his Opposition (at 9) that the Nevada Supreme Court issued the *Parametric* decision after Defendants filed the Motion. While this is true, the holding in

[4] In the Opposition, Plaintiff also fails to contest that he lacks standing to assert derivative claims on the grounds that such claims are property of the Midway bankruptcy estate and that prosecuting such claims constitute a violation of the automatic stay imposed by the bankruptcy code. *See* EDCR 2.20 ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.").

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Parametric is not "contrary to movants' position," as Plaintiff suggests (Opp. at 2:17-22). In fact, it further substantiates the derivative nature of Plaintiff's claims.

In *Parametric*, the Nevada Supreme Court granted a petition for writ of mandamus challenging a district court order denying a motion to dismiss in a corporate shareholder action. *See* 401 P.3d at 1109. The shareholders brought an action against the corporation and its directors for breach of fiduciary duties and aiding and abetting breach of fiduciary duties for, among other things, intentionally delaying the announcement of positive and material information about the corporation in an attempt to manipulate the premium on a merger that was being concurrently negotiated. *See id.* at 1103. The shareholders alleged that their stock's value was improperly diluted when the corporation issued new shares to compensate shareholders of the merging entity. *See id.* at 1109. The directors moved to dismiss the complaint, arguing that the shareholders lacked standing because their claims were derivative, not direct. *See id.* at 1104. The district court denied the motion. *See id.*

The Nevada Supreme Court reversed the district court on the plaintiff's writ of mandamus and granted the petition, holding that the shareholders' claims were derivative, not direct, and thus they lacked standing to sue the corporation and directors.[5] *See* 401 P.3d at 1109-10. In evaluating whether the claims were derivative or direct in nature, the Nevada Supreme Court clarified its holding in *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720, 732 (2003) ("Cohen") by specifically adopting the Direct Harm test articulated by the Delaware Supreme Court in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d. 1031 (Del. 2004).[6] *See id.* at 1107-08. The Nevada Supreme Court concluded that, to distinguish between direct and derivative claims, Nevada "courts should consider only '(1) who suffered the alleged harm

[5] The Nevada Supreme Court granted leave to the shareholders to amend their complaint to assert a narrow direct/derivative equity expropriation claim, if any such claim existed. *See* 401 P.3d at 1109-10. Plaintiff asserts no such equity expropriation in this case, thus, leave would be entirely unwarranted.

[6] Although *Cohen* contains references to several tests for evaluating the derivative nature of claims, it ultimately provided a standard that closely resembles the Direct Harm test. *See Cohen*, 119 Nev. at 19, 62 P.3d at 732 ("shareholder . . . ha[s] standing to seek relief for direct injuries that are independent of any injury suffered by the corporation.") (emphasis added). *Cohen*, as clarified by *Parametric*, is still good law and the cases cited in the D&O Defendants' Motion remain dispositive.

(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)?'" *Id.* (quoting *Tooley*, 845 A.2d at 1033). Applying the Direct Harm test, the Nevada Supreme Court concluded that the shareholders' equity dilution claim was derivative. *See id.* at 1109.

In this case, Plaintiff seeks damages for the diminution in value of his Midway shares as a result of the Defendants' purported concealment of corporate mismanagement. *See Declaration of Daniel E. Wolfus in Opposition to Motion to Dismiss* ("Wolfus Decl.") at ¶ 23 ("My lawsuit is based upon the fact that these defendants caused Midway to take actions or not take actions in connection with its Nevada based Pan mine and then either fail to disclose those actions or provide public disclosures which were misleading primarily because they failed to disclose those Nevada based actions."); *see also* Opp. at 10:1-3 ("Wolfus suffered the harm for which recovery is sought in this action when his own shares became valueless."); *see also* Compl. ¶ 107 ("All of the common stock owned by Wolfus and his assignors has become valueless"). As the D&O Defendants demonstrated in the Motion, such claims are "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); *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).

The Direct Harm test does not permit Plaintiff to personally and directly recover for the diminution in value caused by the D&O Defendants' purported corporate mismanagement. *Parametric*, *Cohen* and the Direct Harm test provide that such claims can only be asserted derivatively. *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

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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."). Accordingly, the Plaintiffs' claims are derivative and should be dismissed for lack of standing.

B. Plaintiff Fails To State a Claim for Relief Under California Securities Law.

1. Plaintiff Failed to Allege Any Misrepresentation "in Connection With a Purchase or Sale of a Security."

In their Motion, the D&O Defendants demonstrated that the Complaint fails to state a claim for relief under the California Corporations Code Sections 25401 and 25501 because (1) Plaintiff's purchase of Midway stock occurred in 2009 when he was granted stock options, not in 2014 when he exercised those options, so that he cannot plead a misrepresentation was made "in connection with" a purchase or sale of a security; (2) the D&O defendants are not sellers of securities as required by the Code and (3) because the California Code cannot be applied extraterritorially to a Canadian corporation in these circumstances.

In response, Plaintiff misstates the law and fails to address with the statutory language contained in the California Corporations Code. Instead, Plaintiff ignores the express requirement of Section 25017(e) and cites to *People v Boles*, an 80 year old criminal case which does not even deal with the issue at hand, as "rejecting a similar argument." Opp. at 11:18.

Here, it is undisputed that Plaintiff's stock options were ***granted*** to Plaintiff in 2009 and ***exercised*** in 2014. *See* Mot. at Exs. H and I (Plaintiff also received stock option grants pursuant to an employee stock option plan on January 7 and September 10, 2009); *see also* Compl. ¶¶ 97 ("[o]n January 23, 2014, Wolfus purchased in California 200,000 shares of Midway's common stock directly from Midway through the exercise of stock options"), 101 ("[i]n exercising his options in January 2014"), 102 ("[o]n September 19, 2014, Wolfus purchased in California 1,000,000 shares of Midway's common stock directly from Midway through the exercise of stock options") and 106 ("[i]n exercising his options in September 2014"). As a matter of law, a "purchase or sale of a security" did not occur in 2014 when Plaintiff ***exercised*** his stock options.

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CAL. CORP. CODE § 25017(e) ("…neither the exercise of the right to purchase . . . nor the issuance of securities pursuant thereto is an offer or sale.").Thus, the California state securities fraud claim fails as a matter of law because the alleged omissions were not made "in connection with the purchase or sale" of the stock options, which were granted in 2009.

2. Plaintiff's Reliance Upon *People v. Boles* Completely Inapposite

In the Opposition, Plaintiff curiously contends that "[w]hile an 'option' may also be a security, it is not the option which is at issue in this action." Opp. 11:6-8. But this contention is directly belied by the express language contained in the Complaint. *See* Compl. ¶ 101 ("In exercising his options in January 2014, Wolfus relied on the public filings of Midway and was unaware of the 2013 Undisclosed Facts."); ¶ 106 ("In exercising his options in September 2014, Wolfus relied on the public filings of Midway and was unaware of the 2014 Undisclosed Facts."). In fact, the only Midway stock acquired by Plaintiff in 2014 was the stock received as a result of Plaintiff exercising the stock options granted to him in 2009. *See* Mot. Exs. H & I. Accordingly, the stock options are clearly the "security" at issue in the Complaint.

Plaintiff's assertion that the D&O Defendants' reading of the California Securities Law of 1968 was "addressed" and "reject[ed]" by an appellate court in California, *People v. Boles*, 95 P.2d 949 (Cal. Ct. App. 1939) is puzzling and wrong. Opp. at 11:5-23. The *Boles* decision did not address when a "purchase or sale" of a stock option is deemed to have occurred. In fact, the *Boles* court could not have "addressed" or "reject[ed]" any portion of the California Corporate Securities Law of 1968 considering that the opinion was rendered 30 years before the statutes at issue in the Complaint were even enacted.

3. D&O Defendants Cannot be Liable as Control Persons Because the Complaint Does Not Plead a Primary Violation of California Securities Law.

In their Motion, the D&O Defendants demonstrated that because they were not sellers of Midway securities, Plaintiff cannot bring a claim against them for violation of the California Code. In the Opposition, Plaintiff responds with one sentence, unsupported by any case law: "§§ 25504 and 25403 impose joint and several liability on the defendants in this action.". Opp. at 11:25-27. Plaintiff is wrong.

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Section 25504 imposes joint and several liability on persons who "directly or indirectly" control primary violators of California's securities laws or broker-dealers or agents who materially aid a primary violation. To state a claim for relief under Section 25504, plaintiff must plead particularized facts establishing a primary violation of Sections 25401 and 25501. *In re Alliance Equipment Lease Program Sec. Litig.*, 2002 WL 34451621, *11 (S.D. Cal. Oct. 15, 2002) ("Section 25504 requires a primary violation of 25501."). The Opposition confirms that Plaintiff's Section 25504 claims against the D&O Defendants are based on the exercise of stock options in Midway stock in 2009. Since Plaintiff does not allege violations of Section 25501, he cannot state a claim for secondary liability under Section 25504.

The Complaint alleges securities fraud based solely on Section 25401 of the California Corporate Securities Law of 1968. Compl. ¶ 100. Section 25401 prohibits misrepresentations in connection with a sale of securities. Section 25501 is a corresponding section that establishes a private remedy for damages and rescission based on Section 25401 liability. Sections 25401 and 25501 impose liability only on the actual seller of the security. *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 253–54, 70 Cal.Rptr.3d 199 (2007). Because the Complaint fails to allege facts showing Plaintiff purchased his stock options from the D&O Defendants, which is required for a Section 25501 claim, the claim fails as a matter of law and must be dismissed. *See Apollo*, 158 Cal. App. 4th at 252–54, 70 Cal. Rptr. 3d 199.

Despite this lack of privity, Plaintiff now claims in his Opposition that Sections 25504 and 25403 impose joint and several liability on the D&O Defendants even though they were not "sellers of the security," as required under Section 25501. But Plaintiff failed to state a control person liability claim under § 25504 or 25403 of the California Corporations Code because he cannot show a primary violation by Midway. *See* Section II(B)(1), (2), *supra*.

A "control person" may only be liable where a plaintiff has shown an underlying violation of the California securities laws. *See Hanson v. Berthel Fisher & Co. Fin. Services, Inc.*, 13-CV-67-LRR, 2014 WL 2434000, at *37 (N.D. Iowa May 29, 2014).[7] Here, Plaintiff

[7] Section 25504 provides: Every person who directly or indirectly controls a person liable under Section 25501 or 25503 ... [is] also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable

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alleges that the D&O Defendants (along with the other Defendants) are jointly and severally liable to Plaintiff because they were "controlling persons" of Midway. Compl. ¶¶ 99, 104. However, Plaintiff failed to assert a claim pursuant to Section 25401, and in the absence of a viable claim of primary liability, Plaintiff cannot state a claim against the D&O Defendants for control person liability under Section 25504. *Jackson*, 931 F.Supp.2d at 1064 (holding that a plaintiff could not assert control person liability pursuant to Section 25504 where the plaintiffs failed to state "a viable claim for primary liability" against the defendants); *Moss v. Kroner*, 197 Cal.App.4th 860, 129 Cal.Rptr.3d 220, 229 (2011) (holding that secondary liability under Section 25504 may exist "as long as primary liability is stated or established"); *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 112 (2d Cir. 2012) (Plaintiff failed to state a control person liability claim under Section 25504 of the California Corporations Code because its underlying California securities law claims failed).

4. The Presumption Against Extraterritoriality Precludes the Application of California Corporate Securities Laws to a Canadian Corporation.

Finally, Plaintiff entirely fails to address in his Opposition the presumption against extraterritorial application of California securities laws raised in the D&O Defendants' Motion.[8] *See* Mot. at 20. Claims predicated on California's Corporate Securities Law of 1968 (the "Corporate Securities Law") cannot be applied extraterritorially to a Canadian corporation where the underlying transaction did not occur in California. S*ee People ex rel Du Fauchard v. U.S. Financial Management, Inc.*, 87 Cal. Rptr. 3d 615, 625 (Cal. App. 2009) ("The presumption against extraterritoriality is one against an intent to encompass conduct occurring in a foreign jurisdiction in the prohibitions and remedies of a domestic statute.") (quoting *Diamond Multimedia Systems, Inc. v. Superior Court of Santa Clara County*, 19 Cal.4th 1036, 1060, 968 P.2d 539 (Cal. 1999)). In keeping with that presumption, the Supreme Court of

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grounds to believe in the existence of the facts by reason of which the liability is alleged to exist. CAL. CORP. CODE § 25504.

[8] Plaintiff's failure to contest the application of the extraterritoriality presumption should be deemed as a concession that the presumption is not rebuttable in this case. *See* EDCR 2.20 ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.").

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California has squarely held, "[s]ection 25500 simply provides a remedy for third parties whose sale or purchase of stock is affected by unlawful conduct in California." *Diamond Multimedia Sys.*, 968 P.2d at 546 ("[S]ection 25400 regulates only manipulative conduct in California.").

In this case, the alleged unlawful conduct at the crux of this case—Midway's purported failure to disclose corporate mismanagement prior to Plaintiff's exercising of his stock options—is not alleged to have occurred, and did not occur, in California. Rather, Midway was organized under the laws of British Columbia, is a Canadian corporation, was headquartered in Colorado and operated mines in Nevada. Plaintiff does not allege any injury, any communications with Defendants, or any conduct by Defendants in California. Thus, the California Corporate Securities Act would have no application. *See Jones*, 119 P.2d at 223-25; *Sullivan*, 254 P.3d at 248; *Diamond Multimedia Sys., Inc.*, 968 P.2d at 553. Accordingly, the California securities law claim must be dismissed.

C. This Court Lacks Personal Jurisdiction Over the D&O Defendants.

Plaintiff has not discharged his burden of justifying the exercise of personal jurisdiction over the D&O Defendants. In their Motion, the D&O defendants demonstrated that the Court should not exercise personal jurisdiction over the non-resident D&O Defendants because their contacts with Nevada are not continuous and systematic to render them at home in Nevada to support a finding of general jurisdiction. The D&O Defendants also demonstrated that the Court lacks specific jurisdiction over them. *See* Mot. at 26.

1. Plaintiff Has Not Met His Burden of Demonstrating General Jurisdiction Over the D&O Defendants.

The uncontroverted declarations of the D&O Defendants demonstrate that their respective affiliations with Nevada are not so continuous and systematic as to render them "essentially ***at home*** in the forum State." *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1157-58 (2014) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, --- U.S. ----, 131 S. Ct. 2846, 2858 (2011)) (emphasis added); *see also Daimler AG v. Bauman*, --- U.S. ----, 134 S. Ct. 746, 761 (2014). The supporting declarations establish that, with a few isolated exceptions, ***none of the D&O Defendants***: are residents of Nevada; own

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personal or real property, or have any other personal assets in Nevada; own or maintain any offices in Nevada; hold any Nevada licenses; own any interest in any companies or corporations organized in Nevada or held any managerial or employment positions with any such companies or corporations;[9] own or maintain any bank accounts in Nevada; maintain any telephone, facsimile or telex number in Nevada; been required to maintain, or maintained, a registered agent for service in Nevada; or been a party to a lawsuit in Nevada, except for the instant case.[10] *See generally* Mot. Exs. A-G. The D&O Defendants are certainly not "at home" in Nevada.

General jurisdiction is intended to only be available in limited circumstances, when a non-resident defendant's contacts with the forum state are so "'continuous and systematic' as to render [it] essentially at home in the forum State." *Viega GmbH*, 328 P.3d at 1157 (internal citations omitted). "For an individual, ***the paradigm forum for the exercise of general jurisdiction is the individual's domicile***. . . ." *Bauman*, 134 S. Ct. at 760 (citations omitted) (emphasis added). The declarations demonstrate that none of the D&O Defendants, with the exception of Mr. Yu, are domiciled in Nevada. Because Plaintiff cannot demonstrate that the D&O Defendants were "at home" in Nevada, he has failed to meet his burden and the claims should be dismissed. *See Viega GmbH*, 328 P.3d at 1157-58; *see also Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) ("This is an ***exacting standard***, as it should be, because a finding of general jurisdiction permits a defendant to be hailed into court in the forum state to answer for any of its activities anywhere in the world.") (emphasis added).

2. The Court Lacks Specific Jurisdiction over the D&O Defendants.

None of Plaintiff's cited cases supports the exercise of specific jurisdiction. For example, the breach of fiduciary claims asserted by the former clients in *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court*, 342 P.3d 997 (2015) ("Fulbright I") and *Fulbright & Jaworski v. Eighth Judicial Dist. Court*, 2017 WL 1813958 (June 27, 2017) ("Fulbright II"), arose directly out of the investment meetings conducted in Nevada by the law firm's attorney.

[9] Mr. Newell has owned an interest in a company organized in the State of Nevada, but his relationship to said company has nothing to do with the claims asserted in this lawsuit.

[10] Mr. Newell was a party to a lawsuit in Nevada.

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In this case, Plaintiff's claims arise out of his alleged reliance upon purported material omissions contained in Midway's SEC filings and press releases (*see* Compl. at ¶¶ 101, 106, 126, 127, 135, 136), which were entirely drafted in and issued from the state of ***Colorado*** where Midway's principal place of business and executive offices are located and were received and purportedly acted upon by Plaintiff in the state of ***California*** (*see* Compl. ¶ 1). Because Plaintiff has not alleged, and cannot allege, that any of the D&O Defendants' allegedly tortious conduct (material omissions in public filings) took place in Nevada, the D&O Defendants are not subject to specific personal jurisdiction in Nevada.

Similarly, in *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 857 P.2d 740 (1993), the Court exercised specific jurisdiction over Trump because he and his agent actively pursued a future employee who lived in Nevada, negotiated an employment agreement with the employee over a period of months while the employee lived in Nevada, and set up a trust in Nevada as part of the agreement. *Id.* at 701-702. The Court reasoned that ***because the action directly related to Trump's contacts with Nevada and arose, in part, from the consequences of Trump's conduct in Nevada***, Trump should have reasonably anticipated being haled into court in Nevada.[11] Unlike in *Trump*, each of the Plaintiff's claims arise out of his reliance upon purported material omissions contained in SEC filings and press releases drafted in and issued from the state of ***Colorado*** and received and purportedly acted upon by Plaintiff in the state of ***California***. Because none of the D&O Defendants' allegedly tortious conduct took place in Nevada or was directed toward Nevada, the Court lacks specific jurisdiction over the D&O Defendants.

Finally, in *Consipio Holding, BV v. Carlberg*, 282 P.3d 751 (2012), the Nevada Supreme Court held that Nevada courts can exercise personal jurisdiction over nonresident officers and directors who directly harm ***a Nevada corporation***, reasoning that "[w]hen officer or directors directly harm a Nevada corporation, they are ***harming a Nevada citizen***. By purposefully directing harm towards a ***Nevada citizen***, officers and directors establish contacts with Nevada

[11] The *Trump* court also found that it lacked general jurisdiction over Trump because he had no real or personal property interests in Nevada and did not conduct business within the state.

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and affirmatively direct conduct toward Nevada." *Id.*, 128 Nev. at ___, 282 P.3d at 755 (emphasis added). But *Consipio* does not support the exercise of specific jurisdiction here because Plaintiff is ***not a Nevada citizen*** and ***Midway is not a Nevada corporation***. Plaintiff, a California citizen, purports to assert direct claims against directors and officers, which makes the exercise of personal jurisdiction even more tenuous.[12] Furthermore, the D&O Defendants did not perform any of the alleged wrongful acts in Nevada, but rather Colorado, where the purported material omissions were made in Midway's SEC filings and press releases. *See* Compl. ¶¶ 101, 106, 126, 127, 135, 136. The only connection the D&O Defendants have to Nevada is attending the ceremonial groundbreaking of the Pan Mine and the occasional board meeting, which did not give rise to any of the claims asserted in the Complaint. Because no Nevada corporation is involved in this suit and the D&O Defendants did not expressly aim any conduct at Nevada associated with Plaintiff's allegations of wrongdoing, this Court has no specific jurisdiction and must dismiss the Complaint.

3. Midway's Contacts Cannot Be Imputed to the D&O Defendants for Purposes of Personal Jurisdiction Analysis.

In his Opposition, Plaintiff submits a self-serving declaration claiming to have made a *prima facie* case of personal jurisdiction over the D&O defendants. But Plaintiff's declaration and his Opposition ignore the well-established case law that when establishing specific jurisdiction "what matters most in this analysis is not the corporations own contacts, with Nevada but the individual defendants' contacts with the state." *See Southport Line Equity II*, 177 F. Supp. 3d at 1294. Nor do the vague conclusions cited in his declaration satisfy his burden

[12] Even with respect to a Nevada corporation, mere affiliation with a Nevada operation is not enough to confer jurisdiction on nonresident defendants. *See Southport Lane Equity II, LLC v. Downey*, 177 F. Supp. 3d 1286 (D. Nev. 2016). In *Southport Lane*, the court concluded that accepting a position as an officer or director of a Nevada corporation does not demonstrate that a defendant has purposefully availed himself of the privilege of conducting activities within the forum state, and is thus insufficient to satisfy due process. Southport Lane, 177 F. Supp. 3d at 1294. The Court further concluded that "[s]ubjecting the directors or officers of a corporation to jurisdiction in any forum in which a corporation operates or is incorporated when the directors or officers have no personal contacts whatsoever with the forum state denies them due process protection." *Id.* Ultimately, "what matters most in this analysis is not the corporation's own contacts with Nevada but the individual Defendants' contacts with the State." *Id.* (emphasis added).

of establishing jurisdiction over any of the defendants. *Trump*, 109 Nev. at 693, 857 P.2d at 744 (noting the party asserting jurisdiction bears the burden of establishing the reasonableness of exercising jurisdiction "and the burden of proof never shifts to the party challenging jurisdiction.")

Plaintiff fails to identify specific facts alleged in the Complaint that support an inference that the foreign D&O Defendants directed their activities into this forum. Instead, Plaintiff identifies Midway's contacts with Nevada and proffers generalized control allegations against the D&O Defendants in the hopes that Midway's contacts will be imputed. Plaintiff attempts to impute Midway's operational contacts with Nevada to the D&O Defendants "[b]ased on their roles as [directors] and officers of Midway whose business operations were almost entirely based in Nevada…." Opp. at 12:6-9. Plaintiff's argument has been expressly and routinely rejected and cannot serve as a means of circumventing the jurisdictional analysis and the Defendants' due process rights.[13] "If accepted, the argument would permit for nationwide jurisdiction over the control persons of any entity that conducts business nationwide or releases securities to the national market." *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 2:11-CV-10414 MRP, 2012 WL 1322884, at *8 (C.D. Cal. Apr. 16, 2012).

In sum, Plaintiff's arguments that a director or officer of a corporation operating in Nevada grants personal jurisdiction over the individual officers and directors fails.[14]

[13] Ninth Circuit law requires the Court to evaluate an officer defendant's connection with a forum separately from the allegations of control. In *Brown v. General Steel Domestic Sales, LLC*, No. CV 08–00779 MMM (SHx), 2008 WL 2128057 (C.D. Cal. May 19, 2008), the plaintiff sought to assert jurisdiction over a corporate officer. The corporation had acted in California, and the plaintiff alleged that the officer, "formulates, controls, directs, supervises, perpetuates, manages and has knowledge of ... the practices and policies of [the corporation]." *Id.* at *11. The court found "the mere fact that [the officer] is [the corporation's] president is not sufficient to subject him to jurisdiction in California." *Id.* In *Toyz, Inc. v. Wireless Toyz, Inc.*, No. C 09–05091 JF (HRL), 2010 WL 334475, at *8 (N.D. Cal. Jan. 25, 2010), the court held that the, "blanket allegation that the Individual Defendants controlled the [corporate defendant] at 'various relevant times' does not establish purposeful direction by any specific Individual Defendant."

[14] Although Plaintiff does not request discovery or an evidentiary hearing with respect to personal jurisdiction, any such oral request at the hearing on the Motion should likewise be denied. Jurisdictional discovery is not warranted where the parties "do not dispute pivotal facts bearing on the question of jurisdiction" and the plaintiff "fails to meet its burden of establishing a prima facie case of personal jurisdiction against [the defendant]." *Digitone Industrial Company, Ltd. v. Phoenix Accessories, Inc.*, 2008 WL 2458194, at *3 (D. Nev. June 13, 2008).

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III.

CONCLUSION

For all the foregoing reasons, the D&O Defendants respectfully request that the Complaint be dismissed in its entirety with prejudice.

DATED this 25th day of October, 2017.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that on the 25th day of October, 2017, I served a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT** by the following method(s):

[X] Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS,

Plaintiff,

v.

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; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25.

Defendants.

Case No.: A-17-756971-B
Dept. No.: XXVII

REPLY IN SUPPORT OF MOTION TO DISMISS AND JOINDER TO D&O DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC (collectively, the "Hale Defendants"), by and through their counsel of record, Greenberg Traurig LLP, hereby submits their Reply in Support of Motion to Dismiss and Joinder to D&O Defendants' Reply in Support of Motion to Dismiss Amended Complaint (the "Reply and Joinder").

This Reply and Joinder is made pursuant to NRCP 12(b)(1), (2) and (5) and is based upon the following Memorandum of Points and Authorities set forth below and in the Hale Defendants' Motion and Joinder, the D&O Defendants' Motion to Dismiss, and the D&O Defendants' Reply, the Declarations of Messrs. Hale, Anderson and Klein submitted in connection with the underlying Motion and Joinder, the pleadings and papers file in this action, and any argument of counsel the Court may allow at the time of hearing on this Motion and Joinder and the D&O Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's Consolidated Memorandum of Points and Authorities in Opposition to Motions to Dismiss (the "Opposition") fails to carry Plaintiff's high burden of demonstrating the Court's personal jurisdiction over any of the Hale Defendants. Rather, Plaintiff's Opposition relies solely on the vague allegations in his own declaration regarding certain of the Hale Defendants' interactions with a Canadian corporation whose subsidiary conducted certain business in Nevada. Such allegations, even if true, are woefully deficient to support the exercise of jurisdiction over any of the Hale Defendants. As a result, while the Court should dismiss the case in its entirety for lack of subject matter jurisdiction and failure to state a claim as set forth in the other briefs, it should, at a minimum, dismiss each of the Hale Defendants from this action for lack of personal jurisdiction.

II. ANALYSIS

A. This Court Cannot Exercise Personal Jurisdiction Over the Investment Entities.

Defendants INV-MID, LLC, EREF-MID II, LLC, or HCP-MID, LLC (the "Investment Entities") must be dismissed for lack of personal jurisdiction because Plaintiff failed to present any evidence to attempt to establish a *prima facie* case of personal jurisdiction over any of them. As Eighth Judicial District Court Rule 2.20 provides, the "[f]ailure of the opposing party

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to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same."

Plaintiff's Opposition fails to make any argument at all with respect to why exercising personal jurisdiction over any of the Investment Entities would be proper or reasonable. Nor does the Opposition present any facts demonstrating any contact between any of the Investment Entities and the State of Nevada. In fact, Plaintiff's supporting declaration does not even mention any of the Investment Entities at all. *See* Wolfus Decl. In stark contrast, Mr. Hale's declaration presented in connection with the Hale Defendants' Motion and Joinder demonstrates that each of the Investment Entities are Delaware limited liability companies created for the sole purpose of making investments into Midway, a Canadian entity. Ex. A, Hale Decl., ¶¶ 14-16. None of the members or managers of those entities are residents of the State of Nevada, nor do any of the Investment Entities own any property or assets in Nevada. On this unchallenged record, the Court should dismiss each of the Investment Entities for lack of personal jurisdiction.

B. <u>This Court Cannot Exercise General Jurisdiction Over the Remaining Hale Defendants.</u>

The remaining, individual Hale Defendants do not have substantial, continuous, or systematic contacts with the State of Nevada such that the Court could find them "at home" in this forum to support exercising personal jurisdiction over them. Nevada courts may only exercise general personal jurisdiction over a party when "the defendant's forum state activities are so 'substantial' or 'continuous and systematic' that it is considered present in the forum and thus subject to suit there, even though the suit's claims are unrelated to that forum." *Arbella Mut. Ins. Co. v. Eighth Jud. Dist. Ct.*, 122 Nev. 509, 513, 134 P.3d 710, 713 (2006). "The level of contact with the forum state necessary to establish general jurisdiction is high." *Budget Rent-a-Car v. Dist. Ct.*, 108 Nev. 483, 485, 835 P.2d 17, 19 (1992). As the Supreme Court has noted, such contacts must be of such an extent as to make the defendant "essentially at home in the forum State" before the Court can exercise general personal jurisdiction. *Viega GmbH v. Eighth*

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Judicial Dist. Court, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1157-58 (2014) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, --- U.S. ----, 131 S. Ct. 2846, 2858 (2011)). Notably, Plaintiff bears the burden of demonstrating the reasonableness of exercising personal jurisdiction over each of the defendants, "and the burden of proof never shifts to the party challenging jurisdiction." *Trump v. District Court*, 109 Nev. 687, 693, 857 P.2d 740, 744 (1993).

Plaintiff has not presented this Court with evidence of the Hale Defendants' purported "substantial" or "continuous and systematic" contacts with the State of Nevada to satisfy his burden and to justify the exercise of general personal jurisdiction over any of them. Plaintiff has only cited to the conclusory statements contained in his own declaration whereby he merely alleges that Defendants Hale, Anderson, and Klein were "actively involved in managing Midway's mining operations in Nevada." *See* Wolfus Decl., at, ¶¶ 11, 12, 17. Beyond this conclusion, Plaintiff fails to identify any specific contacts any of the individual Hale Defendants have with the State of Nevada. *See id*. Nor does Plaintiff articulate how the activities of a Nevada subsidiary of a Canadian corporation could somehow be attributable to the directors of that parent company. *Id.* Simply put, Plaintiff's failure to present evidence of any contacts, let alone "substantial" or "continuous and systematic" contacts such that the Hale Defendants should be said to be "at home" in this state, make the exercise of general personal jurisdiction patently unreasonable and offensive to the notions of fair play and substantial justice.

Plaintiff's shortcomings are particularly enlightening in the face the uncontroverted declarations proffered by Messrs. Hale, Anderson and Klein in connection with the Hale Defendants' Motion and Joinder. *See* Hale Defendants' Motion and Joinder, Exs. A, B, C. As set forth in those declaration, none of the individual Hale Defendants reside in the state, hold any property in the state, or maintain any bank accounts, telephone numbers, or registered agents within the state. *Id.* Instead, the individual Hale Defendants' interactions with the State of Nevada are limited to transient vacations with families and friends. *Id.*

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In light of the foregoing, Plaintiff has failed to carry his high burden of establishing general personal jurisdiction over any of the Hale Defendants. The Amended Complaint should be dismissed as to each of them.

C. Specific Jurisdiction Does Not Exist Over Any of the Individual Hale Defendants.

This Court lacks specific personal jurisdiction over the Hale Defendants as none of them have purposefully availed themselves of the forum and Plaintiff's claims do not arise out of the Hale Defendants' incidental contacts with the forum state in any event. The Nevada Supreme Court has repeatedly held:

> A state may exercise specific personal jurisdiction only where: (1) the defendant purposefully avails himself of the privilege of serving the market in the forum or of enjoying the protection of the laws of the forum, or where the defendant purposefully establishes contacts with the forum state and affirmatively directs conduct toward the forum state, and (2) the cause of action arises from that purposeful contact with the forum or conduct targeting the forum.

Arbella, 122 Nev. at 513, 134 P.3d at 712-13. In addition, even if the first two elements for specific personal jurisdiction are satisfied, "a court must consider whether requiring the defendant to appear in the action would be reasonable." *Id.*

Here, Plaintiff has merely alleged that the individual Hale Defendants were directors of Midway, a Canadian company, and involved in activities as directors of that company. Such allegations are insufficient to support a claim of specific personal jurisdiction as a matter of law. *See Southport Lane Equity II, LLC v. Downey*, 177 F.Supp.3d 1286, 1296 (D. Nev. 2016) ("what matters most in this analysis is not the corporation's own contacts with Nevada but the individual Defendants' contacts with the State."). Plaintiff has failed to allege any specific conduct on behalf of the remaining Hale Defendants such that it could be said they availed themselves of the forum. Nor does Plaintiff articulate how his claims allegedly arise out of the Hale Defendants' contacts with the State of Nevada. Notably, Plaintiff's claims do not arise out from any operational issues that occurred in the State of Nevada, but rather on press releases and public filings issued by Midway from its corporate offices in Colorado. Such claims have nothing to do

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with the Hale Defendants' purported contacts with the State of Nevada that Wolfus alleges in his declaration. Plaintiff's attempt to assert specific personal jurisdiction over the Hale Defendants fails at the most elementary level.

Plaintiff's position finds no solace in the cases cited in his Opposition. The claims asserted in *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court*, 342 P.3d 997 (2015) and *Fulbright & Jaworski v. Eighth Judicial Dist. Court*, 2017 WL 1813958 (June 27, 2017) (unpublished disposition) arose out of the defendant's specific contacts with the State of Nevada, namely certain meetings conducted in Nevada, and the court therefore found sufficient grounds to exercise specific personal jurisdiction. Here, Plaintiff's claims are predicated on SEC filings and press releases made by a Canadian company issued from its principal place of business in Colorado and purportedly received by Plaintiff in his home state of California. *See* Comp., ¶ 101, 106, 126, 127, 135, 136. As a result, both of the *Fulbright* cases are readily distinguished and do not support a finding of personal jurisdiction.

The same is true with respect to *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 857 P.2d 740 (1993). The claims in that case arose directly from the defendant's specific contacts by sending an agent into the State of Nevada to conduct certain business activities. *Id.* at 701-02. The Court found that exercise of jurisdiction over the defendant was reasonable because the defendant took deliberate action in the State of Nevada and the claims arose from that conduct. That simply is not the case here, where the claims arose out of conduct, purportedly misleading public filings and press releases, that did not originate in Nevada nor were received by Plaintiff in Nevada. Again, Plaintiff's reliance on *Trump* misses the mark.

Plaintiff's attempted reliance on *Consipio Holding, BV v. Carlberg*, 282 P.3d 751 (2012) fares no better. In *Consipio*, the court permitted the exercise of personal jurisdiction over nonresident officers and directors ***of a Nevada corporation***. *Id.*, 128 Nev. at ___, 282 P.3d at 755. This was because the purported harm asserted in that case was to a Nevada citizen. Again, neither Plaintiff nor Midway are Nevada residents to which the holding in *Consipio* could apply. Plaintiff has not, and cannot, cite to any cases on similar facts as what is presented here where he

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seeks to hale nonresident directors of a Canadian corporation into Court in Nevada because that corporation had a subsidiary in that state. Exercise of jurisdiction is not supported by the law, nor is it reasonable under the facts and circumstances presented in the record. All of the Hale Defendants should be dismissed from this action for lack of personal jurisdiction.

D. The Arguments in the D&O Reply Apply Equally to the Hale Defendants.

In addition to lacking personal jurisdiction over any of the Hale Defendants, this Court lacks subject matter jurisdiction over the action as the claims set forth therein are derivative in nature. Nonetheless, Plaintiff likewise failed to plead necessary facts to support his remaining claims against the Hale Defendants supporting dismissal under NRCP 12(b)(5). All of these issues are already addressed at length in the D&O Motion and the D&O Reply. As a result, and pursuant to EDCR 2.20(d), the Hale Defendants hereby join the D&O Reply filed on October 25, 2017. In joining the D&O Reply, the Hale Defendants hereby adopt and incorporate the arguments set forth therein by reference in this Reply in their entirety.

In the interest of judicial economy and efficiency, the legal arguments set forth in the D&O Rely not repeated herein. However, the Hale Defendants reserve the right to argue the legal arguments and positions set forth in the D&O Reply at the time of the consolidated hearing on this Motion and Joinder, the D&O Motion, and Defendant Brunk's Motion to Dismiss.

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III. CONCLUSION

For the reasons set forth in this Reply, the underlying Motion and Joinder, and the D&O Motion and Reply, the Hale Defendants respectfully request that this Court dismiss the Amended Complaint as to each of them.

DATED this 25th day of October, 2017.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this 25th day of October, 2017, I caused a true and correct copy of the foregoing ***Reply in Support of Motion to Dismiss and Joinder to D&O Defendants' Reply in Support of Motion to Dismiss Amended Complaint*** to be filed and e-served via the Court's E-Filing System on all parties with an email address on record this action. The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

/s/ Andrea Lee Rosehill
An employee of GREENBERG TRAURIG, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS,

Plaintiff,

v.

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; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25,

Defendants.

Case No.: A-17-756971-B
Dept. No.: XXVII

REPLY IN SUPPORT OF MOTION TO DISMISS OF KENNETH A. BRUNK AND JOINDER IN REPLY MEMORANDUM IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Defendant Kenneth A. Brunk ("Brunk"), by and through his counsel, hereby files this Reply in Support of Motion to Dismiss of Kenneth A. Brunk and Joinder in Reply Memorandum in Support of D&O Defendants' Motion to Dismiss Amended Complaint ("Reply"), and responds to Plaintiff's Opposition to the Motion to Dismiss filed by the D&O Defendants ("Opposition")[1] – which is apparently also meant to serve as Plaintiff's opposition to the Motion to Dismiss of Brunk ("Motion").

This Reply is made and is based on the below Memorandum of Points and Authorities, the Supplemental Declaration of Kenneth A. Brunk, **Exhibit "A,"** the pleadings and papers on file herein, and any oral argument this Court may allow.

DATED this 25th day of October, 2017.

SANTORO WHITMIRE

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff has failed to meet his burden of establishing that this Court has personal jurisdiction over Brunk. Plaintiff has failed to present any evidence, let alone *prima facie* evidence, that would establish any basis for this Court to exercise personal jurisdiction over Brunk. In his Motion, Brunk established that he is a non-resident of the state and that he has had

[1] Unless stated otherwise, capitalized terms shall have the same meaning conferred upon them in the Motion.

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de minimis contacts with Nevada. He demonstrated that his contacts with Nevada are not systematic and continuous to render him at "home" in Nevada. Plaintiff fails to refute the evidence presented by Brunk and fails to tie the few contacts Brunk had with Nevada to any of the claims asserted against Brunk. Therefore, the Court lacks personal jurisdiction over Brunk and, pursuant to NRCP 12(b)(2), the Court should dismiss Plaintiff's claims against Brunk for lack of personal jurisdiction.

In addition, as further grounds for dismissal of the Amended Complaint, Brunk joins in the Reply Memorandum in Support of the D&O Defendants' Motion to Dismiss Amended Complaint.

ARGUMENT

The Amended Complaint fails to allege that Brunk had any personal contact with the state of Nevada. Plaintiff's Opposition fails to cure this jurisdictional defect in the Amended Complaint. When a challenge to personal jurisdiction is made, the plaintiff bears the "burden of introducing competent evidence of essential facts which establish a prima facie showing that personal jurisdiction exists. *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 692, 857 P.2d 740, 743-44 (1993) and cases cited therein.

With respect to specific jurisdiction, Plaintiff does not present evidence of sufficient contacts to establish specific jurisdiction, nor does he even attempt to tie Brunk's limited contacts with Nevada to his claims against Brunk. Nor can he do so. Plaintiff's claims against Brunk center on whether Brunk, in his capacity as an officer and director of Midway, contributed to Midway's alleged failure to disclose certain material facts in SEC filings and press releases, and that this failure induced Plaintiff to purchase and/or retain Midway stock. It is unrefuted that all conduct relating to these claims. Neither the Amended Complaint, Plaintiff's Opposition, nor the Wolfus Declaration establish any nexus between this alleged conduct and Brunk's contacts with the state of Nevada. The Court, therefore, lacks specific jurisdiction over Brunk.

Concerning general jurisdiction, Plaintiff provides no evidence that Brunk has any systematic and continuous contacts with Nevada such that he could be considered "at home" in Nevada. Plaintiff's Declaration, which was submitted as an exhibit to the Opposition, makes

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general assertions regarding the Defendants' contacts with Nevada. However, as demonstrated in his Supplemental Declaration (*see* **Exhibit A** attached to this Reply) which is submitted to rebut Plaintiff's Declaration that is attached to the Opposition**,** Brunk's trips to Nevada were extremely limited (approximately three to five times per year), and the number of visits to Nevada were similar in number to other jurisdictions he traveled to on Midway business.[2] These limited contacts are insufficient to give rise to general jurisdiction.

A. THE COURT LACKS SPECIFIC JURISDICTION OVER BRUNK.

In determining whether the exercise of specific personal jurisdiction over a defendant is appropriate, the Court considers a three-prong test:

> [1] [t]he defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state. [2] The cause of action must arise from the consequences in the forum state of the defendant's activities, and [3] those activities, or the consequences thereof, must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

See e.g., Viega GmbH v. Eighth Judicial Dist. Court, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1157 (2014). "Whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (internal quotations omitted). In order to give rise to specific jurisdiction over a defendant, "the defendant's suit-related conduct must create a substantial connection with the forum state." *Id.*

Plaintiff has presented no evidence of sufficient contacts by Brunk with Nevada that would give rise to the exercise of personal jurisdiction over Brunk, including failing to present any evidence that ties his claims to suit-related conduct by Brunk in Nevada.

1. None of the Alleged Acts Giving Rise to Plaintiff's Cause of Action Took Place in Nevada.

Plaintiff's Opposition, though never making the distinction between general and specific jurisdiction, appears to make an argument for specific jurisdiction; Plaintiff contends that Brunk

[2] Brunk previously submitted a declaration as part of his Motion.

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had "sufficient minimum contacts" with Nevada because "the activities which give rise to this lawsuit all occurred at the Pan mine in Nevada," including the following conduct:

- Operating, through Midway, "various subsidiaries" in Nevada;
- Managing and controlling Midway's actions in Nevada;
- Availing themselves of Nevada's natural resources;
- Seeking and securing permits to operate the Pan Mine;
- Hiring employees and contractors to work at the Pan Mine; and
- Purchasing mining equipment located at the Pan Mine.

Opp'n p. 16, lns. 12-25. The Wolfus Declaration also vaguely refers to Brunk's management of the Pan Mine. *Wolfus Dec.* ¶¶ 6, 7. Unfortunately for Plaintiff, all of this purported conduct relates to Midway, not Brunk. Plaintiff cites to no specific contacts by Brunk with Nevada, and no conduct by Brunk that specifically relates to any of the claims asserted against Brunk.

Plaintiff's claims against Brunk clearly arise from his involvement in alleged misrepresentations and material omissions, which were purportedly done for the purpose of inducing investors in Midway to retain and purchase Midway stock. *Am. Compl.* at ¶¶ 100, 105, 112, 120, 124-125, 132-133. According to the Amended Complaint, any such alleged misrepresentations and/or omissions would have been contained in forms and press releases filed with the Securities Exchange Commission ("SEC"). While such forms/disclosures may have concerned a Midway-owned asset located in Nevada (the Pan Mine), Plaintiff neither alleges nor offers any evidence that the subject forms and disclosures were prepared in Nevada, based on meetings or conversations occurring in Nevada, or directed toward any particular person or entity located in Nevada. Again, the only evidence presented in this regard is contained in Brunk's original Declaration (the "Brunk Declaration," attached as **Exhibit A** to the Motion), in which he testifies that all such actions took place in Colorado. *Brunk Dec.* ¶ 20. Plaintiff has not refuted this evidence and, therefore, has not met his burden under Nevada law.

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2. Brunk's Connection to Nevada Is Too Attenuated to Support Specific Jurisdiction.

The activities cited by Plaintiff in his Opposition were conducted in Nevada by Midway and not by Brunk as an individual. These Midway activities are insufficient to establish personal jurisdiction over Brunk. *See Southport Lane Equity II, LLC v. Downey*, 177 F.Supp.3d 1286, 1296 (D. Nev. 2016) (in shareholder direct and derivative action against a corporation's directors and officers, court held that non-resident director and officer defendants' mere affiliation with the Nevada corporation was insufficient for personal jurisdiction). Here, there is even greater reason for the Court to conclude there is no personal jurisdiction because Brunk's affiliation is not even with a Nevada corporation, but with a Canadian corporation, which has its principal offices in Colorado. *Am. Compl. ¶ 17.*

While Plaintiff makes some vague statements regarding Brunk's management role as President of Midway, such allegations do not show that Brunk had sufficient personal contacts with Nevada and, importantly, none of the acts identified by Plaintiff are remotely "suit-related." These acts are related to day-to-day management of one Midway asset, including securing permits for the Pan Mine, hiring employees to work at the Pan Mine, and buying mining equipment. *See supra,* at p. 4. None of the claims in the Amended Complaint relate in any way to or arise from this conduct. Again, this case is about alleged misrepresentations made to Midway investors through SEC filings and press releases. It is undisputed that any such filings and releases were planned, discussed, and prepared in Colorado. *See Brunk Dec.* ¶20.

Brunk's purported connection to Nevada is simply too attenuated, and Plaintiff has provided no case law which would give rise to any basis for this Court to exercise specific jurisdiction over Brunk. Moreover, Plaintiff has asserted claims under California's, not Nevada's, securities statutes. Plaintiff has failed to meet his burden to establish specific jurisdiction.

B. THE COURT LACKS GENERAL JURISDICTION OVER BRUNK.

General jurisdiction over a defendant allows a plaintiff to assert claims against that defendant unrelated to the forum only in the limited circumstances where a non-resident

defendant's contacts with the forum state are so "'continuous and systematic' as to render [it] essentially at home in the forum State." *See, e.g., Viega GmbH*, 328 P.3d at 1157. As recently stated by the United States Supreme Court, "only a limited set of affiliations with a forum will render a defendant amenable to general jurisdiction there" and for an individual, "***the paradigm forum for the exercise of general jurisdiction is the individual's domicile***. . . ." *Bauman*, 134 S. Ct. 746, 760 (2014) (citations omitted) (emphasis added).

It is undisputed that Brunk is not domiciled in Nevada. *Brunk Dec.* at ¶¶ 6-7. It is further undisputed that Brunk does not own property, hold licenses, or maintain bank accounts or phone numbers in Nevada. *Id.* at ¶¶ *8-12*. Plaintiff and Brunk agree that Brunk has traveled to Nevada to some degree in furtherance of his duties to Midway as CEO, COO, and a board member. However, the Wolfus Declaration vaguely asserts "Brunk reported to me, when he was Chief Operating Officer, that he very frequently went to Nevada to perform his duties." *Wolfus Dec.* at ¶7. The remainder of the Wolfus Declaration generally asserts conduct regarding the collective activities of "management" and "directors" of Midway, but does not identify any contacts specific to Brunk.

In his initial Declaration, Brunk clearly asserts that he only "occasionally and intermittently went to Nevada to fulfill his duties" for Midway. *See Brunk Dec.* at ¶¶ 17-19. Plaintiff has not provided any facts that that refute the Brunk Declaration. However, to clarify, in Brunk's Supplemental Declaration), Brunk provides further clarity as to the amount of time he actually spent in Nevada in a managerial or Board-related capacity for Midway. Such visits only occurred between three to five times per year. **Ex. A** at ¶ 4. Further, Brunk visited other jurisdictions, such as New York, Toronto, and Vancouver, British Columbia, with the same frequency and for the same reasons. *Id.* at ¶ *5*.

Brunk's sporadic visits to Nevada are insufficient to support the Court's exercise of general jurisdiction under the circumstances. *See Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995) ("[Defendant's] lack of a regular place of business in [the forum state] is significant, and is not overcome by a few visits" for purposes of determining general jurisdiction); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1330-31 (9th Cir. 1984) (visiting the

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forum state a "number of times" was insufficient to support general jurisdiction); *Forsythe v. Overmyer*, 576 F.2d 779, 782, 783 n.4 (finding that a nonresident who visited the forum state twice per year was not subject to general jurisdiction); *see also Shrader v. Biddinger*, 633 F.3d 1235, 1247 (10th Cir. 2011) ("sporadic or isolated visits to the forum state will not subject the defendant to general jurisdiction.") (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-18 (1984)). Further, the fact that Brunk visited other locations during the relevant timeframe for similar purposes and with similar frequencies demonstrates that Nevada is no more his "home state" than certain parts of New York and Canada. Accordingly, the Court lacks general jurisdiction over Brunk.

C. THE LEGAL AUTHORITY CITED BY PLAINTIFF IS INAPPOSITE.

Plaintiff presents several cases as "instructive" in analyzing the personal jurisdiction arguments presented by D&O Defendants, yet offers almost no insight into as to how these cases apply to the facts before the Court. In fact, these cases are inapposite. On examination, each of the four cases cited by Plaintiff, each is easily distinguishable. More importantly, Plaintiff wholly avoids any discussion of *Southport*, cited at p. 10 of Brunk's Motion, an opinion based on similar facts in which personal jurisdiction was found improper where the defendant had an even closer connection to the forum state than Brunk has to Nevada.

1. *Fulbright I and II*

Plaintiff identifies *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court of Nev.*, 342 P.3d 997 (Nev. 2015) ("*Fulbright I*") and *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court of Nev.*, 2017 Nev. LEXIS 542 (Nev. June 27, 2017) (unpublished opinion) ("*Fulbright II*") as "instructive" cases relative to the issue of personal jurisdiction. Plaintiff appears, however, to rely only upon *Fulbright II*, which upheld the district court's exercise of specific jurisdiction after the case had previously been remanded by *Fulbright I* for further findings of fact.

Fulbright II, unlike this case, presented a clear case for the application of specific jurisdiction. There, the plaintiff sued the defendant law firm and a partner of that firm for professional negligence and breach of fiduciary duty. *Fulbright II*, 2017 Nev. LEXIS 541, at *1.

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Specifically, the case arose from investments which were made after the partner's presentation to prospective investors in the plaintiff (which was a client of the law firm) in the state of Nevada. *Id.* at *1-2. The district court made substantial findings concerning the partner's involvement in the Nevada meetings, including citing information the partner withheld from her client (the plaintiff), and that the partner's presentation led to the investment of at least $480,000 in the project at issue, a portion of which the partner knew would be used to pay her outstanding legal fees. *Id.* at *2 n.1.

The Nevada Supreme Court concluded general jurisdiction did not exist, but upheld the district court's exercise of specific jurisdiction. *Id.* at *6-7. The court reasoned that specific jurisdiction was properly exercised because the plaintiff had raised a claim for breach of fiduciary duty and the partner intentionally misled the plaintiff's investors at the meetings that were held in Nevada.

Here, unlike the facts in *Fulbright II*, Plaintiff has no evidence that any of the allegedly misleading statements and omissions took place in Nevada. Again, the unrefuted evidence presented by the Defendants establishes that any such statements were prepared and issued in Colorado.

2. *Consipio*

Plaintiff also cites *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 282 P.3d 751 (Nev. 2012), in support of his argument that the Court should exercise personal jurisdiction over Brunk and the other D&O Defendants. In *Consipio*, the Nevada Supreme Court answered – in the affirmative –the question of whether a Nevada court could exercise jurisdiction over nonresident officers and directors of a corporation that harms a Nevada corporation. *Id.* at 753. Plaintiff's Opposition points out the key reason that *Consipio* is distinguishable from the present case: "[t]he only tie to Nevada was the fact that the corporation was located in Nevada." *Opp'n* at p. 14, lns. 14-18. In *Consipio*, the plaintiff was a Nevada corporation, and the defendants were officers and directors of that Nevada corporation, thus establishing clear contacts with Nevada. *Consipio*, 282 P.3d at 753.

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Here, the Plaintiff is not a Nevada resident. Furthermore, Brunk and the other Defendants were officers and directors of a Canadian corporation. Unlike *Consipio*, here, there is simply no nexus to Nevada. Neither the Plaintiff nor Brunk are Nevada residents.

3. *Trump*

Plaintiff contends that *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 857 P.2d 740 (Nev. 1993), is "instructive because it involves a similar situation to this action." *Opp'n* at p. 15, ln. 21. Plaintiff then goes on to summarize *Trump*, describing circumstances that are completely unlike the facts in this case.

In *Trump*, the plaintiff sued the defendant for intentional interference with contractual relations when an employee of the plaintiff entered into a conflicting contract with an entity owned by the defendant. *Trump*, 857 P.2d at 741. The Court found that it lacked general jurisdiction over Trump because he was a resident of New York and did not maintain any type of continuous and systematic contacts with Nevada, based upon the following: he had no real or personal property interests in Nevada, had not personally entered the state, did not conduct business within the State or engaged in any persistent course of conduct within the state, or derived any revenues from any goods consumed or services rendered in the state. *Id*. at 749.

However, with respect to specific jurisdiction, the Court found that defendant and his agent pursued the employment of a Nevada resident, negotiated an employment with the employee while the employee lived in Nevada, and established a Nevada trust fund as part of the agreement. The Court concluded that because the action related directly to these contacts by Trump with Nevada, Trump purposefully directed his conduct toward the forum, and "Trump should have reasonably anticipated being haled into court in this state." *Id*. at 750. The court upheld the finding of specific jurisdiction. Unlike *Trump*, Plaintiff's claims arise out of his claimed reliance on purported material omission contained in SEC filings and press releases, which were all drafted and issued in Colorado and purportedly received and acted on by Plaintiff in California.

Because none of the alleged tortious conduct committed by Brunk took place in or was directed toward Nevada, this Court lacks personal jurisdiction over Brunk.

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CONCLUSION

In addition to joining in the relief sought by the D&O Defendants, this Court has no basis to exercise personal jurisdiction over Brunk because his contacts with Nevada are insufficient as a matter of law. Brunk therefore respectfully requests that the Court grant his Motion and enter an order dismissing the Complaint in its entirety.

DATED this 25th day of October, 2017.

SANTORO WHITMIRE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 25th day of October, 2017, a true and correct copy of the **REPLY IN SUPPORT OF MOTION TO DISMISS OF KENNETH A. BRUNK AND JOINDER IN REPLY MEMORANDUM IN SUPPORT OF THE D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT** was served electronically with the Clerk of the Court using the Eighth Judicial District Court's eFileNV system to the following:

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/s/ Kristen Capella
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Exhibit A

DECL
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Attorneys for Defendant Kenneth A. Brunk

DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. 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; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25, Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII

SUPPLEMENTAL DECLARATION OF KENNETH A. BRUNK IN SUPPORT OF JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT AND SUPPLEMENTAL MOTION TO DISMISS OF KENNETH A. BRUNK

I, Kenneth A. Brunk, pursuant to NRS 53.045 and under penalty of perjury of the State of Nevada, hereby declare the following are true and correct to the best of my knowledge:

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1. I am a Defendant in the above-captioned matter and am familiar with the facts and circumstances of such matter.

2. I am over the age of eighteen and am competent to testify about the matters contained herein, of which I have personal knowledge. If called as a witness to testify, I could and would truthfully testify to the matters set forth herein.

3. I make this Supplemental Declaration In Support Of Joinder in D&O Defendants' Motion to Dismiss Amended Complaint And Supplemental Motion to Dismiss of Kenneth A. Brunk.

4. During the time I served as the president and chief operating officer ("COO") of Midway Gold Corporation ("Midway") and chief executive officer ("CEO") of Midway, I visited Nevada approximately three to five times per year. All such visits were made in furtherance of my duties as President, COO and/or CEO, or as a board member of Midway.

5. During the time I served as President, COO, and CEO of Midway, I also made regular trips on behalf of Midway to New York City, New York, Toronto, Ontario, and Vancouver British Columbia. During this time period, I visited each of these locations approximately three to five times per year. All such visits were made in furtherance of my duties as President, COO and/or CEO, or as a board member of Midway.

Pursuant to NRS 53.045, I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Dated this 20th day of October, 2017.

KENNETH A. BRUNK

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL WOLFUS, Plaintiff(s), vs. RICHARD MORITZ Defendant(s).	CASE NO. A-17-756971-B DEPT. NO. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, NOVEMBER 1, 2017

TRANSCRIPT OF PROCEEDINGS RE:
ALL PENDING MOTIONS TO DISMISS AND JOINDERS

****

(Appearances on page 2)

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER
TRANSCRIBED BY: SHAWNA ORTEGA, CET-562

APPEARANCES:

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For the Defendant(s), Rodney D. Knutson, Roger A. Newell, John W. Sheridan, Frank Yu, and Richard Sawchak, Timothy Haddon, Bradley J. Blacketor, Richard D. Moritz:	ROBERT J. CASSITY, ESQ. DAVID J. FREEMAN, ESQ.
For the Defendant(s), Martin M. Hale, Jr.:	CHRISTOPHER R. MILTENBERGER, ESQ.
For the Defendant(s), Kenneth Brunk:	ERIC B. LIEDMAN, ESQ. JASON D. SMITH, ESQ.

LAS VEGAS, NEVADA, WEDNESDAY, NOVEMBER 1, 2017

[Proceeding commenced at 11:00 a.m.]

THE COURT: Thank you. Please be seated. Calling the case of *Wolfus vs. Moritz*, and if everyone will do their appearances in order, I'll try to be respectful of everyone's name.

Plaintiff?

MR. CHRISTENSEN: Jim Christensen on behalf of Plaintiff.

THE COURT: Thank you.

MR. FREEMAN: David Freeman on behalf of the directors and officer defendants.

THE COURT: Thank you.

MR. CASSITY: Good morning, Your Honor. Robert Cassity of Holland & Hart on behalf of the directors and officer defendants, with the exception of Mr. Brunk.

THE COURT: Thank you.

MR. FERRARIO: Good morning, Your Honor. Mark Ferrario and Chris Miltenberger on behalf of what we call the Hale defendants in our pleading. So.

THE COURT: Yes. Thank you.

MR. FERRARIO: Thanks.

MR. LIEDMAN: Good morning, Your Honor. Eric Liedman appearing pro hac vice from Denver, Colorado, from the law firm of Moye White. I represent Kenneth Brunk, Defendant Kenneth Brunk. And I'm here with my local counsel, Jason Smith from Santoro Whitmire.

THE COURT: Thank you. So that --

MR. SMITH: Good morning, Your Honor.

THE COURT: -- that's everyone? Very good.

All right. So I would like to take this in the following order. The Hale defendant -- let's see, the -- the directors and officers was the first Motion to Dismiss, then the Hale defendants, and then the Brunk, as well as the joinders, if we can take them in that order with one opposition, kind of the way it was briefed, that would be easier for me that -- because that's how I briefed it, too.

MR. CASSITY: Thank you, Your Honor. That's exactly how we were going to propose. So --

THE COURT: Good.

MR. CASSITY: -- I appreciate that.

Your Honor, our motion focuses on three primary grounds for dismissal. First is a lack of subject matter jurisdiction, the second is a failure to state a claim, and the final is personal jurisdiction.

I'll start with just kind of running through the general allegations. The plaintiff is a -- is the former CEO and chairman of the board of Midway, which is now a bankrupt Canadian company --

THE COURT: All right.

MR. CASSITY: -- whose principle place of business was in Colorado. The plaintiff claims that the defendants failed to disclose material facts related to the operation of the Pan Mine Project that was here in Nevada when he exercised stock options in 2014. And he essentially alleges that, because some material facts were not disclosed publicly, he wouldn't have exercised it and omnisciently would have sold all the shares at -- at the peak value of -- of Midway stock.

We think that the -- the claims are subject to dismissal, so I'll first

address the lack of subject matter jurisdiction, Your Honor. And that gets into the issue of the Internal Affairs Doctrine, which holds that the law of the jurisdiction of the corporation applies. In this case, because we have a Canadian company, the -- the law of British Columbia applies and any claims need to be brought in the Supreme Court of British Columbia, or they need to apply for a leave from the British Columbia supreme court, which has not happened.

The second issue of subject matter jurisdiction is because we believe these are derivative claims, derivative claims that are claims that belong to the company, and because the company's in bankruptcy, those claims are -- are held by the bankruptcy trustee as part of the bankruptcy plan.

What do we see in the opposition? Absolutely nothing. They totally ignore the --

THE COURT: Well, they -- they argued that it was his individual right to buy the stock and not -- not an action of the company. It --

MR. CASSITY: Right. So -- so they're trying to make --

THE COURT: -- was -- they argue against the derivative argument.

MR. CASSITY: Exactly. So they're trying to -- they avoid the -- the -- those arguments by trying to say that it's a direct claim, not a derivative claim. And what they do is they point to the recent supreme court decision in the *Parametric Sound Corporation*. I'm familiar with that, because I represent the Parametric director defendants in that case.

And as the Court knows, the supreme court in *Parametric* adopted the direct harm test, which is entirely consistent with all the Delaware case authority that we cited in the motion, which -- and just to give the Court a little bit of background, in *Parametric* there was a challenge to a merger, and the plaintiffs

claim that their equity was diluted. They claimed that that was a direct claim and not a derivative claim.

The -- the district court denied our Motion to Dismiss on a -- on -- on the writ petition, the supreme court reversed and held that the claims were derivative, with one exception of whether this kind of direct/derivative equity ex-appropriation claim, which has nothing to do with this case. So no need to get into that.

But the current focus is on who suffered the harm and who -- where would the benefit of any recovery be? And what we see in this case is the plaintiff seeks damages for the diminution in value of his Midway shares as a result of the alleged failure to disclose these material facts. And as we look -- I'm just going to cite to the Court the opposition at -- at page 10, it says:

> Wolfus suffered the harm for which recovery is sought in this action when his own shares became valueless.

And the problem with that, Your Honor, is that everybody's shares became valueless, because the company went into bankruptcy. And that -- that harm was suffered across the board. It was suffered by my clients, who likewise --

THE COURT: But isn't equity separate in -- in Chapter 11? It's really not under the jurisdiction of the Court.

MR. CASSITY: Well, it is -- it -- at least in this case, Your Honor, it is part of the bankruptcy plan. The derivative claims on behalf of -- of the company would be direct claims. And to the extent otherwise, I mean, I guess if they're saying that there was a claim against the company, you know, that would be subject to the bankruptcy court's jurisdiction, as well.

But the -- the issue with if there was a failure to disclose and all the shareholders suffered a harm, he -- Mr. Wolfus was not unique; all the other shareholders, likewise, suffered a diminution of value of their shares. And for that reason, when we look at the -- the nature of the harm and the nature of the remedy, those are derivative claims, because there's no -- there's no injury that was not suffered by the entire corporation, as well.

And so that does not allow the plaintiff to -- to personally and directly recover for that diminution of value for this alleged mismanagement by failing to make this disclosure. And we cite a number of cases for that proposition, that the diminution in value of corporate shares is derivative. It's a classic derivative case.

The second issue, Your Honor, is the -- is our failure to state a claim argument with respect to the California Securities Law. And we think that this is crystal clear, Your Honor. The Section 25017(e) provides that a purchase or sale of a stock option is deemed to have occurred -- deemed to occur at the time this option is granted. Not at the time that the option is exercised.

And in this case, the evidence is clear, we submitted the filings that reflect the -- the option awards, which occurred in 2009. There's no allegation or suggestion that there was any material omission in 2009, when the stock options were -- were issued. In fact, the plaintiff was the CEO and chairman of the board in 2009 when the -- the options were issued. So it's very difficult for him to make any type of claim. And I don't think that any leave to amend would -- would allow him to amend to assert any claim that he somehow failed to disclose information to himself.

Their only response to that, Your Honor, is pointing to this

People v. Boles case, which is a criminal case from the 1930s, approximately 30 years before the statute was enacted. We don't think that that's a serious argument, that that case in any way shows that these securities -- or that the option -- the -- the sale occurred at the time they were issued as opposed to at the time that he exercised the options.

The second argument they make in that regard, Your Honor, is that -- that the -- the D&O defendants were somehow control persons and therefore liable. The problem is, again, you still have to get the primary violation. And the primary violation as it relates to stock options is when they were issued. So even if -- even if we accepted their argument, we look at -- still at the 2009 timeframe, not at the 2014 timeframe, when he exercised the options.

The last issue on that is the extraterritoriality argument. I hope -- and there's a presumption in the California law against extraterritorial application. And here we have a company that's incorporated in Canada, corporate headquarters in Colorado, with also some company operations in Nevada, and the sale of stock occurred from Colorado. So all these things would suggest and -- and militate against extraterritorial application of the -- of the law.

And finally, Your Honor, we get to the issue of personal jurisdiction. I know this Court is extraordinarily familiar with --

THE COURT: I am.

MR. CASSITY: -- with the standards on --

THE COURT: You're --

MR. CASSITY: -- personal jurisdiction?

THE COURT: You're all aware that that was my case.

MR. CASSITY: Yes.

THE COURT: Yes.

MR. CASSITY: Yes, Your Honor. And I know that we had a recent case, the *Jackson/Walker* case, Mr. Pickard [phonetic], before you a couple of months ago that -- so I know that's probably fresh on the Court's mind. Of course, we know that the plaintiff is not a Nevada resident, he's a California resident. Midway is not a -- a Nevada corporation, it's a Canadian corporation. It's not headquartered here, it was headquartered in Colorado.

And with one exception, and -- and the D&O defendants do not reside in Nevada. Mr. Yu does reside in Nevada. And so the remainder of my points on general jurisdiction won't apply -- or personal jurisdiction won't apply to Mr. -- Mr. Yu. But the directors, the other directors reside in Canada, Colorado, Virginia, and Washington. And none of the purportedly misleading public disclosures were issued from Nevada, they were issued from Colorado.

So we -- we look at the general jurisdiction analysis and, of course, for individuals, we look at the individual's domicile. Again, none of the individuals are domiciled here. We've said on our papers the -- the complete lack of -- of continuous or systematic contact between any of the director defendants in Nevada.

So then we turn to the specific jurisdictional analysis. And again, the Court is -- is familiar. And I think each of the cases the plaintiff cites, none of them -- each -- well, each of them has specific conduct that occurred in Nevada either by the individuals themselves, or in the case of -- of Mr. Trump, the -- the agent who was in Nevada negotiating, entering into contracts, and even in the *Fulbright and Jaworski* case that your -- Your Honor was -- was dealing with relates there were meetings by the *Fulbright and Jaworski* lawyer that were presented to

the investors here in Nevada. So each of those cases involved direct interactions that gave rise to the claims that were at issue.

In this case, the claim isn't fit, the directors and officers did something in Nevada, made communications or failed to make disclosures out of some interaction that he had with the plaintiff in Nevada. They relate to complaints that the public filings that were issued from Colorado, where Midway's principle place of business and offices are located, were not -- did not fully disclose concerns that they had about the operation.

And what I see in the opposition, we see the plaintiff tries to avoid this issue by saying, Well, we've got to look at the company. Midway had operations here. Midway had the Pan Project here. Midway had business that it was operating in Nevada. And then they try to -- to attribute that conduct to each of the D&Os.

And the case law is pretty clear, Your Honor, that with respect to the individuals, the personal jurisdiction analysis is not at the corporation level, it's at the individual level. And none of the claims the plaintiff has relates to any of the defendants and officers' conduct in Nevada or communications that were made or not made to the plaintiff that occurred in Nevada.

And there's no evidence that they purposely directed these public statements or injected them into Nevada when we have a -- a California plaintiff who is purportedly acting on those lack of disclosures in California.

So on that basis, Your Honor, we'd ask the Court to dismiss the complaint with prejudice.

THE COURT: Thank you, Mr. Cassity.

Mr. Ferrario.

MR. FERRARIO: Actually, this unfolded just like I hoped it would. Mr. Cassity did an excellent job, so I'm not going to repeat --

THE COURT: Well, the -- let me compliment -- compliment all of the briefing.

MR. FERRARIO: Right.

THE COURT: It was fabulous. It's the best I ever see from all of you.

MR. FERRARIO: No, I -- I thought -- I thought that, as well, on behalf of -- of all parties.

Really, the only thing I would -- I would point out, Your Honor, is this -- I represent some investment companies. And in the opposition, you know, by -- by the plaintiff, they don't even address those companies. So under local rules, I think you can dismiss those companies out of hand for them to -- failure to oppose our arguments. So you can grant our relief in that regard.

On the rest of it, Mr. Cassity covered it. I, you know, we have a Canadian company, my clients have no contact with the state of Nevada other than occasional visit down here maybe to, you know, open a mine or something of that nature. You know, I -- there's nothing, really, left to say. The record is -- is pretty clear here.

And -- and, you know, what -- what really struck me in going through this today is why are we in Nevada on this at all? I -- I just don't see any connection or any reason for this Court to get involved. And I see no reason for this Court to exercise jurisdiction over my client. So with that I'll terminate my --

THE COURT: Thank you.

And Mr. Liedman?

MR. LIEDMAN: Thank you, Your Honor.

Good morning -- yes, morning.

THE COURT: Still morning.

MR. LIEDMAN: And just briefly like to thank you for granting our Motion to Associate --

THE COURT: Of course.

MR. LIEDMAN: -- and allowing me to come from Denver to argue in your court. Denver's a nice city, but it's a lot more exciting down here.

THE COURT: Hasn't been so much fun lately.

MR. LIEDMAN: Which could be a blessing or a curse, depending on you -- whether or not you live here, I suppose.

But I -- I echo Mr. Ferrario's sentiment with respect to Mr. Cassity's argument. As you know, Mr. Brunk has joined in the briefs of the D&O defendants.

THE COURT: Yes. And I'm recognizing all the joinders of all the parties.

MR. LIEDMAN: Okay. And unless Your Honor has specific questions, I'm going to -- not going to restate those arguments and just focus on --

THE COURT: You know, you guys are the only thing on calendar. I -- I don't want anyone to feel that you've come here and been cut off.

MR. LIEDMAN: Oh, not -- not at all, Your Honor. And if you have any questions, I'm happy to answer them. But -- and I -- and I appreciate the solicitness of -- but aside from Mr. Brunk, there isn't much left to say. I think Mr. Ferrario said it best, and I think it was also in Mr. Cassity's brief.

Mr. Brunk lives in Colorado. Mr. Brunk has lived in Colorado for 21 years -- 25 years, excuse me. The plaintiff lives in California and is suing

under California Security Statutes. The injury presumably occurred in California, where he would have received these 10-K's and 8-K's and press releases and read them. Those are all generated in Colorado at -- at Midway's headquarters in Colorado.

I represent to the Court I've represented Midway for several -- you know, I represented Midway for several years preceding the bankruptcy and the office. I know it says something in the declaration of -- of Mr. Wolfus that there was some small office in Colorado or something like that. Colorado is Midway's headquarters. And it's -- that's in the record. I'm not just making the representation of filing the 10-K's that are attached -- the 10-K that's attached to Mr. Wolfus's brief. You can see that that is the corporate headquarters, that is where all emphasis on the declaration, as well. That is where all the documents were generated, that's where almost all of the meetings were held.

Midway's in British Columbia, and as I said, has its headquarters in Colorado. And as it was stated very succinctly in Mr. Cassity's brief:

Why Nevada?

I clearly -- I'm not blind to the fact that the mine was here. But the *Southport* case clearly holds that just the fact that a corporation that is headquartered somewhere else and is incorporated somewhere else happens to have operations or assets in various states does not subject it to jurisdiction in those various states.

I do want to go back and I know Your Honor is entirely aware and probably can recite in your sleep the standards for jurisdiction and personal -- that are -- and the specific and general jurisdiction. The point I want to make, though, is that under the *Trump* case, and I think all the -- all the cases are clear, that the

plaintiff has the burden to make out the case of personal jurisdiction, once it's challenged.

The *Trump* case has some interesting language in that regard, though, that I've always assumed to be the case, but *Trump* points it out. Oftentimes when you have a -- a prima facie case, our challenge triggers their prima facie case, there's a burden-shifting analysis. *Trump* points out there is no burden-shifting analysis here. They retain -- the plaintiff retains the burden through this proceeding of making out the prima facie case.

We -- we can rebut that to show that they haven't made out their prima -- prima facie case, but the burden never shifts to the defendant to make out the case that there is not jurisdiction. And I think that's crucial here.

And at several points in the defendant's brief, he mentions his detailed allegations of jurisdiction at paragraphs 59 and 79. And I just want to direct the Court to those paragraphs, because I think it makes the point that some made out in several of these cases we've cited, *Amalook* [phonetic], *Southport*, the *Fulbright* cases, and *Trump*. It's paragraph 59, 18. And it has A, B, C, and D, and refers to the fact that 59(a) refers to the defendant. Defendant's side -- this is crucial, as well -- the defendants here are defined as defendants. And Mr. Brunk's name is not mentioned one time. It's Midway did this, Midway did this, Midway did this. The *Southport* case, the *Amalook* case all support the point that it's not the corporation's contacts, it's the individual's contacts.

And the -- we don't have -- we don't have the individual contacts, and I'll get into that in a moment, but it's --

THE COURT: It does reference Hale in -- in paragraph B, but you're right, there's no specific with regard to Brunk.

MR. LIEDMAN: Exactly so, Your Honor. It said Midway was unable to raise sufficient cash, that -- that's Midway. That the appropriate way to remedy that would be to file a claim in Midway's bankruptcy, which apparently wasn't done.

Does mention Hale. But nothing the environmental and other permits secured by Midway, nothing about Mr. Brunk, nothing that says Mr. Brunk failed to do anything. And here I -- I represent just Mr. Brunk, and there are no allegations here regarding Mr. Brunk. And these are what the plaintiff characterizes as his detailed and specific allegations to satisfy its prima facie burden. And with -- with respect to Mr. Brunk and with respect to all the defendants, he simply failed to do so.

I'd also like to direct Your Honor's attention to paragraph 79, the other supposedly specific in detailed allegations of jurisdiction. And again, lead pour was poised to commence mining operations at Pan Loading, Midway had not sought or received modified permits, which is the same allegation from paragraph 59, and Midway did not have necessary facilities.

And so again, it sounds a lot more like the -- the *Southport* case, where the case make -- which makes very clear that it is not simply enough for -- for you -- you can't -- you can't exercise jurisdiction over a corporate officer or director simply because the corporation has operations in a different state.

And again, paragraph 79 is devoid of Mr. Brunk's name. As a matter of fact, in the entire complaint, Mr. Brunk is only mentioned in paragraph 2 and, I believe, once more -- I'm missing it here, but it's -- in -- in the allegations and not at -- not in the sense that it makes allegations against them, they're just descriptive allegations that say Mr. Brunk is in the parties section, Mr. -- Mr. Brunk -- excuse me -- is -- is an individual who's a resident of Colorado. And

then further in here it points out that he was also a director and an officer and lists his tenure. That's not what they're suing about. They're suing based on allegations and nondisclosures from 10-K's and 8-K's and press releases.

I'd also like to point out, since even if the complaint were more detailed in that regard, the cases say that the plaintiff -- the defendant cannot -- or, excuse me, the plaintiff cannot rely on the complaint, but has to rely on -- once personal jurisdiction is challenged, has to rely on the declaration.

And turning and directing Your Honor to Mr. Wolfus's declaration, again point out -- bear with me for a moment here -- and so now I'm on the declaration to Daniel E. Wolfus in opposition to Motions to Dismiss. And this is really the crucial document and declarations, in my experience, are the crucial documents in any jurisdictional argument. And particularly when we're not having an evidentiary hearing and the Court is relying on those declarations.

This was Mr. Wolfus's opportunity to set forth all the facts that he could to establish general or specific jurisdiction over Mr. Brunk. And I'm going to show the Court why he failed to do so.

THE COURT: I have it up. I have it up.

MR. LIEDMAN: Thank you. Mr. Brunk is only mentioned in paragraphs 6 or 7, and I'll say -- unless I missed one, unless the -- the Court find one and tell me that I have -- there was another paragraph.

And again, let's look at paragraph 6 and think about jurisdiction in that regard, and let's break it down.

I have known Kenneth Brunk since the time I interviewed him to be the chief operating officer of Midway.

This is the -- the plaintiff's opportunity to show that the Court

should be able to exercise general or specific jurisdiction. And I won't go into detail, but I think we're talking about specific jurisdiction here. I don't think there's any case for -- for exercising general jurisdiction over Mr. Brunk, based on his declaration and lack of specific allegations. But if the Court wants me to speak more to that, I will.

THE COURT: It's not necessary.

MR. LIEDMAN: Okay. Okay. So Mr. Wolfus has known Mr. Brunk. That's interesting, but completely immaterial to this case. Couldn't be more immaterial. He hired him in May 2010 in order to bring the Pan Project in Nevada online as an operating gold mine. These are simply factual statements. They have nothing to do with conduct directed at Nevada, conduct directed into Nevada, harm caused to Nevada citizens. There's no question. The Pan Gold Mine is in Nevada. We don't dispute that. However, it was run out of Colorado, all the decisions were made out of Colorado, almost all the board meetings were made in -- were -- were held in Colorado. And they were -- and -- and these -- these misrepresentations or omissions, if an omission can be directed, presumably, where Mr. Wolfus -- where Mr. Wolfus didn't receive information, would also be in -- in California, just similarly not on misrepresentation, this would be received in the -- and the state where Mr. Wolfus lived. So whether we're talking about misrepresentations or omissions, the -- the conduct is directed at California, not Nevada.

Then we go onto paragraph 7, and so this appears to be -- these three sentences appear to be the heart of the argument against Mr. Brunk for specific personal jurisdiction. He was actively involved in managing the day-to-day affairs of Midway and its Nevada subsidiaries on behalf of Midway. He was the COO and then he was the CEO, we don't deny that. That's true. But the cases are

uniform in saying, and *Southport* in particular and -- and the first *Fulbright* case, as well, which I understand is your case, Your Honor, that simply -- simply being the director or officer of a corporation that has operations in a different state is not sufficient to subject that director or officer to jurisdiction in that state without more.

And I'm not -- I'm not going to gloss over the fact that Mr. Brunk has been to Nevada. It's not mentioned here, I'd be surprised that -- that just like the rest of the world, that he's -- he's probably been here for entertainment once or twice, although that's not in our declaration and I won't dwell on that.

But with respect to -- with respect to Midway, there are very vague allegations here. Based on -- and -- and if this sentence is crucial. As a result and based upon my knowledge of the duties and tasks required of chief executive officers -- and there's not an S on the end of that, but for the sentence to make sense, I think it needs to say chief executive officers -- it appears that Mr. Wolfus is not saying that Brunk was involved; he's saying he knows what chief executive officers do.

And based upon his knowledge, which there's no foundation for it in here, and query whether you could -- you could categorize all the companies in the United States and -- and generalize as to what chief executive officers do in any event. He's just saying that based on what he knows that CEOs do, that Brunk's involvement in managing Midway increased. Okay. It did. From Colorado.

He directed -- he directed Midway's mining operations in Nevada from Colorado. He reported to -- he reported for when he was chief operating officer, he offered -- he -- he reported to Mr. Wolfus and did go to Nevada to -- and did go to Nevada to perform his duties. And Mr. Brunk absolutely did come to -- to Nevada from time to time. There was a groundbreaking when the mine was

opened. And that's interesting, because that hearkens to the *Amalook* case, where there was a christening of a ship, similar to what -- I guess, I don't know -- I don't know if our groundbreaking had champagne, but when I think of christening of a ship, I think of the champagne bottle breaking on the ship.

And there -- there were -- it was a maritime related case and it was noted that in the jurisdiction where the plaintiff sought to hold the defendant to -- to personal jurisdiction, that it -- purchases and related trips and the christening ceremony had been held in that jurisdiction. And *Amalook* held that that was not sufficient to -- to support personal jurisdiction or support specific jurisdiction.

Finally, I'd like to make the point, Your Honor, that even if Mr. Brunk came to Nevada more than this, the key, the *sine qua non* of personal jurisdiction and specific jurisdiction, is that the contacts have to be connected to the claim. And there I go back to the -- and that -- that's really where the heart of all -- all of it. Maybe I should have said that and sat down.

But the -- the allegations in 6 and 7, even if you read them and even if you read the whole thing as accepting that all is true, as we must on a motion with -- not on a jurisdictional motion, but even accepting it as true, he frequently went to Nevada to perform his duties. If there was another sentence here that said, And these -- and he performed these duties which were X, Y, and Z, and those duties, X, Y, and Z, created my damages by doing A, B, and C, that would be entirely different story. But all he says with respect to Mr. Brunk's contacts with Nevada at all is that he frequently went to Nevada, frequently being a vague term in and of itself. I think we were more specific about how often he's been to -- to Nevada than frequently. I mean, we readily concede there were a couple of board meetings that were held in Nevada. And that Mr. Brunk did come

out to the mine and they did have a groundbreaking. I don't know if there was champagne there.

But Plaintiff has the burden. And Plaintiff has the burden of showing that connection between the connections with the state and the claims. The claims here are all based on these securities issues, the 10 statements and the 10-K's, or the statements not in the 10-K's, the press releases. And there are no allegations whatsoever in this declaration that tie any of these contacts to the actual -- to Mr. Brunk and the actual harm caused.

As I said, Your Honor recognized we are joining in the D&O arguments. I would also like to point out, as they did, that the plaintiff did not even address the -- the bankruptcy claims or the extra territoriality claims, and I understand that in Your Honor's discretion, that could be deemed an admission of those claims or a confession of -- or those arguments under Nevada law. And we urge that that should be the case. I commend Your Honor to those arguments, as I think they're particularly strong. It may very well be a violation of the automatic stay in bankruptcy, but, of course, that's not an issue for Your Honor.

THE COURT: Midway's not a party. And did Midway reorganize?

MR. LIEDMAN: Well, Midway is in the process of reorganizing. There -- it's in the midst of a Chapter 11. They have an amended plan that's been provisionally granted and they're resolving the claims process right now. I direct Your Honor, I believe it is -- it's an exhibit that --

THE COURT: Yeah, I --

MR. LIEDMAN: -- plan of --

THE COURT: -- can't recall the specifics of that.

MR. LIEDMAN: Yeah, once it gets into the bankruptcy stuff, it gets --

THE COURT: I'm not sure if that's relevant to my concerns here.

MR. LIEDMAN: Very -- very well, Your Honor. Just my -- my point with respect to that was that in the plan process, the -- the claims were -- the -- claims, if they were derivative, and the plaintiff's claiming is direct, if they were -- if they are derivative -- so if they're direct, we've got that issue that was covered by the D&O defendants. If they're derivative, they were assigned in the bankruptcy. So asserting these claims would be a violation of the automatic stay. And that's -- that's detailed in -- in the D&O defendants' brief.

THE COURT: I understand. Thank you.

MR. LIEDMAN: So based on all those points, Your Honor, we've got Colorado, we've got California, we've got British Columbia. Why Nevada? Sure. The mine's here. But the conduct didn't occur here. And anything that Mr. Brunk did alleged by Plaintiff in this state, he doesn't tie together with the claims. It was his burden, he didn't meet it.

THE COURT: Thank you, Mr. Liedman.

MR. LIEDMAN: We respectfully request that the Court dismiss the plaintiff's claims with prejudice. Thank you very much, Your Honor.

THE COURT: Thank you.

The opposition, please, Mr. Christensen.

MR. CHRISTENSEN: Thank you, Your Honor.

I'm going to start with jurisdiction first and then I'll touch on some of the comments of the counsel for Mr. Brunk.

Their position is based upon a real narrow reading of things. For example, counsel for Mr. Brunk commented that page or paragraph 59 of the complaint does not contain Mr. Brunk's name, which is correct. Paragraph 59 does

contain control defendants, which is defined in paragraph 58 as including Mr. Brunk. So no, in drafting the complaint, we didn't add in Mr. Brunk's name every time the control defendants appeared. That same exact situation happened at paragraph 78 through 79.

Not really sure they brought a -- that reading the claim on why it's supposed to have any meaning to us, Mr. Brunk is clearly defined as a control defendant, and the control defendants are clearly defined as folks who are getting sued. So I'm not sure about that entire point. But it doesn't really mean anything.

With regard to jurisdiction, sure, under *Trump* and under *Fulbright* 1 and 2, when jurisdiction is challenged, then the plaintiff has to come forward and put forth a prima facie case. But once they put forth a prima facie case, that's it. The court doesn't then assume a fact-finding position. You don't weigh the competing declarations, for example. You could, if we have discovery and then there was a Rule 56 motion, but we're not at that point. No one's done any discovery. We're right at the very beginning of the case. No one's filed an answer, we don't have a case conference or a report, we haven't appeared before Your Honor for the case conference and the business court procedure. We haven't done any of that.

So what we have is a declaration by Mr. Wolfus, and we also have some of the information that Mr. Wolfus incorporated into that declaration, including the 10-K.

So the question is asked why Nevada? Well, why not Nevada? Could have sued in California, we would have gotten motions challenging jurisdiction. Could have sued in Colorado, we would have gotten motions challenging jurisdiction. Could have sued in any of the other states where any of

the other officers and directors reside, would have gotten motions. Colorado -- or Nevada is as good as a place as any other. We could have sued in Colorado or California. We still would have faced the same motions.

The difference with Nevada is that it has a real strong nexus, in our opinion. And it's kind of our choice on where to bring the case. Even if California would be slightly better, but Colorado would be arguably slightly better, that doesn't mean we can't bring the claim in Nevada. And that's what we did.

So let's take a look at Mr. Wolfus's declaration, because again, the argument I heard was very, very, very narrow. Of course, Mr. Brunk is mentioned in paragraph 6 and, you know, Mr. Wolfus establishes a foundation for his statements about Mr. Brunk by indicating he hired him and he's known him, so he establishes familiarity, and that's, you know, kind of the part for establishing a foundation for what follows.

So he mentions that he's part -- he's -- he hired him in May 2010 in order to bring the Pan Project in Nevada online as an operating gold mine. That's entirely consistent with the 10-K. If you take a look at the 10-K -- sorry, that they filed, that Midway filed with the SEC, they have a map of Nevada in it. They don't have a map of Colorado or Washington or Canada or any other place. They have a map of Canada [sic], because that's where all the action is. And Mr. Brunk was hired to run that action.

And it goes on and -- and he talks about that in paragraph 7. And he also talks about that he was part of the disclosure committee. But that's not the only paragraphs that apply to Mr. Brunk. That's where we come up with this narrow reading again. For example, paragraph 18 refers to each of the defendants. And Mr. Wolfus says:

I have read the declarations of each of the defendants.

That would include Mr. Brunk.

Those declarations are each misleading, because each fails to describe each of their conduct in managing Midway's mining operations in Nevada, which each did continuously during the time each was a director and/or officer of Midway.

So he's saying, Well, wait a second. Brunk was -- was running the mines.

And it goes on. For example, in paragraph 20:

Midway's only operational office was located in Ely, Nevada.

That's where they -- that's where the action was happening. Paragraph 21, when they went to go seek permits and everything, that came through the Ely, Nevada, office. And permits is kind of important, because one of the things that Mr. Wolfus claims is that there wasn't accurate disclosure about the status of the permits in the public disclosure except for by Midway.

The next paragraphs all go through what Midway was doing in Nevada. Starting at paragraph 25, for example, as a matter of practice, management facilitated tourism of Nevada project sites for board members. Mr. Brunk was a board member. At a minimum upon their nomination to the board, they went on through specifically to gain firsthand knowledge, observation, and interaction.

Paragraph 26, they've got tours of the project sites. 27 says, [indiscernible] efforts before the legislature, conferences, other forums held in Nevada.

Paragraph 28, directors were requested by management to

actively participate in person in negotiating agreements between the company and local jurisdictions and agencies, including with the BLM in Reno or Ely, and the town of Tonopah.

Board members also participated in M&A evaluations conducted within Nevada.

Number 30, board meetings themselves were hosted a number of times in Las Vegas in part because Yu was based there. But also because it was a convenient location that all board members could reach with direct flights. Lot of planes come to Las Vegas, Nevada. It's a convenient place to meet.

So, really, the picture that we have is we have gold mines that are located in Nevada, we have folks who are operating those gold mines who are here in Nevada on a routine business, and all of that leads to the issuance of the disclosure and all of that is involved in and establishes their knowledge that those disclosures were incorrect. When this stuff runs through the audit committee or the disclosure committee or a handful of other committees that they have that all of the named defendant were a part of, they have -- they have a duty and obligation to step up and say, hey, wait a second, that's not accurate. Those permits haven't been issued yet. We're still awaiting it, the mine hasn't gone that far. We don't have the financing that these public statements state we do or infer we do.

So, really, the focus, the entire focus of the defense is that the last final act in this whole chain of events, we've got a whole pool of information, the last event occurred in Colorado, did not occur in Nevada. Well, that's true. Wherever these -- wherever these were issued from, they were issued from. But they are all based upon a whole pool of facts and circumstances that existed in Nevada. You can't just pull that away and look at the last fact in the chain.

Because all of those facts and circumstances resulted in that act.

The failure -- the knowledge gained by the disclosure committee, the failure of the disclosure committee to act at some of these board meetings that were held in Las Vegas, all of those things leads up to that last act.

So under the cases that we have, we've set forth a prima facie case, this declaration is a lot broader than argued. And it covers all of these facts and circumstances that occurred within Nevada.

Now, there is an argument concerning wrongful -- there's an argument concerning whether this is a derivative or a direct claim. But if you take a look at the complaint, you will see that there are no mismanagement claims, there are no claims of overall diminution of value of the stock except where that pertains to the damages of Mr. Wolfus.

And that's where the quote goes that was read by first counsel up here. If you take a look at this complaint, and I'm going to refer mainly to the first cause of action, because that seems to be the -- where everybody's -- is aiming --

THE COURT: I have it up.

MR. CHRISTENSEN: Right. Which is the securities cause of action. It's a California Securities cause of action. So paragraph 59, for example, sets out some of the false statements and omissions claimed by Mr. Wolfus. Paragraph 78 and 79 do so, as well.

So the question is, I heard failure to state a claim and no primary violation allegation. Well, paragraph 100 of the complaint says:

> In violation of California Corporations Code 25401, the 2013 public filings by Midway, which discuss the Pan Project, were materially false and misleading by failing to timely disclose each of the 2013 undisclosed

facts and the failure by the 2013 control defendants to disclose the 2013 undisclosed facts.

And that goes on and says that that was intentional and -- and done to induce reliance.

There it is. And then it goes on. There's a couple more paragraphs that flesh that out.

So let's take a look at the -- the framework against what we're doing this -- and it's -- and it's set up pretty well in *Parametric*. We don't have a mismanagement claim. But here is an interesting section from *Parametric*, and this is before they get into their actual discussion of the *Tooley* factors. And this is a -- a quote from *Cohen*:

A derivative claim is one brought by a shareholder on behalf of the corporation to recover for harm done to the corporation.

Well, paragraph 100 alleges a violation of California Corporations Code 25401. A corporation can't have that claim. That claim is based upon Mr. Wolfus's purchase of stock from Midway. Midway got the money. Mr. Wolfus's money. Midway's already been paid. It doesn't have a claim and it has no damages.

And just as -- as kind of an aside with that, going to the diminution of value of stock argument, it's interesting that *Parametric* sites with approval the -- a quote -- I'm sorry, a -- a statement on the Baylor Law Review, which noted the logical fallacy of the assumption that if the harm is to all shareholders, that it must be derivative. That's kind of what these folks have fallen into. Sure, the stock went down. But that's only evidence of damage. We're not saying that mismanagement caused that stock to go down. And in particular,

Mr. Wolfus has a unique -- at least as far as we know -- unique claim, because he exercised options based upon inaccurate or statements which contained omissions, and that caused him to act and to put over an extra million into the company. Not all other stockholders fall into that group.

So the question is the *Tooley* factors, one, who suffered the alleged harm? The corporation of the suing stockholders individually. Well, we've alleged a violation of -- of California Corporate Code, and Mr. Wolfus is the one who suffered that harm. The corporation couldn't. It doesn't have cause of action under that statute, and it has no damages. It got the money.

That's not to say, by the way, that the corporation at Midway or the trustee or whoever under the plan might not decide at some point to sue former officers and directors or what have you for allegations of mismanagement. That's not to say --

THE COURT: They would have had to declare that in --

MR. CHRISTENSEN: Yeah, but we don't --

THE COURT: -- the Chapter 11.

MR. CHRISTENSEN: That has nothing to do --

THE COURT: So the --

MR. CHRISTENSEN: -- with our case. You know, whatever the facts are, they are. But our claim is based upon the California Corporate Code section.

So number one, in answering the question, who suffered harm, the relevant inquiries, looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation? Absolutely. The corporation was not injured. They got Mr. Wolfus's money.

So the second one is who would receive the benefit of any recovery or other remedy, the corporation or the stockholder? Again, Mr. Wolfus. It's his money. Midway can't recover that investment twice. That would be a double recovery.

So under any -- I mean, *Parametric* makes it crystal clear that this is a direct claim. It's not derivative. As such, all of these other arguments fall to the wayside. There was no violation of the stay, because it's not a derivative claim and we didn't sue Midway. All of these other arguments -- I can't even recite them all, but there was a bunch of them. But if they're all keyed upon the premise that this is a derivative claim; It's not. It's a direct claim.

So there was a allegation that there was a failure to assert a claim. California Corporate Code, all these references will be to the Corporate Code. 25019 defines what a security is. Security means any note; stock; and it goes on. Mr. Wolfus bought common stock. That's his security.

Was there a sale? And we heard some discussion of 25017. 25017 says:

> Sale or sell includes every contract of sale, of contract to sell, disposition of, a security or interest in a -- in a security for value. Sale or sell includes any exchange of securities and any change in the rights, preferences, privileges of, restriction of, or on outstanding securities.

That's clearly what we have here. We have a sale of a security, common stock. So the question is, is there some sort of an exception for subsection E? And it was interesting, because the argument said that E addressed an option. I don't think there's any question that Mr. Wolfus had an option to buy common stock. I mean, it's -- the plans laid out in the S-8 filing made by Midway

years and years before, this was an option to buy stock.

Interestingly, subsection E does not mention an option. The word option doesn't appear. It talks about warrants and it talks about convert -- it says convert the security into another security the same or another issue. It talks about a convertible security. That's not an option. And granted, the line between option and warrant can sometimes become a little gray. But not here. They specifically mention warrant and they specifically mention a convertible security. Not an option. And those are different animals.

For example, a convertible security or a warrant is given a CUSIP number. Options don't get CUSIPs. It's a different thing. And just for the record, a CUSIP is issued by the Committee on Uniform Securities Identification Procedures. That came into place back in the '60s. That's who identify things that get traded on the exchanges, over the counter, whatnot. Private placements even get CUSIPs. You know, are you buying some timeshare, some interest in a -- in a CDO or something. You get a CUSIP. There's no CUSIP here to this option.

E does not apply to an option. It would have to say if it did. He would have to say, this is going to apply to an option. This specifically applies to a warrant and to a convertible security.

So we have an argument about extraterritoritality and some of that is taken care of by the direct and derivative argument. But under California Code 25008, an offer to buy is accepted in the state, the offer to buy was accepted in Cotton, California. So there's no extraterritorial application of the California Corporate Code in this case.

So the actual claim is brought under 25401, as our complaint stated, and essentially, it's unlawful to make a statement of an accurate material

fact or omission involved with the sale of a security.

25501 provides a private cause of action for a violation of 25401. And it says:

> Any person who violates Section 25401 shall be liable to the person who purchases a security from him or sells a security to him.

And it goes on.

That -- or the control defendants are the folks who violated it, and Mr. Wolfus is the person who bought it. That means Mr. Wolfus holds this cause of action. It -- it's not Midway's. Midway does not have a private cause of action. Only Mr. Wolfus.

Now we're talking about there was an argument in there that Midway sold the securities, not the officers and directors. That's correct and that might be a problem, except that California Code 25504 makes those control persons liable, as well. It expands liability for the sale beyond Midway Gold. You get to sue other folks.

Interestingly enough, the defendant cited *Moss vs. Kroner* -- I'm sorry, one of the defendants, I forget which one. It's 197 Cal. App. 4th 860. And that's a -- a good case for understanding how 25504 operates. It took a look at the argument that, well, there were arguments floating around in California, you have to have privity, you have to have direct privity, you have to have all these things before you can state a primary violation under 401. And a *Moss vs. Kroner* said no, that's -- that's incorrect. The legislature clearly intended to expand liability.

And it talks about that -- those privity cases, and then it says:

> These outcomes appear inconsistent with the intent to expand liability from direct violators to secondary participants that the legislature

demonstrated by enacting the secondary liability statutes.

And we think the reasoning of the *Viterbi* decision is flawed in two respects. *Viterbi* was one of those privity cases.

So it goes on through here and talks about the fact that the legislature, when it enacted sections 25504 and 504.1, intended to depart from those principles by placing these certain secondary actors in the shoes of the principle violator for the purpose of civil liability. That's what we have here. These control persons are the secondary actors, they're liable under 25504.

The defense's own case makes it clear that that expanded the reach of the 25401, that shows the primary securities violation.

So to kind of sum up a correct and a proper claim was presented under California Securities Law, there's no argument against extraterritoriality or the application of Canadian law, or violation of the stay, because this is a direct claim. Because Mr. Wolfus owns the claim and he will get the money. Midway can't. It doesn't have a private cause of action and it can't obtain a double recovery of the money Mr. Wolfus invested, which is the damages in the case.

And going to jurisdiction, the declaration of Mr. Wolfus should not be as narrowly read as suggested. It covers all the bases, at least for the purpose of laying out a prima facie case at the very beginning of an action. If the Court has any hesitancy at all concerning the factual assertions contained in the declaration, then we request it be given an opportunity to conduct some discovery or maybe have a hearing, as was done in *Fulbright*, so that we can flush this out.

I mean, we are faced with a practical consideration here that we're at the very beginning of the case. And Mr. Wolfus laid out what went on, he laid out all the things that happened in Ely, Nevada. The 10-K establishes that all

of these -- all of the happening of this company was going on in Nevada. The Colorado office was an executive office, it was a mail drop, all of the action was happening here in Nevada. So all of the events that led up to the very last item in the chain occurred here in Nevada, and all of the folks who are individually named came here to Nevada on occasion to participate in the operations and the direction of this company.

So, you know, looking at this from a due process standpoint, is it fair to hail these folks into court in Nevada when the gold mine they were operating and running was in Nevada, and when their actions operating the mine in Nevada? Sure. As good as any other state, at least.

Unless Your Honor has any specific questions.

THE COURT: All right. Thank you, Mr. Christensen.

MR. CHRISTENSEN: Thank you, Your Honor.

THE COURT: Let's take Mr. Liedman, Mr. Ferrario, and then Mr. Cassity on the reply. And I'll ask you to focus on *Parametric* in your reply arguments.

MR. LIEDMAN: Your Honor, I will defer to my able co-counsel and I -- with respect to *Parametric*. I -- since we joined independence argument, I -- I've really focused on the person who -- jurisdictional aspects. However, I do have -- did read *Parametric* and have substantial experience with derivative and direct claims. And whether you're applying the direct harm test or any other test for derivative and direct claims, there can be derivative and direct claim arguments that -- where they're more convoluted or it's more difficult to tell whether the claims are direct or derivative based on the facts. A drop in stock price is the classic derivative claim. It applies to all the parties, it applies to all the shareholders, it

applies to the company. Because, as I believe *Parametric* points out, that when -- when a company -- when a shareholder loses money because the stock price dropped, that's simply one cog in the wheel of the company losing value. You're saying the equity of the company has decreased.

So to the extent Mr. Wolfus's equity decreases, his -- his share price goes down, a rising tide raises all boats, a lowering tide lowers all boats, including with respect to the company. And that's why it's the company's claim. And that's why there's a liquidating trust in this case where the trustee of the bankruptcy has the authority on behalf of Midway to assert derivative claims against Midway if it so chose to. It did not.

So I -- I don't think there's really any better example. I think that all the cases including *Parametric* and the cases cited by *Parametric* talk -- talk about the -- the issue is whether the harm is directly aimed at one party or at -- and I suppose an example of that would be with misrepresentation claims, if Mr. Wolfus were able to point a specific misrepresentations that were made only to him.

But in this case, we have the exact opposite of that, which makes the case even easier to make. These were 10-K's and 8-K's and press releases. They went to every shareholder. This wasn't narrowly held stock, this is not a closely held corporation, it was initially listed on the Toronto SmallCap Exchange and then on the Toronto Exchange, then the New York Stock Exchange. This information was disseminated to all shareholders to the extent the shareholders relied or didn't rely, that's what's covered by the fraud-on-the-market doctrine, and if the -- if -- if the information's out there, then the -- the market is presumed under the fraud-on-the-market doctrine to have relied on that information. And if the stock price drops, that's an injury, yes, to Mr. Wolfus, but it's also an injury to every other

shareholder and to the company.

And to the extent one would say that Midway wasn't injured by this, I'd say Midway got the death penalty. It's in reorganization, but frankly, it's a liquidating reorganization, not -- not a reorganization that it intends to come out of. It's a -- just in the light -- in the light and to dispose of those assets.

And based on that, to the -- the notion of saying that Midway didn't suffer any harm here, Midway -- Midway got the death penalty. And each and every shareholder, as well as a party who was once looked to be co-plaintiff with -- with Mr. Wolfus, Mr. Haas [phonetic], who didn't wind up bringing a lawsuit, he had the same claims, same arguments. And the only difference between their arguments was based on their stockholdings. When the price of the stock drops, every shareholder loses money based on their pro rata equity in the company. And it's the company that's losing money, and those various components of it are just losing money because the company decreased in equity.

Unless Your Honor has any other further questions about that, I'd like to thank the Court again for allowing me to associate and come to your court and thank you very much.

THE COURT: Thank you, Mr. Liedman.

Mr. Ferrario.

MR. FERRARIO: Your Honor, I would just adopt the comments made by counsel. I think he covered the *Parametric* case very well and I don't know what else we could say. We briefed the heck out of this, as you've said, and, you know, I think only thing I can point out is -- is Mr. Christensen, you know, talked a lot, but really didn't zero in on -- on the precise issues that I think we've presented in our pleadings. And, I mean, it was kind of an exercise in obfuscation. I -- I just noted

that, you know, the why not Nevada is any -- as opposed to any other state isn't really a valid jurisdictional argument. You have to -- you have to point to specific things and -- and he -- he wasn't able to do that. Not specific things that relate directly to his claims.

The fact that a subsidiary company may have some operations in Nevada doesn't then, by definition, confer jurisdiction on the individuals that may be affiliated with that company. So he -- he skipped over a lot of steps on the jurisdiction argument.

And again, I think Mr. Liedman and Mr. Cassity adequately covered the *Parametric* analysis, so I won't add anything to it.

THE COURT: Thank you.

Mr. Cassity.

MR. CASSITY: Yes, Your Honor.

So I'll briefly address *Parametric*, Your Honor. As the Court knows from having read that decision, the shareholders brought a claim against the directors and officers for breaches in our fiduciary duties. And one of the claims was that there was an intentional delay of the announcement of positive and material information related to what was happening at *Parametric*. And that that, then, allowed them to manipulate the premium that they would get on that merger transaction. So, in other words, that their -- that the stock was worth more than what they disclosed.

Similar to what's being alleged here is that you didn't disclose other material information about, you know, if you understand why counsel wants to say that this isn't about mismanagement, that's entirely what this is about. It's about you mismanaged this and you didn't disclose the mismanagement of the

mine, the Pan Mine, to public shareholders. And that's, of course, what resulted in, ultimately, the company having to file bankruptcy. At least that's, essentially, the -- the story that they're -- they're telling.

And so the supreme court in addressing that issue of, you know, the -- the shareholder saying that their stock was improperly diluted and there was this, you know, failure to disclose material information that would -- would have shown that our -- our merger price should have been higher and we should have gotten more value out of the shares, the supreme court said, look, that dilutive issuance of the stock in light of these claims is derivative in nature. And the only way you get out of the derivative is if you can show that there was some type of equity ex-appropriation where there was equity that was -- that was taken from you. That didn't happen in *Parametric*. Plaintiffs may try to make that argument as we're down on remand. But in any case, the court held that with -- in that respect, that that was a derivative claim.

Again, putting a map in a public filing, not sufficient to show personal jurisdiction. I was listening to counsel and I kept waiting to hear, where's the conduct? He talked a lot about some conduct that was occurring in Nevada; where's the conduct that gives rise to the plaintiff's claims? And I -- I didn't hear it in the argument. If I -- if he said something, I must have missed it. But I don't think it was there. I don't think it's in the declaration of Mr. Wolfus.

You know, Mr. Christensen kept talking about the -- the California Securities Claim. I think the statute is clear. You know, let me refer back to it briefly.

THE COURT: If I need to look at it, you'll have to --

MR. CASSITY: Yes --

THE COURT: -- point me --

MR. CASSITY: -- page 21 of our brief, Your Honor, of the motion, the original motion.

THE COURT: Thank you.

MR. CASSITY: Where section E of 25017 talked about the exercise of the right to purchase. An option is a right to purchase stock. This was an exercise by Mr. Wolfus of an option of a right to purchase securities that was issued to him in 2009, when he was affiliated with the company and involved in the operation of the company.

The law, the California code is clear that that issuance occurred in 2009, not in 2013 or 2014, when he claims that the material facts were not disclosed to him. You know, the comments about extraterritoriality -- had to practice that a couple of times this morning, Your Honor -- there's a presumption against extraterritorial application. I don't think they've rebutted the presumption against that in this case.

The last issue that counsel raised was the jurisdictional discovery issue. And, Your Honor, the -- the case law is clear that where you either haven't presented into prima facie case and you don't dispute the material facts and you have no dispute as to any of the allegations in -- or any of the -- the testimony represented in the declarations of any of the directors and officers is false, there's no dispute between the two, he's just trying to impute the conduct of the company to all the D&Os. And, respectfully, Your Honor, that -- that does not meet his burden of showing jurisdiction.

For all those reasons, we ask the Court to dismiss.

THE COURT: Thank you.

This is not determinative of my decision. In the Chapter 11 case, is there an equity committee?

MR. CASSITY: I'm not sure that -- whether there is, Your Honor.

MR. LIEDMAN: I do not know the answer to that, Your Honor.

THE COURT: It's not determinative. It was just speculation on my part.

All right. The matter's going to be taken under advisement. I -- I have some concerns with jurisdictional arguments of looks like Yu is probably the only person subject to general or specific jurisdiction. I'm going to re-read *Parametric*, but it looks like a derivative cause of action to me. So I'm going to re-read it.

I'm going to set this down for a decision for you. It will not be a comprehensive decision, but will decide the issues of all three pending motions. And I'm going to set it down for a chamber status on Tuesday, the 21st of November, with the hope that we'll have that out before the holiday. So everyone will have some sort of [indiscernible] for the holiday.

MR. CASSITY: Thank you, Your Honor.

MR. LIEDMAN: Thank you very much, Your Honor.

MR. CHRISTENSEN: Thank you, Your Honor.

THE COURT: And it will direct the -- the party who succeeds to do particular findings and conclusions of law.

Thank you all.

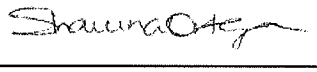
MR. CASSITY: Thank you, Your Honor.

MR. LIEDMAN: Thank you.

MR. CASSITY: Thank you, Your Honor.

[Court recessed at 12:10 p.m.]

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



Shawna Ortega, CET*562

A-17-756971-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Securities (NRS 90) **COURT MINUTES** **November 29, 2017**

A-17-756971-B Daniel Wolfus, Plaintiff(s)
vs.
Richard Moritz, Defendant(s)

November 29, 2017 3:00 AM Decision

HEARD BY: Allf, Nancy **COURTROOM:**

COURT CLERK: Nicole McDevitt

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- COURT FINDS after review on August 25, 2017, Defendants Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell, and Rodney D. Knutson filed a Motion to Dismiss Amended Complaint. Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC filed a Motion to Dismiss and Joinder to D&O Defendants Motion to Dismiss Amended Complaint. Defendant Kenneth A. Brunk filed a Motion to Dismiss of Kenneth A. Brunk and Joinder in D&O Defendants Motion to Dismiss Amended Complaint.

COURT FURTHER FINDS after review these matters came on for hearing on November 1, 2017; James R. Christensen, Esq. appearing for Plaintiff Daniel E. Wolfus (Plaintiff); Robert J. Cassity, Esq. and David J. Freeman, Esq. appearing for the D&O Defendants; Mark E. Ferrario, Esq. and Christopher R. Miltenberger, Esq. appearing for the Hale Defendants; and Eric B. Liebman, Esq. and Jason D. Smith, Esq. appearing for Defendant Kenneth A. Brunk (all collectively as Defendants).

COURT FURTHER FINDS after review Defendants argue the Court lacks subject matter jurisdiction because Plaintiff s claims are derivative, and under the Business Corporations Act, the Supreme Court of British Columbia has exclusive jurisdiction over derivative claims against a Canadian

corporation. Moreover, Defendants argue that due to the Midway bankruptcy action the liquidating trustee has the sole right to assert derivative claims. Plaintiff counters that under the Direct Harm Test enumerated in Parametric Sound Corp., Plaintiff brings direct claims because Plaintiff individually suffered harm and any recovery will remit to Plaintiff and his assignors, not to Midway. See Parametric Sound Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark, 133 Nev. Adv. Op. 59, 401 P.3d 1100 (Nev. 2017).

COURT FURTHER FINDS after review Plaintiff s claims are derivative in nature. Though Plaintiff frames his damages as arising from the exercise of his stock options and corresponding purchase of Midway shares, reading the Complaint as a whole indicates the alleged harm suffered comes from his shares becoming valueless after acquiring them. Claims premised on harm caused by the reduction in value of shares of stock are inherently derivative as the reduction arises from the reduction of the entire value of the corporation, and such an equal injury is not a specific direct harm to each shareholder individually. See id.

THEREFORE COURT ORDERS for good cause appearing and after review Defendants Motions to Dismiss and Joinders thereto are GRANTED. The Complaint is dismissed, and Plaintiff is granted leave to amend.

COURT FURTHER ORDERS for good cause appearing and after review Defendants are directed to prepare and submit an Order with detailed findings of fact and conclusions of law, allowing Plaintiff to review the Order as to form before submitting. After submission, Plaintiff will have 30 days from the Notice of Entry of Order to file a Second Amended Complaint.

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, ,

Plaintiff,

v.

KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25.

Defendants.

CASE NO. : A-17-756971-B
DEPT. NO.: XXVII

NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AMENDED COMPLAINT WITHOUT PREJUDICE

Electronic Filing Case

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PLEASE TAKE NOTICE that an Order Granting Defendants' Motion to Dismiss Amended Complaint Without Prejudice was entered in the above-captioned matter on January 5, 2018. A copy of said Order is attached hereto.

DATED this 8th day of January, 2018.

By __/s/ David J. Freeman_____
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of January 2018, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AMEDNED COMPLAINT WITHOUT PREJUDICE** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's Odyssey eFileNV Electronic Filing system and serving all parties with an email address on record, as indicated below, pursuant to Administrative Order 14-2 and Rule 9 of the .N.E.F.C.R. That date and time of the electronic proof of service in place of the date and place of deposit in the U.S. Mail.

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☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, ,

Plaintiff,
v.

KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25.

Defendants.

CASE NO.: A-17-756971-B
DEPT. NO.: XXVII

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AMENDED COMPLAINT WITHOUT PREJUDICE

Electronic Filing Case

This matter came before this Court for hearing on November 1, 2017 at 9:30 a.m., on Defendants Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson (collectively, the "D&O Defendants") *Motion to Dismiss Amended Complaint* (the "Motion"), Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC (collectively, the "Hale Defendants") *Motion to Dismiss and Joinder* thereto (the "Hale Joinder") and Defendant Kenneth A. Brunk ("Brunk") *Motion to Dismiss and Joinder* thereto (the "Brunk Joinder"), wherein the D&O Defendants, Hale Defendants and Brunk (collectively, the "Defendants") moved this Court to dismiss the *First Amended Complaint for Damages* filed by Plaintiff Daniel E. Wolfus ("Wolfus" or "Plaintiff") on June 30, 2017 (the "Complaint").

Robert J. Cassity, Esq. and David J. Freeman, Esq., of the law firm HOLLAND & HART LLP, appeared on behalf of the D&O Defendants. Mark E. Ferrario, Esq. and Christopher R. Miltenberger, Esq., of the law firm GREENBERG TRAURIG, LLP, appeared on behalf of the Hale Defendants. Eric B. Liebman, Esq., of the law firm MOYE WHITE LLP, and Jason D. Smith, Esq., of the law firm SANTORO WHITMIRE, appeared on behalf of Brunk. James R. Christensen, Esq., of the law firm JAMES R. CHRISTENSEN PC, appeared on behalf of Plaintiff.

Having carefully considered the D&O Defendants' Motion, Hale Joinder, Brunk Joinder, Errata to the Brunk Joinder, Plaintiff's *Consolidated Memorandum of Points and Authorities in Opposition to Motions to Dismiss*, the Defendants' respective reply memorandums filed in support of the Motion, together with all declarations filed in support of and opposition to the Motion and Joinders, including the exhibits to the declarations, the oral argument of counsel presented at the hearing on this matter, and good cause appearing, the Court hereby finds and concludes as follows:

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FINDINGS OF FACT

The following facts are drawn from the First Amended Complaint, which for purposes of this Order are taken as true. References to paragraph numbers are to that First Amended Complaint. In Paragraph 1 of the First Amended Complaint, Plaintiff alleges that this action is brought in his own capacity and as assignee of the rights and claims of The Wolfus Revocable Trust, Christine Wolfus and Daniel Wolfus (JTWROS), Devoney Wolfus, and Stephanie Wolfus.

A. Plaintiff Becomes the Chairman and CEO of Midway Gold.

1. Midway Gold Corp. ("Midway") was a publicly traded Canadian Corporation incorporated under the Company Act of British Columbia. Midway became a reporting issuer in the Province of British Columbia on May 16, 1997 and shortly thereafter its common shares were listed on the Vancouver Stock Exchange, the predecessor of the TSX Venture Exchange. Midway subsequently became a reporting issue in the Province of Alberta and at all relevant times, Midway was a reporting company under the Securities Exchange Act of 1934 (the "Exchange Act"). Also during all relevant times, Midway's common shares were listed on both the NYSE Amex exchange and Tier 1 of the TSX.V under the symbol. As a reporting company under the Exchange, Midway has been required to file periodic reports with the Securities and Exchange Committee (the "SEC"). At all relevant times, Midway's principal executive offices were located in Englewood, Colorado. Compl. ¶ 17.

2. Prior to 2008, Midway was an exploration stage company with all except one of its properties located in Nevada. *Id.* ¶¶ 18, 24. Midway's Pan Gold Project was located at the northern end of the Pancake mountain range in Western Pine County, Nevada. *Id.* ¶ 26.

3. At all relevant times, Defendants were directors, officers and/or controlling investors of Midway. *See* Compl., *generally.*

4. Plaintiff, a California resident, became a director of Midway in November 2008 and began purchasing Midway common stock in the open market in February 2008. As of May 1, 2012, Wolfus and his assignors owned 1,629,117 shares of Midway common stock. In January 2014, Wolfus and/or his assignors acquired an additional 200,000 shares of Midway common

stock. In September 2014, Wolfus and/or his assignors acquired an additional 1,000,000 shares of common stock and as of December 23, 2014, and after the sale of some shares, the combined shareholdings of Wolfus and/or his assignors were 2,402,251 shares of Midway common stock. Certain of these share purchases were made directly from Midway after Wolfus ceased to be an officer or director of Midway and were made pursuant to the exercise of stock options previously granted to Wolfus. *Id.* ¶¶ 1, 20 and 23.

5. As of October 8, 2013, Wolfus or his assignors owned 1,609,117 shares of Midway's common stock. *Id.* ¶ 96.

6. 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 Brunk. *Id.* ¶ 21.

7. In May 2010, Brunk was hired by Midway as its President and Chief Operating Officer with the primary assignment to bring the Pan project into production. *Id.* ¶ 30.

8. Brunk served in that capacity until May 2012 at which time he also became Chairman of the Board and CEO after Midway's Board of Directors voted to replace Plaintiff in these positions. *Id.* ¶¶ 30, 44.

9. Plaintiff, however, continued as a director until June 2013 and continued to receive board packages and participated in quarterly Board meeting which occurred prior to June 2013. *Id.* ¶ 44.

B. The 2011 Pan Mine Study.

10. At the time Plaintiff became Chairman of the Board and CEO, Midway had properties in the exploratory stage where gold mineralization had been identified (*see* Compl. at ¶ 24), including the Pan Mine (*see id.* ¶ 26).

11. Prior to May 2010, Midway made the decision to convert from a purely exploration company into a gold mining production company using the Pan Mine as its initial production mine. *Id.* ¶ 29.

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12. In November 2011, Midway reported the results of its Feasibility Study and its mining plan for the Pan Project. *Id.* ¶ 38.

13. In December 2011, Midway filed a feasibility study on the Pan Mine (the "2011 Pan Mine Study"). *Id.* ¶ 39.

14. As of December 31, 2013, Brunk, Hale, Newell, Sheridan, Yu, Knutson and Klein were each directors of Midway; Brunk was the Chairman, President and Chief Executive officer of Midway; Blacketor was a Senior Vice President and Chief Financial Officer of Midway; Moritz was the Senior Vice President of Operations of Midway; Brunk, Blacketor, Newell, Yu and Klein were each members of the Disclosure Committee of Midway; Sheridan, Yu and Knutson were each members of the Audit Committee of Midway; Brunk, Hale, Sheridan, Yu and Klein were each members of the Budget/Work Plan Committee; and Newell, Sheridan and Yu were each members of the Environment, Health and Safety Committee. In those capacities, each was responsible for insuring that Midway publically disclosed all material information concerning the Pan project and that all publically disclosed information concerning the Pan project was true and complete, was not misleading and did not omitted material facts. These defendants were collectively referred to as the 2013 Control Defendants. *Id.* ¶ 58.

15. Prior to December 13, 2013, Midway made numerous public filings and issued numerous press releases concerning Midway and the Pan project. See Complaint generally.

16. As of December 13, 2013, the 2013 Control Defendants knew each of the following facts ("2013 Undisclosed Facts") to be true, knew that each of the following facts would be material to any reasonable investor in Midway including Wolfus, and knew that none of those facts had been disclosed to the public generally or to Wolfus:

A. Midway had been unable to raise sufficient cash either in the form of equity or debt to allow it to complete the Pan project in the manner set forth in the Feasibility Study as well as fund on-going operations until the Pan project produced sufficient revenues to cover those expenses;

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B Hale and the Hale Investors had blocked any consideration of the sale of either Midway's interest in the Spring Valley project or the Gold Rock project or any other material assets to generate additional revenues;

C. The environmental and other permits secured by Midway for the Pan project were based upon and required Midway to conduct mining operations in accordance with the mining plan submitted which called for the crushing and agglomeration of ore before it was placed on the leach pads and Midway had taken no steps to cause those permits to be modified to allow Midway to proceed using Run of Mine for the South Pit of the Pan project; and

D. Modifying the permits to permit Run of Mine would have been time consuming delaying the time when Midway could start the leaching process. *Id.* ¶ 59.

17. Prior to August, 31, 2014, Midway made additional numerous public filings and issued numerous press releases concerning Midway and the Pan Project. See Complaint generally.

18. As of August 31, 2014, Brunk, Hale, Sawchak, Sheridan, Yu, Haddon and Klein were each directors of Midway; Haddon was Chairman of the Board, Brunk was the President and Chief Executive officer of Midway; Blacketor was a Senior Vice President and Chief Financial Officer of Midway;; Brunk, Blacketor, Yu and Klein were each members of the Disclosure Committee of Midway; Sheridan, Yu and Sawchak were each members of the Audit Committee of Midway; Brunk, Hale, Sheridan, Yu and Klein were each members of the Budget/Work Plan Committee; and Haddon, Sheridan and Yu were each members of the Environment, Health and Safety Committee. In those capacities, each was responsible for insuring that Midway publically disclosed all material information concerning the Pan project and that all publically disclosed information concerning the Pan project was true and complete, was not misleading and did not omitted material facts. The foregoing defendants are collectively referred to as the "2014 Control Defendants."

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19. As of August 31, 2014, the 2014 Control Defendants knew each of 2013 Undisclosed Facts and the following addition facts ("collectively the 2014 Undisclosed Facts") to be true, knew that each of those facts would be material to any reasonable investor in Midway including Wolfus, and knew that none of those facts had been disclosed to the public generally or to Wolfus:

A. Ledcor was poised to commence mining operations at Pan loading ore directly on the leach pads but Midway did not have either a "qualified" person or a knowledgeable employee on site to supervise the loading of the ore on the leach pads;

B. Midway had not sought or received modified permits to allow it to deviate from the mining plan submitted for the permits and as contained in the Feasibility Study; and

C. Midway did not have the necessary facilities to process the gold solution once the leaching had been completed and it would be a considerable period before those facilities were constructed and permitted for operation. *Id.* ¶ 79.

C. Plaintiff Exercises Stock Options in 2014.

20. On January 7, 2014, Plaintiff notified Midway of his intent to exercise some of the stock options. At the time Plaintiff exercised these options he was not aware of any of the 2013 Undisclosed Facts, had no way of learning the 2013 undisclosed facts except from the 2013 Control Defendants, would not have exercised any of his options and would instead have sold his and his assignors' remaining Midway common shares. *Id.* ¶ 60.

21. On January 23, 2014, Plaintiff purchased 200,000 shares at $0.56/share for $112,000 Canadian Dollars ($100,636 USD). *Id.* ¶ 63.

22. On September 5, 2014, Plaintiff notified Midway of his intent to exercise some of the stock options. At the time Wolfus exercised these options he still was not aware of any of the 2014 Undisclosed Facts, had no way of learning the 2014 Undisclosed Facts except from the 2014 Control Defendants, would not have exercised any of his options had he known. *Id.* ¶ 80.

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23. On September 19, 2014, Plaintiff consummated his stock option exercise purchasing 1,000,000 shares at $0.86/share for $860,000 Canadian Dollars ($783,778 USD). *Id.* ¶ 82.

D. Plaintiff Asserts Claims Against Defendants.

24. Plaintiff asserts as his First Cause of Action a claim for securities fraud based upon the California Corporate Securities Law of 1968, California *Corporations Code* § 25000, *et seq.* (the "Act"). In that cause of action, Plaintiff alleges that in violation of California *Corporations Code* § 25401, the 2013 public filings by Midway which discussed the Pan project were materially false and misleading by failing to timely disclose each of the 2013 Undisclosed Facts and the failure by the 2013 Control Defendants to disclose the 2013 Undisclosed Facts was intentional and was done to encourage investors to retain and purchase Midway's common stock. Plaintiff further alleges that In violation of California *Corporations Code* § 25401, the pre-September 2014 public filings by Midway which discussed the Pan project were materially false and misleading by failing to timely disclose each of the 2014 Undisclosed Facts and the failure by the 2014 Control Defendants to disclose the 2014 Undisclosed Facts was intentional and was done to encourage investors to retain and purchase Midway's common stock. Each of the defendants was alleged as being liable as "controlling persons" of Midway. *Id.* ¶¶ 92-108.

25. Plaintiff asserts as his Second Cause of Action a claim under California law for breach of fiduciary duty against the 2013 Control Defendants arising out of their failure to disclose the 2013 Undisclosed Facts prior to Plaintiff stock option exercise in January 2014 and against the 2014 Control Defendants for their failure to disclose the 2013 Undisclosed Facts and the 2014 Undisclosed Facts prior to Plaintiff stock option exercise in September 2014. Each of the defendants was alleged to owe Plaintiff fiduciary duties as officers, directors and/or controlling persons of Midway. *Id.* ¶¶ 109-114.

26. Plaintiff asserts as his Third Cause of Action a claim under California law for aiding and abetting a breach of fiduciary duty full disclosure of all material facts owed to Plaintiff by Midway. *Id.* ¶¶ 115-121.

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27. Plaintiff asserts as his Fourth Cause of Action a claim under California law for common law fraud for failing to disclose the 2013 Undisclosed Facts and the 2014 Undisclosed Facts related to the Pan project prior to Plaintiff's exercise of his stock options in 2014. *Id.* ¶¶ 122-129.

28. Plaintiff's asserts as his misnamed Fifth Cause of Action a claim under California law for common law negligent misrepresentation for negligently failing to disclose the 2013 Undisclosed Facts and the 2014 Undisclosed Facts related to the Pan project prior to Wolfus' exercise of his stock options in 2014. *Id.* ¶¶ 130-138.

29. Each cause of action sought damages according to proof. *Id.* ¶¶ 108, 114, 121, 129 and 138.

CONCLUSIONS OF LAW

A. Legal Standard on a Rule 12(b)(1) Motion.

30. Rule 12(b)(1) of the Nevada Rules of Civil Procedure ("NRCP") allows a party to seek dismissal of a complaint for lack of subject matter jurisdiction. NRCP 12(b)(1); *Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d 982, 983 (2000).

31. "NRCP 12(h)(3) provides that '[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.'" *Morrison*, 116 Nev. at 36, 991 P.2d at 983. The burden of proving subject matter jurisdiction lies with the party asserting subject matter jurisdiction, the plaintiff or petitioner in an action. *Id.*

32. A motion to dismiss for lack of subject matter jurisdiction is proper "when a lack of jurisdiction over the subject matter [] appears on the face of the pleading." *Girola v. Roussille,* 81 Nev. 661, 663 (1965); *see also, Nevada v. United States*, 221 F. Supp. 2d 1241, 1248 (D. Nev. 2002).[1] Where the 12(b)(1) is a facial challenge, the pleadings are taken as true for the purposes of the motion. *See Nevada v. United States*, 221 F. Supp. 2d at 1248; *see also Jetform Corp. v.*

[1] "Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (quoting *Las Vegas Novelty v. Fernandez,* 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

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Unisys Corp., 11 F. Supp. 2d 788, 789 (D. Va. 1998) (holding that if the challenge is that the complaint fails to state sufficient facts to support subject matter jurisdiction the analysis is similar to a motion to dismiss for failure to state a claim).

B. Plaintiff Lacks Standing to Assert Derivative Claims.

33. Rather, the focus is on the essential nature of the claims. *See Kramer v. W. Pac. Indus.*, 546 A.2d 348, 352 (Del. 1988) ("Whether a cause of action is individual or derivative must be determined from the nature of the wrong alleged and the relief, if any, which could result if plaintiff were to prevail.").

34. To distinguish between direct and derivative claims, Nevada "courts should consider only '(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?'" *Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 66689, 2017 WL 4078845, *7 (Nev. Sept. 14, 2017) (quoting *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d. 1031, 1033 (Del. 2004)).

35. Having carefully considered who suffered the harm alleged in the Complaint, and who would receive the benefit of any recovery, the Court concludes that Plaintiff's claims are derivative in nature under the Direct Harm test recently adopted by the Nevada Supreme Court in *Parametric Sound Corp.*

36. Although Plaintiff frames his damages as arising from the exercise of his stock options and corresponding purchase of Midway shares, reading the Complaint as a whole indicates the alleged harm suffered by Plaintiff stems from his shares becoming valueless after acquiring them.

37. Claims premised on harm caused by the reduction in value of shares of stock are inherently derivative as the reduction in value arises from the reduction of the entire value of the corporation, and such an equal injury is not a specific direct harm to each shareholder individually. *Id.*

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38. Because Plaintiff failed to allege any direct harm, the claims are derivative and Plaintiff lacks standing to assert such claims.

C. Under the Internal Affairs Doctrine, British Columbia Law Vests Exclusive Jurisdiction in the Supreme Court of British Columbia to Adjudicate Plaintiff's Derivative Claims.

39. This case concerns the internal management of a Canadian corporation and that, as a result, the internal affairs doctrine requires this Court to apply the law of the jurisdiction where the corporation was incorporated (British Columbia, Canada) to determine whether it has subject matter jurisdiction to hear Plaintiff's claims. *See 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").

40. Because Midway is a British Columbia corporation, its internal affairs are governed by the Business Corporations Act ("BCA") of British Columbia, which endows its Supreme Court with exclusive jurisdiction over derivative claims involving British Columbia corporations. *See* BCA at §§ 232 & 233.

41. Under the BCA, a shareholder or director of a British Columbia corporation must satisfy two separate and mandatory preconditions before bringing a derivative suit involving the corporation: (a) the complainant must provide notice to the directors prior to initiating the action; and (b) the complainant must obtain judicial permission from the Supreme Court of British Columbia to bring the derivative action prior to filing suit. *See id.*

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42. Because Plaintiff failed to make application to and did not obtain leave from the Supreme Court of British Columbia to bring this derivative action on behalf of Midway, Plaintiff lacks standing to assert the derivative claims alleged in the Complaint and this Court cannot properly exercise subject matter jurisdiction over the same. *See 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).

D. Plaintiff Lacks Standing to Assert his Claims Because They Are Property of the Bankruptcy Estate of Midway Gold.

43. The commencement of a bankruptcy case creates a bankruptcy estate. *Bolick v. Pasionek*, 2015 WL 1734936, at *5 (D. Nev. Apr. 16, 2015).

44. Upon creation of the bankruptcy estate, section 541 of the bankruptcy code ("Section 541") mandates that all legal and equitable property interests of the debtor become property of its bankruptcy estate, including all prepetition causes of action held by the debtor. *See* 11 U.S.C. § 541(a).

45. Many courts, including the Ninth Circuit, have held that derivative claims are property of the bankruptcy estate pursuant to Section 541 and, as such, can only be enforced by the debtor or trustee. *See Lapidus v. Hecht,* 232 F.3d 679, 682 (9th Cir. 2000) ("[a] bankruptcy court may enjoin a derivative claim brought by shareholders *because the claim is property of the bankruptcy estate*.") (emphasis added).

46. Because Plaintiff's derivative claims arose prior to the filing of Midway's bankruptcy case (*Midway Gold US Inc. et al.*, Bankr. D. Colo., Case No. 15-16835), said claims belong to Midway's bankruptcy estate and Plaintiff lacks standing to assert the same.

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47. Furthermore, Midway's proposed *Second Amended Joint Chapter 11 Plan of Liquidation* (the "Plan") expressly transfers Plaintiff's derivative claims to its liquidating trust, which will become the party with exclusive authority to prosecute such claims for the benefit of Midway's general unsecured creditors.

48. Because Plaintiff's derivative claims are being exclusively administered in Midway's bankruptcy case for the benefit of its general unsecured creditors pursuant to the Plan, Plaintiff lacks standing to assert such claims.

WHEREFORE, having made the foregoing findings of fact and conclusions of law and oral findings on the record, and good cause appearing,

IT IS HEREBY ORDERED that the *D&O Defendants' Motion to Dismiss Amended Complaint* is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that the Hale Defendants' *Motion to Dismiss and Joinder* is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that Brunk's *Motion to Dismiss and Joinder* is **GRANTED**.

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IT IS HEREBY FURTHER ORDERED that Plaintiff is granted leave to amend, provided that a Second Amended Complaint is filed within 30 days of filing and service of the Notice of Entry of this Order.

IT IS SO ORDERED.

DATED this 4 day of ~~December~~ Jan. 2017.

Nancy L Allf
DISTRICT COURT JUDGE

AE

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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.

Electronically Filed
Jun 12 2018 10:59 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 76052

District Court Case No.
A-17-756971-B

PETITIONERS' APPENDIX FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

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PART 1 OF 2

(PA0375-PA0501)

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2/5/2018	Plaintiff Daniel E. Wolfus' Second Amended Complaint for Damages	IV	PA0603 - PA0748

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 12th day of June, 2018, a true and correct copy of **PETITIONERS' APPENDIX FOR WRIT OF PROHIBITION, OR ALTERNATIVELY MANDAMUS – VOLUME 3** 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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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS,

Plaintiff,

v.

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; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25,

Defendants.

Case No.: A-17-756971-B
Dept. No.: XXVII

MOTION TO DISMISS OF KENNETH A. BRUNK AND JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Defendant Kenneth A. Brunk ("Brunk"), by and through his counsel, hereby moves this Court to dismiss the Complaint for lack of personal jurisdiction as to all claims asserted against

him. Brunk also joins the Motion to Dismiss Amended Complaint filed by Defendants 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") (collectively, the "D&O Defendants"), except for those portions of the Motion that relate to personal jurisdiction as to the D&O Defendants. This Motion is made pursuant to Rule 12(b)(2) of the Nevada Rules of Civil Procedure ("NRCP") and is based on the attached Memorandum of Points and Authorities, the Declaration of Kenneth A. Brunk, **Exhibit "A,"**[1] together with the exhibits, the pleadings and papers on file herein, and any oral argument this Court may allow.

DATED this 25th day of August, 2017.

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/s/ Jason D. Smith
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[1] The enclosed Declaration of Kenneth Brunk (Ex. A) has been reviewed and is approved by Mr. Brunk. Mr. Brunk is presently traveling out of the country and the executed version of the document has not been received by undersigned counsel as of the time of filing this Motion. To avoid any delay, Defendant files the instant Motion and the unexecuted Declaration. Immediately upon receipt of the executed version, however, Defendant Brunk will file an Errata to provide the executed version to the Court.

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE that the foregoing **JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT AND SUPPLEMENTAL MOTION TO DISMISS OF KENNETH A. BRUNK** will be brought before Department XXVII of the above-entitled Court on the 4th day of October, 2017, at 10:30 a.m.

DATED this 25th day of August, 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT OF KENNETH A. BRUNK

INTRODUCTION

In his First Amended Complaint for Damages (hereinafter, "Complaint"), Plaintiff asserts claims against Brunk for: 1) securities fraud in violation of a California statute; 2) breach of fiduciary duty; 3) aiding and abetting breach of fiduciary duty; 4) fraud; and 5) negligent misrepresentation. *See* Compl. ¶¶ 92-138.

Brunk joins the D&O Defendants Motion to Dismiss Amended Complaint and the Memorandum of Point and Authorities in support thereof, except for those portions of the motion and memorandum that relate to the Court's personal jurisdiction as to the D&O Defendants, and urges the Court to dismiss the Complaint as to Brunk for all the reasons stated therein. In addition, Brunk moves the Court to dismiss the claims asserted against him in the Complaint under Rule 12(b)(2) of the Nevada Rules of Civil Procedure ("NRCP") on the grounds that this Court lacks personal jurisdiction over him.

FACTUAL BACKGROUND

Brunk joins in the factual background set forth in the D&O Defendants' Motion. In addition, Brunk provides the following additional facts:

1. Midway Gold Corp. ("Midway") is a Canadian Corporation, incorporated under the Company Act of British Columbia. Compl. ¶ 17.[2]

2. At all times relevant to this litigation, the headquarters of Midway was located in Englewood, Colorado. *See* Declaration of Kenneth A. Brunk, Exh. A ¶ 21.

3. From May 2010 to May 2012, Brunk served as the president and Chief Operating Officer ("COO") of Midway. Compl. ¶ 30. In May 2012, Brunk became the Chief Executive Officer ("CEO") and Chairman of the Board of Midway. *Id.* He served as Chairman of the Board until August 2014 and as CEO until December 2014. *Id.*

[2] For purposes of this Motion, the factual allegations in the Complaint are takes as true as they are stated. Brunk does not admit any of the allegations through this Motion and reserves the right to change any of the allegations at any further stage of this litigation.

4. During the time Brunk served as the president and the COO of Midway, his business office was located in Colorado and he only occasionally and intermittently went to Nevada for business reasons to fulfill his duties as President and COO. Exh. A ¶ 17.

5. During the time Brunk served as the CEO and Chairman of the Board of Midway, his business office was located in Colorado and he only occasionally and intermittently went to Nevada for business reasons to fulfill his duties as CEO and Chairman of the Board. Exh. A ¶ 18.

6. Throughout the time Brunk was on the board of Midway, board meetings were held either in Canada or Colorado, except there may have been one or two meetings held in Nevada. Exh. A ¶ 19.

7. Midway caused numerous SEC filings and press releases to be issued. These filing and releases were entirely drafted in and issued from the state of ***Colorado*** where Midway's principal place of business and executive offices are located. Brunk was the Company signatory on some of these filings and releases. However, to the extent he was involved in the preparation and issuance of these filings and releases, that involvement occurred in Colorado, and all discussions and decisions related to them occurred in Colorado. Exh. A ¶ 20.

8. In 2012, Midway and representatives of Hale Capital Partners, LP ("Hale") engaged in negotiations for Hale to invest in Midway. Brunk was involved in these negotiations. These negotiations occurred in New York and Denver. None of the negotiations surrounding this transaction occurred in Nevada. Exh. A ¶ 21.

9. During the time Brunk served as President and CEO of Midway, he attended Midway's annual shareholder meetings. These meetings occurred primarily in Canada or Colorado. Exh. A ¶ 22.

10. Brunk is a resident of Colorado and has been a resident of Colorado since 1991. He does not currently reside in Nevada and has not resided in Nevada since 1991. Exh. A ¶¶ 1-7.

11. Brunk does not own any real property, personal property or other assets in Nevada. Exh. A ¶¶ 7-9.

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12. Brunk does not hold any Nevada licenses. Exh. A ¶ 10.

13. Brunk does not own or maintain any bank accounts in Nevada. Exh. A ¶ 11.

14. He does not maintain any telephone, facsimile or telex number in Nevada. Exh. A ¶ 12.

15. He has never been a party to a lawsuit in Nevada, except for the instant case. Exh. A ¶ 13.

16. Since 1991, Brunk has had only occasional and intermittent contact with Nevada for personal or business visits. Exh. A ¶ 14.

17. He does not have family in Nevada. Exh. A ¶ 15.

STANDARD OF REVIEW

Pursuant to N.R.C.P. 12(b)(2), a party may move to dismiss an action for lack of personal jurisdiction. In reviewing a motion to dismiss, the court must construe the pleadings liberally and accept all factual allegations in the complaint as true. *Vacation Village v. Hitachi Am.*, 110 Nev. 481, 874 P.2d 744 (1994). Once a court determines that it lacks jurisdiction, it "can proceed no further and must dismiss the case on that account." *Sinochem Int'l Co. v. Malay Int'l Shipping Corp*., 127 S. Ct. 1184, 1193 (2007).

ARGUMENT

A. This Court Lacks Personal Jurisdiction Over Mr. Brunk.

The Complaint should be dismissed pursuant to NRCP 12(b)(2) because the court lacks personal jurisdiction over Brunk, a nonresident. The exercise of jurisdiction under the circumstances would be improper and offend due process. The sole basis upon which Plaintiff alleges jurisdiction is proper in this state is his assertion that that ***one*** of the Defendants resides in Nevada. Compl, ¶¶ 9, 16. Of course, the domicile of one individual defendant does not convey jurisdiction over any of the other defendants. Brunk's contacts with Nevada certainly are not so continuous and systematic as to render any of them at "home" in this forum, such that exercising general jurisdiction in Nevada would be proper. Furthermore, each of the claims asserted in the Complaint arise out of Plaintiff's reliance upon purported material omissions contained in Midway's SEC filings and press releases, which were drafted in and issued from the state of

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Colorado where Midway's principal place of business and its offices are located. Because the claims asserted in this lawsuit do not arise from Brunk's purported contacts with the state of Nevada, this Court cannot exercise specific jurisdiction.

1. Legal Standard for Personal Jurisdiction.

Jurisdiction over a non-resident defendant is proper only if the plaintiff shows: (1) the requirements of Nevada's long-arm statute have been satisfied; and (2) due process is not offended by the exercise of jurisdiction.[3] Nevada's long-arm statute provides that "a court of this state may exercise jurisdiction over a party to a civil action on any basis not inconsistent with the constitution of this state or the Constitution of the United States." NRS 14.065(1). Nevada courts have determined that the long-arm statute reaches the limits of due process set by the United States Constitution.[4] The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires a nonresident defendant to have "minimum contacts" with the forum state sufficient to ensure that exercising personal jurisdiction over him would not offend "traditional notions of fair play and substantial justice."[5]

Due process requirements are satisfied if the nonresident defendant's contacts are sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction, and it is reasonable to subject the nonresident defendants to suit in the forum state.[6] Courts may exercise general or "all-purpose" personal jurisdiction over a defendant "to hear any and all claims against it" only when the defendant's affiliations with the forum state "are so constant and pervasive as to render it essentially at home in the forum State."[7] By contrast, specific personal

[3] *See Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1156 (2014) (citing *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. at 512, 516, 134 P.3d at 712, 714; *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 698, 857 P.2d 740, 747 (1993); *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *see also Casentini v. Ninth Judicial Dist. Court*, 110 Nev. 721, 726, 877 P.2d 535, 539 (1994).

[4] *Viega GmbH*, 328 P.3d at 1156; *see also Baker v. Dist. Ct.*, 116 Nev. 527, 531, 999 P.2d 1020, 1023 (2000).

[5] *Id.* at 531-32, 999 P.2d at 1023; *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also Arabella at* 712.

[6] *Viega GmbH*, 328 P.3d at 1156 (2014) (citing *Arbella*, 134 P.3d at 712, 714; *Daimler AG v. Bauman*, – ––– U.S. ––––, –––– n. 20, 134 S.Ct. 746, 762 n. 20, 187 L.Ed.2d 624 (2014)).

[7] *Daimler*, 134 S. Ct. at 751.

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jurisdiction comports with due process only where "the defendant's suit-related conduct" creates "a substantial connection with the forum state."[8]

As set forth in detail below, Plaintiff has not established, and indeed cannot establish, that Brunk's contacts with Nevada are sufficient for the Court to obtain either general or specific jurisdiction. Therefore, the Complaint must be dismissed because the exercise of jurisdiction over Brunk would violate the requirements of due process.

2. This Court Lacks General Jurisdiction Over Brunk.

General jurisdiction over a defendant allows a plaintiff to assert claims against that defendant unrelated to the forum. *Viega GmbH*, 328 P.3d at 1157. Such broad jurisdiction is available only in limited circumstances, when a non-resident defendant's contacts with the forum state are so "'continuous and systematic' as to render [it] essentially at home in the forum State." *Id.* (internal citations omitted). As recently stated by the United States Supreme Court, there are "only a limited set of affiliations with a forum will render a defendant amenable to general jurisdiction there" and for an individual, "***the paradigm forum for the exercise of general jurisdiction is the individual's domicile***. . . ." *Bauman*, 134 S. Ct. at 760 (citations omitted) (emphasis added).

As Plaintiff acknowledges, Brunk is not a resident of Nevada. Compl. ¶ 2. Moreover, the Complaint is devoid of any allegations establishing that Brunk had "substantial" or "continuous and systematic contacts" with Nevada that would warrant the application of general jurisdiction. Indeed, the supporting Declaration establishes that, with a few isolated exceptions, Brunk has had virtually no contact with Nevada. In addition to the fact Brunk is not a resident of Nevada (Ex. A ¶¶ 5-7), he: does not own personal or real property, or have any other personal assets in Nevada (Ex. A ¶¶ 8-9); does not hold any Nevada licenses (Ex. A ¶ 10); does not own or maintain any bank accounts in Nevada (Ex. A ¶ 11); does not maintain any telephone, facsimile or telex number in Nevada (Ex. A ¶ 12); and has never been a party to a lawsuit in Nevada, except for the instant case (Ex. A ¶ 13). Brunk has only occasionally traveled to

[8] *Walden v. Fiore*, 571 U.S. ——, ——, 134 S. Ct. 1115, 1121-22 (2014); *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915 (2011).

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Nevada, primarily to fulfill his official corporate duties as COO or CEO or as a member of the board of Midway. (Ex. A ¶¶ 14, 17-19, 22).

In sum, Brunk does not have the continuous and systematic contacts with Nevada that are necessary to support a finding of general jurisdiction.

3. This Court Lacks Specific Jurisdiction Over Brunk.

In determining whether the exercise of specific personal jurisdiction over a defendant is appropriate, the Court considers a three-prong test:

> [1] [t]he defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state, [2] The cause of action must arise from the consequences in the forum state of the defendant's activities, and [3] those activities, or the consequences thereof, must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Viega GmbH, 328 P.3d at 1157; *Arbella*, 134 P.3d at 712.

Whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on "the relationship among the defendant, the forum, and the litigation." *Walden*, 134 S.Ct. at 1122 (internal citations omitted). For a State to exercise jurisdiction consistent with due process, the "defendant's suit-related conduct" must create a substantial connection with the forum State. *Id.*

For an exercise of specific jurisdiction to comport with due process, the lawsuit must arise "out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 134 S.Ct. at 1122 (quoting *Burger King Corp.*, 471 U.S. at 475, 105 S. Ct. 2174) (emphasis in original). The Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* at 1122, 1125 (concluding that causing an "injury to a forum resident is not a sufficient connection to the forum," and "the plaintiff cannot be the only link between the defendant and the forum"). In other words, the "minimum contacts" analysis looks to the defendant's contacts with the forum state itself, not the defendant's contacts with persons who reside there. *Id.* at 1122.

In this case, Plaintiff has not alleged that Brunk engaged in any specific "suit-related

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conduct" that would create a substantial connection between him and Nevada. *See, generally,* Compl. The only basis for jurisdiction asserted by Plaintiff is that at least one Defendant resided and still resides in Nevada. *See* Compl. ¶16. The claims asserted by Plaintiff all arise out of Plaintiff's reliance upon purported material omissions contained in Midway's SEC filings and press releases. *See* Compl. ¶¶ 101, 106, 126, 127, 135, 136. Importantly, Plaintiff has not alleged, and cannot allege, that Brunk's allegedly tortious conduct (material omissions in public filings) took place in Nevada. *See, generally,* Complaint. As stated in the Declaration, the SEC filings and press releases were entirely drafted in and issued from the state of ***Colorado*** where Midway's principal place of business and executive offices are located. Exh. A ¶ 25. These filings and press releases were also received and purportedly acted upon by Plaintiff in the state of ***California***. *See* Compl. ¶ 1. Absent evidence to the contrary, there is no connection between these claims and Nevada that would serve as a basis for the exercise of specific jurisdiction.[9] Plaintiff's Complaint must be dismissed.

Even if Midway was a Nevada corporation, which it is not, mere affiliation with a Nevada operation is not enough to confer jurisdiction on nonresident defendants. *See Southport Lane Equity II, LLC v. Downey*, 177 F.Supp.3d 1286, 1296 (D. Nev. 2016)(in shareholder direct and derivative action against a corporation's directors and officers, court held that non-resident director and officer defendants' mere affiliation with the Nevada corporation was insufficient for personal jurisdiction). The "a mere connection between a defendant and a plaintiff that has contacts with the forum state or that has been injured in the state is insufficient for personal jurisdiction under the Due Process Clause." *Id.* The Court acknowledged, "what matters most in this analysis is not the corporation's own contacts with Nevada but the ***individual Defendants' contacts with the State***." *Id.* (emphasis added).

Here, the exercise of personal jurisdiction is even more tenuous because not only is

[9] *See Graziose v. Am. Home Prods. Corp.*, 161 F.Supp.2d 1149 (D. Nev. 2001) (press statements made outside of the forum State and transmitted into the forum cannot provide the basis for personal jurisdiction). Here, again, personal jurisdiction is even more tenuous because Plaintiff's alleges no relationship between Nevada and the purported wrongful press releases and SEC filings, and he acknowledges he received them and purportedly acted on them in California, not Nevada. Comp. ¶ 1.

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Plaintiff not a Nevada citizen and ***Midway is not a Nevada corporation***, Plaintiff has alleged no facts alleging that Brunk had any contact with Nevada related to the purportedly wrongful conduct alleged in the Complaint and the Declaration establishes he has not had such contacts. Brunk did not perform any of the acts alleged against him in the Complaint in Nevada. The only connection Brunk has to Nevada is occasional and intermittent travel to Nevada for business reasons. However, Plaintiff's claims do not arise out of or relate to any representations made during such travel.

Because no Nevada corporation is involved in this suit and Brunk did not engage in any suit-related conduct in Nevada in connection with the claims Plaintiff has asserted against him, this Court has no specific jurisdiction as to Brunk. The Complaint must be dismissed.

CONCLUSION

In addition to joining in the relief sought by the D&O Defendants by way of Defendant Brunk's Joinder, this Court has no basis to exercise personal jurisdiction over Brunk because his contacts with Nevada are insufficient as a matter of law. Brunk therefore respectfully requests that the Court grant this Motion and enter an order dismissing the Complaint in its entirety.

DATED this 25th day of August, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 28th day of August, 2017, a true and correct copy of the **MOTION TO DISMISS OF KENNETH A. BRUNK AND JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT** was served electronically with the Clerk of the Court using the Eighth Judicial District Court's eFileNV system to the following:

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/s/ Rachel Jenkins
An employee of SANTORO WHITMIRE

Exhibit A

DECL
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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. 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; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25, Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII

DECLARATION OF KENNETH A. BRUNK IN SUPPORT OF JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT AND SUPPLEMENTAL MOTION TO DISMISS OF KENNETH A. BRUNK

I, Kenneth A. Brunk, pursuant to NRS 53.045 and under penalty of perjury of the State of Nevada, hereby declare the following are true and correct to the best of my knowledge:

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1. I am a Defendant in the above-captioned matter and am familiar with the facts and circumstances of such matter.

2. I am competent to testify to the matters set forth herein, of which I have personal knowledge. If called as a witness to testify, I could and would truthfully testify to the matters set forth herein.

3. I make this declaration in support of Joinder in D&O Defendants' Motion to Dismiss Amended Complaint and Supplemental Motion to Dismiss of Kenneth A. Brunk ("Motion"). Capitalized terms below are as defined in the Motion.

4. I am over the age of eighteen and am competent to testify about the matters contained herein.

5. I am a resident of Colorado.

6. I have been a resident of Colorado since 1991.

7. I am not currently a resident of Nevada and have not resided in Nevada since 1991.

8. I do not own any real property in Nevada.

9. I do not own any personal property or other assets in Nevada.

10. I do not hold any Nevada licenses.

11. I do not own or maintain any bank accounts in Nevada.

12. I do not maintain any telephone, facsimile, or telex number in Nevada.

13. I have never been a party to a lawsuit in Nevada, except for the instant case.

14. Since 1991, I have had only occasional and intermittent contact with Nevada for personal or business visits.

15. I do not have family in Nevada.

16. At all times relevant to this litigation, the headquarters of Midway Gold Corporation ("Midway") were located in Englewood, Colorado.

17. During the time I served as the president and chief operating officer ("COO") of Midway, my business office was located in Colorado, and I only occasionally and intermittently went to Nevada for business reasons to fulfill my duties as President and COO.

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18. During the time I served as the chief executive officer ("CEO") and chairman of the board of Midway, my business office was located in Colorado, and I only occasionally and intermittently went to Nevada for business reasons to fulfill my duties as CEO and Chairman of the Board.

19. Throughout the time I was on the board of Midway, board meetings were held either in Canada or Colorado, except there may have been one or two meetings held in Nevada.

20. Midway caused numerous SEC filings and press releases to be issued. These filing and releases were entirely drafted in and issued from the state of Colorado where Midway's principal place of business and executive offices were located. In some instances I reviewed and was the Company signatory on these filings and releases. To the extent I had any involvement with the preparation or issuance of these filings and releases, such involvement occurred in Colorado, and all discussions and decisions related to the filings and releases occurred in Colorado.

21. In 2012, Midway and representatives of Hale Capital Partners, LP ("Hale") engaged in negotiations relating to the investment by Hale in Midway. I was involved in these negotiations. These negotiations occurred in New York and Colorado. None of the negotiations surrounding this transaction occurred in Nevada.

22. During the time I served as President and CEO of Midway, I attended Midway's annual shareholder meetings. To the best of my recollection, these meetings occurred primarily in Canada or Colorado.

Pursuant to NRS 53.045, I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Dated this ____ day of August, 2017.

_____

KENNETH A. BRUNK

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS,

Plaintiff,

v.

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; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25,

Defendants.

Case No.: A-17-756971-B
Dept. No.: XXVII

ERRATA TO MOTION TO DISMISS OF KENNETH A. BRUNK AND JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Defendant Kenneth A. Brunk ("Brunk") submits this errata to his Motion to Dismiss of Kenneth A. Brunk and Joinder in D&O Defendants' Motion to Dismiss Amended Complaint (the "Motion") filed on August 25, 2017. Attached hereto is Exhibit "A," the fully executed Declaration of Kenneth A. Brunk, an exhibit to Brunk's August 25, 2017 Motion.

DATED this 11th day of September, 2017.

SANTORO WHITMIRE

/s/ Jason D. Smith
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 11th day of September, 2017, a true and correct copy of the **ERRATA TO MOTION TO DISMISS OF KENNETH A. BRUNK AND JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT** was served electronically with the Clerk of the Court using the Eighth Judicial District Court's eFileNV system to the following:

James R. Christensen PC

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/s/ Rachel Jenkins
An employee of SANTORO WHITMIRE

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Exhibit A

DECL
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Attorneys for Defendant Kenneth A. Brunk

DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS,

Plaintiff,

v.

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; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25,

Defendants.

Case No.: A-17-756971-B
Dept. No.: XXVII

DECLARATION OF KENNETH A. BRUNK IN SUPPORT OF JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT AND SUPPLEMENTAL MOTION TO DISMISS OF KENNETH A. BRUNK

I, Kenneth A. Brunk, pursuant to NRS 53.045 and under penalty of perjury of the State of Nevada, hereby declare the following are true and correct to the best of my knowledge:

1. I am a Defendant in the above-captioned matter and am familiar with the facts and circumstances of such matter.

2. I am competent to testify to the matters set forth herein, of which I have personal knowledge. If called as a witness to testify, I could and would truthfully testify to the matters set forth herein.

3. I make this declaration in support of Joinder in D&O Defendants' Motion to Dismiss Amended Complaint and Supplemental Motion to Dismiss of Kenneth A. Brunk ("Motion"). Capitalized terms below are as defined in the Motion.

4. I am over the age of eighteen and am competent to testify about the matters contained herein.

5. I am a resident of Colorado.

6. I have been a resident of Colorado since 1991.

7. I am not currently a resident of Nevada and have not resided in Nevada since 1991.

8. I do not own any real property in Nevada.

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13. I have never been a party to a lawsuit in Nevada, except for the instant case.

14. Since 1991, I have had only occasional and intermittent contact with Nevada for personal or business visits.

15. I do not have family in Nevada.

16. At all times relevant to this litigation, the headquarters of Midway Gold Corporation ("Midway") were located in Englewood, Colorado.

17. During the time I served as the president and chief operating officer ("COO") of Midway, my business office was located in Colorado, and I only occasionally and intermittently went to Nevada for business reasons to fulfill my duties as President and COO.

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19. Throughout the time I was on the board of Midway, board meetings were held either in Canada or Colorado, except there may have been one or two meetings held in Nevada.

20. Midway caused numerous SEC filings and press releases to be issued. These filing and releases were entirely drafted in and issued from the state of Colorado where Midway's principal place of business and executive offices were located. In some instances I reviewed and was the Company signatory on these filings and releases. To the extent I had any involvement with the preparation or issuance of these filings and releases, such involvement occurred in Colorado, and all discussions and decisions related to the filings and releases occurred in Colorado.

21. In 2012, Midway and representatives of Hale Capital Partners, LP ("Hale") engaged in negotiations relating to the investment by Hale in Midway. I was involved in these negotiations. These negotiations occurred in New York and Colorado. None of the negotiations surrounding this transaction occurred in Nevada.

22. During the time I served as President and CEO of Midway, I attended Midway's annual shareholder meetings. To the best of my recollection, these meetings occurred primarily in Canada or Colorado.

Pursuant to NRS 53.045, I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Dated this 24th day of August, 2017.

KENNETH A. BRUNK

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Attorney for Plaintiff, DANIEL E. WOLFUS

EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

DANIEL E. WOLFUS,

Plaintiff,

vs.

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; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25.

Defendants.

CASE NO.: A-17-756971-C
DEPT NO.: 10

CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS

Date of hearing: 11.1.17
Time of hearing: 10:30 a.m.

INTRODUCTION

Plaintiff, Daniel E. Wolfus ("Wolfus") submits this consolidated opposition to the three pending defense motions to dismiss. The most extensive was filed by the D&O Defendants. Of the D&O Defendants, Moritz and Blacketor were senior officers of Midway and not directors. Haddon was both a director and an officer. The balance are directors and committee members.

The second motion was filed by the Hale Defendants. Of these, Hale, Anderson and Klein were directors and committee members. The Hale Defendants also consist of three entities that are alleged to be controlling shareholders of Midway who at all relevant times acted through Hale, Anderson and Klein, who in turn were appointed to Midway's Board to protect the interests of these controlling shareholders.

The final motion is brought by Kenneth Brunk. Brunk first served as a director and Chief Operating Officer of Midway until May 2012, when he became Chairman of the Board and the Chief Executive Officer of Midway.

The D&O Defendants assert the following reasons for seeking dismissal. They first contend that the Court lacks subject matter jurisdiction because exclusive jurisdiction resides in British Columbia, Canada and Wolfus lacks standing to bring these claims. This argument is based on the false assertion that Wolfus' claims are all derivative claims and not individual claims.

The second ground asserted by the D&O Defendants is that Wolfus failed to state a claim under California's securities fraud law because he was not a purchaser of seller of securities. The argument is that it is the granting of a stock option which triggers a claim and not the subsequent exercise of that option when the securities were delivered and paid for.

The final ground asserted is that this Court lacks personal jurisdiction over each of the D&O defendants because they do not have sufficient contacts with Nevada to allow this Court to assert jurisdiction.

The motions of the Hale Defendants and Brunk join in all the bases asserted in the D&O Defendants motion, except lack of personal jurisdiction, and then assert their own lack of personal jurisdiction claims.

As will be demonstrated below, all these motions are without merit.

As to whether Wolfus' claims herein are derivative or individual claims, the recent case of *Parametric Sound Corp. v. Eighth Judicial District Court of the State of Nevada*, 133 Nev., Advance Opinion 59 (September 14, 2017) is controlling and is directly contrary to movants' position.

As to the second ground, California's security law grants a private right of action to the purchaser of a security if the sale is "by means of any written or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading." *California Corporations*

Code § 25401. Midway's common stock clearly is a security. See *California Corporations Code* § 25019. Under this law, Wolfus personally is entitled to damages for a violation of Section 25401. See *California Corporations Code* § 25501. *California Corporations Code* § 25504 imposes joint and several liability for principal executive officers and directors. Liability is also imposed by *California Corporations Code* § 25403. Defendants herein have direct liability under these sections.

Defendants cite *California Corporations Code* § 25017(e) and argue that it is the grant of the option which triggers a right of action and not the sale of the security. That is simply a misreading of the statute. The applicable section is 25017(a). Subsection (e) relates to an option to purchase another security of the same or another issuer. Thus, Wolfus has a private right of action for damages against these defendants under California's Corporate Securities Law of 1968, *California Corporations Code* § 25000, *et seq.*

Defendants' final ground, is lack of personal jurisdiction. Nevada's personal jurisdiction is as broad as the Constitution permits. See *Fulbright & Jaworski LLP v. Eighth Judicial District Court of The State of Nevada*, 342 P.3d 997, 131 Nev. Adv. Op. 5 (2015). Nevada has two bases for jurisdiction - General Personal Jurisdiction and Specific Personal Jurisdiction. To defeat a motion on this ground, the plaintiff must present a *prima facie* case that one or the other jurisdiction exists, which evidence is normally accepted as true and ends the inquiry at the motion stage. See

Trump v. Eighth Judicial Dist. Court of State of Nev., 857 P.2d 740, 109 Nev. 687 (Nev., 1993). Wolfus has presented this information as to each defendant in his concurrently filed declaration.

FACTUAL BACKGROUND[1]

Most of the facts are contained in the First Amended Complaint ("FAC") and are primarily alleged in chronological order.

At all relevant times, Midway was and is a Canadian corporation whose common stock was listed on several exchanges and who was required to file periodic reports with the SEC and others. [FAC ¶ 17] Midway started out as a gold exploration company who developed mining claims but did not actually conduct mining operations. The only revenue then generated by Midway was through the sale of its common stock. [FAC ¶ 12]

While Midway owned a small mining claim in Washington and had a small rented "executive" office in the Denver area, virtually all of Midway's business operations were in Nevada operated either directly by Midway or through one of its wholly owned Nevada subsidiaries. See Exhibit 1 to the Wolfus Declaration and the Nevada map included therein.

[1] Defendants conceded that the factual allegations of the First Amended Complaint are taken as true for purposes of this motion. See D&O Motion at Footnote 2.

In November 2008, Wolfus became a director of Midway. In 2009, Wolfus became the Chairman of the Board and Chief Executive Officer of Midway. In May 2012, Wolfus ceased to be the Chairman of the Board and Chief Executive Officer of Midway but remained as a director of Midway until the June 2013 annual meeting of shareholders. As a director and officer of Midway, Wolfus served from time to time on several of its committees. [Wolfus Declaration ¶ 4] In this capacity, Wolfus gained substantial knowledge of the activities of both Midway and of the defendants.

Each of the defendants is either a director or senior management officer or both of Midway. Most of the directors also served on Board Committees, the two primary committees being the Disclosure Committee and the Audit Committee. These committees had as a primary responsibility to insure Midway's public filings and press releases were accurate, complete, not misleading and contained all material facts required to be disclosed to the investing public. The tenures of each defendant are both alleged in the FAC and are contained in the Wolfus declaration.

As directors and officers of Midway, these defendants had full control over Midway. See *NRS* §§ 78.120, 78.125 and 73.135. Also, directors and senior management owe fiduciary duties to both the corporation and its shareholders. See *NRS* §§ 78.135. California and probably all other states impose similar rights and duties on corporate directors and officers. See *California Corporations Code* §§ 300 and 309.

At the time Wolfus became a director, Midway had three primary mining properties all of which were in Nevada and one of which was being handled by a Joint Venture partner, Barrick. [FAC ¶¶ 24-26] The other two Nevada properties were the Pan and Gold Rock projects.

After Wolfus became Chief Executive Officer, a decision was made to consider developing the Pan project as a working gold mine which would create a revenue stream for Midway. Brunk and Moritz were hired to achieve this goal for the Pan project, primarily because of their mining experience.

Midway conducted several feasibility studies for the Pan project, the final one of which was publically announced in November 2011 and filed the following month. [FAC ¶¶ 38-39] This study not only demonstrated that the Pan project was feasible but provided a detailed plan for operating the mine, listing the equipment which needed to be purchased and the method by which the gold could be successfully extracted and sold at a substantial profit. [FAC ¶ 39 and Exhibit 1 thereto]

To bring the Pan project to fruition two tasks needed to be accomplished. Midway needed to secure the essential Nevada state and county permits, which also formed the basis for securing a federal permit, and it needed to raise the necessary capital to fund the operation. [FAC ¶ 40]

As a senior officer and a director of Midway, Wolfus was granted certain stock options by Midway, the issuer of the stock covered by the options. This was not a purchase or sale. On two occasions in 2014, Wolfus exercised some of his stock

options purchasing common stock directly from Midway and paying Midway substantial cash for those purchases. These purchases all occurred in California. At all relevant times, Wolfus was a substantial Midway common shareholder and as such was owed fiduciary duties by each of Midway's directors and officers. Upon electing to exercise his options but prior to the actual purchase of those shares, Midway and the defendants did nothing to inform Wolfus of previously undisclosed material facts necessary to make the facts which those defendants caused to be made to the public not misleading. Those defendants and Midway had also made public announcements which were knowingly false when made and which those defendants made no effort to retract or correct. Paragraphs 59 and 79 of the FAC set forth most of the highly material undisclosed facts.

In Mid 2015, Midway collapsed and sought bankruptcy protection. Midway is not a defendant in this action because of the bankruptcy stay. Wolfus' shares in Midway have become valueless and because of Midway's creditors, Wolfus will not receive any recovery from Midway's bankruptcy estate.

In his First Amended Complaint, Wolfus has alleged five causes of action, all of which are based either on California statutory law or California common law. All of Wolfus' claims are individual claims and Wolfus alone will recover the damages sought in this action.

Wolfus' first claim is for violation of California's Corporate Securities Law of 1968, *California Corporations Code* § 25000, *et seq.* While the primary liability imposed by this statute is on Midway as the seller, joint and several liability is also imposed on each defendant by *California Corporations Code* §§ 25504 and 25403.

Wolfus' second claim is for breach of fiduciary duty. Wolfus was owned this duty because he was a Midway shareholder and because the defendants were directors and/or senior officers of Midway.

Wolfus' third claim is for aiding and abetting a breach of fiduciary duty. California recognizes this claim in *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451 [171 Cal.Rptr.3d 548]. A copy of this decision is attached hereto as Exhibit 2 for the Court's convenience.

Wolfus' fourth and fifth claims are for fraud or negligent misrepresentation and omission based upon California's *Civil Code.* See California *Civil Code* § 1710 and *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244 [91 Cal.Rptr.3d 532, 203 P.3d 1127].

THIS COURT HAS SUBJECT MATTER JURISDICTION

This is a court of general jurisdiction. As a result, it has subject matter jurisdiction over all claims brought before it unless some other court has exclusive jurisdiction over those claims. By their motions, defendants assert that exclusive jurisdiction resides in British Columbia, Canada.

Defendants have asserted that all of Wolfus' claims are derivative in nature inaccurately asserting that the same claims would belong not only to Midway but all of Midway's other shareholders. However, Midway does not hold California securities law claims against its own directors and officers because it is the issuer of those shares and primarily liable. Other shareholders may or may not have similar claims depending on whether they reside in California, purchased or sold shares based upon the same material misstatements and omissions and have the requisite reliance. The other common law claims have similar problems.

However, defendants assert that because the claims asserted are derivative and not individual, this Court must apply British Columbia law under the Internal Affairs Doctrine and that law provides that derivative lawsuits must be brought in Canada.

After defendants filed their motion, the Nevada Supreme Court issued its opinion in *Parametric Sound, supra.* In that decision, the Court clarified its holding in *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720 (2003) holding that Nevada would apply the "Direct Harm Test" and not the "Special Injury Test."

Citing and quoting from *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), the Court held that under the Direct Harm Test this court "should consider only "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Parametric* at 19.

As clearly demonstrated by both the FAC and the Wolfus Declaration, Wolfus suffered the harm for which recovery is sought in this action when his own shares became valueless. Moreover, any recovery will redound to the sole and exclusive benefit of Wolfus and his assignors. Midway suffered no harm from Wolfus' share purchases. In fact, it received substantial monies from Wolfus. Midway will not share in any recovery in this action.

As a result, the claims asserted herein are direct and personal claims of Wolfus and are not derivative claims. Since they are not derivative claims, none of Defendants' other arguments about applying Canadian law are on point.

THE SECURITY INVOLVED IN THIS ACTION IS MIDWAY'S COMMON STOCK AND THE PURCHASE AND SALE TRANSACTIONS ARE WOLFUS' PURCHASES IN 2014

The D&O Defendants assert in their motion two grounds for seeking to dismiss Wolfus' California securities law claim. The other defendants have joined in this part of that motion.

The D&O Defendants contend that the actual sale by Midway of its common stock is not covered by that statute because it was done pursuant to the exercise of a stock option which was granted to Wolfus for his services as a director and officer of Midway and not sold to Wolfus by Midway. They contend that *California Corporations Code* § 25017(e) precludes this claim.

Alternatively, the D&O Defendants contend that they have no liability under California securities laws because they were not the seller.

Both arguments are fatally flawed.

California Corporations Code § 25019 defines a "Security" to include stock. While an "option" may also be a security, it is not the option which is at issue in this action.

Defendants have failed to provide this Court with the full text of *California Corporations Code* § 25017. It is attached hereto as Exhibit 3 for the Court's convenience. Of importance is subpart (a) which provides:

> " (a) “Sale” or “sell” includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. “Sale” or “sell” includes any exchange of securities and any change in the rights, preferences, privileges, or restrictions of or on outstanding securities."

The subsection which Defendants discuss was addressed by the Court in *People v. Boles* (1939) 35 Cal.App.2d 461 [95 P.2d 949]. Rejecting a similar argument, the Court at 464 stated:

> "In the instant case, the option given by defendants is clear on its face and does not provide for the exchange of one security of the corporation for another security of the same corporation. Therefore, the transaction involved here did not fall within the purview of the exception above noted."

As to Defendants second ground that they are not the sellers of the security at issue, *California Corporations Code* §§ 25504 and 25403 impose joint and several liability on the defendants in this action.

BY HIS DECLARATION, WOLFUS HAS PROVIDED A *PRIMA FACIE* CASE THAT THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS

Each of the defendants has provided the Court with a declaration where they attempt to distance themselves from Nevada. Based upon their roles as defendants and officers of Midway whose business operations were almost entirely based in Nevada and directed by the defendants and officers, these declarations are disingenuous.

Wolfus relies on his own declaration to establish the necessary facts for this Court to exercise personal jurisdiction over each of the defendants.

Four decisions are instructive in analyzing defendants' arguments. They are *Fulbright & Jaworski LLP v. Eighth Judicial District Court of The State of Nevada*, 342 P.3d 997, 131 Nev. Adv. Op. 5 (2015) referred to herein as Fulbright I; Fulbright & Jaworski v. Eighth Judicial Dist. Ct., 2017 WL 1813958 (June 27, 2017) (Unpublished) ("Fulbright II"); *Consipio Holding, BV v. Carlberg*, 282 P.3d 751, 128 Nev. Adv. Op. 43 (Nev., 2012) and *Trump v. Eighth Judicial Dist. Court of State of Nev.*, 857 P.2d 740, 109 Nev. 687 (Nev., 1993).

Fulbright I and Fulbright II involved a plaintiff's attempt to have the Court exercise personal jurisdiction against a Texas law firm. After first citing *Trump, supra,* for providing the way these issues are considered, the Court defined what is necessary for either general jurisdiction or specific jurisdiction to exist, as follows:

"A court may exercise general jurisdiction over a [nonresident defendant] when its contacts with the forum state are so '"continuous and systematic" as to render [the defendant] essentially at home in the forum State.'" *Viega*, 130 Nev. at ——, 328 P.3d at 1156–57 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ——, ——, 131 S.Ct. 2846, 2851, 180 L.Ed.2d 796 (2011)); *see also Arbella Mut. Ins. Co.*, 122 Nev. at 513, 134 P.3d at 712 ("[G]eneral personal jurisdiction exists when the defendant's forum state activities are so substantial or continuous and systematic that it is considered present in that forum and thus subject to suit there, even though the suit's claims are unrelated to that forum." (internal quotations omitted)). A general jurisdiction inquiry "calls for an appraisal of a [defendant's] activities in their entirety, nationwide and worldwide."

* * *

"Unlike general jurisdiction, specific jurisdiction is proper only where 'the cause of action arises from the defendant's contacts with the forum.'" *Dogra v. Liles*, 129 Nev. ——, ——, 314 P.3d 952, 955 (2013) (quoting *Trump*, 109 Nev. at 699, 857 P.2d at 748). In other words, in order to exercise specific personal jurisdiction over a nonresident defendant,

> "[t]he defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state. The cause of action must arise from the consequences in the forum state of the defendant's activities, and those activities, or the consequences thereof, must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable."

Consipio Holding, BV v. Carlberg, 128 Nev. ——, ——, 282 P.3d 751, 755 (2012) (quoting *Jarstad v. Nat'l Farmers Union Prop. & Cas. Co.*, 92 Nev. 380, 387, 552 P.2d 49, 53 (1976)).

In Fulbright II, the Court amplified on specific jurisdiction, as follows:

> Specific jurisdiction occurs when "the cause of action arises from the defendant's contacts with the forum." *Id*. at 1002 (internal quotation marks omitted). For a Nevada court to exercise specific jurisdiction, an out-of-state defendant must "purposefully avail himself of the privilege of acting in [Nevada] or of causing important consequences [therein]." *Id*. (quoting *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 458, 282 P.3d 751, 755 (2012)). The purpose of this policy is to ensure that such an exercise over an out-of-state defendant is reasonable. *Id*.

In the Fulbright cases, the Court ultimately found that even though the law firm was based in Texas and the lawsuit involved a Texas real estate venture, that a few meetings by Fulbright lawyers in Nevada to raise funds for the Texas project was sufficient to permit jurisdiction.

Consipio also involved specific jurisdictions over foreign nationals. The lawsuit involved directors and officers of a corporation headquartered in Spain. The only tie to Nevada was the fact that the corporation was incorporated in Nevada. That was sufficient to allow for specific jurisdiction.

Trump is useful because it discusses the method by which this Court should examine defendants' motions. In discussing specific jurisdiction, the Court held:

> Absent general jurisdiction, specific personal jurisdiction over a defendant may be established only where the cause of action arises from the defendant's contacts with the forum. Budget Rent-A-Car, 108 Nev. at 486, 835 P.2d at 20; Price and Sons, 108 Nev. at 390, 831 P.2d at 602. A state may exercise specific personal jurisdiction only where: (1) the defendant purposefully avails himself of the privilege of serving the market in the forum [109 Nev. 700] or of enjoying the protection of the laws of the forum, or where the defendant purposefully establishes contacts with the forum state and affirmatively directs conduct toward the forum state, and (2) the cause of action arises from that purposeful contact with

the forum or conduct targeting the forum. Budget Rent-A-Car, 108 Nev. at 487, 835 P.2d at 20 (citing World-Wide Volkswagen Corp., 444 U.S. at 291, 297, 100 S.Ct. at 564, 567); MGM Grand, Inc. v. District Court, 107 Nev. 65, 69, 807 P.2d 201, 203 (1991); see Burger King v. Rudzewicz, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985); Brainerd v. Governors of the University of Alberta, 873 F.2d 1257, 1259 (9th Cir.1989)

As to the procedure to be followed, the Court stated:

> Once a defendant challenges personal jurisdiction, the plaintiff may proceed to show jurisdiction by one of two distinct processes. In the more frequently utilized process, a plaintiff may make a prima facie showing of personal jurisdiction prior to trial and then prove jurisdiction by a preponderance of the evidence at trial. "When a challenge to personal jurisdiction is made, the plaintiff has the burden of introducing competent evidence of essential facts which establish a prima facie showing that personal jurisdiction exists." [Citations omitted]
>
> The plaintiff must produce some evidence in support of all facts necessary for a finding of personal jurisdiction, and the burden of proof never shifts to the party challenging jurisdiction. [Citations Omitted] "In determining whether a prima facie showing has been made, the district court is not acting as a fact finder. It accepts properly supported proffers of evidence by a plaintiff as true." Boit, 967 F.2d at 675. However, the plaintiff must introduce some evidence and may not simply rely on the allegations of the complaint to establish personal jurisdiction.

Trump is also instructive because it involves a similar situation to this action. Various entities then owned a casino in New Jersey that needed a President and COO. Trump was the sole owner/director of these entities. Trump decided to hire the CEO of the Golden Nugget and sent one of his employees to Nevada to make the deal. The employee left the Golden Nugget who sued Trump and others in Nevada for stealing the employee. Trump moved to quash service claiming that he never went to Las

Vegas. Following the above procedure and analysis, both the trial court and the Nevada Supreme Court held that Trump must answer in Nevada.

Except for the portions of the Defendants' declarations where they admit their corporate status and their trips to Nevada, Wolfus relies on his factually specific declaration to establish a *prima facie* case for jurisdiction. Defendants admit that personal jurisdiction exists over Yu, the sole Nevada resident. The balance of the Defendants have more than sufficient minimum contacts with Nevada to require them to answer Wolfus' FAC.

First, the activities which give rise to this lawsuit all occurred at the Pan mine in Nevada. Indeed, virtually all of Midway's business activities were conducted in Nevada. (Exhibit 1; Midway Gold 10-k.) Midway operated various subsidiaries, most of which were Nevada entities. (Exhibit 1; Midway Gold 10-k.)

Midway is a corporation and not an individual. It must act, if at all, through individuals. The Defendants together managed and controlled all of Midway's actions in Nevada. The Defendants availed themselves of Nevada's natural resources. They sought and secured permits to operate the Pan mine. They hired the employees and contractors working at the mine. They purchased all the mining equipment located at the mine. All of Midway's conduct in Nevada, which was substantial, was all directed by the Defendants.

This is not even a close case. Specific or General Personal Jurisdiction has been shown to exist and the motions in this regard should be denied.

CONCLUSION

The Defendants have moved to dismiss the FAC for lack of subject matter jurisdiction contending that all of Wolfus' claims are derivative and not personal. Under the now applicable "Direct Harm Test," Defendants' argument of lack of subject matter jurisdiction is without merit.

Defendants contend that Wolfus is not a purchaser of a security. The statute holds otherwise.

Defendants contend that they are not liable for Midway's security fraud. Two statutes hold to the contrary.

Defendants argue that they do not have sufficient contacts with Nevada to be sued in this state. Defendants operated a mining business whose operative mines were in Nevada, availed itself of Nevada's laws, resources, and citizens whom they employed to work their mine. Clearly, Defendants understood that under these

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/ / /

/ / /

circumstances that could be sued for their Nevada directed conduct and it is not unfair to any of them to respond to the complaint.

Dated this 6th day of October, 2017.

/S/ James R. Christensen
JAMES R. CHRISTENSEN ESQ.
Nevada Bar No. 3861
James R. Christensen PC
601 S. 6th St.
Las Vegas NV 89101
(702) 272-0406
(702) 272-0415 fax
jim@jchristensenlaw.com
Attorney for Plaintiff, DANIEL E. WOLFUS

CERTIFICATE OF SERVICE

I CERTIFY SERVICE of PLAINTIFF'S CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS was made this date by electronic service (via Odyssey) to all parties currently shown on the Court's e-serve list of recipients this 6th day of October, 2017.

/s/ Dawn Christensen
an employee of James R. Christensen

JAMES R. CHRISTENSEN ESQ.
Nevada Bar No. 3861
James R. Christensen PC
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(702) 272-0406
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jim@jchristensenlaw.com
Attorney for Plaintiff, DANIEL E. WOLFUS

EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

DANIEL E. WOLFUS,

Plaintiff,

vs.

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; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25.

Defendants.

CASE NO.: A-17-756971-C
DEPT NO.: 10

DECLARATION OF DANIEL E. WOLFUS IN OPPOSITION TO MOTIONS TO DISMISS

I, Daniel E. Wolfus, declare under penalty of perjury of the laws of the United States and the State of Nevada, as follows:

1. I am the Plaintiff in the above entitled action. I know the contents of this declaration of my own personal knowledge and if called as a witness could and would testify competently as to all of the facts contained herein.

2. All of the claims which I have asserted belong to me either individually or as assigned to me by my family trust or my wife and daughters. I am not pursuing any claims owned either by Midway Gold Corp. ("Midway") or any other shareholder of Midway.

3. All recoveries and damages which I seek by this action belong to me and my assignors. I am not seeking any recoveries or damages for Midway or any of its other shareholders, past or present.

4. In November 2008, I became a director of Midway. In 2009, I became the Chairman of the Board and Chief Executive Officer of Midway. In May 2012, I ceased to be the Chairman of the Board and Chief Executive Officer of Midway but remained as a director of Midway until the June 2013 annual meeting of shareholders. As a director and officer of Midway, I served from time to time on several of its committees.

5. I have known Frank Yu ("Yu") since 2008 when he became a director of Midway. I know that at all the times I have known him, Yu was and is a resident of Clark County Nevada. Yu was also a member of Midway's Disclosure Committee and

charged with the responsibility of reviewing all public filings and press releases issued by Midway to insure that they were accurate and complete, not misleading and contained all necessary facts which required disclosure to insure that what Midway did disclose was not misleading. As a director and committee member, Yu was actively involved in managing the affairs of Midway and its Nevada subsidiaries on behalf of Midway.

6. I have known Kenneth A. Brunk ("Brunk") since the time I interviewed him to be the Chief Operating Officer of Midway. I hired Brunk in May 2010 in that capacity in order to bring the Pan Project in Nevada on line as an operating gold mine. Brunk was also a director and a member of the Disclosure Committee with the same duties in that regard as Yu. Brunk was reported as leaving Midway in December 2014.

7. At all times, Brunk was with Midway, Brunk was actively involved in managing the day to day affairs of Midway and its Nevada subsidiaries on behalf of Midway. Brunk replaced me as the Chief Executive Officer of Midway in May 2012. As a result and based upon my knowledge of the duties and tasks required of the Chief Executive Officer, Brunk's involvement in managing Midway Nevada mining operations increased. Brunk was hired to direct all of Midway's mining operations in Nevada which he did up until his departure. Brunk reported to me, when he was Chief Operating Officer, that he very frequently went to Nevada to perform his duties.

8. I have known Richard D. Moritz ("Moritz") since July 2010. Moritz was specifically hired by Brunk to oversee and manage all of Midway's Nevada mining operations including Midway's offices in Nevada and Nevada based employees. Moritz was directly supervised by Brunk who directed his Nevada based duties. Moritz was actively involved in conducting Midway's mining operations in Nevada until his departure.

9. I have known of Bradley J. Blacketor ("Blacketor") since he was hired as Midway CFO in December 2013 and have spoken with him on several occasions during which he demonstrated to me that he was actively involved in managing Midway Nevada mining operations and the financial operations related thereto. Midway disclosed that Blacketor was a member of the Disclosure Committee at Midway and, as such, had the same duties as Yu in that regard although far greater knowledge of Midway's finances than Yu.

10. I have known Timothy J. Haddon ("Haddon") since sometime in August 2014 when he became a director and Chairman of the Board of Midway. I have spoken to Haddon on several occasions in that capacity. Based upon my personal knowledge of the duties of Chairman, Haddon was actively involve involved in managing Midway's mining operations in Nevada.

11. I have known Martin M. Hale, Jr., ("Hale") since prior to May 2012. Hale became a director of Midway in December 2012. Hale also was the agent of INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a

Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company (collectively the "Hale Investors"), who became investors of Midway. Hales job as an agent was to protect these investors' investment. At all times since becoming a director, Hale was actively involved in managing Midway's mining operations in Nevada and indeed took effective control over those operations because he could veto any expenditure of capital by Midway.

12. Trey Anderson ("Anderson") became a director of Midway in November 2014. Like Hale, Anderson was appointed a director by the Hale Investors and was their agent charged with protecting their investment and particularly overseeing what funds of Midway would be expended in Nevada. Based upon my knowledge of the duties and activities of Midway directors, Anderson was actively involved in managing Midway's mining operations in Nevada.

13. Richard Sawchak ("Sawchak") became a director of Midway in June 2014. Based upon my knowledge of the duties and activities of Midway directors and based upon my communications with other Midway employees, Sawchak was actively involved in managing Midway's mining operations in Nevada.

14. I have known John W. Sheridan ("Sheridan") since prior to February 2012 when he became a director of Midway. Sheridan was actively involve involved in managing Midway's mining operations in Nevada and indeed visited the Nevada mining facilities and projects.

15. I have known Roger A. Newell ("Newell") since prior to December 2009 when he became a director of Midway. Newell was asked to be a director because of his extensive mining knowledge. Newell was also a member of the Disclosure Committee with the same duties as Yu referenced above. Newell was actively involve involved in managing Midway's mining operations in Nevada until his departure in August 2014.

16. Rodney D. Knutson ("Knutson") replaced me as a director in June 2013. Based upon my knowledge of the duties and activities of Midway directors, Knutson was actively involve involved in managing Midway's mining operations in Nevada.

17. I have known Nathaniel E. Klein ("Klein") prior to the time he became a director of Midway in August 2012. Klein became a director because of his substantial mining experience. Like Hale and Anderson, Klein was appointed a director by the Hale Investors and was their agent charged with protecting their investors. Klein was actively involve involved in managing Midway's mining operations in Nevada.

18. I have read the declarations of each of the defendants in support of their motions to dismiss. Those declarations are each misleading because each fails to describe each of their conduct in managing Midway's mining operations in Nevada which each did continuously during the time each was a director and/or officer of Midway.

19. While Midway started out as an exploration company, its primary business had changed by December 2012 when it became a mining company whose goal was to mine gold at its Pan project in Nevada. By that time, virtually all of Midway's business was located in Nevada and centered primarily on its Pan project and secondarily on its Gold Rock project which it intended to mine once the Pan project provided positive revenues and cash flow. While Midway has a mining claim in Washington, the regulatory environment in that state precluded further development. Other than Nevada operations, Midway has a small executive office in Colorado but engaged in no mining operations in that state or any other state or country.

20. Attached hereto as Exhibit 1 are pages taken from Midway's 2013 Annual Report filed on Form 10-K with the SEC. On page 2 of that exhibit is a listing of Midway's wholly owned subsidiaries, most of which were incorporated in Nevada and all of them which conducted any business did so in connection with Midway's Nevada mining operations. Each of the defendants also managed these subsidiaries. Also included is Midway's description of its business activities which show that virtually all such activities were conducted in Nevada. Midway's only operational office was located in Ely Nevada and a number of Midway's employees worked out of that office. Midway touted that its Pan project would result in substantial additional Nevada employees to operate Pan.

21. In order to mine for gold in Nevada, Midway was required to secure essential permits. Most permits were from Nevada state and county departments. The only federal permit was from the BLM and was sought through is Nevada office. Much of the activities of the defendants were directed to securing the necessary Nevada based permits. See the discussion of permitting in Exhibit 1 including its importance to the Pan project.

22. Midway raised capital primarily by selling its common stock to the public. I know that there have been at all times a number of Nevada residents who purchased and owned Midway stock. Midway availed itself of this market for its stock and the defendants were responsible for Midway selling stock in Nevada or keeping its Nevada shareholders fully informed to maintain Midway's market price.

23. My lawsuit is based upon the fact that these defendants caused Midway to take actions or not take actions in connection with its Nevada based Pan mine and then either fail to disclose those actions or provide public disclosures which were misleading primarily because they failed to disclose those Nevada based actions. I have listed many of the undisclosed facts in Paragraph 59 and 79 of my First Amended Complaint.

24. Midway only active mining operations were all in Nevada. Midway did not expect to derive a profit except by extracting and selling Nevada's natural gold resources. Midway could not conduct mining operations in Nevada without Nevada permits and Nevada employees and equipment purchased and located in Nevada and

by Nevada based contractors. As directors and/or officers of Midway, each of the defendants directed all of the above Nevada activities which required deriving protection by Nevada's laws.

25. As a matter of practice, management facilitated tours of the Nevada project sites for the board members, at a minimum upon their nomination to the board, specifically to gain familiarity with the projects through firsthand knowledge, observation, and interaction with the employees present at the project sites.

26. On a regular basis, Midway hosted analyst tours of the project sites, whether independently or in conjunction with other mining companies. Directors were invited to participate and often came on those tours.

27. Directors participated in a number of Nevada located events, including lobbying efforts before the Legislature and conferences and other forums held in Nevada.

28. Directors were requested by management to actively participate (in person) in negotiating agreements between the company and local jurisdictions and agencies, including with the BLM in Reno or Ely and the Town of Tonopah.

29. Board members also participated in M&A evaluations conducted within Nevada.

30. Board meetings themselves were hosted a number of times in Las Vegas, in part because Yu was based there, but also because it was a convenient location that all board members could reach with direct flights.

31. All of the above actions by the defendants were purposeful and targeted solely at Nevada and not any other state or country.

I declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct and that I signed this declaration on this 5 day of October, 2017.

Daniel E. Wolfus

EXHIBIT 1

10-K 1 mdw-20131231x10k.htm 10-K

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

x **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2013

☐ **TRANSITION REPORT UNDER SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from to

Commission file number 001-33894

MIDWAY GOLD CORP.
(Exact name of registrant as specified in its charter)

British Columbia	**98-0459178**
(State or other jurisdiction of incorporation or organization)	(I.R.S. Employer Identification No.)
8310 South Valley Highway, Suite 280Englewood, Colorado	**80112**
(Address of principal executive offices)	(Zip Code)

(720) 979-0900
(Registrant's telephone number, including area code)

Securities registered under Section 12(b) of the Exchange Act:

Title of each class	**Name of each exchange on which registered**
Common Shares, no par value	**NYSE MKT**

Securities registered under Section 12(g) of the Exchange Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☐ No x

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No x

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Sections 13 or 15(d) of the Securities Exchange Act of 1934 during the past 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes x No ☐

PART I

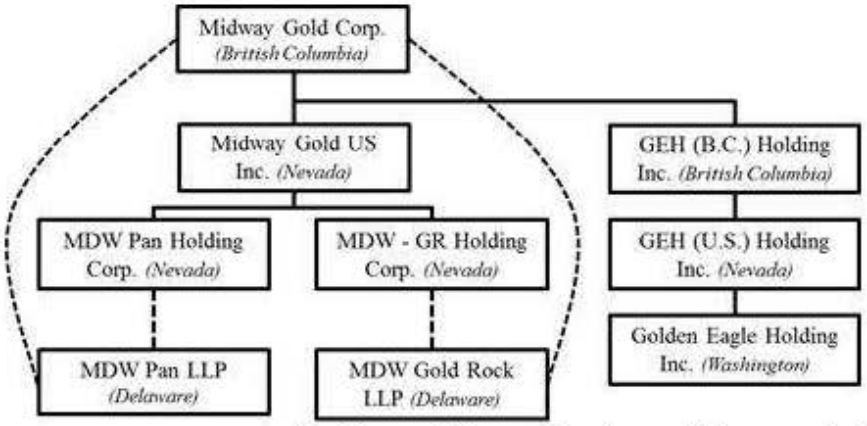
As used in this Annual Report, references to the "Company," "we," "our," or "us" mean Midway Gold Corp., its predecessors and consolidated subsidiaries, or any one or more of them, as the context requires.

Item 1. Business

History and Organization

Midway Gold Corp. was incorporated under the Company Act (British Columbia) on May 14, 1996, under the name Neary Resources Corporation. On October 8, 1999, we changed our name to Red Emerald Resource Corp. On July 10, 2002, we changed our name to Midway Gold Corp. We became a reporting issuer in the Province of British Columbia upon the issuance of a receipt for a prospectus on May 16, 1997. Our common shares were listed on the Vancouver Stock Exchange (a predecessor of the TSX Venture Exchange ("TSX-V")) on May 29, 1997. On July 1, 2001, we became a reporting issuer in the Province of Alberta pursuant to Alberta BOR#51-501. On December 21, 2007, we filed a Form 8-A with the SEC in connection with the listing of our common shares on the American Stock Exchange (now known as the NYSE MKT) and became a reporting issuer under Section 12(b) of the Securities Exchange Act of 1934, as amended. On July 16, 2013, we received final approval to move our common shares to the Toronto Stock Exchange ("TSX") from the TSX-V. Our common shares are currently listed on the NYSE MKT and TSX under the symbol "MDW."

The name and place of incorporation for our wholly-owned material subsidiaries as of December 31, 2013 is set out below.



We are a development stage company engaged in the acquisition, exploration, and, if warranted, development of gold and silver mineral properties in North America. Our mineral properties are located in Nevada and Washington. The Tonopah, Spring Valley, Gold Rock and Golden Eagle gold properties are exploratory stage projects and have identified gold mineralization. Our Pan project is in the development stage. We are working towards transitioning from a development stage company to a gold production company with plans to advance the Pan gold property located in White Pine County, Nevada through to production in 2014.

We have completed our technical, engineering, permitting and economic studies on our Pan gold project and have commenced construction with production expected in 2014.

We do not currently produce gold and do not currently generate operating earnings. Through 2013, funding to explore and develop our gold properties and to operate the company has been through equity and debt financings. We expect to continue to raise capital through additional equity and/or debt financings and through the exercise of stock options until we are able to generate earnings through operations.

Our registered office in Canada is located at 1000 – 840 Howe Street, Vancouver, British Colombia V6Z 2M1. Our principal executive and head office in the United States is located at 8310 South Valley Highway, Suite 280, Englewood, Colorado 80112, U.S.A. and our telephone number is (720) 979-0900.

Available Information

You may read and copy any materials we file with the SEC at the SEC's Public Reference Room at 100 F Street, NE, Washington, D.C. 20549. Copies of such materials also can be obtained free of charge at the SEC's website, www.sec.gov, or by mail from the Public Reference Room of the SEC, at prescribed rates. Please call the SEC at 1-800-SEC-0330 for further information on the operation of the Public Reference Room.

Q3 Preferred Series A Dividend Declared and Paid

On September 17, 2013 our Board of Directors (the "Board") declared the third dividend payment to the holders of Series A Preferred Shares with a record date of September 23, 2013, totaling $1,467,197 (U.S. $1,421,014), which was paid on October 1, 2013 in common shares less applicable tax withholdings, through the issuance of 1,260,144 common shares to the holders of the Series A Preferred Shares. The dividend payment resulted in recording of a Canadian corporate "Part VI.1" tax payable of $309,801, which is payable during the first quarter of 2014.

Barrick Gold Exploration Inc. Exploration Program at the Spring Valley Project

On November 18, 2013, the Company announced that Barrick Gold Exploration Inc. ("Barrick") had informed the Company that it has completed expenditures totaling $38 million at the Company's Spring Valley Project. This meets the requirements for Barrick to earn a 70% interest in the project. The formation of the joint venture was completed on February 24, 2014, with Barrick holding a 70% interest and the Company holding the remaining 30% interest. The Company has until July 14, 2014 to decide on the option to be carried to production, at which point, the Company would retain a 25% interest in the joint venture.

Resignation of Mr. Schaudies as Interim Chief Financial Officer and Appointment of Mr. Bradley Blacketor as Chief Financial Officer

On December 5, 2013, Mr. Fritz K. Schaudies informed the Company of his intentions to transition out as our Interim Chief Financial Officer with the appointment of Mr. Bradley Blacketor as Chief Financial Officer. The Board of Directors appointed Mr. Bradley Blacketor as the Company's Chief Financial Officer and a Senior Vice President effective December 5, 2013.

Q4 Preferred Series A Dividend Declared and Paid

On December 19, 2013 our Board of Directors (the "Board") declared the third dividend payment to the holders of Series A Preferred Shares with a record date of December 23, 2013, totaling $1,515,845 (U.S. $1,421,014), which was paid on January 2, 2014 in common shares less applicable tax withholdings, through the issuance of 1,485,728 common shares to the holders of the Series A Preferred Shares. The dividend payment resulted in recording of a Canadian corporate "Part VI.1" tax payable of $378,935, which is payable in equal monthly installments during 2014.

Completion of Pan Permitting

On December 20, 2013, the Company obtained a signed Record of Decision ("ROD") on the Final Environmental Impact Statement (EIS) for the Pan gold project, White Pine County, Nevada. The ROD signifies full completion of the required National Environmental Policy Act ("NEPA") and Environmental Impact Statement ("EIS") process. The ROD represents the final step in the federal permitting process and allows construction at the Pan gold project to begin.

Financial Information about Segments

Segmented information is contained in Note 18 of the "*Notes to the Consolidated Financial Statements*" contained in the section titled "Item 8. Financial Statements and Supplementary Data" of this Annual Report and is incorporated herein by reference.

Competitive Business Conditions

The exploration for, and the acquisition of gold and silver properties, are subject to intense competition. Due to our limited capital and personnel, we are at a competitive disadvantage compared to many other companies with regard to exploration and development of mining properties. We believe that competition for acquiring mineral prospects will continue to be intense in the future.

The availability of funds for exploration is sometimes limited, and we may find it difficult to compete with larger and more well-known companies for capital. Development of our mining properties could stall due to a lack of funding which would have a material adverse effect on our operations and financial position.

Seasonality

None of our properties are subject to material restrictions on operations due to seasonality.

Reclamation

We generally are required to mitigate long-term environmental impacts by stabilizing, contouring, re-sloping and re-vegetating various portions of a site after mining and mineral processing operations are completed. These reclamation efforts are conducted in accordance with detailed plans, which must be reviewed and approved by the appropriate regulatory agencies.

Government Regulation

Mining operations and exploration activities are subject to various federal, state, and local laws and regulations in the United States, which govern prospecting, development, mining, production, exports, taxes, labor standards, occupational health, waste disposal, protection of the environment, mine safety, hazardous substances and other matters. We have obtained or have pending applications for those licenses, permits or other authorizations currently required in conducting our exploration, development and other programs. We believe that we are in compliance in all material respects with applicable mining, health, safety and environmental statutes and the regulations passed thereunder in the United States. There are no current orders or directions relating to us with respect to the foregoing laws and regulations.

On lands owned by the United States, mining rights are governed by the General Mining Law of 1872, as amended ("General Mining Law"), which allows the location of mining claims on certain federal lands upon the discovery of a valuable mineral deposit and compliance with location requirements. The exploration of mining properties and development and operation of mines is governed by both federal and state laws. Federal laws that govern mining claim location and maintenance and mining operations on federal lands are generally administered by the Bureau of Land Management ("BLM"). Additional federal laws, governing mine safety and health, also apply. State laws also require various permits and approvals before exploration, development or production operations can begin. Among other things, a reclamation plan must typically be prepared and approved, with bonding in the amount of projected reclamation costs. The bond is used to ensure that proper reclamation takes place, and the bond will not be released until that time. Local jurisdictions may also impose permitting requirements (such as conditional use permits or zoning approvals). For a more detailed discussion of the various government laws and regulation applicable to our operations and potential negative effect of these laws and regulations, see the section heading "Item 1A. Risk Factors" below

Environmental Regulation

Our mineral projects are subject to various federal, state and local laws and regulations governing protection of the environment. These laws are continually changing and, in general, are becoming more restrictive. The development, operation, closure, and reclamation of mining projects in the United States requires numerous notifications, permits, authorizations, and public agency decisions. Compliance with environmental and related laws and regulations requires us to obtain permits issued by regulatory agencies, and to file various reports and keep records of our operations, as well as obligations to post reclamation bonds for our projects as work is commenced. Certain of these permits require periodic renewal or review of their conditions and may be subject to a public review process during which opposition to our proposed operations may be encountered. We are currently operating under various permits for activities connected to mineral exploration, reclamation, and environmental considerations. Our policy is to conduct business in a way that safeguards public health and the environment. We believe that our operations are conducted in material compliance with applicable laws and regulations.

Changes to current local, state or federal laws and regulations in the jurisdictions where we operate could require additional capital expenditures and increased operating and/or reclamation costs. Although we are unable to predict what additional legislation, if any, might be proposed or enacted, additional regulatory requirements could impact the economics of our projects.

During 2013, there were no material environmental incidents or material non-compliance with any applicable environmental regulations. We anticipate that we will incur capital expenditures for environmental control facilities during 2014 relating to the development of the Pan mine.

Employees

As of December 31, 2013, we had 38 full-time employees and one part-time employee, 22 of whom were employed full-time at our principal executive office in Denver, Colorado. In addition, we had 15 full-time employees, and one part-time employee at our Ely, Nevada office. We use consultants with specific skills to assist with various aspects of our project evaluation, due diligence, corporate governance and our administrative and financial affairs.

Item 1A. Risk Factors

This Annual Report, including Management's Discussion and Analysis of Financial Condition and Results of Operation, contains forward-looking statements that may be materially affected by several risk factors, including those summarized below:

Risks Relating to Our Company

Since we have no operating or production history, investors have no basis to evaluate our ability to operate profitably. We were organized in 1996 but have had no revenue from operations since our inception. We have no history of producing metals from any of our properties. The majority of our properties are exploration stage properties in various stages of exploration. Our Tonopah, Spring Valley, Golden Eagle, and Gold Rock properties are exploratory stage exploration projects with identified gold mineralization. We now hold a minority interest in our Spring Valley project under the joint venture agreement with Barrick. Our Pan gold project is in the development stage. Advancing properties from exploration into the development stage requires significant capital and time, and successful commercial production from a property, if any, will be subject to completing feasibility studies, permitting and construction of the mine, processing plants, roads, and other related work and infrastructure. As a result, we are subject to all of the risks associated with developing and establishing new mining operations and business enterprises including:

- completion of feasibility studies to verify reserves and commercial viability, including the ability to find sufficient gold reserves to support a commercial mining operation;
- the timing and cost, which can be considerable, of further exploration, preparing feasibility studies, permitting and construction of infrastructure, mining and processing facilities;
- the availability and costs of drill equipment, exploration personnel, skilled labor and mining and processing equipment, if required;
- compliance with environmental and other governmental approval and permit requirements;
- the availability of funds to finance exploration, development and construction activities, as warranted;
- potential opposition from non-governmental organizations, environmental groups, local groups or local inhabitants which may delay or prevent development activities;
- potential increases in exploration, construction and operating costs due to changes in the cost of fuel, power, materials and supplies; and
- potential shortages of mineral processing, construction and other facilities related supplies.

The costs, timing and complexities of exploration, development and construction activities may be increased by the location of our properties and demand by other mineral exploration and mining companies. It is common in exploration and development programs to experience unexpected problems and delays during drill programs and, development, construction and mine start-up. Accordingly, our activities may not result in profitable mining operations and we may not succeed in establishing mining operations or profitably producing metals at any of our properties.

We have a history of losses, negative operating cash flow and expect to continue to incur losses in the future. We have incurred losses since inception, have negative cash flow from operating activities and expect to continue to incur losses in the future. We incurred the following operating losses during each of the following periods:

- $17,380,100 for the year ended December 31, 2013;
- $14,734,063 for the year ended December 31, 2012; and
- $18,615,682 for the year ended December 31, 2011.

We had an accumulated deficit of $83,801,392 as of December 31, 2013. We expect to continue to incur losses until such time as one of our properties enters into commercial production and generates sufficient revenues to fund continuing operations.

Increased costs could affect our financial condition. We anticipate that costs at our projects that we may explore or develop, will frequently be subject to variation from one year to the next due to a number of factors, such as changing ore grade, metallurgy and revisions to mine plans, if any, in response to the physical shape and location of the ore body. In addition, costs are affected by the price of commodities such as fuel, rubber, and electricity. Such commodities are at times subject to volatile price movements, including increases that could make production at certain operations less profitable. A material increase in costs at any significant location could have a significant effect on our profitability.

Item 2. Properties

Nevada Properties

Map of Properties

The map below shows the location of the Company's properties located in Nevada, USA. These properties are described in further detail below.

MAP OF OUR NEVADA PROPERTIES, 2013

Source: Midway Gold Corp., 2013

Pan Project, White Pine County, Nevada

The Pan property is located at the northern end of the Pancake mountain range in western White Pine County, Nevada, approximately 22 miles southeast of Eureka, Nevada, and 50 miles west of Ely, Nevada. Access is via a dirt road running south from US Highway 50. Eureka has a population of about 2,000. Water is readily available from wells on of the property. Permitting and engineering are underway to extend power lines to the property.

Highlights

Permitting continues to be a high priority with a goal of initial production on the Pan project in 2014. The DEIS has been completed and public comments are being incorporated into the final EIS. A Record of Decision is expected before the end of 2013, which will be followed by the commencement of construction. Applications for over 40 other permits are in progress. We have received some critical permits such as the Water Pollution Control Permit and the Class I Air Quality Operating Permit, which authorize the construction, operation and closure of approved mining facilities once the EIS is complete and a Record of Decision has been received from the BLM.

Preliminary results from metallurgical test work on run-of-mine ("ROM") bulk samples at Pan suggest the South Pan ore can be processed with ROM leaching and that a crusher installation at Pan can be deferred for at least 18 to 24 months. Representative samples of true ROM ore were collected from a trial blast in July 2013 at South Pan. The samples were tested in large columns to simulate a ROM leaching operation by Kappes-Cassidy & Associates (KCA) laboratories in Reno. Observed gold recoveries showed 92% recovery after 58 days. These excellent leaching results and leach kinetics lead the project team and management to conclude that ROM leaching is a viable option for South Pan.

To optimize the Pan project cost parameters in order to deliver better returns to our shareholders, we are updating the Pan project technical and financial information, completing detailed engineering, re-evaluating operating costs, re-visiting capital costs, improving the construction plan and schedule, performing in-depth risk analyses of every aspect of the project and examining financing alternatives for the balance of funding needed to bring the project to production in the second half of 2014.

We are pursuing a combination of project and equipment financing alternatives, and have received proposals from several major commercial funding sources. We have been working with financial advisors to assess the amount of financing needed and the various options available in the current financial market to secure the remaining capital necessary to fund Pan to production.

Mineral Reserves and Resources

Cautionary Note to U.S. Investors – In this Quarterly Report on Form 10-Q we use the terms "mineral resource", "measured mineral resource", "indicated mineral resource" and "inferred mineral resource", which are geological and mining terms as defined in accordance with NI 43-101 under the guidelines adopted by CIM, as CIM Standards in Mineral Resources and Reserve Definition and Guidelines. U.S. investors in particular are advised to read carefully the definitions of these terms as well as the "Cautionary Note to U.S. Investors Regarding Reserve and Resource Estimates" above.

A resource estimate for the Pan project was reported in October 2011 based on results from 2011 drilling. The Measured and indicated resource estimate exceeds one million ounces of gold as summarized in Table 1. The updated resource was prepared by Gustavson Associates, LLC ("Gustavson").

Table 1: Mineral Resource Estimate, Pan Project, Nevada

Measured Resource

Cutoff (gpt)	Tonnes	Grade (gpt)	Gold ounces
0.27	27,352,000	0.59	520,000
0.21	30,857,000	0.55	547,000
0.14	36,920,000	0.49	579,000
0.07	50,924,000	0.38	622,000

Indicated Resource

Cutoff (gpt)	Tonnes	Grade (gpt)	Gold ounces
0.27	27,126,000	0.52	453,000
0.21	32,652,000	0.47	495,000
0.14	43,118,000	0.40	551,000
0.07	73,925,000	0.27	645,000

Measured Plus Indicated Resource

Cutoff (gpt)	Tonnes	Grade (gpt)	Gold ounces
0.27	54,478,000	0.56	974,000
0.21	63,509,000	0.51	1,042,000
0.14	80,037,000	0.44	1,130,000
0.07	124,849,000	0.32	1,268,000

Inferred Resource

Cutoff (gpt)	Tonnes	Grade (gpt)	Gold ounces
0.27	1,771,000	0.58	33,000
0.21	2,229,000	0.51	37,000
0.14	3,928,000	0.36	45,000
0.07	9,693,000	0.20	63,000

Note: The tonnage and total ounces of gold were determined from the statistical block model. Average grades were calculated from the tonnage and total ounces and then rounded to the significant digits shown. Calculations based on this table may differ due to the effect of rounding. See "Cautionary Note to U.S. Investors Regarding Reserve and Resource Estimates."

A Feasibility Study was completed November 15, 2011 showing robust economics for the Pan project. Mineral reserves were based upon a design pit that maximized revenue based on a $1,200 per ounce three-year trailing average price of gold. Cutoff grades of 0.21 gpt in the South pit and 0.27 gpt in the North & Central pits produced the project's highest NPV. Reserve estimates are summarized in Table 2.

Table 2: Total Pan Mineral Reserves, November 2011

Pit Area	Cutoff Grade (grams/tonne)	Metric Tonnes (x 1000)	Gold Grade (grams/tonne)	Ounces Gold (x 1000)
		Proven		
North & Central	0.27	13,085	0.60	251
South	0.21	12,160	0.61	236
All Pits		25,245	0.60	487
		Probable		
North & Central	0.27	10,994	0.50	178
South	0.21	12,073	0.51	199
All Pits		23,067	0.51	377
		Proven plus Probable		
North & Central	0.27	24,078	0.55	429
South	0.21	24,233	0.56	435
All Pits		**48,311**	**0.56**	**864**

Note: The tonnage and total ounces of gold were determined from the statistical block model. Average grades were calculated from the tonnage and total ounces and then rounded to the significant digits shown. Calculations based on this table may differ due to the effect of rounding.

The Feasibility Study was prepared to the standards of NI 43-101. The open pit mineral reserves and resources were completed by Gustavson, with Terre Lane and Donald E. Hulse acting as the qualified persons. An updated report "Updated NI 43-101 Technical Report, Feasibility Study for the Pan Project, White Pine County, Nevada" dated November 29, 2012 was filed to clarify responsibilities of the Qualified Persons. This updated report made no changes in the feasibility study numbers.

We believe there is no material difference between the mineral reserves as disclosed in our NI 43-101 Feasibility Study and those disclosable under SEC Industry Guide 7, and therefore no reconciliation is provided. The Pan project has known reserves under SEC Industry Guide 7 guidelines; therefore, the project is considered to be in the development stage.

Mining and Production

The Pan gold deposit contains near-surface mineralization that can be extracted using open pit mining methods. Results from mineral extraction tests indicate that the ore can be processed by conventional heap leaching methods. Ore from the South Pan pit will be processed ROM, while ore from the North Pan pit will be crushed before being placed on the leach pad. Pregnant solutions will be treated in an adsorption/desorption recovery (ADR) plant.

During the three months ended September 30, 2013 and 2012 we incurred expenditures of $578,309 and $700,787 at the Pan project, respectively and $1,432,693 and $1,152,876 in the nine months ended September 30, 2013 and 2012, respectively. These expenditures were primarily for salaries and labor, which were 65% and 70% of mineral exploration expenditures during the three and nine months ended September 30, 2013, respectively. For the comparable period during 2012, expenditures were primarily for salaries and labor, which were 59% of mineral exploration expenditures during the three and nine months ended September 30, 2012.

During the three and nine months ended September 30, 2013, we capitalized into property, equipment and mine development $2,523,412 and $4,455,746 of Pan expenditures, respectively, for permitting, mitigation, engineering, site characterization, metallurgy, mine planning, and detailed design. For the comparable periods during 2012, we capitalized $2,176,070 and $4,224,020 of Pan Expenditures.

Gold Rock Project, White Pine County, Nevada

The Gold Rock property is located in the eastern Pancake Range in western White Pine County, Nevada. The property is eight miles southeast of our Pan project. Access is via the Green Springs road from US Highway 50 approximately 65 miles from Ely, Nevada. Water for exploration purposes is available from wells in the region under temporary grant of water rights. It is anticipated that power will be available from the line being extended to serve the nearby Pan Project.

Gold Rock is scheduled to be our second operating gold mine. A gold resource has been defined on the project and numerous drill targets with potential for expanding that resource have been identified. Additional drilling is planned, but the Pan project has priority for available funds in the near term.

A mining Plan of Operations submitted to the BLM has been declared complete, beginning the EIS process. Scoping meetings for the EIS were held in September, followed by a public comment period.

We incurred $629,269 and $2,294,594 of expenditures at the Gold Rock project in the three and nine months ended September 30, 2013, respectively. Environmental costs represented 54% and 25% of the expenditures for the three and nine months ended September 30, 2013, respectively, while reverse circulation drilling costs accounted for 18% of expenditures for the nine months ended September 30, 2013. For the three and nine months ended September 30, 2012, we incurred $1,021,807 and $2,075,021, of which 39% and 20% were drilling costs, environmental costs represented 18% and 26% of expenditures, and 15% and 17% was related to salaries and wages, respectively.

Spring Valley Project, Pershing County, Nevada

The Spring Valley property is located in the Spring Valley Mining District, Pershing County, Nevada, approximately 20 miles northeast of the town of Lovelock. The property is accessed via paved and dirt roads east of US Interstate 80. Water for exploration purposes is available from water wells drilled on the property under temporary grant of water rights. Power is accessible from existing power lines; however, capacity is unknown.

The Spring Valley project is under an exploration and option agreement with Barrick. Barrick is funding 100% of the costs to earn a joint venture interest in the project. Barrick informed us that they had incurred $30,000,000 in exploration expenditures as of April 19, 2013, completing the earn-in requirement for a 60% interest in the property. Additionally, Barrick stated their intention to spend an additional $8,000,000 in exploration expenditures to increase their interest in the property to 70%. We expect Barrick to complete the earn-in around the end of 2013, one year ahead of schedule. Drilling in 2013 focused on in-fill drilling in the main resource area to upgrade the quality of the resource for future reserve calculations.

During the three months ended September 30, 2013 and 2012, we incurred nil and $21,705 of expenditures on the Spring Valley Project, respectively. For the nine months ended September 30, 2013 and 2012, we incurred $4,914 and $128,916. In 2013, we incurred costs that primarily related to legal and accounting fees. The costs incurred in 2012 were primarily related to funding engineering and legal costs incurred on the portion of the Seymork land that falls outside of the area of interest under the Barrick joint venture agreement.

Tonopah Project, Nye County, Nevada

The Tonopah property is located in Nye County, Nevada, approximately 15 miles northeast of the town of Tonopah, 210 miles northwest of Las Vegas and 236 miles southeast of Reno. The property is over the northeastern flank of the San Antonio Mountains and in the Ralston Valley. Water for exploration purposes is available from water wells for a fee from municipal sources. Power is accessible from existing power lines crossing the property; however, capacity is unknown and may be limited.

There was no new exploration activity on the property during the three months ended September 30, 2013.

We incurred $78,942 and $84,812 of expenditures at the Tonopah project in the three and nine months ended September 30, 2013, respectively. For the comparable periods in 2012, we incurred $90,583 and $222,603. The expenditures for all periods were primarily related to property maintenance and taxes.

Golden Eagle Project, Ferry County, Washington

The Golden Eagle property is located on private land in the Eureka (Republic) mining district in Ferry County, Washington. The property is two miles northwest of the town of Republic, Washington and is accessed by the Knob Hill county road.

There was no new exploration activity on the project during the three months ended September 30, 2013.

We incurred $525 and $10,618 of expenditures at the Golden Eagle project in the three and nine months ended September 30, 2013, respectively, primarily related to property maintenance and taxes. For the comparable periods in 2012, we incurred $16,644 and $82,444 primarily for engineering studies.

Pinyon Project, White Pine County, Nevada

Pinyon is a disseminated gold target near the Gold Rock and Pan projects. A portion of the claims were acquired in 2012 as part of an agreement with Aurion Resources allowing us to earn-in to a joint venture over a five year period. The Pinyon property is located in White Pine County, Nevada approximately 20 miles southeast of Eureka, Nevada. It is 10 miles north of the Gold Rock project and 6 miles east of the Pan project. Access is by 5 miles of dirt road running south-southeast from US Highway 50, at a point about 17 miles southeast of Eureka, Nevada. Water is available from wells that service the Pan and Gold Rock projects. Power is expected to be available from the Pan or Gold Rock projects.

Exploration activity on the project during the three months ended September 30, 2013 included geologic mapping and surface sampling. Results are pending.

We incurred $76,901 and $159,115 of expenditures at the Pinyon project in the three and nine months ended September 30, 2013, respectively, primarily for property maintenance and taxes. We did not incur any expenditures for the comparative periods of 2012.

As we are currently focused on bringing the Pan project into production, the cash expenditures for exploration have been reduced in order to preserve capital for completion the Pan project. Beginning on January 1, 2012, we began to capitalize certain permitting and engineering activities as part of our plans to advance the Pan project to production, and in the three months ended September 30, 2013 the Company capitalized $2,523,412 of these costs as compared to $2,176,070 for the comparable period in 2012.

Office and administration expense for the three months ended September 30, 2013 were $300,772 compared to $270,769 during the comparable period of 2012, an increase of $30,003 or 11%. This increase is a result of increased overhead costs including insurance, information systems and rent in both our Englewood and Ely offices, due to our continued growth.

Salaries and benefits expense during the three months ended September 30, 2013 was $1,163,197 inclusive of $184,360 of non-cash stock based compensation, compared to $1,096,261 and $331,677 during the comparable period of 2012, respectively. The cash component of salaries and benefits has increased period over period as a result of additional employees added during the nine months ending September 30, 2013 as well as regular annual pay raises and recruitment and relocation fees for new employees added in 2013. We use an option pricing model to estimate the value of stock options granted to officers, directors, employees and consultants. We use the Black-Scholes model, which requires considerable judgment selecting the subjective assumptions that are critical to the results produced by the model, to calculate the estimated fair value. We record the estimated fair value as an expense on a pro-rata basis over the vesting period of the options.

Other income (expense) for the three months ended September 30, 2013 was an expense of $291,878 compared to an income of $225,931 during the comparable period of 2012, a net decrease of $517,809. During the three months ended September 30, 2013, we recorded a gain on the change in the fair value of derivative liabilities of $988,443 ($93,209 warrant liability and $895,234 derivative preferred liability) and a foreign exchange loss of $1,259,322.

Income tax recovery for the three months ended September 30, 2013 was $272,628 compared to $231,633 during the comparable period of 2012. An income tax recovery of $582,429 recorded during the three months ended September 30, 2013 related to a decrease of the future income tax liability that is associated with the acquisition of the Pan and Gold Rock projects, which was offset by a Canadian preferred share dividend tax expense of $309,801.

Our ability to continue on a going concern basis beyond the next twelve months depends on our ability to successfully raise additional financing for substantial capital expenditures and to successfully reach gold production from our Pan project in order to achieve planned principal operations. While we have been successful in the past in obtaining financing, there is no assurance that we will be able to obtain adequate financing in the future or that such financing will be on terms acceptable to us.

We have historically relied on equity financings to fund our operations. From inception through to September 30, 2013, we received $103,849,381 in cash, services, and other consideration through issuance of shares of our common stock and $68,295,156 through issuance of our preferred shares. As of September 30, 2013, we did not have any outstanding debt.

Our most significant expenditures for the remainder of 2013 are expected to be costs associated with the development of our Pan project and further exploration of our other properties. We also continue to incur operating expenses approximating $850,000 per month for salaries and benefits (exclusive of non-cash stock-based compensation), professional fees, community relations, investor relations, travel and other overhead expenses at our Colorado executive offices and Ely, Nevada locations.

Net cash used in continuing operations was $9,350,562 during the nine months ended September 30, 2013 compared to $8,725,172 during the nine months ended September 30, 2012, an increase of $625,390. This increase is driven largely by legal expenses incurred during the first and second quarters of 2013 associated with general legal issues, land claims and other corporate entity matters as well as an increase in salary expense resulting from an increase in employee headcount. These increases were offset by a decrease in exploration spending as we have shifted our efforts to a more concentrated development of the Pan project.

Net cash used in investing activities for the nine months ended September 30, 2013 was $5,485,910 compared to $6,167,719 during the comparable period in 2012. Although most of our exploration stage expenditures are recorded as an expense rather than an investment, we capitalize the acquisition cost of land and mineral rights and certain equipment that has alternative future uses or significant salvage value, including furniture, and electronics, and the cost of these capitalized assets is reflected in our investing activities. We also capitalize permitting, engineering and other development activities as part of our plans to develop the Pan project. Cash used in investing activities during the nine months ended September 30, 2013 consisted of permitting and engineering activities on the Pan project, property and equipment additions of $4,874,255 and $1,482,858 for the acquisition of mineral properties. Cash provided by investing activities of $871,203 came from the return of reclamation bond deposits which were held by various third parties.

Net cash used in financing activities for the nine months ended September 30, 2013 was $1,978,170 primarily for the payment of the first quarter 2013 dividend to our Preferred Shareholders on April 1, 2013 and associated withholding taxes. During the comparable period in 2012, cash provided by financing activities was $15,803,591, consisting primarily of proceeds from the public offering that closed on July 6, 2012 wherein 12,261,562 units were issued at U.S.$1.28.

Contractual Obligations

We have obligations under operating leases for our corporate offices in Englewood, Colorado and Ely, Nevada and office equipment until 2020. Future minimum lease payments for non-cancellable leases with initial lease terms in excess of one year are included in the table below.

We have purchased surety bonds during the nine months ended September 30, 2013 for reclamation bonds covering several of our projects in the amount of

EXHIBIT 2

American Master Lease LLC v. Idanta Partners, Ltd.

Court of Appeal of California, Second Appellate District, Division Seven

May 5, 2014, Opinion Filed

B244689

Reporter
225 Cal. App. 4th 1451 *; 171 Cal. Rptr. 3d 548 **; 2014 Cal. App. LEXIS 402 ***; 2014 WL 1761583

AMERICAN MASTER LEASE LLC, Plaintiff and Respondent, v. IDANTA PARTNERS, LTD., et al., Defendants and Appellants.

Subsequent History: Modified by *American Master Lease LLC v. Idanta Partners, Ltd., 2014 Cal. App. LEXIS 460 (Cal. App. 2d Dist., May 27, 2014)*

Prior History: [*1]** APPEAL from a judgment and an order of the Superior Court of Los Angeles County, No. BC367987, Ramona G. See, Judge.

Am. Master Lease LLC v. Idanta Partners, Ltd., 2014 Cal. App. Unpub. LEXIS 1317 (Cal. App. 2d Dist., Feb. 25, 2014)

Disposition: Affirmed in part and reversed in part with directions.

Core Terms

aiding and abetting, breach of fiduciary duty, unjust enrichment, trial court, restitution, defendants', disgorgement, jury instructions, fiduciary duty, constructive trust, stock, cause of action, operating agreement, calculated, fiduciary, statute of limitations, benefits, conspiracy, Citations, special instruction, license, parties, limited liability company, transactions, equitable, aider and abettor, instructions, prejudicial, damages, profits

Case Summary

Procedural Posture
Defendant licensees appealed a judgment and order from the Superior Court of Los Angeles County (California), which, after a jury found the licensees liable to plaintiff limited liability company for aiding and abetting a breach of fiduciary duty and awarded restitution, denied the licensees' motion for judgment notwithstanding the verdict.

Overview

Three members and managers of the company executed a document purporting to grant a non-exclusive license of a business method. The jury returned a special verdict finding that these members and managers knowingly acted against the company's interests and that the licensees knowingly gave them substantial assistance in breaching their fiduciary duties, resulting in unjust enrichment. The court held that liability for aiding and abetting a breach of fiduciary duty, on a theory of committing an independent tort, did not require that the aiders and abettors owe an independent duty. The action was timely filed less than three years after accrual. Regardless of whether the three-year limitations period for a fraudulent breach or the four-year catchall period of *Code Civ. Proc., § 343*, applied, the action was not governed by the two-year statute of limitations for interference with contract in *Code Civ. Proc., § 339*, because the fiduciary duties arose from *Corp. Code, § 17704.09*, rather than from contract. The restitutionary remedies of unjust enrichment and disgorgement were appropriate. The jury was not

given proper instructions on net profit as the measure of unjust enrichment.

Outcome

The court reversed as to the amount of unjust enrichment, remanded with directions to the trial court to grant a new trial on that issue, and affirmed in all other respects.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

HN1[] **Reviewability of Lower Court Decisions, Adverse Determinations**

Only an aggrieved party may appeal. *Code Civ. Proc., § 902*. As a general rule, a party is not aggrieved and may not appeal from a judgment or order entered in its favor. However, a party which has not obtained all of the relief it requested in the trial court is aggrieved and may appeal.

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Invited Errors Doctrine

HN2[] **Harmless & Invited Errors, Invited Errors Doctrine**

Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error. But the doctrine does not apply when a party, while making the appropriate objections, acquiesces in a judicial determination. An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible. The doctrine of invited error does not apply where a party submits a jury instruction pursuant to or consistent with a prior adverse court ruling.

Business & Corporate Law > ... > Causes of Action & Remedies > Breach of Fiduciary Duty > General Overview

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN3[] **Causes of Action & Remedies, Breach of Fiduciary Duty**

Civil conspiracy is a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors. By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to the plaintiff recognized by law and is potentially subject to liability for breach of that duty. A nonfiduciary cannot conspire to breach a duty owed only by a fiduciary. Some courts, noting the close relationship between conspiracy and aiding and abetting, have suggested that the law should treat conspiracy to breach a fiduciary duty and aiding and abetting a breach of fiduciary duty similarly. California law, however, does not treat conspiracy to breach a fiduciary duty and aiding and abetting a breach of fiduciary duty similarly.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN4[] **Concerted Action, Civil Aiding & Abetting**

California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. Liability may be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. Liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN5[] **Concerted Action, Civil Aiding & Abetting**

Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. Aiding-abetting focuses on whether a defendant knowingly gave substantial assistance to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct. While aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. The aider and abetter's conduct need not, as separately considered, constitute a breach of duty.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN6[] **Concerted Action, Civil Aiding & Abetting**

Under California law a defendant can be liable for aiding and abetting a breach of fiduciary duty in the absence of an independent duty owed to the plaintiff. Liability may properly be imposed on one who knows that another's conduct constitutes a breach of duty and substantially assists or encourages the breach. Unlike a conspirator, an aider and abettor does not adopt as his or her own the tort of the primary violator. Rather, the act of aiding and abetting is distinct from the primary violation; liability attaches because the aider and abettor behaves in a manner that enables the primary violator to commit the underlying tort. Because aiders and abettors do not agree to commit, and are not held liable as joint tortfeasors for committing, the underlying tort, it is not necessary that they owe the plaintiff the same duty as the primary violator. Conspirators, by contrast, are held liable for the tort committed by their co-conspirator. Because liability is premised on the commission of a single tort, it is logical that all conspirators must be legally capable of committing the wrong. Additionally, causation is an essential element of an aiding and abetting claim, i.e., the plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered.

Business & Corporate Law > ... > Causes of Action & Remedies > Breach of Fiduciary Duty > General Overview

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN7[] Causes of Action & Remedies, Breach of Fiduciary Duty

There are two different theories pursuant to which a person may be liable for aiding and abetting a breach of fiduciary duty. One theory, like conspiracy to breach a fiduciary duty, requires that the aider and abettor owe a fiduciary duty to the victim and requires only that the aider and abettor provide substantial assistance to the person breaching his or her fiduciary duty. On this theory, California law treats aiding and abetting a breach of fiduciary duty and conspiracy to breach a fiduciary duty similarly. Courts impose liability for concerted action that violates the aider and abettor's fiduciary duty. The second theory for imposing liability for aiding and abetting a breach of fiduciary duty arises when the aider and abettor commits an independent tort. This occurs when the aider and abettor makes a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

Torts > Procedural Matters > Statute of Limitations > General Overview

HN8[] Statute of Limitations, Time Limitations

The statute of limitations for a cause of action for aiding and abetting a tort generally is the same as the underlying tort.

Business & Corporate Law > ... > Causes of Action & Remedies > Breach of Fiduciary Duty > Statute of Limitations

HN9[] Breach of Fiduciary Duty, Statute of Limitations

The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or non-fraudulent. The limitations period is three years for a cause of action for breach of fiduciary duty where the gravamen of the claim is deceit, rather than the catchall four-year limitations period that would otherwise apply. A breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year catch-all statute of *Code Civ. Proc., § 343*. In some circumstances, the statute of limitations for a breach of fiduciary duty claim can be less than three years.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Business & Corporate Law > Limited Liability Companies > Member Duties & Liabilities

HN10[] Limited Liability Companies, Management Duties & Liabilities

The fiduciary duties of members and managers of a limited liability company are not created exclusively or even primarily by the operating agreement, but are imposed by law on them as members and managers of the company.

Business & Corporate Law > Limited Liability Companies > Management Duties & Liabilities

Business & Corporate Law > Limited Liability Companies > Member Duties & Liabilities

HN11[] Limited Liability Companies, Management Duties & Liabilities

Corp. Code, § 17704.09, provides that members owe fiduciary duties of loyalty and care to a limited liability company, including the duties to refrain from dealing with a limited liability company in the conduct or winding up of the activities of a limited liability company as or on behalf of a party having an interest adverse to a limited liability company, and to refrain from competing with a limited liability company; a member shall discharge the duties to a limited liability company and the other members under this title or under the operating agreement and exercise any rights consistent with the obligation of good faith and fair dealing.

Contracts Law > Remedies > Equitable Relief > General Overview

Contracts Law > Remedies > Restitution

HN12[] Remedies, Equitable Relief

An individual is required to make restitution if he or she is unjustly enriched at the expense of another. A person is enriched if the person receives a benefit at another's expense. Benefit means any type of advantage. The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it.

Contracts Law > Remedies > Equitable Relief > General Overview

Contracts Law > Remedies > Restitution

HN13[] Remedies, Equitable Relief

Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment. Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position. However, many instances of liability based on unjust enrichment do not involve the restoration of anything the claimant previously possessed, including cases involving the disgorgement of profits wrongfully obtained. California's public policy does not permit one to take advantage of his own wrong, regardless of whether the other party suffers actual damage. Where a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust, the defendant may be under a duty to give to the plaintiff the amount by which the defendant has been enriched. Moreover, it is not essential that money be paid directly to the recipient by the party seeking restitution. The emphasis is on the wrongdoer's enrichment, not the victim's loss.

Contracts Law > Remedies > Equitable Relief > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Contracts Law > Remedies > Restitution

HN14[] Remedies, Equitable Relief

A person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing

the same unlawful actions again. Disgorgement may include a restitutionary element, but it may compel a defendant to surrender all money obtained through an unfair business practice, regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.

Business & Corporate Law > ... > Causes of Action & Remedies > Breach of Fiduciary Duty > Remedies

Contracts Law > Remedies > Equitable Relief > General Overview

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN15[] **Breach of Fiduciary Duty, Remedies**

Disgorgement based on unjust enrichment is an appropriate remedy for aiding and abetting a breach of fiduciary duty.

Civil Procedure > Preliminary Considerations > Equity > Relief

HN16[] **Equity, Relief**

The fact that equitable principles are applied in an action does not necessarily identify the resultant relief as equitable. Equitable principles are a guide to courts of law as well as of equity. Where liability is definite and damages may be calculated without an accounting, the action is legal.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Estate, Gift & Trust Law > Trusts > Constructive Trusts

Civil Procedure > Preliminary Considerations > Equity > Relief

HN17[] **Jury Trials, Province of Court & Jury**

A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner. The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing. Imposition of a constructive trust is an equitable remedy to compel the transfer of property by one who is not justly entitled to it to one who is. It is not a substantive claim for relief. The issue of whether to impose a constructive trust is an equitable issue for the court.

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Civil Procedure > Appeals > Standards of Review > Prejudicial Errors

HN18[] **Harmless & Invited Errors, Harmless Error Rule**

A judgment may not be reversed for instructional error in a civil case unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Instructional error in a civil case is prejudicial where it seems probable that the error prejudicially affected the verdict. When deciding whether an instructional error was prejudicial, a court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's

arguments, and (4) any indications by the jury itself that it was misled. The appellant has the burden on appeal of showing that an instructional error was prejudicial and resulted in a miscarriage of justice. Prejudice from an erroneous instruction is never presumed; it must be affirmatively demonstrated by the appellant.

Business & Corporate Law > ... > Causes of Action & Remedies > Breach of Fiduciary Duty > Remedies

Contracts Law > Remedies > Restitution

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN19[] **Breach of Fiduciary Duty, Remedies**

There is a distinction between those who are subject to disgorgement because they have breached a fiduciary duty and those who are subject to disgorgement because they are other conscious wrongdoers, such as aiders and abettors. The object of restitution is to eliminate profit of the conscious wrongdoer or defaulting fiduciary without regard to notice or fault. Indeed, the object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing—is one of the cornerstones of the law of restitution and unjust enrichment, and the profit for which the wrongdoer is liable is the net increase in the assets of the wrongdoer, to the extent that this increase is attributable to the underlying wrong. Independent wrongdoers under a theory of aiding and abetting liability based on the commission of an independent tort are subject to disgorgement of the profit or net increase in the assets they obtained, not merely those that the fiduciaries obtained.

Contracts Law > Remedies > Equitable Relief > General Overview

Contracts Law > Remedies > Restitution

HN20[] **Remedies, Equitable Relief**

The unjust enrichment of a conscious wrongdoer, or of a defaulting fiduciary without regard to notice or fault, is the net profit attributable to the underlying wrong. Restitution remedies that pursue this object are often called disgorgement or accounting. The amount of restitution to be made is sometimes described as the benefit received by the defendant. In determining net profit the court may apply such tests of causation and remoteness, may make such apportionments, may recognize such credits or deductions, and may assign such evidentiary burdens, as reason and fairness dictate, consistent with the object of restitution. Profit includes any form of use value, proceeds, or consequential gains that is identifiable and measurable and not unduly remote. In addition, a conscious wrongdoer or a defaulting fiduciary may be allowed a credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement.

Contracts Law > Remedies > Equitable Relief > General Overview

Evidence > Burdens of Proof > General Overview

Contracts Law > Remedies > Restitution

HN21[] **Remedies, Equitable Relief**

In measuring the amount of a defendant's unjust enrichment, a plaintiff may present evidence of the total or gross amount of the benefit, or a reasonable approximation thereof, and then the defendant may present evidence of costs, expenses, and other deductions to show the actual or net benefit the defendant received. A party seeking disgorgement has the burden of producing evidence permitting at

least a reasonable approximation of the amount of the wrongful gain, and the residual risk of uncertainty in calculating net profit is assigned to the wrongdoer. The claimant has the burden of producing evidence from which the court may make at least a reasonable approximation of the defendant's unjust enrichment, and the defendant is then free (there is no need to speak of burden shifting) to introduce evidence tending to show that the true extent of unjust enrichment is something less. Thus, as a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid. Disloyal fiduciaries are uniformly reimbursed for the purchase price of property acquired in conscious breach of their duty of loyalty.

Estate, Gift & Trust
Law > Trusts > Constructive Trusts

HN22[] **Trusts, Constructive Trusts**

In valuing an asset subject to a constructive trust, the trier of fact should consider the actual value of the asset, including issues such as collectability and solvency.

Business & Corporate Law > ... > Causes of Action & Remedies > Breach of Fiduciary Duty > Remedies

Contracts Law > Remedies > Equitable Relief > General Overview

Contracts Law > Remedies > Restitution

HN23[] **Breach of Fiduciary Duty, Remedies**

Where a person is entitled to a money judgment against another because by fraud, duress or other consciously tortious conduct the other has acquired, retained or disposed of his property, the measure of recovery for the benefit received by the other is the value of the property at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value. Where the subject matter is of fluctuating value, and where the person deprived of it might have secured a higher amount for it had he not been so deprived, justice to him may require that the measure of recovery be more than the value at the time of deprivation. This is true where the recipient knowingly deprived the owner of his property or where a fiduciary in violation of his duty used the property of the beneficiary for his own benefit. In such cases the person deprived is entitled to be put in substantially the position in which he would have been had there not been the deprivation, and this may result in granting to him an amount equal to the highest value reached by the subject matter within a reasonable time after the tortious conduct.

Headnotes/Syllabus

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

After a jury found licensees liable for aiding and abetting a breach of fiduciary duty and awarded restitution, the trial court denied the licensees' motion for judgment notwithstanding the verdict. Three members and managers of a limited liability company executed a document purporting to grant a nonexclusive license of a business method. The jury returned a special verdict finding that these members and managers knowingly acted against the company's interests and that the licensees knowingly gave them substantial assistance in breaching their fiduciary duties, resulting in unjust enrichment. (Superior Court of Los Angeles County, No. BC367987, Ramona G. See, Judge.)

The Court of Appeal reversed as to the amount of the award for unjust enrichment, remanded with directions to the trial court to grant a new trial on that issue, and affirmed in all other respects. The court held that liability for aiding and abetting a breach of fiduciary duty, on a theory of committing an independent tort, does not require that the aiders and abettors owe an independent duty. The action was timely filed less than three years after accrual. Regardless of whether the three-year limitations period for a fraudulent breach or the four-year catchall period (*Code Civ. Proc., § 343*) applied, the action was not governed by the two-year statute of limitations for interference with contract (*Code Civ. Proc., § 339*), because the fiduciary duties arose from statute (*Corp. Code, § 17704.09*) rather than contract. The restitutionary remedies of unjust enrichment and disgorgement were appropriate. The jury was not given proper instructions on net profit as the measure of unjust enrichment. (Opinion by Segal, J.,† with Perluss, P. J., and Zelon, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Appellate Review § 5—Who May Appeal—Aggrieved Party.

Only an aggrieved party may appeal (*Code Civ. Proc., § 902*). As a general rule, a party is not aggrieved and may not appeal from a judgment or order entered in its favor. However, a party which has not obtained all of the relief it requested in the trial court is aggrieved and may appeal.

CA(2)[] **(2)**

Conspiracy § 12—Distinguished from Civil Aiding and Abetting.

Civil conspiracy is a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability coequal with the immediate tortfeasors. By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to the plaintiff recognized by law and is potentially subject to liability for breach of that duty. A nonfiduciary cannot conspire to breach a duty owed only by a fiduciary.

CA(3)[] **(3)**

Torts § 11—Actions and Parties—Aiding and Abetting Intentional Tort—Elements.

California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. Liability may be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. Liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted.

CA(4)[] **(4)**

Torts § 11—Actions and Parties—Aiding and Abetting Intentional Tort—Independent Duty.

Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort,

† Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. Aiding and abetting focuses on whether a defendant knowingly gave substantial **[*1453]** assistance to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct. While aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. The aider and abetter's conduct need not, as separately considered, constitute a breach of duty.

CA(5)[⬇] **(5)**

Torts § 11—Actions and Parties—Aiding and Abetting Breach of Fiduciary Duty—Independent Duty.

Under California law a defendant can be liable for aiding and abetting a breach of fiduciary duty in the absence of an independent duty owed to the plaintiff. Liability may properly be imposed on one who knows that another's conduct constitutes a breach of duty and substantially assists or encourages the breach. Unlike a conspirator, an aider and abettor does not adopt as his or her own the tort of the primary violator. Rather, the act of aiding and abetting is distinct from the primary violation; liability attaches because the aider and abettor behaves in a manner that enables the primary violator to commit the underlying tort. Because aiders and abettors do not agree to commit, and are not held liable as joint tortfeasors for committing, the underlying tort, it is not necessary that they owe the plaintiff the same duty as the primary violator. Conspirators, by contrast, are held liable for the tort committed by their coconspirator. Because liability is premised on the commission of a single tort, it is logical that all conspirators must be legally capable of committing the wrong. Additionally, causation is an essential element of an aiding and abetting claim, i.e., the plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered.

CA(6)[⬇] **(6)**

Torts § 11—Actions and Parties—Aiding and Abetting Breach of Fiduciary Duty.

There are two different theories pursuant to which a person may be liable for aiding and abetting a breach of fiduciary duty. One theory, like conspiracy to breach a fiduciary duty, requires that the aider and abettor owe a fiduciary duty to the victim and requires only that the aider and abettor provide substantial assistance to the person breaching his or her fiduciary duty. On this theory, California law treats aiding and abetting a breach of fiduciary duty and conspiracy to breach a fiduciary duty similarly. Courts impose liability for concerted action that violates the aider and abettor's fiduciary duty. The second theory for imposing liability for aiding and abetting a breach of fiduciary duty arises when the aider and abettor commits an independent tort. This occurs when the aider and abettor makes a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.

CA(7)[⬇] **(7)**

Torts § 11—Actions and Parties—Aiding and Abetting Breach of Fiduciary Duty—Independent Duty.

A limited liability company pleaded and proved that licensees had actual knowledge of the fiduciary duties three members and managers owed to the company, that the licensees provided the three fiduciaries with substantial assistance in breaching their duties, and that the licensees' conduct resulted in unjust enrichment. Thus, the trial court did not err in ruling, on demurrer and in connection with the jury instructions, that the licensees could be liable for aiding and abetting a breach of fiduciary duty even though they did not owe a fiduciary duty to the company.

[*Levy et al., Cal. Torts (2014) ch. 9, § 9.02*; 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 44; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 679; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 1013 et seq.]

CA(8)[] **(8)**

Limitation of Actions § 26—Period of Limitation—Aiding and Abetting Torts.

The statute of limitations for a cause of action for aiding and abetting a tort generally is the same as the underlying tort.

CA(9)[] **(9)**

Limitation of Actions § 26—Period of Limitation—Breach of Fiduciary Duty.

The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent. The limitations period is three years for a cause of action for breach of fiduciary duty where the gravamen of the claim is deceit, rather than the catchall four-year limitations period that would otherwise apply. A breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year catchall statute of *Code Civ. Proc., § 343*. In some circumstances, the statute of limitations for a breach of fiduciary duty claim can be less than three years.

CA(10)[] **(10)**

Corporations § 35—Directors, Officers, and Agents—Fiduciary Relationship—Members and Managers of Limited Liability Company.

The fiduciary duties of members and managers of a limited liability company are not created exclusively or even primarily by the operating agreement, but are imposed by law on them as members and managers of the company.

CA(11)[] **(11)**

Restitution and Constructive Contracts § 2—Grounds—Unjust Enrichment.

An individual is required to make restitution if he or she is unjustly enriched at the expense of another. A person is enriched if the person receives a benefit at another's expense. Benefit means any type of advantage. The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it.

CA(12)[] **(12)**

Restitution and Constructive Contracts § 1—Disgorgement.

Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment. Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position. However, many instances of liability based on unjust enrichment do not involve the restoration of anything the claimant previously possessed, including cases involving the disgorgement of profits wrongfully obtained. California's public policy does not permit one to take advantage of one's own wrong, regardless of whether the other party suffers actual damage. Where a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust, the defendant may be under a duty to give to the plaintiff the amount by which the defendant has been enriched.

CA(13)[] **(13)**

Restitution and Constructive Contracts § 1—Disgorgement.

A person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again. Disgorgement may include a restitutionary element, but it may compel a defendant to surrender all money obtained through an unfair business practice, regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.

CA(14)[] **(14)**

Torts § 11—Actions and Parties—Aiding and Abetting Breach of Fiduciary Duty—Remedies—Disgorgement Based on Unjust Enrichment.

Disgorgement based on unjust enrichment is an appropriate remedy for aiding and abetting a breach of fiduciary duty.

CA(15)[] **(15)**

Equity § 5—Scope and Types of Relief—In Legal and Equitable Actions.

The fact that equitable principles are applied in an action does not necessarily identify the resultant relief as equitable. Equitable principles are a guide to courts of law as well as of equity. Where liability is definite and damages may be calculated without an accounting, the action is legal.

CA(16)[] **(16)**

Trusts § 26—Constructive Trusts—Equitable Nature of Remedy.

A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner. The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing. Imposition of a constructive trust is an equitable remedy to compel the transfer of property by one who is not justly entitled to it to one who is. It is not a substantive claim for relief. The issue of whether to impose a constructive trust is an equitable issue for the court.

CA(17)[] **(17)**

Restitution and Constructive Contracts § 1—Disgorgement—Aiding and Abetting Intentional Tort—Unjust Enrichment Measured by Net Profit.

There is a distinction between those who are subject to disgorgement because they have breached a fiduciary duty and those who are subject to disgorgement because they are other conscious wrongdoers, such as aiders and abettors. The object of restitution is to eliminate profit of the conscious wrongdoer or defaulting fiduciary without regard to notice or fault. Indeed, the object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing—is one of the cornerstones of the law of restitution and unjust enrichment, and the profit for which the wrongdoer is liable is the net increase in the assets of the wrongdoer, to the extent that this increase is attributable to the underlying wrong. Independent wrongdoers under a theory of aiding and abetting liability based on the commission of an independent tort are subject to disgorgement of the profit or net increase in the assets they obtained, not merely those that the fiduciaries obtained.

CA(18)[] **(18)**

Restitution and Constructive Contracts § 1—Disgorgement—Conscious Wrongdoer or Defaulting Fiduciary—Unjust Enrichment Measured by Net Profit.

The unjust enrichment of a conscious wrongdoer, or of a defaulting fiduciary without regard to notice or fault, is the net profit attributable to the underlying wrong. Restitution remedies that pursue this object are often called disgorgement or accounting. The amount of restitution to be made is sometimes described as the benefit received by the defendant. In determining net profit the court may

apply such tests of causation and remoteness, may make such apportionments, may recognize such credits or deductions, and may assign such evidentiary burdens, as reason and fairness dictate, consistent with the object of restitution. Profit includes any form of use value, proceeds, or consequential gains that is identifiable and measurable and not unduly remote. In addition, a conscious wrongdoer or a defaulting fiduciary may be allowed a credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement.

CA(19)[] **(19)**

Restitution and Constructive Contracts § 1—Disgorgement—Unjust Enrichment Measured by Net Profit—Calculation.

In measuring the amount of a defendant's unjust enrichment, a plaintiff may present evidence of the total or gross amount of the benefit, or a reasonable approximation thereof, and then the defendant may present evidence of costs, expenses, and other deductions to show the actual or net benefit the defendant received. A party seeking disgorgement has the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain, and the residual risk of uncertainty in calculating net profit is assigned to the wrongdoer. The claimant has the burden of producing evidence from which the court may make at least a reasonable approximation of the defendant's unjust enrichment, and the defendant is then free (there is no need to speak of burden shifting) to introduce evidence tending to show that the true extent of unjust enrichment is something less. Thus, as a general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid. Disloyal fiduciaries are uniformly reimbursed for the purchase price of property acquired in conscious breach of their duty of loyalty.

CA(20)[] **(20)**

Trusts § 31—Constructive Trusts—Evidence—Value.

In valuing an asset subject to a constructive trust, the trier of fact should consider the actual value of the asset, including issues such as collectability and solvency.

CA(21)[] **(21)**

Restitution and Constructive Contracts § 1—Measure of Recovery for Benefit Received—Property of Fluctuating Value.

Where a person is entitled to a money judgment against another because by fraud, duress or other consciously tortious conduct the other has acquired, retained or disposed of his or her property, the measure of recovery for the benefit received by the other is the value of the property at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value. Where the subject matter is of fluctuating value, and where the person deprived of it might have secured a higher amount for it had he or she not been so deprived, justice to that person may require that the measure of recovery be more than the value at the time of deprivation. This is true where the recipient knowingly deprived the owner of the property or where a fiduciary in violation of his or her duty used the property of the beneficiary for his or her own benefit. In such cases the person deprived is entitled to be put in substantially the position in which the person would have been had there not been the deprivation, and this may result in granting to him or her an amount equal to the **[*1458]** highest value reached by the subject matter within a reasonable time after the tortious conduct.

Counsel: Lathrop & Gage, John Shaeffer, Jeffrey Grant and Emily Birdwhistell for Defendants and Appellants.

Mayer Brown, Donald Falk; Mayer Brown, Neil M. Soltman and Germain D. Labat for Plaintiff and Respondent.

Judges: Opinion by Segal, J.,* with Perluss, P. J., and Zelon, J., concurring.

Opinion by: Segal, J.

Opinion

[553] SEGAL, J.***—

INTRODUCTION

In this appeal we consider the questions (1) whether a defendant can be liable for aiding and abetting breach of fiduciary duty without owing the plaintiff a fiduciary duty, (2) what is the statute of limitations for aiding and abetting breach of fiduciary duty, (3) whether the restitutionary remedy of disgorgement is available for aiding and abetting breach of fiduciary duty, and (4) what is the measure of restitution for aiding and abetting breach **[***2]** of fiduciary duty. We answer these questions (1) yes, (2) three or four years (depending whether the breach is fraudulent or nonfraudulent), (3) yes, and (4) the net profit attributable to the wrong.

Defendants Idanta Partners, Ltd., David J. Dunn, Steven B. Dunn, and the Dunn Family Trust appeal from a judgment on a jury verdict in favor of plaintiff American **[**554]** Master Lease LLC (AML) and from an order denying their motion for judgment notwithstanding the verdict. The jury found defendants liable for aiding and abetting breach of fiduciary duty and awarded restitution in the amount of approximately $5.8 million. Defendants argue that the judgment must be reversed because they cannot be liable for aiding and abetting breach of fiduciary duty in the absence of a duty owed directly to plaintiff, and because the aiding and abetting claim is barred by the applicable statute of limitations. We find no merit in these contentions, but we do conclude that defendants are entitled to a new trial on the amount of defendants' unjust enrichment. After having granted a petition for rehearing **[*1459]** by AML in order to give the parties an opportunity to file supplemental briefs on the valuation timing issue **[***3]** for restitution, we affirm in part and reverse in part for a new trial on the amount of restitution.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *AML*

Neal Roberts formed AML in 1998 for the purpose of investing in real estate. He observed that there were people his age who owned real property but were reaching a point in their lives where they wanted to retire and did not want to continue actively managing their real estate investments. Roberts's idea was to allow these investors to sell their real estate to a larger entity and then buy interests in the larger entity as tenants in common, which would allow them to avoid adverse tax consequences associated with the sale of the real estate. This investment vehicle became known as a 1031 FORT, where 1031 referred to the section of the Internal Revenue Code applicable to real estate exchanges and FORT stood for fractionalized ownership in real estate tax deferred.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

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[1] "We state the facts in the light most favorable to the jury's verdict, resolving all conflicts and indulging all reasonable inferences to support the judgment." (*Green Wood Industrial Co. v. Forceman Internat. Development Group, Inc. (2007) 156 Cal.App.4th 766, 770, fn. 2 [67 Cal. Rptr. 3d 624]*.)

AML initially **[***4]** had seven members. Roberts and three trusts that he set up for his wife, his son, and his daughter owned 75 percent of AML. Jim Andrews, the Roberts's family lawyer, Charles "Duke" Runnels (Runnels), and Michael Franklin owned the remaining 25 percent. Andrews, Runnels, and Franklin had participated in a company Roberts formed prior to AML, and Roberts wanted them involved in AML. Roberts was the managing member of AML.

The AML operating agreement (Operating Agreement) included an agreement not to compete. Paragraph 3.9 provided: "The Members agree that the business of the LLC, either to sell AML Products[2] … directly to purchasers or to sell AML Products indirectly through an accommodator as part of a tax-exempt transaction, is unique. … No Member, Principal of a Member or holder of an Economic Interest of a Member, may have any interest, directly or indirectly, in any business that offers to sell or exchange AML Products or is otherwise competitive with [AML], nor may any such Member, Principal or Economic Interest holder be employed by, or act as a consultant to, any such competitive business without the approval of a Majority In Interest of the Class A and Class B Members, voting as a Class. … **[***5]** "
[*1460]

[555]** B. *The Dunns and Idanta Partners, Ltd. (Idanta)*

David J. Dunn was the founder and managing general partner of Idanta, a venture capital firm that for over 40 years had specialized in helping entrepreneurs create and finance new companies. David Dunn was also the sole trustee of the Dunn Family Trust, which held the bulk of his assets. David Dunn's son, Steven, worked for Idanta for about two and a half years and was a partner in Idanta for some of that time. Steven left Idanta in 1987 or 1988.

David Dunn and the other active partners owned about 20 percent of Idanta. Members of the Bass family, a wealthy Texas family engaged in the oil business, owned the other 80 percent as limited partners. The Bass family invested $7 or $8 million in Idanta.

C. *AML Seeks Investment Partners*

AML needed an investment partner to provide funding to purchase commercial properties. The first partner, in the late 1990's, was Ethan Penner and an entity he created for that purpose, T-Rex. Roberts knew about and approved the joint venture with T-Rex. The joint venture was supposed **[***6]** to pay the salaries of Runnels and Franklin, and Roberts contributed money to the joint venture to help pay for their compensation. Before the joint venture could complete any transactions, however, Penner withdrew for financial reasons, and the joint venture was dissolved in 1999.

In January 2000 Roberts, Andrews, Runnels, and Franklin entered into a management agreement with AML. While Roberts remained the managing member and chairman of the board, Andrews, Runnels, and Franklin agreed to function as the operational management of AML (collectively the Operating Group). In addition, their interests in AML increased to 13⅓ percent each, while Roberts's interests decreased to 60 percent. The management agreement also required Runnels and Franklin to use their best efforts to find a new investment partner.

In July 2000 the Operating Group identified CB Richard Ellis as a potential investment partner. Again with Roberts's knowledge and approval, AML entered into a relationship with the newly formed CB Richard Ellis Investors 1031 (CBREI). In December 2001 AML entered into an exclusive license agreement with CBREI for FORT transactions. During the course of the relationship CBREI grossed **[***7]** $86 million and paid AML $500,000.

In the summer of 2003 CBREI lost its financing

[2] Paragraph 1.4 of the Operating Agreement defines "AML Products" as "direct or indirect tenancy-in-common interests in real property."

after its funding source refused to fund the transactions. That fall, Roberts told the Operating Group **[*1461]** that they should consider terminating AML's relationship with CBREI and searching for a new investment partner.[3]

At a November 7, 2003 AML board meeting, the Operating Group suggested two possibilities for a new investment partner: Idanta and Warburg-Pincus. A dispute arose at the meeting, however, between the Operating Group and Roberts. Roberts was concerned about protecting AML's business method, while the Operating Group wanted to proceed with finding a new investment partner. Roberts vetoed the Operating Group's proposal to pursue a new investment partner. Roberts then presented the Operating Group with an amendment to AML's Operating Agreement, signed by him and the trustee of the three trusts. The purpose of the amendment was to make it "absolutely **[**556]** clear that no deal could get done without the approval of the majority interest **[***8]** in the company."

D. *Idanta and AML Explore the Possibility of a Relationship*

Steven Dunn played tennis with Tyler Runnels, Charles Runnels's brother. In the fall of 2003 Tyler Runnels had Steven Dunn introduce him to David Dunn to discuss a loan to AML. Charles Runnels and Franklin were looking for a loan for a FORT transaction in conjunction with the CBREI joint venture. David Dunn initially refused to provide a loan commitment. At some point, however, he provided a loan commitment of $5.1 million in exchange for $177,000, but he never had to make the loan. David Dunn later tried to put together a joint venture between Idanta and CBREI but was unsuccessful.

In January 2004 David Dunn proposed a transaction that would not include CBREI. Idanta would form and finance a new company in which Idanta would own 80 percent, Runnels and Franklin would own 15 percent and manage the company, and AML would own 5 percent. This proposal was unacceptable to Roberts because Runnels and Franklin would be "getting far too much of the deal when, in fact, it's an AML deal." Roberts also objected to the interest rate Idanta wanted to charge for loans to the new company, and he did not want to grant **[***9]** the new company an exclusive license to engage in FORT transactions.[4]

On January 13, 2004, David Dunn met with Runnels to discuss the situation. He told Runnels that he was "still interested" in the transaction. He **[*1462]** gave Runnels "a lot of good reasons why he [was] better off with an independent entity like Idanta as opposed to being tied to a major realty firm" like CBREI.

By the end of January 2004 the relationship between Roberts and the Operating Group was strained. Roberts and the Operating Group retained separate legal counsel. Roberts was allowed to speak with representatives of Idanta only if Franklin introduced him and was present at the meeting.

On February 5, 2004, Franklin wrote to Roberts to set up a meeting with Steven Dunn. He urged **[***10]** Roberts to review the paperwork, "which shows that the IDANTA offer has an approximate value of $26.5 Million to AML with the majority of that coming from FORT sales activity. … You seem willing to 'bet the farm' on potential licensing revenue when we certainly have an excellent opportunity to be in business immediately, producing FORT's, generating income and creating value."

[3] In December 2003 AML converted CBREI's exclusive license to a nonexclusive license and gave CBREI time to find new financing or face termination of the agreement with AML.

[4] At the time AML had granted exclusive licenses to T-Rex and CBREI, no one else was engaging in FORT transactions. According to Roberts, "by the time we get to 2004, there's a whole bunch of companies that seemed to be stealing our ideas that you could have gone after who were doing billions of dollars of business, and so I wasn't about to give that to some venture capital entity to take care of because I didn't think they knew anything about it."

On February 10, 2004, Andrews, Runnels, and Franklin sent Roberts a compromise proposal regarding the proposed new company. Under this proposal, "AML [would] accept the Idanta proposal and issue it an exclusive license of the AML business method … ." The agreement not to compete would be eliminated from AML's Operating Agreement. The November 2003 amendment to the Operating Agreement would be rescinded, and any future amendments would require the approval of the Operating Group.

On February 19, 2004, Roberts presented the Operating Group with his counterproposal. **[**557]** His "central policy issue" was the protection of AML's intellectual property. He proposed entering into a joint venture with Idanta, with AML having at least a 20 percent interest in the new company. AML would grant the new company a nonexclusive **[***11]** license to use the AML business method. The Operating Group sent Roberts's proposal to Steven Dunn, who forwarded it to David Dunn.

In late February 2004 Roberts met with Steven Dunn. Roberts told Steven Dunn that he did not approve of David Dunn's proposal and that they "had to work out a way to go forward that was acceptable to the controlling members, … majority in interest in" AML. Roberts told Steven Dunn about disputes with the Operating Group and "that I controlled the company. And I also specifically told him—I think I used the phrase 'dirty linen,' that we would attempt to clean up the 'dirty linen' if we were going to proceed."

E. *The Operating Group Forms a New Company and Grants It a License*; *Idanta and the Dunns Buy into It*

In approximately mid-March 2004 Runnels incorporated FORT Properties, Inc. (FPI), with himself and Franklin as FPI's owners. David Dunn had **[*1463]** already negotiated with Runnels and Franklin an ownership interest in FPI for himself, the Dunn Family Trust, and Idanta. Initially, Runnels and Franklin owned 100 percent of the shares of FPI. In April 2004 defendants purchased preferred shares in FPI for $2.3 million, which gave defendants an 85 percent ownership **[***12]** interest in FPI. The Operating Group, on behalf of AML, then granted FPI a nonexclusive license to use AML's business method. Runnels signed the licensing agreement on behalf of FPI; Andrews, Runnels, and Franklin signed on behalf of AML.

On March 15, 2004, David Dunn wrote to Sid Bass, one of Idanta's partners, about the deal. David Dunn expressed his belief that "we are involved with first-rate professionals who have an opportunity to build a very large strongly financed business." David Dunn further stated that "once we have done a couple of successful transactions and, again, this management has done successful transactions, we will be able to increase the number of deals we do through obtaining additional layers of capital. We also believe that if we become the major player in the industry, we will have a very attractive vehicle for a public offering." David Dunn explained that Runnels and Franklin "finally lost patience with CBREI" due to the failure to provide the promised financing. While "the majority holder" of AML's business method (i.e., Roberts) wanted to go after infringers, Runnels and Franklin were not interested in pursuing this course of action. They intended to draft **[***13]** a nonexclusive license for FPI to use the business method. Andrews, Runnels, and Franklin, "as the operating people (non-employees) of AML will inform the majority … holder of their action sending him copies of the FORT Property license and a copy of the deposited check" for the license.

Runnels and Franklin wrote to Roberts on March 17, 2004, that his February 19 proposal "misse[d] the mark." They explained: "Your opposition to any exclusive license arrangement is noted, and as a result we have been actively seeking parties in addition to CBREI who are willing to enter into nonexclusive licenses. In this regard, the Operating Group has granted a nonexclusive license to [FPI], a newly formed entity." The royalty rate was the

same as the royalty rate paid by CBREI, and FPI paid an advance against royalties of $50,000. Runnels and Franklin stated that they "believe[d] the license agreement with FPI is fair and reasonable and can **[**558]** provide a launching pad for the AML licensing operation."

Runnels and Franklin also stated that Roberts's proposal that they work for the proposed venture between AML and a new company was unacceptable. They pointed out that they "have never been employees of **[***14]** AML and do not plan to be in the future." They also stated that they had been informed by counsel that paragraph 3.9 of the AML Operating Agreement was "an unenforceable attempt to restrict employment under California law." They **[*1464]** notified Roberts that "[Runnels] has decided to join FPI as its President with a view to bringing it into the 1031 TIC[5] business. [Runnels] and other management personnel will purchase an equity interest in FPI. [Franklin] will likely also accept an offer for employment and affiliate himself with FPI."

Roberts received the letter on March 22, 2004. He researched FPI and discovered that Runnels was its the sole incorporator. He sent an e-mail to Runnels and Franklin stating that he was "obviously disheartened" to learn of their conclusion that his proposal "'misse[d] the mark' but [was] hopeful that your comments about moving forward to protect the Company's intellectual property and generate revenue can lead to an agreement in that sphere." He also stated his belief that Runnels and Franklin were "bound by the non-compete provisions of the operating agreement and that you have never had the authority to make exclusive or non-exclusive licenses **[***15]** on behalf of the company … ."

Runnels forwarded the e-mail to David Dunn. David Dunn was aware that the authority of Runnels and Franklin to enter into the license agreement was questionable, but he let his son Steven, who knew about licenses, deal with the issue. Having read the e-mail, however, David Dunn did not believe that Roberts had vetoed the license agreement. Franklin later reported to David Dunn that he had met with Roberts and given him the $50,000 check for the advance against royalties. After discussing the matter, Roberts said, "'I don't know whether this is the best thing that ever happened to us or whether I've been f'd.' And [Franklin] said he told him it was the best thing that ever happened to him."

F. *Roberts Objects*

On September 28, 2004, Roberts's attorney, Neil M. Soltman, wrote to Steven Dunn. He stressed that Roberts and his family owned a majority interest in AML, and that AML owned a business method for performing tax-deferred real estate exchanges. "The 1998 Operating Agreement … specifically provides that without the approval of a majority in interest of AML's owners, no member of AML may have any interest, directly or indirectly, in any business that **[***16]** offers to sell or exchange AML products or is otherwise competitive with AML, nor may any member be employed by or act as a consultant to any such competitive business. Neither the 2003 Amendment to the Operating Agreement nor any side agreement signed by some of the members of the company in any way changed these provisions." Soltman noted that Roberts had learned that Runnels had formed FPI "and that three members of AML ([Andrews, Runnels, and Franklin]) who do not **[*1465]** collectively own a majority in interest in AML have executed a document which purports to grant a non-exclusive license of the AML [business method] to FPI. At no time has the majority in interest of AML's owners approved of that license." Having learned of the investment in FPI by Idanta and the Dunns, **[**559]** Soltman informed them that the license was not authorized. Soltman advised: "If the actions of the three individuals are, as we are now of the opinion, in breach of their duties under the AML Operating Agreement and their fiduciary duties to AML … , it then follows that all compensation that they receive

[5] Tenant in common.

of any type … does and will continue to belong to AML. Since at least one of the three individuals formed FPI **[***17]** and executed the license on behalf of FPI and AML, FPI is on notice that all such compensation is to be held in trust for the benefit of AML. [¶] In addition, if FPI knowingly infringes the AML [business method], FPI will be liable to AML for all proceeds from the enterprise and for all available damages and remedies under the patent laws of the United States and similar state and federal laws or decisions." Steven Dunn sent Soltman's letter to David Dunn, who now understood that Roberts was objecting to the transaction.

On October 25, 2004, counsel for Idanta responded to the letter and stated that "Steve Dunn is not affiliated with Idanta Partners. Furthermore, the investment that you mentioned by Idanta Partners in Fort Properties, Inc. has been concluded. [¶] Since it appears that the matters you raise in your letter concern disputes between Neal Roberts and the other members of AML … , Idanta partners believes it is appropriate for those parties to resolve those matters among themselves without the involvement of Idanta Partners."

G. *FPI's FORT Transactions*

Within a month after Soltman sent his letter, FPI cancelled the license agreement with AML. FPI engaged in several FORT transactions **[***18]** without AML, with its first FORT transaction closing in November 2004. Idanta and the Dunn Family Trust provided financing for these transactions in the amount of $2.5 million "[p]lus a commitment to put in up to 25 million for subordinated loans on [each] individual [FORT] transaction." FPI paid Idanta and the Dunn Family Trust $2.45 million in interest on total loans of approximately $74 million, at prime plus 8 percent.

H. *Roberts Institutes Arbitration Proceedings Against Andrews, Runnels, and Franklin*

At some point Roberts commenced arbitration proceedings against Andrews, Runnels, and Franklin. On December 4, 2008, the arbitrator issued a final arbitration award, finding that some of the conduct by Runnels and Franklin constituted a breach of their fiduciary duties to AML, and some of it did not. **[*1466]** "[T]he Arbitrator found [that] the appropriate remedy was an equitable remedy of requiring Runnels and Franklin to transfer a certain percentage of the [FPI] shares to Roberts based on his 60% ownership in AML." Roberts filed a petition to confirm the arbitration award, but the parties to the arbitration settled their disputes and Roberts dismissed the petition. (*Roberts v. Andrews* (Super. **[***19]** Ct. L.A. County, 2009, No. BS120091).)

I. *Idanta and the Dunn Family Trust End Their Relationship with FPI*

On March 15, 2007, AML filed this action against Idanta, the Dunn Family Trust, David Dunn, Steven Dunn, and Jonathan Huberman,[6] one of Idanta's partners. AML alleged causes of action for aiding and abetting breach of fiduciary duty, inducing breach of contract, conspiracy to induce breach of contract, interference with contractual relations, conspiracy to interfere with contractual relations, unfair competition, and unjust enrichment.

A few months later, in June 2007, FPI agreed to pay Idanta and the Dunn Family **[**560]** Trust $5.8 million for the preferred stock they had purchased in April 2004 for $2.3 million. The initial payment for the repurchase of the stock was $2.9 million, with the payment of another $2.9 million after closing.[7] FPI made the first $2.9

[6] Huberman is not a party to this appeal.

[7] It is unclear from the record whether the second payment from FPI to defendants was a fixed $2.9 million or some percentage of FPI's profits that may have been valued at $2.9 million. AML's expert, Kelly Melle, testified that there was a "closing payment" of $2.9 million and a "post closing payment" of another $2.9 million. During discussions with the court over the jury instructions, however, counsel for AML stated that the terms of defendants' sale of their stock back to FPI had "a cash component" (presumably the first $2.9 million payment) and a "retained … future profit interest" in FPI of "25 percent of [FPI's] profits," and that Melle was going to value this "25 percent profit interest" at over $2 million. Neither side points to any direct evidence of the terms of this transaction, and the copy of Melle's demonstrative exhibit that might shed light on this issue is

million payment, and then, during the pendency of this litigation in 2009, paid $300,000 towards the second $2.9 million payment. Idanta and the Dunn Family Trust agreed to accept an additional $100,000 in lieu of the remaining $2.6 million owed on the second payment. From March 2004 through **[***20]** December 2009 FPI experienced a net loss of about $600,000 to $700,000.

J. *The Litigation*

1. *Rulings on the Pleadings*

On July 5, 2007, defendants filed a demurrer to AML's **[***21]** first amended complaint. They argued in part that AML could not state a claim for aiding **[*1467]** and abetting a breach of fiduciary duty because they did not owe a fiduciary duty to AML. The trial court, Hon. Edward Ferns, sustained the demurrer with leave to amend. The court ruled that while a defendant must owe an independent duty to the plaintiff in order to be liable for conspiracy to breach that duty (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 510–511 [28 Cal. Rptr. 2d 475, 869 P.2d 454]*), a defendant need not owe an independent duty to the plaintiff in order to be liable for aiding and abetting a breach of that duty (*Casey v. U.S. Bank Nat. Assn. (2005) 127 Cal.App.4th 1138, 1144 [26 Cal. Rptr. 3d 401]*). In other words, the court ruled that aiding and abetting is an independent tort even though conspiracy is not. The court nevertheless sustained the demurrer to AML's aiding and abetting cause of action on the ground AML had failed to plead sufficient facts to state a cause of action for aiding and abetting a breach of fiduciary duty by Andrews, Runnels, and Franklin. Specifically, the court ruled that AML had not sufficiently alleged that defendants knew the conduct of Andrews, Runnels, and Franklin constituted **[***22]** a breach of fiduciary duty, or that defendants gave the three of them substantial assistance or encouragement.

On June 27, 2008, AML filed its fourth amended complaint alleging causes of action for aiding and abetting a breach of fiduciary duty, interference with contract, unfair competition, and unjust enrichment. The trial court sustained defendants' demurrer to the causes of action for unfair competition and unjust enrichment without leave to amend. The court ruled that although the conduct of Andrews, Runnels, and Franklin "in unfairly competing with [AML] may be considered" unfair competition, AML was not entitled to injunctive relief or disgorgement under "California's unfair competition law."

2. *Defendants' Motion for Summary Judgment*

On June 26, 2009, defendants filed a motion for summary judgment or in the **[**561]** alternative summary adjudication. They argued that the arbitrator's ruling on AML's breach of fiduciary duty claim was collateral estoppel on AML's claim in this action, and that the arbitrator's equitable remedy gave Roberts "complete satisfaction." Defendants also argued that they could not be liable for interference with contract because paragraph 3.9 of the AML Operating **[***23]** Agreement, the agreement not to compete, was void and unenforceable. The trial court denied the motion on the grounds the parties in this case were not the same as the parties in the arbitration and that the unconfirmed arbitration award was not binding. The court did not address the validity of the noncompetition agreement.
[*1468]

3. *Evidence of the Unjust Enrichment*

After multiple continuances, the trial finally began on June 13, 2012, before Judge Ramona See.[8] During the trial, AML's expert, Melle, testified that he was "asked to compute the dollar amount of the benefit that the defendants received [as of June 13, 2012,] from a revolving loan agreement and a

illegible. For purposes of this appeal, we assume that the June 2007 transaction between defendants and FPI contemplated two $2.9 million payments.

[8] On February 27, 2012, the parties stipulated to a waiver of the five-year period in which to commence trial. (See *Code Civ. Proc., §§ 583.310*, *583.330, subd. (a)*.)

preferred stock sale."[9] Melle calculated that defendants earned $2,328,892 interest on loans to FPI between 2004 and 2007, and that with prejudgment interest the total amount of this benefit was $3,399,287. The jury did not award this amount.

Melle also "did an analysis of the benefits [defendants] received" from the June 2007 sale of their FPI stock. The "sale called for a payment of 2.9 million dollars and then following the closing, other payments of another 2.9 million, for a total of 5.8 million dollars or 5,808,826 dollars." Adding interest through June 13, 2012, Melle calculated that the total amount of this benefit was $7,075,891.

Melle acknowledged that shortly after he had performed his calculations, "there were payments of about 300,000 dollars," and that defendants subsequently "took 100,000 dollars instead of [the remaining] 2.6 million." Melle's calculations, however, did not take into account the fact that defendants did not receive all of the second $2.9 million payment and therefore did not receive the entire $5.8 million. Nor did Melle take into account defendants' initial investment of $2.3 million to acquire the **[***25]** FPI stock. He stated that he did not take these facts into account because his task was to calculate the (gross) benefits defendants received "at the time they closed the deal," not "profits."

4. *Jury Instructions*

The court and counsel had several discussions, some before trial and some in the middle of trial, about the parties' proposed CACI and special jury instructions. AML objected to *CACI No. 3900*, "Introduction to Tort Damages—Liability Contested," because it instructed the jury on traditional tort damage theories, while AML sought restitution based on disgorgement and constructive trust. AML had drafted special instructions to cover its restitution **[*1469]** theories. Defendants objected to AML's special instructions Nos. 3 and 4 regarding unjust enrichment and constructive trust, arguing that the trial **[**562]** court had previously sustained their demurrer to AML's cause of action for unjust enrichment and that there was nothing over which a constructive trust could be imposed. Defendants also objected to AML's special instructions Nos. 7 and 8 regarding the calculation of the amount of disgorgement and the imposition of a constructive trust with respect to the date as of which the restitution amounts should be calculated. **[***26]** Defendants argued that these instructions failed to include any offset for amounts paid by defendants. The trial court took the matter of the jury instructions under submission.

During Melle's testimony, counsel for defendants attempted to question him on cross-examination about whether he had included any offsets in his calculations. Counsel for AML objected, pointing out that there was "an approved jury instruction, special number 8, which says the jury can't take that into account." After considering the matter the trial court ruled that it was going to modify this instruction to refer to "profit" rather than "economic benefit," because "[d]isgorgement deals with profit. And profit by its very definition is calculated less expenses." The record reflects, however, that the trial court ultimately did not give this instruction.[10]

5. *Motion for Nonsuit*

Following the conclusion of AML's case-in-chief defendants moved for a judgment of nonsuit "as to both claims on the basis **[***27]** that they are barred by the statute of limitations and as to the

[9] Defendants had filed a motion in limine seeking to exclude evidence of "any alleged damage sustained by [AML] based upon the purported **[***24]** 'benefits' defendants received from" interest on the loan to FPI and the sale of FPI stock. Defendants argued that these amounts were not damages proximately caused by the tortious conduct alleged in the complaint. The trial court denied the motion as a "failed motion[] for summary adjudication."

[10] The court reporter did not transcribe the trial court's reading of the instructions to the jury. This particular instruction does not appear in the set of written instructions included as given in the record on appeal.

second cause of action for interference with contract on the basis that there has not been proof offered of a valid and enforceable contract." The trial court denied the motion and ruled that the limitations period for AML's cause of action for aiding and abetting a breach of fiduciary duty was four years pursuant to *Code of Civil Procedure section 343* and *In re Brocade Communications Systems, Inc. Derivative Litigation (N.D.Cal. 2009) 615 F.Supp.2d 1018, 1037*. The trial court stated that the limitations period for interference with contract was two years. The court found, however, that "[a]lthough it appears that all aspects of the claims that are the subject of this lawsuit were known at the time of the September 28, 2004 letter sent by Neil Soltman to Steven Dunn … , there remain issues of fact for the jury to decide regarding the effect of a subsequent response letter from Idanta dated October 4, 2004 and the meaning of the word 'concluded' within that letter."

On the issue of the existence of a valid contract, the court noted that the ruling on defendants' summary judgment motion was that they "did not meet **[*1470]** their **[***28]** burden of proof … , not that the defense or claims asserted by Defendants lacked merit." When defendants raised the issue again in a motion in limine, the trial court denied the motion "on the grounds that it was a disguised motion for summary judgment not that the substance of the motion lacked merit."

6. *Deliberations*

The trial court instructed the jury, pursuant to *CACI No. 3900*, that if it found AML had proved its claims against defendants, the jury then had to decide how much money would reasonably compensate AML for the "harm." The court instructed the jury pursuant to special instruction No. 3 that "[t]he elements of an unjust enrichment claim are (1) the receipt of a benefit from another; and (2) the unjust **[**563]** retention of the benefit at the expense of another," and that if the jury found that defendants were unjustly enriched at AML's expense, then it could "award [AML] the amount by which Defendant has been unjustly enriched."

During deliberations, the jury sent the court a note asking the court to define "harm" and "benefit." Counsel noted that there were no instructions defining "harm." Special instruction No. 4, calculation of disgorgement of defendants' benefits, referred **[***29]** to "profit," but the word "benefit" did not appear in the instruction. Over defendants' objection, the trial court instructed the jury, "These words are to be used in their plain and ordinary meaning. You are to read these words in the context of the instructions in which they are used."

7. *Jury Verdict*

On July 3, 2012, the jury returned a special verdict. On the cause of action for interference with contract, the jury found that Idanta, David Dunn, Steven Dunn, and the Dunn Family Trust knew about the noncompetition agreement, paragraph 3.9 of the AML Operating Agreement; they acted with the intent to disrupt the performance of paragraph 3.9; their conduct prevented the performance of paragraph 3.9 or made its performance more expensive or difficult; and their conduct was a substantial factor in causing harm to AML. On the cause of action for aiding and abetting a breach of fiduciary duty, the jury found that Andrews, Runnels, and Franklin knowingly acted against AML's interests, and without AML's informed consent, in forming FPI, and, as to Runnels and Franklin, working for and owning shares in FPI. The jury also found that defendants knew that Andrews, Runnels, and Franklin were going **[***30]** to breach their fiduciary duties to AML; that defendants gave substantial assistance to Andrews, Runnels, and Franklin; and that defendants' conduct was a substantial factor in causing harm to AML.
[*1471]

The jury rejected defendants' affirmative defenses of estoppel, laches, waiver, consent, and ratification. The jury found for defendants, however, on their claim that AML's cause of action for interference with contract was barred by the

two-year statute of limitations, finding that defendants proved that AML had suffered harm before March 15, 2005, and that AML had not proven that it did not discover facts leading a reasonable person to suspect defendants' wrongful conduct until after March 15, 2005.

The jury awarded AML restitution (although it was called "damages" on the verdict form) in the amount of $7,075,891. This was the exact figure AML's expert, Melle, had calculated as "the benefits [defendants] received" from the June 2007 sale of their FPI stock, plus interest. The jury also found that AML was not entitled to punitive damages.

8. *Motion for Judgment Notwithstanding the Verdict and New Trial*

On August 9, 2012, defendants filed motions for judgment notwithstanding the verdict and for **[***31]** a new trial, arguing that the award of damages was excessive and not supported by substantial evidence. In particular they argued that Melle's testimony was without foundation and that the jury instructions were confusing, as evidenced by the jury's question regarding the definitions of "harm" and "benefit."[11] On September 21, 2012, the trial court denied both motions. The court rejected **[**564]** defendants' contentions of evidentiary and instructional error and found "that the jury's verdict is supported by substantial evidence in the form of testimony and admitted exhibits." On October 18, 2012, defendants timely filed a notice of appeal.[12]

DISCUSSION

A. *Aiding and Abetting a Breach of Fiduciary Duty*

Defendants challenge the trial court's ruling that a defendant can be liable for aiding and abetting a breach of fiduciary duty, even if the defendant does not owe the plaintiff a fiduciary duty. Defendants argue that there **[***32]** is no sound policy reason to distinguish between liability for conspiracy to breach a fiduciary duty and liability for aiding and abetting a breach of fiduciary duty by requiring that a conspirator but not an aider and abettor owe a fiduciary duty to the plaintiff. AML argues that defendants cannot make this argument on appeal, and that, even if they can, on the merits it is legally incorrect.

[*1472]

1. *Standing and Invited Error*

AML asserts that defendants lack standing to challenge the trial court's ruling on demurrer because the court sustained their demurrer and therefore they are not aggrieved parties. AML also asserts that because the trial court gave defendants' jury instruction on aiding and abetting, which did not include a requirement that they owe a fiduciary duty, the doctrine of invited error precludes defendants' claim of error on appeal.

HN1[⬆] ***CA(1)***[⬆] **(1)** Only an aggrieved party may appeal. (*Code Civ. Proc., § 902*; *United Investors Life Ins. Co. v. Waddell & Reed, Inc. (2005) 125 Cal.App.4th 1300, 1304 [23 Cal. Rptr. 3d 387]*.) "It is true that, as a general rule, a party is not aggrieved and may not appeal from a judgment or order entered in its favor. [Citation.] However, a party which has not obtained *all* of the relief **[***33]** it requested in the trial court is aggrieved and may appeal. [Citations.]" (*Friends of Aviara v. City of Carlsbad (2012) 210 Cal.App.4th 1103, 1108 [148 Cal. Rptr. 3d 805]*; see *Roa v. Lodi Medical Group, Inc. (1985) 37 Cal.3d 920, 925, fn. 4 [211 Cal. Rptr. 77, 695 P.2d 164]* [plaintiffs could challenge award of attorneys' fees in their favor on the ground that the statutory limitation on such fees was invalid]; *Archer v. United Rentals, Inc. (2011) 195 Cal.App.4th 807, 811, fn. 2 [126 Cal. Rptr. 3d 118]* [fact that plaintiffs received cash payments did not preclude their appeal of denial of class certification].)

[11] Defendants also submitted a declaration from one of the jurors regarding the confusion, but the trial court properly ruled it inadmissible. (See *Evid. Code, § 1150*.)

[12] The trial court subsequently denied AML's motion for attorneys' fees. AML's appeal from that order is pending.

Here, although the trial court sustained defendants' demurrer with leave to amend, the court ruled against defendants on the legal issue of whether AML could maintain a cause of action for aiding and abetting a breach of fiduciary duty in the absence of a fiduciary duty on their part. The trial court sustained the demurrer only because the complaint lacked sufficient factual allegations of aiding and abetting. After amending its complaint AML proceeded and ultimately prevailed on this cause of action. Defendants did not obtain all of the relief they requested and thus were aggrieved by the court's ruling and have standing to challenge it on appeal.

AML also **[***34]** argues that defendants "successfully proposed an aiding and abetting jury instruction, but only one that omitted the independent duty element it claims on appeal should be imposed. Having invited the supposed error, [defendants] **[**565]** forfeited [their] right to appeal the issue." The doctrine of invited error does not apply here.

HN2[↑] "Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error. [Citations.] But the doctrine does not apply when a party, while making the appropriate objections, acquiesces in a judicial determination. [Citation.] As this court has **[*1473]** explained: '"An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."' [Citation.]" (*Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 212–213 [285 Cal. Rptr. 99, 814 P.2d 1341]*; see *Norgart v. Upjohn Co. (1999) 21 Cal.4th 383, 403 [87 Cal. Rptr. 2d 453, 981 P.2d 79]* [invited error does not apply where "a party may be deemed to have induced the commission **[***35]** of error, but did not in fact mislead the trial court in any way—as where a party '"'endeavor[s] to make the best of a bad situation for which [it] was not responsible'"'"].)

Here, the trial court had already rejected defendants' argument that aiding and abetting a breach of fiduciary duty requires that the aider and abettor owe the plaintiff a fiduciary duty. Defendants did not forfeit the right to challenge that ruling by proposing a jury instruction that was consistent with the trial court's ruling. The doctrine of invited error does not apply where, as here, the party submits a jury instruction pursuant to or consistent with a prior adverse court ruling. (See *Gillan v. City of San Marino (2007) 147 Cal.App.4th 1033, 1052 [55 Cal. Rptr. 3d 158]* ["[d]efendants did not invite the error by proposing … instructions" on two causes of action "after their unsuccessful attempts to defeat those counts by demurrer and summary adjudication"]; *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal.App.4th 1538, 1555 [6 Cal. Rptr. 2d 698]* ["[w]hen an appellant offers instructions on irrelevant matter only after an unsuccessful attempt to remove it from the case, he may attack the relevancy on appeal"]; *Quigley v. Pet, Inc. (1984) 162 Cal.App.3d 877, 894, fn. 6 [208 Cal. Rptr. 394]* **[***36]** [no invited error in submitting instruction on issue where "from the beginning in law and motion, and thereafter through the motion for new trial, defendants objected" to the issue].) Defendants did not forfeit their right to challenge the trial court's ruling on this issue.

2. *Civil Conspiracy and Aiding and Abetting*

HN3[↑] ***CA(2)***[↑] **(2)** Civil conspiracy is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton*

Saudi Arabia Ltd., supra, 7 Cal.4th at pp. 510–511.) "By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff **[*1474]** recognized by law and is potentially subject to liability for breach of that duty." (*Id. at p. 511*.) Following *Applied Equipment* ***[***37] [**566]*** *Corp*., this court held in *Kidron v. Movie Acquisition Corp. (1995) 40 Cal.App.4th 1571 [47 Cal. Rptr. 2d 752]* that "[a] nonfiduciary cannot conspire to breach a duty owed only by a fiduciary." (*Id. at p. 1597*; accord, *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI (2002) 100 Cal.App.4th 1102, 1109 [123 Cal. Rptr. 2d 297]*.)

Some courts, noting the close relationship between conspiracy and aiding and abetting, have suggested that the law should treat conspiracy to breach a fiduciary duty and aiding and abetting a breach of fiduciary duty similarly. For example, in *In re County of Orange (Bankr. C.D.Cal. 1996) 203 B.R. 983*,[13] citing *Applied Equipment Corp*. and *Kidron*, the court stated that it saw "no reason for treating the vicarious tort of aiding and abetting breach of a fiduciary duty differently from that of conspiracy to breach a fiduciary duty. 'Conspiracy is a concept closely allied with aiding and abetting. A conspiracy generally requires agreement plus an overt act causing damage. Aiding and abetting requires no agreement, but simply assistance. The common basis for liability for both conspiracy and aiding and abetting, however, is concerted action.'" (*Id. at p. 999*, quoting *Janken v. GM Hughes Electronics (1996) 46 Cal.App.4th 55, 78 [53 Cal. Rptr. 2d 741]*.) **[***38]** In *Howard v. Superior Court (1992) 2 Cal.App.4th 745 [3 Cal. Rptr. 2d 575]* the issue was whether a client attempting to plead a cause of action for aiding and abetting against an attorney had to comply with *Civil Code former section 1714.10*, which required the plaintiff to obtain a court order before pleading such a civil conspiracy claim. The court noted that "[i]n the abstract, there may be a distinction between an aiding and abetting cause of action and one for civil conspiracy," but held that because the alleged conduct fell "within the ambit" of the statute, the statute applied to the plaintiff's aiding and abetting claim. (*Howard, at p. 749*, fn. omitted.) And in *K & S Partnership v. Continental Bank, N.A. (8th Cir. 1991) 952 F.2d 971*, the court stated, "[k]nowing participation in a breach of fiduciary duty 'is analogous to a cause of action … for aiding and abetting a securities fraud,' where the primary violation involves a breach of fiduciary duty. [Citation.] Likewise, liability for civil conspiracy is in substance the same thing as aiding and abetting liability. Civil conspiracy requires an agreement to participate in an unlawful activity and an overt act that causes injury, so it 'does not set **[***39]** forth an independent cause of action' but rather is 'sustainable only after an underlying tort claim has been established.' [Citations.]" (*Id. at p. 980*.)

CA(3)[↑] **(3)** California law, however, does not treat conspiracy to breach a fiduciary duty and aiding and abetting a breach of fiduciary duty similarly. In **[*1475]** *Casey v. U.S. Bank Nat. Assn., supra, 127 Cal.App.4th 1138*, on which the trial court relied, a trustee in bankruptcy sued three banks, alleging that they aided and abetted the fiduciaries of the bankrupt corporation in a scheme to divert funds from the corporation. One of the causes of action was aiding and abetting a breach of fiduciary duty. (*Id. at pp. 1141–1142*.) Citing this court's opinion in *Saunders v. Superior Court (1994) 27 Cal.App.4th 832, 846 [33 Cal. Rptr. 2d 438]*, the court in *Casey* observed that ***HN4***[↑] "California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. '"Liability **[**567]** may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance **[***40]** or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct,

[13] Reversed in part on other grounds in *In re County of Orange (Bankr. C.D.Cal. 1997) 245 B.R. 138*.

separately considered, constitutes a breach of duty to the third person." [Citations.]' [Citation.]" (*Casey, supra, at p. 1144*.)[14] The trustee in *Casey* attempted to allege liability under the first theory, and the banks challenged the sufficiency of the allegations of "'substantial assistance.'" (*Casey, at p. 1145*.) The court noted "that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Ibid*.) The court concluded that the trustee had failed to allege facts showing that the banks knew the fiduciaries were misappropriating corporate funds. Thus, the trustee failed to state a cause of action for aiding and abetting a breach of fiduciary duty. (*Id. at p. 1153*.)

CA(4)[↑] **(4)** Citing *Casey*, *Saunders*, and the Restatement Second of Torts, the court in *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc. (2005) 131 Cal.App.4th 802 [32 Cal. Rptr. 3d 325]* explained: ***HN5***[↑] "Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. [Citations.] '"[A]iding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct." [¶] … [W]hile aiding and abetting may **[***42]** not require a defendant to agree to join the wrongful conduct, it **[*1476]** necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. …' [Citation.] The aider and abetter's conduct need not, as 'separately considered,' constitute a breach of duty. [Citations.]" (*Id. at pp. 823–824, fn. 10*.)

CA(5)[↑] **(5)** In *Neilson v. Union Bank of California, N.A. (C.D.Cal. 2003) 290 F.Supp.2d 1101*, the court thoroughly reviewed California case law and concluded that ***HN6***[↑] under California law a defendant can be liable for aiding and abetting a breach of fiduciary duty in the absence of an independent duty owed to the plaintiff. (*Id. at p. 1135*.) After noting that conspiracy and aiding and abetting "are closely allied forms of liability," the court found that "[n]o California case, however, holds that a party must owe the plaintiff a duty before he or she can be held liable as an aider and abettor. Rather, California cases outlining the elements of aiding and abetting liability have consistently cited the elements of the tort as **[**568]** they are set forth in the *Restatement (Second) of Torts, § 876*, and have omitted any reference to an independent **[***43]** duty on the part of the aider and abettor. Under this formulation, liability may properly be imposed on one who knows that another's conduct constitutes a breach of duty and substantially assists or encourages the breach." (*Id. at p. 1133*.)

The *Neilson* court explained why this is so: "Unlike a conspirator, an aider and abettor does not 'adopt as his or her own' the tort of the primary violator. Rather, the act of aiding and abetting is distinct from the primary violation; liability attaches because the aider and abettor behaves in a manner that enables the primary violator to commit the underlying tort. [Citations.] … Because aiders and abettors do not agree to commit, and are not held liable as joint tortfeasors for committing, the underlying tort, it is not necessary that they owe plaintiff the same duty as the primary violator. Conspirators, by contrast, are held liable for the tort

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[14] California courts have consistently followed and applied the two-part alternative test for civil aiding and abetting liability in *Saunders* and *Casey*. (See, e.g., *Das v. Bank of America, N.A. (2010) 186 Cal.App.4th 727, 741, 744–745 [112 Cal. Rptr. 3d 439]*; *Berryman v. Merit Property Management, Inc. (2007) 152 Cal.App.4th 1544, 1559 [62 Cal. Rptr. 3d 177]*; **[***41]** *Austin B. v. Escondido Union School Dist. (2007) 149 Cal.App.4th 860, 879 [57 Cal. Rptr. 3d 454]*; *Richard B. LeVine, Inc. v. Higashi (2005) 131 Cal.App.4th 566, 574 [32 Cal. Rptr. 3d 244]*; *Fiol v. Doellstedt (1996) 50 Cal.App.4th 1318, 1325–1326 [58 Cal. Rptr. 2d 308]*; *River Colony Estates General Partnership v. Bayview Financial Trading Group, Inc. (S.D.Cal. 2003) 287 F.Supp.2d 1213, 1225*; see also *Wood v. Greenberry Financial Services, Inc. (D. Hawaii 2012) 907 F.Supp.2d 1165, 1181–1182* [adopting *Casey*]; ***El Camino Resources, Ltd. v. Huntington National Bank (W.D.Mich. 2010) 722 F.Supp.2d 875, 905*** [same].)

committed by their co-conspirator. [Citation.] Because liability is premised on the commission of a single tort, it is logical that all conspirators must be legally capable of committing the wrong." (*Neilson v. Union Bank of California, N.A., supra, 290 F.Supp.2d at pp. 1134–1135*, fn. omitted.) "Additionally, causation is an essential element of an aiding and abetting **[***44]** claim, i.e., plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered. [Citations.] … This difference too demonstrates the distinction between the forms of liability, and argues in favor of a rule that permits the imposition of aider and abettor liability in the absence of a duty owed directly to the plaintiff." (*Id. at p. 1135*; see *Simi Management Corp. v. Bank of America, N.A. (N.D.Cal. 2013) 930 F.Supp.2d 1082, 1099, fn. 15* ["'liability for aiding and abetting may exist even where the defendant's conduct does not independently breach a duty to the plaintiff'"]; *Villains, Inc. v. American Economy Ins. Co. (N.D.Cal. 2012) 870 F.Supp.2d 792, 795* ["'[t]he differences between conspiracy and aiding and abetting are not merely semantic' **[*1477]** and … '[t]hese differences have led several courts … to recognize that a non-fiduciary can aid and abet a breach of fiduciary duty'"]; *Granewich v. Harding (1999) 329 Ore. 47 [985 P.2d 788, 793–794]* ["[l]egal **[***45]** authorities … virtually are unanimous in expressing the proposition that one who knowingly aids another in the breach of a fiduciary duty is liable to the one harmed thereby," and "[n]one of those authorities even implies that liability for participants in the breach of fiduciary duty is confined to those who *themselves* owe such duty"]; see also *Heckmann v. Ahmanson (1985) 168 Cal.App.3d 119, 127 [214 Cal. Rptr. 177]* [third party greenmailer purchasers of corporation's shares in takeover attempt can be liable for aiding and abetting breach of fiduciary duty of corporation's directors who authorized corporation's purchase of the third parties' shares at a premium]; accord, *Feinberg Testamentary Trust v. Carter (S.D.N.Y. 1987) 652 F.Supp. 1066, 1083*.)

3. *Application to This Case*

CA(6)[↑] **(6)** Thus, *HN7*[↑] there are two different theories pursuant to which a person may be liable for aiding and abetting a breach of fiduciary duty. One theory, like conspiracy to breach a fiduciary duty, requires that the aider and abettor owe a fiduciary duty to the victim and requires only that the aider and abettor provide substantial assistance to the person breaching his or her fiduciary duty. (*Casey v. U.S. Bank Nat. Assn, supra, 127 Cal.App.4th at p. 1144*; **[***46]** *Coffman v. Kennedy (1977) 74 Cal.App.3d 28, 32 [141 Cal. Rptr. 267]*.) On this theory, California law treats aiding and abetting a breach of fiduciary **[**569]** duty and conspiracy to breach a fiduciary duty similarly. Courts impose liability for concerted action that violates the aider and abettor's fiduciary duty. (See *Janken v. GM Hughes Electronics, supra, 46 Cal.App.4th at p. 78*; *In re County of Orange, supra, 203 B.R. at p. 999*.) The second theory for imposing liability for aiding and abetting a breach of fiduciary duty arises when the aider and abettor commits an independent tort. (See *Casey, supra, at p. 1144*; *Saunders v. Superior Court, supra, 27 Cal.App.4th at p. 846*.) This occurs when the aider and abettor makes "'a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.'" (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc., supra, 131 Cal.App.4th at p. 823, fn. 10*; accord, *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A. (1994) 511 U.S. 164, 181 [128 L. Ed. 2d 119, 114 S. Ct. 1439]*.)

CA(7)[↑] **(7)** AML proceeded on the second theory of aiding and abetting liability. AML pleaded and proved that defendants had actual knowledge of the fiduciary duties Andrews, Runnels, and Franklin owed to AML, that defendants **[***47]** provided the three fiduciaries with substantial assistance in breaching their duties, and that defendants' conduct resulted in unjust enrichment. Thus, **[*1478]** the trial court did not err in ruling, on demurrer and in connection with

the jury instructions,[15] that defendants could be liable for aiding and abetting a breach of fiduciary duty even though they did not owe a fiduciary duty to AML.

B. *Statute of Limitations for Aiding and Abetting a Breach of Fiduciary Duty*

Defendants also argue that AML's cause of action for aiding and abetting a breach of fiduciary duty was barred by the two-year statute of limitations applicable to a cause of action for interference with contract, and that the trial court erred by not instructing the jury that this two-year limitations period applied to AML's breach of fiduciary duty claim.[16] AML argues that the four-year statute of limitations of *Code of Civil Procedure section 343*, the "catchall provision," applies to its aiding and abetting breach of fiduciary duty claim. We conclude that because the applicable statute of limitations is either three or four years, and there is no dispute that AML **[**570]** filed this action less than three years after accrual,[17] AML's aiding and abetting claim is not barred by the statute of limitations.

HN8[↑] ***CA(8)***[↑] **(8)** The statute of limitations for a cause of action for aiding and abetting a tort generally is the same as the underlying tort. (See *Vaca v. Wachovia Mortgage Corp. (2011) 198 Cal.App.4th 737, 743–744 & fn. 4 [129 Cal. Rptr. 3d 354]* [aiding and abetting fraud]; *River Colony Estates General Partnership v. Bayview Financial Trading Group, Inc., supra, 287 F.Supp.2d at p. 1220* [aiding and abetting fraud]; see also *Marketxt Holdings Corp. v. **[*1479]** Engel & Reiman, P.C. (S.D.N.Y. 2010) 693 F.Supp.2d 387, 393* ["statute of limitations for each aiding and abetting claim is determined by the underlying **[***50]** tort"].) Thus, the statute of limitations for aiding and abetting a breach of fiduciary duty is the same as the statute of limitations for breach of fiduciary duty. (See *In re Brocade Communications Systems, Inc. Derivative Litigation, supra, 615 F.Supp.2d at pp. 1036–1037* [because aiding and abetting breach of fiduciary duty is "most akin to a breach of fiduciary duty claim," the four-year statute of limitations applies].)

HN9[↑] ***CA(9)***[↑] **(9)** The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent. (See *Fuller v. First Franklin Financial Corp. (2013) 216 Cal.App.4th 955, 963 [163 Cal. Rptr. 3d 44]* ["limitations period is three years … for a cause of action for breach of fiduciary duty where the gravamen of the claim is deceit, rather than the catchall four-year limitations period that would otherwise apply …"]; *William L. Lyon & Associates, Inc. v. Superior Court (2012) 204 Cal.App.4th 1294, 1312 [139 Cal. Rptr. 3d 670]* ["[b]reach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of *Code of Civil Procedure section 343*"]; *Thomson v. Canyon (2011) 198 Cal.App.4th 594, 606–607 [129 Cal. Rptr. 3d 525]* [same]; *City of Vista v. Robert*

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[15] Pursuant to defendants' special instruction No. 4, the trial court instructed the jury that defendants could be held liable for aiding and abetting a breach of fiduciary duty if: "(1) Runnels, Franklin, and/or Andrews breached their fiduciary duties to [AML]; [¶] (2) Defendants had actual knowledge that Runnels, Franklin, and/or Andrews were breaching their fiduciary duties to [AML]; [¶] (3) Defendants gave substantial assistance or encouragement to Runnels, Franklin, and/or Andrews in breaching their fiduciary duties; [¶] (4) Defendants acted with the intent to participate in the breach of fiduciary duty by Runnels, Franklin, and/or Andrews for the purpose of assisting them in performing the breach of their fiduciary duties; and [¶] (5) That the conduct of Defendants was a substantial factor in causing **[***48]** harm to [AML]."

[16] Defendants asked the trial court to instruct the jury that the limitations period for both of AML's claims was "two years from the time [AML] knew or should have known of the loss or damage it claims to have suffered." The trial court instructed the jury "[w]ith regard to AML's claim for interference **[***49]** with contract only, Defendants contend that AML's lawsuit was not filed within the time set by law. To succeed on this defense, Defendants must prove that AML's claimed harm occurred before March 15, 2005 unless AML proves that before March 15, 2005 it did not discover, and did not know facts that would have caused a reasonable person to suspect, Defendants' wrongful act or omission."

[17] As noted above, Roberts learned that the Operating Group had granted FPI a license on March 17, 2004. AML filed this action on March 15, 2007. Defendants do not argue that AML's aiding and abetting claim is barred by a three-year statute of limitations.

Thomas Securities, Inc. (2000) 84 Cal.App.4th 882, 889 [101 Cal. Rptr. 2d 237] **[***51]** [four-year statute of limitations applies to breach of fiduciary duty, unless the gravamen of the claim is actual or constructive fraud, in which case the statute of limitations is three years].) Because defendants do not dispute that AML filed this action within three years of accrual, it does not matter whether the breach of fiduciary duty was fraudulent or nonfraudulent. Either way, the claim is timely.

In some circumstances, the statute of limitations for a breach of fiduciary duty claim can be less than three years. For example, in *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc. (2004) 115 Cal.App.4th 1145 [10 Cal. Rptr. 3d 582]*, the court held that because the claim of breach of fiduciary duty "amount[ed] to a claim of professional negligence," the two-year statute of limitations for professional negligence applied, and the plaintiff could not "prolong the limitations period by invoking a fiduciary theory of liability." (*Id. at p. 1159*.) Here, defendants argue that the two-year statute of limitations for interference with contract applies because "interference with contract is the gravamen of [AML's] aiding and abetting claim in this case." Defendants argue that "since a contractual **[***52]** agreement [(i.e., the AML Operating Agreement)] created the underlying fiduciary obligation (owed by third parties), AML's claim is for interfering with **[**571]** [the three Operating Group members'] obligations to AML, and is logically akin to other interference torts and should be subject to the two-year limitations period of *section 339 of the Code of Civil Procedure*."
[*1480]

HN10[↑] ***CA(10)***[↑] **(10)** The fiduciary duties of Andrews, Runnels, and Franklin, however, were not created exclusively or even primarily by the Operating Agreement but were imposed by law on them as members and managers of AML. (See *Corp. Code, former § 17153* ["[t]he fiduciary duties a manager owes to the limited liability company and to its members are those of a partner to a partnership and to the partners of the partnership"];[18] *Corp. Code, former § 17001, subd. (w)* ["manager" includes each of the members unless the articles of organization state that one **[***53]** or more members will manage the company][19]; *Huong Que, Inc. v. Luu (2007) 150 Cal.App.4th 400, 410 [58 Cal. Rptr. 3d 527]* ["[t]he duty of loyalty arises not from a contract but from a relationship …"]; *Manok v. Fishman (1973) 31 Cal.App.3d 208, 213 [107 Cal. Rptr. 266]* [although "[a]n express agreement between the parties may govern their relationship, … to the extent that their respective rights and duties are not spelled out in an express agreement, the law imposes obligations arising out of the nature of their fiduciary relationship"]; see also *Federal Deposit Ins. Corp. v. McSweeny (S.D.Cal. 1991) 772 F.Supp. 1154, 1157* ["a cause of action for breach of fiduciary duty is its own 'right sued on' and cannot be compartmentalized into another

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[18] The events of this case are governed by former section *17153 of the Corporations Code*. *Corporation Code section 17704.09*, which replaced *Corporations Code former section 17153*, "applies only to the acts or transactions by a limited liability company or by the members or managers of the limited liability company occurring, or contracts entered into by the limited liability company or by the members or managers of the limited liability company, on or after January 1, 2014. The prior law governs all acts or transactions by a limited liability company or by the members or managers of the limited liability company occurring, or contracts entered into by the limited liability company or by the members or managers of the limited liability company, prior to that date." (*Corp. Code, § 17713.04, subd. (b)*.) ***HN11***[↑] The new statute provides that members of a limited liability company owe fiduciary duties of loyalty and care to the limited liability company, including the duties to "refrain from dealing with a limited liability company in the conduct or winding up of the activities of a limited liability company as or on behalf of a party having an interest adverse to a limited liability company" and to "refrain from competing with a limited liability company." (*Corp. Code, § 17704.09, subd. (b)(2), (3)*; see *id., subd. (d)* ["[a] member shall discharge the duties to a limited liability company and the other members under this title or under the operating agreement and exercise any rights consistent with the obligation of good faith and fair dealing"].) **[***54]**

[19] The Operating Agreement for AML named Roberts as the managing member, but provided that the members "may determine that there should be more than one Manager." The January 2000 management agreement gave Andrews, Runnels, and Franklin control over AML's "operational decisions" and responsibility at "both the senior management (operational) level as well as the board-level (leadership) level."

rubric for time-bar purposes"].)

Moreover, AML did not allege that defendants aided and abetted by interfering with a contract. AML's fourth amended complaint mentioned a contractual provision, paragraph 3.9 of the Operating Agreement, and alleged that it formed the basis for AML's (ultimately unsuccessful) cause of action for interference with contract, but AML did not allege that the Operating Agreement was the basis of the aiding and abetting claim. Instead, the gravamen of AML's cause of action for aiding and abetting breach of fiduciary duty was that defendants provided substantial assistance for Andrews, Runnels, and Franklin in breaching their duties of loyalty as members and managers of AML. AML alleged that defendants acted with Andrews, Runnels, and Franklin "to: a). wrongfully acquire rights to the AML patent for less than full value; b). hire Runnels and Franklin to execute the AML Business Method; and c). otherwise cause Runnels and Franklin to breach their fiduciary duties to AML without **[***55]** seeking or obtaining the **[*1481]** requested permission of AML and Roberts, its majority owner and manager." AML alleged that in February 2004 Andrews, Runnels, and Franklin "were secretly aligned with the Defendants **[**572]** and had already commenced negotiating with Defendants," "surreptitiously forwarded [AML's] strategic negotiating points" to defendants, received financial incentives from defendants "to breach their duties of loyalty to AML and its other member," and "incorporate[d] [FPI] for the unlawful purpose of using [FPI] as an operating company to exploit the patented AML Business Method without receiving valid authorization from AML and without adequately compensating AML."[20] AML also alleged that Runnels engaged in a classic example of a breach of the duty of loyalty by signing an unauthorized and undervalued licensing agreement on behalf of both contracting parties, AML and FPI. The fact that one of the breaches of fiduciary duty may also have been a breach of a provision of the Operating Agreement does not mean the three defalcating fiduciaries only breached a provision of the Operating Agreement.

Thus, the gravamen of AML's aiding and abetting breach of fiduciary duty claim was not interference with a provision of the Operating Agreement. The two-year statute of limitations for interference with contract did not apply.

C. *Remedies for Aiding and Abetting a Breach of Fiduciary Duty*

Defendants argue that the trial court erred in allowing the jury to make an award based on unjust enrichment, disgorgement, and constructive trust, because equitable remedies available for breach of fiduciary duty are not available for aiding and abetting a breach of fiduciary duty. We agree with AML that the restitutionary remedies of unjust enrichment and disgorgement are available for aiding and abetting breach of fiduciary duty.

CA(11)[↑] **(11)** "We begin with the law of restitution. ***HN12***[↑] An individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another's expense. [Citation.] Benefit means any type of **[***57]** advantage. [Citations.] [¶] The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it. [Citation.]" (*First Nationwide Savings v. Perry (1992) 11 Cal.App.4th 1657, 1662–1663 [15 Cal. Rptr. 2d 173]*; see *City of Chula Vista v. Gutierrez (2012) 207 Cal.App.4th 681, 686 [143 Cal. Rptr. 3d 689]*; *Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal.App.4th 612, 627 [12 Cal. Rptr. 2d 741]*.)

[20] The district court in ***Fort Properties, Inc. v. American Master Lease, LLC (C.D.Cal. 2009) 609 F.Supp.2d 1052*** **[***56]** invalidated AML's business patent. The court of appeals affirmed the district court's decision invalidating AML's patent in *Fort Properties, Inc. v. American Master Lease LLC (Fed.Cir. 2012) 671 F.3d 1317*.

[*1482]

CA(12)[↑] **(12)** HN13[↑] Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. (County of San Bernardino v. Walsh (2007) 158 Cal.App.4th 533, 542 [69 Cal. Rptr. 3d 848]; Feitelberg v. Credit Suisse First Boston, LLC (2005) 134 Cal.App.4th 997, 1013 [36 Cal. Rptr. 3d 592].) There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment. (Feitelberg, supra, at p. 1013.)[21] "Typically, the defendant's **[**573]** benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position." (County of San Bernardino, supra, at p. 542.) **[***58]** However, "[m]any instances of 'liability based on unjust enrichment … do not involve the restoration of anything the claimant previously possessed … includ[ing] cases involving the disgorgement of profits … wrongfully obtained … .' [Citation.] '[T]he public policy of this state does not permit one to "take advantage of his own wrong"' regardless of whether the other party suffers actual damage. [Citation.] Where 'a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust … the defendant may be under a duty to give to the plaintiff the amount by which [the defendant] has been enriched.' [Citation.]" (*Ibid.*; see Feitelberg v. Credit Suisse First Boston, LLC, supra, 134 Cal.App.4th at p. 1013.)

CA(13)[↑] **(13)** Moreover, " ' "[i]t is not essential that money be paid directly to the recipient by the party seeking restitution. …" ' [Citations.] The emphasis is on the wrongdoer's enrichment, not the victim's loss. In particular, HN14[↑] a person acting in conscious disregard of the rights of another should be required to disgorge all profit because disgorgement both benefits the injured parties and deters the perpetrator from committing the same unlawful actions again. [Citations.] Disgorgement may include a restitutionary element, but it '"may compel a defendant to surrender all money obtained through an unfair business practice … regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice." ' [Citation.] Without this result, there would be an insufficient deterrent to improper conduct that is more profitable than lawful conduct." (County of San Bernardino v. Walsh, supra, 158 Cal.App.4th at pp. 542–543.)

[*1483]

HN15[↑] CA(14)[↑] **(14)** Disgorgement **[***60]** based on unjust enrichment is an appropriate remedy for aiding and abetting a breach of fiduciary duty. For example, in County of San Bernardino v. Walsh, supra, 158 Cal.App.4th 533, the defendant, the vice-president of a waste management company, was negotiating a new contract with the county. He and the former county administrative officer (CAO) agreed to bribe the current CAO to award the contract to the waste management company, along with an additional consulting agreement that would benefit the former CAO and the defendant. (Id. at pp. 538–539.) When the county discovered the bribery scheme, the county sued the current CAO, the former CAO, and the defendant. Affirming the trial court's decision finding them liable for breaching or inducing a breach of the current CAO's fiduciary duty, fraud, unfair competition, and unjust enrichment, the Court of Appeal held: "Disgorgement of profits is particularly applicable

[21] The cases cited by defendants that involve restitution under the unfair competition law are inapplicable "[b]ecause restitution in a private action brought under the unfair competition law is measured by what was taken from the plaintiff …" (Clark v. Superior Court (2010) 50 Cal.4th 605, 614–615 [112 Cal. Rptr. 3d 876, 235 P.3d 171]), rather than by the defendant's unjust enrichment. **[***59]** (*Ibid.*; Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1149 [131 Cal. Rptr. 2d 29, 63 P.3d 937]; Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 177–178 [96 Cal. Rptr. 2d 518, 999 P.2d 706]; Peterson v. Cellco Partnership (2008) 164 Cal.App.4th 1583, 1593–1594 [80 Cal. Rptr. 3d 316].)

in cases dealing with breach of a fiduciary duty, and is a logical extension of the principle **[**574]** that public officials and other fiduciaries cannot profit by a breach of their duty. Where a person profits from transactions conducted by him as a fiduciary, the proper measure **[***61]** of damages is full disgorgement of any secret profit made by the fiduciary regardless of whether the principal suffers any damage. [Citations.]" (*Id. at p. 543*.) Even though the defendant was not in a fiduciary relationship with the county, the court held that his "[a]ctive participa[tion] in the breach of fiduciary duty by another [rendered him] accountable for all advantages [he] gained thereby … ." (*Ibid.*; see *Chicago Park Dist. v. Kenroy, Inc. (1980) 78 Ill. 2d 555 [37 Ill. Dec. 291, 402 N.E.2d 181, 186]* ["[i]t is a fundamental rule in the law of restitution that '[a] third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary'"]; *Rest.3d Restitution and Unjust Enrichment, § 43, com. g* ["[b]enefits derived from a fiduciary's breach of duty may … be recovered from third parties, not themselves under any special duty to the claimant, who acquire such benefits with notice of the breach," and "[*a*] *fortiori*, one who actively participates in another's breach of fiduciary duty will be liable to disgorge the profits realized thereby"].)

CA(15)[↑] **(15)** Defendants assert that "nonrestitutionary disgorgement is purely equitable and only for the **[***62]** court to decide." Defendants do not argue, however, that the trial court erred by submitting the issue of unjust enrichment to the jury. Indeed, as the court in *Jogani v. Superior Court (2008) 165 Cal.App.4th 901 [81 Cal. Rptr. 3d 503]* explained, ***HN16***[↑] "'[t]he fact that equitable principles are applied in the action does not necessarily identify the resultant relief as equitable. [Citations.] Equitable principles are a guide to courts of law as well as of equity. [Citations.]' [Citations.]" (*Id. at p. 909*.) Where liability is definite and damages may be calculated without an accounting, the action is legal. (*Id. at pp. 909–910*; see *Lectrodryer v. SeoulBank (2000) 77 Cal.App.4th 723, 728 [91 Cal. Rptr. 2d 881]* [plaintiff entitled to jury trial on **[*1484]** claim for unjust enrichment seeking restitution of money unjustly retained by bank, "even when equitable principles are applied"]; *Martin v. County of Los Angeles (1996) 51 Cal.App.4th 688, 694 [59 Cal. Rptr. 2d 303]* ["'law courts now recognize and apply many equitable principles and grant relief based thereon where … legal relief is sought in the form of a judgment for a specific amount'"]; see also *Holson Inv. Co. v. Villelli (N.D.Ill., June 3, 1998 No. 97 C 988) 1998 WL 312107, p. *5* ["the amount of the restitution is a question **[***63]** of fact for the jury"].)

As part of their argument that restitution is not available for aiding and abetting a breach of fiduciary duty, defendants contend that the trial court erred by instructing the jury on constructive trust. The court gave a special instruction, requested by AML and entitled "disgorgement/constructive trust," that defined a constructive trust, set forth the requirements for imposing a constructive trust, and told the jurors that if they found the existence of the elements of a constructive trust then they could award AML the profit defendants derived from their investment in FPI.[22] This hybrid instruction essentially **[**575]**

[22] The trial court instructed the jury pursuant to special instruction No. 2: "A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully **[***64]** holding it to the rightful owner. A constructive trust may only be imposed where the following three conditions are satisfied: (1) the existence of property or a property interest; (2) the right of the Plaintiff to that property or property interest; and (3) some wrongful acquisition or detention of that property or property interest by Defendants.

"If you find that (1) a property interest existed in the proceeds of any sale by Defendants of their interests in FORT and/or the interest on any loans made by Idanta Partners, Ltd. To FORT; (2) Plaintiff had a right to the proceeds of any sale by Defendants of their interests in FORT and/or the interest on any loans made by Idanta Partners, Ltd. To FORT; and (3) Defendants wrongfully acquired the proceeds of any sale by Defendants of their interest in FORT and/or the interest on any loans made by Idanta Partners, Ltd. to FORT, then you may award Plaintiff the profit that Defendants have derived from their acquisition of the proceeds of any sale by Defendants of their interests in FORT and/or the interest on any loans made by Idanta

asked the jury to determine whether AML had proven entitlement to a constructive trust but did not ask the jury to actually impose one; it only asked the jury to award disgorgement. Nevertheless, to the extent that the instruction asked the jury to decide whether to impose a constructive trust, the instruction was erroneous.

HN17[↑] *CA(16)*[↑] **(16)** "A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner. [Citations.] The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing. [Citations.]" **[*1485]** (*Communist Party v. 522 Valencia, Inc. (1995) 35 Cal.App.4th 980, 990 [41 Cal. Rptr. 2d 618]*.) Imposition of "[a] constructive trust is an equitable remedy to compel the transfer of property by one who is not justly entitled to it to one who is. [Citation.]" (*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga (2009) 175 Cal.App.4th 1306, 1332 [96 Cal. Rptr. 3d 813]*; accord, *Farmers Ins. Exchange v. Zerin (1997) 53 Cal.App.4th 445, 457 [61 Cal. Rptr. 2d 707]*.) It is not "a substantive claim for relief." (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP (2007) 150 Cal.App.4th 384, 398 [58 Cal. Rptr. 3d 516]*; see *Embarcadero Mun. Improvement Dist. v. County of Santa Barbara (2001) 88 Cal.App.4th 781, 793 [107 Cal. Rptr. 2d 6]* **[***66]** ["[a] constructive trust is not a substantive device but merely a remedy …"].) The issue of whether to impose a constructive trust is an equitable issue for the court. (See *Fowler v. Fowler (1964) 227 Cal.App.2d 741, 747 [39 Cal. Rptr. 101]* ["it is for the trial court to decide whether" the plaintiff has proven entitlement to a constructive trust].) The trial court erred by submitting the issue of whether to impose a constructive trust to the jury.

The error, however, was not prejudicial. *HN18*[↑] "'A judgment may not be reversed for instructional error in a civil case "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." [Citation.]' [Citation.] Instructional error in a civil case is prejudicial '"where it seems probable"' that the error '"prejudicially affected the verdict."' [Citation.] '[W]hen deciding whether an [instructional] error … was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' [Citation.]" (*Turman v. Turning Point of Central California, Inc. (2010) 191 Cal.App.4th 53, 61 [119 Cal. Rptr. 3d 166]*; see **[**576]** **[***67]** *Daum v. SpineCare Medical Group, Inc. (1997) 52 Cal.App.4th 1285, 1313–1314 [61 Cal. Rptr. 2d 260]*.) The appellant has the burden on appeal of showing that an instructional error was prejudicial and resulted in a miscarriage of justice. (*Boeken v. Philip Morris, Inc. (2005) 127 Cal.App.4th 1640, 1678 [26 Cal. Rptr. 3d 638]*; *Logacz v. Limansky (1999) 71 Cal.App.4th 1149, 1161 [84 Cal. Rptr. 2d 257]*.)

Defendants' statement, without more, that the instruction on constructive trust was "plainly prejudicial to [them], given the Jury's monetary verdict" is insufficient to meet their burden of showing prejudice. (See *Scheenstra v. California Dairies, Inc. (2013) 213 Cal.App.4th 370, 403 [153 Cal. Rptr. 3d 21]*.) "Prejudice from an erroneous instruction is never presumed; it must be affirmatively demonstrated by the appellant. [Citation.]" (*Wilkinson v. Bay Shore Lumber Co. (1986) 182 Cal.App.3d 594, 599 [227 Cal. Rptr. 327]*; see *Brokopp v. Ford Motor Co. (1977) 71 Cal.App.3d 841, 853–854 [139 Cal. Rptr. 888]*.) Defendants have not demonstrated that the measure or award of **[*1486]** restitution would have been any different had the instruction focused on disgorgement only, without any mention of

Partners, Ltd. to FORT. However, if you find that Plaintiff never had a right to the proceeds of any sale by **[***65]** Defendants of their interest in FORT and/or the interest on any loans made by Idanta Partners, Ltd. to FORT, then you should not award Plaintiff any damages under the theory of constructive trust or disgorgement."

constructive trust. Defendants have not shown how a more favorable verdict would have been reasonably probable had the instruction excluded **[***68]** the theory of constructive trust. Therefore, any error was not prejudicial.

D. *Award of Restitution*

CA(17)[↑] **(17)** Defendants first contend that one who aids and abets a breach of fiduciary duty may be liable for the fiduciary's unjust enrichment but cannot be liable for more than the fiduciary's unjust enrichment. Thus, defendants contend that even if they can be liable for aiding and abetting the breach of fiduciary duty by Andrews, Runnels, and Franklin, they cannot be liable for more than any profit Andrews, Runnels, and Franklin obtained. Defendants, however, cite no authority for this contention. Moreover, *HN19*[↑] the Restatement distinguishes between those who are subject to disgorgement because they have breached a fiduciary duty and those who are subject to disgorgement because they are other "conscious wrongdoer[s]," such as aiders and abettors: "The object of restitution … is to eliminate profit …" of the "conscious wrongdoer, *or* … defaulting fiduciary without regard to notice or fault … ." (*Rest.3d Restitution and Unjust Enrichment, § 51(4)*, italics added.) Indeed, "[t]he object of the disgorgement remedy—to eliminate the possibility of profit from conscious wrongdoing—is one of the cornerstones of the **[***69]** law of restitution and unjust enrichment," and "[t]he profit for which the wrongdoer is liable by the rule of §51(4) is the net increase in the assets of the wrongdoer, to the extent that this increase is attributable to the underlying wrong." (*Id.*, com. e.)[23] As independent wrongdoers under the second theory of aiding and abetting liability based on the commission of an independent tort (see *Casey v. U.S. Bank Nat. Assn., supra, 127 Cal.App.4th at p. 1144*; *Saunders v. Superior Court, supra, 27 Cal.App.4th at p. 846*.), defendants were subject to disgorgement of the profit or "net increase in the assets" they obtained, **[**577]** not merely those that Andrews, Runnels, and Franklin obtained.

Defendants next contend that even if AML is entitled to an award based on unjust **[***70]** enrichment or disgorgement, the jury instructions were erroneous and the amount of restitution in the verdict is inconsistent with controlling law and not supported by substantial evidence. We agree that the trial court committed prejudicial instructional error. Therefore, the award must be reversed.

[*1487]

CA(18)[↑] **(18)** As noted above, section 51(4) of the Restatement Third of Restitution and Unjust Enrichment provides that *HN20*[↑] "the unjust enrichment of a conscious wrongdoer, or of a defaulting fiduciary without regard to notice or fault, is the net profit attributable to the underlying wrong … . Restitution remedies that pursue this object are often called 'disgorgement' or 'accounting.'" The amount of restitution to be made is sometimes described as the "benefit" received by the defendant. (*Rest., Restitution, § 1, com. a.*) This was the term the trial court used in special instruction No. 3.

Section 51(5) of the Restatement Third of Restitution and Unjust Enrichment explains that "[i]n determining net profit the court may apply such tests of causation and remoteness, may make such apportionments, may recognize such credits or deductions, and may assign such evidentiary burdens, **[***71]** as reason and fairness dictate, consistent with the object of restitution as specified in subsection (4). …" The Restatement further explains that "[p]rofit includes any form of use value, proceeds, or consequential gains [citation] that is identifiable and measurable and not unduly

[23] In *Uzyel v. Kadisha (2010) 188 Cal.App.4th 866 [116 Cal. Rptr. 3d 244]*, the court relied on section 51(4) of the Restatement Third of Restitution and Unjust Enrichment, although then still in draft form, and "deem[ed it] applicable under California law to a trustee who has committed a breach of trust." (*Uzyel, at p. 894*; see *Ghirardo v. Antonioli (1996) 14 Cal.4th 39, 51 [57 Cal. Rptr. 2d 687, 924 P.2d 996]* [relying on the Restatement of Restitution definition of unjust enrichment].)

remote." (*Id.*, § 51(5)(a).) In addition, a "conscious wrongdoer or a defaulting fiduciary may be allowed a credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement. …" (*Id.*, § 51(5)(c).) Comment a explains that "[t]he principal focus of § 51 is on cases in which unjust enrichment is measured by the defendant's profits, where the object of restitution is to strip the defendant of wrongful gain [citations]. …" (*Id.*, com. a.)

HN21[↑] *CA(19)*[↑] **(19)** In measuring the amount of the defendant's unjust enrichment, the plaintiff may present evidence of the total or gross amount of the benefit, or a reasonable approximation thereof, and then the defendant may present evidence of costs, expenses, and other deductions to show the actual or net benefit the defendant received. As the court in *Uzyel v. Kadisha, supra, 188 Cal.App.4th 866* **[***72]** stated, "[t]he party seeking disgorgement 'has the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain,'" and the "'[r]esidual risk of uncertainty in calculating net profit is assigned to the wrongdoer.' [Citation.]" (*Id. at p. 894*.) The court in *Uzyel* adopted this formulation from the Restatement, which explains that the "traditional formula, inherited from trust accounting and enshrined in the Copyright Act (*17 U.S.C. § 504(b)*), states that the claimant has the burden of proving revenues and the defendant has the burden of proving deductions." (*Rest.3d Restitution and Unjust Enrichment, § 51, com. i.*) The new Restatement, however, "adopts a more modern and generally useful rule that the claimant has the burden of producing evidence from which the court may make at least a reasonable approximation of the defendant's unjust enrichment," and "the defendant is then free (there is no need to speak of 'burden shifting') to introduce evidence tending to show that the true extent of unjust enrichment **[**578]** is something less." (*Ibid.*) Thus, "[a]s a **[*1488]** general rule, the defendant is entitled to a deduction for all marginal costs incurred in producing **[***73]** the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid." (*Id.*, com. h.) Of particular relevance here, comment h of the Restatement Third of Restitution and Unjust Enrichment, section 51, states: "Disloyal fiduciaries are uniformly reimbursed for the purchase price of property acquired in conscious breach of their duty of loyalty."

The trial court instructed the jury pursuant to special instruction No. 7, entitled "Calculation of Disgorgement of Defendants' Benefits—Effective Date": "If you decide to award [AML] any profit made or to be made by Defendants as a result of [FPI's] existence, you must consider the value of those benefits at the time they were acquired by Defendants. You may not reduce the value of those benefits by any events occurring after they were first acquired, including any later decision by Defendants to accept less for the benefits they received than their value on the date they received them." The trial court further instructed the jury pursuant to special instruction No. 4, entitled "Calculation **[***74]** of Disgorgement of Defendants' Benefits—No Offset": "In awarding [AML] any profit made or to be made by Defendants as a result of [FPI's] existence, you must disregard what Defendants might have earned had they not created [FPI]. Instead, you must only focus on the profit received or to be received by Defendants as a result of their actual conduct in this case."

These special jury instructions, requested by AML, were erroneous. Special instruction No. 7 incorrectly told the jury that it had to consider the value of the benefits defendants received at the time of acquisition of the benefits. Defendants acquired shares of FPI stock for $2.3 million in April 2004, which "at the time" probably, although not necessarily, had a value of $2.3 million (because that is what defendants paid for the stock). Assuming that defendants had not negotiated a

discount, or that defendants had not otherwise underpaid or overpaid, there was no benefit yet to defendants because they had only exchanged $2.3 million in cash for $2.3 million in stock. Defendants held the stock, which in June 2007 may have had a value of $5.8 million, giving defendants a potential benefit of $3.5 million. Sometime later, defendants' **[***75]** FPI stock had a value of at least $3.3 million ($2.9 million plus $300,000 plus $100,000), and perhaps more, depending on the value of defendants' contractual right to the second $2.9 million, discounted by the prospects of FPI's finances, risk of insolvency, and ability to pay the balance due. Both sides were entitled to present evidence, including expert testimony, on these issues. The trial court's instruction to consider only the value of the **[*1489]** benefits "at the time they were acquired" improperly instructed the jury on valuing the defendants' enrichment.[24]

[579]** Special instruction No. 7 also incorrectly told the jury that it could not reduce the value of the benefits defendant received "by any events occurring after they were first acquired, including any later decision by Defendants to accept less for the benefits they received than their value on the date they received them." As noted above, an unjust enrichment defendant may introduce evidence that its enrichment was reduced by costs, expenses, and other factors. Defendants may have received only a total of $400,000 out of the second $2.9 million payment because (as AML argued) defendants engaged in a sham transaction to minimize the value of AML's claims in this litigation,[25] or because (as defendants argued) of "the failure of the real estate market … in September of 2009." Either way, defendants were entitled to present **[***77]** evidence of this transaction, AML was entitled to challenge the transaction's legitimacy, and the jury was entitled to hear this evidence and determine the value of defendants' remaining interest in FPI. As counsel for defendants acknowledged to the trial court, if counsel for AML "want to argue that they should get $5.8 million even though the defendants never got $5.8 million, I suppose they can argue that." Counsel for defendants just wanted the corresponding ability to argue that defendants did not get $5.8 million. Special instruction No. 7 deprived them of this ability by erroneously precluding the jury from considering defendants' acceptance of $400,000 for its right to receive the remaining $2.9 million when determining the unjust enrichment defendants obtained as a result of the sale of their FPI stock.[26]

Special instruction No. 4 compounded the problem by instructing the jury that it "must only focus on the profit received or to be received by **[*1490]** Defendants … ." There is no difference between the benefit or "profit" defendants received and the benefit or "profit" defendants were to receive in the future. Defendants received one benefit, an equity interest in FPI. There may have been a dispute about how to value this benefit, but both sides were entitled to present evidence of its value, and the jury was entitled to determine how much it was really worth. The 2004 value of $2.3 million and the 2007 values of $3.5 million and $400,000 were

[24] AML argues in its supplemental brief that special instruction No. 7 stood "simply [for] the proposition that any purchase price of the property to be disgorged should be 'considered' in the profit equation, *i.e.*, if proven, it can be deducted as an expense from the highest future value to determine [defendants'] profit." This is not a fair reading of the instruction. In the instruction's mandate to the jurors that they "must consider the value of those benefits at the time they were acquired by Defendants," "those benefits" referred to the jury's "award" of defendants' profits, not an element of a "profit equation." There is nothing **[***76]** in the instruction suggesting that the jury should deduct the purchase price or anything else. Moreover, AML's argument is inconsistent with its argument, also in its supplemental brief, that defendants' $2.3 million purchase price "is irrelevant to the restitutionary calculation" and should *not* be deducted as an expense or offset when calculating defendants' profit.

[25] Defendants' agreement to accept $100,000 for the remaining $2.6 million occurred within 30 days of Melle's deposition, where defendants first saw Melle's damages analysis.

[26] AML argues that defendants forfeited their challenge to special instruction No. 7 by withdrawing their objection to the instruction. AML directs us to a portion of the record where counsel for defendants **[***78]** withdrew an objection to the use of the word "benefits" in the instruction. We do not construe this stipulation to one word in the instruction as a waiver of all objections to the instruction.

evidence of the value of the unjust enrichment defendants obtained as a result of their wrongful conduct, but none of these values was conclusive, and the jury was entitled to "focus" on any or all of them.[27]

[580]** *CA(20)*[↑] **(20)** In support of special instruction No. 7, AML cited section 51 of the Restatement Third of Restitution and Unjust Enrichment, section 202 of the Restatement Second of Restitution, and *Elliott v. Elliott (1964) 231 Cal.App.2d 205 [41 Cal. Rptr. 686]*. None of these authorities supports an instruction that AML was entitled to recover the full contract price of defendants' stock rather than the amount defendants actually received for the stock, or that in determining the value of defendants' profits from the sale of its FPI stock the jury should not consider defendants' subsequent decision to accept less than the contract amount. As noted above, section 51 focuses on the defendant's net benefit. Section 202 concerns imposition of a constructive trust, not restitution based on unjust enrichment. And the court in *Elliott* held that ***HN22***[↑] in valuing an asset subject to a constructive trust, the trier of fact should consider the actual value of the asset, including issues **[***81]** such as collectability and solvency. (See *Elliott, supra, at p. 213* [failure to make findings on whether the note was collectable and whether the maker of the note was insolvent was reversible error].)

[*1491]

Finally, these instructional errors were prejudicial. As noted, the "uniform test for civil instructional error" (*Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 581, fn. 11 [34 Cal. Rptr. 2d 607, 882 P.2d 298]*) is whether "it is reasonably probable the error affected the verdict." (*Ted Jacob Engineering Group, Inc. v. The Ratcliff Architects (2010) 187 Cal.App.4th 945, 962 [114 Cal. Rptr. 3d 644]*). In assessing the likelihood that instructional error prejudicially affected the verdict, "'[t]the reviewing court should consider not only the nature of the error … but [also] the likelihood of actual prejudice as reflected in the individual trial record, taking into account "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." [Citation.]'" (*Viner v. Sweet (2004) 117 Cal.App.4th 1218, 1226, fn. 8 [12 Cal. Rptr. 3d 533]*, quoting *Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 983 [67 Cal. Rptr. 2d 16, 941 P.2d 1203]*, and *Soule v. General Motors Corp., supra, at pp. 580–581*.) **[***82]** Here, the evidence was that defendants obtained a net benefit from the sale of their FPI stock of approximately $1 million ($600,000 from the first $2.9 million payment, plus $400,000), not the $5.8 million the jury awarded. Moreover, as noted above, the other jury instructions on restitution simply made matters worse. And although counsel for AML asked the jury to award Franklin's estimated value of AML's interest in a potential joint venture with defendants, $26,462,188, the joint venture never materialized and the jury's award was not close to this amount. Finally, the jury gave a very clear and unequivocal indication it was misled or at **[**581]** least confused by asking a question during deliberations

[27] AML argues in its supplemental brief that "[n]othing in the text of any instruction prevented the jury from determining [defendants'] wrongful profits **[***79]** net of any legitimate costs" because there was no evidence in the record that defendants actually paid $2.3 million for the FPI stock. It is true that none of the parties to the 2004 transaction testified that defendants paid $2.3 million. But there was testimony by Melle about the $2.3 million investment. There was a long discussion at sidebar, while Melle was on the witness stand, about whether the trial court would allow counsel for defendants to ask Melle about the $2.3 million. Melle had included the $2.3 million in his expert report, but, in response to a tentative ruling by the court on a jury instruction regarding "offsets," Melle removed the $2.3 million from his calculations. Counsel for defendants argued to the court that it was unfair to allow the jury to make an award "without having discounted for the [$]2.3 [million] that [defendants] put in," and that "the [$]2.3 [million] offset definitely comes in now. That's an expenditure." The trial court ultimately allowed counsel for defendants to ask Melle about the $2.3 million investment. Counsel for defendants then asked Melle if he had "take[n] into account the fact that defendants had put in 2,300,000 dollars as their initial **[***80]** investment," and Melle acknowledged he had not. Melle said that his calculations did "not include a deduction for the amount that the defendants initially invested." Both sides agree that Melle's testimony was the only testimony on this issue.

about the meaning of "harm" and "benefit" and how to calculate defendants' unjust enrichment. The instructional error was prejudicial because in all probability it "misled the jury and affected [the] verdict." (*Krouse v. Graham (1977) 19 Cal.3d 59, 72 [137 Cal. Rptr. 863, 562 P.2d 1022]*; see *Code Civ. Proc., § 475*; *Veronese v. Lucasfilm Ltd. (2012) 212 Cal.App.4th 1, 32 [151 Cal. Rptr. 3d 41]* ["instructional error will be prejudicial if it is '*reasonably probable* that instructions … *actually* misled the jury …'"], quoting *Kinsman v. Unocal Corp. (2005) 37 Cal.4th 659, 682 [36 Cal. Rptr. 3d 495, 123 P.3d 931]*.) **[***83]** Therefore, we conclude that defendants are entitled to a new trial on the amount of unjust enrichment they should pay in restitution to AML.

On remand, the trial court should instruct the jury that the amount by which defendants were unjustly enriched "is the net profit attributable to the underlying wrong." (*Rest.3d Restitution and Unjust Enrichment, § 51(4)*.) In calculating the net profit attributable to the underlying wrong, the jury will need guidance on how to evaluate three important numbers in this case: (1) the $2.3 million defendants paid for the FPI stock in April 2004, (2) the value of the FPI stock defendants received when they purchased the stock in April 2004, and (3) the value of defendants' right to receive the second $2.9 million payment when they sold the stock in June 2007. On the first issue, the **[*1492]** trial court should instruct the jury that it should give defendants "credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement." (*Rest.3d Restitution and Unjust Enrichment, § 51(5)(c)*; accord, *Uzyel v. Kadisha, supra, 188 Cal.App.4th at p. 894*; see *Carrey v. Boyes Hot Springs Resort, Inc. (1966) 245 Cal.App.2d 618, 622 [54 Cal. Rptr. 199]* **[***84]** ["in calculating the net profit of a business all of the costs of producing the gross income should be deducted"].)[28]

On the second issue, the trial court should instruct the jury it should consider the face value of the benefits at the time defendants received them (i.e., the $2.3 million defendants paid for the FPI stock), as well as evidence that the benefits were worth more or less than what defendants paid for them. (See *Knudsen v. Hill (1964) 227 Cal.App.2d 639, 640, 642 [38 Cal. Rptr. 859]* [in a damages case involving conversion of a "pledged promissory note," measure of damage is "value at time of conversion and, although the rule is variously expressed, *face* value of the bill or **[**582]** note is, prima facie, its *true* value," although "[e]vidence is admissible to establish that actual value is a lesser sum than face value …"]; *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp. (8th Cir. 2008) 539 F.3d 809, 818* ["[w]hile the contract price is evidence of the value of an item, it is not conclusive"].)

On the third issue, the trial court should instruct the jury that in determining whether defendants have met their burden of proving any **[***86]** deductions or discount from the right to receive the second $2.9 million, the jury may consider defendants' ability to collect the full contract price for the sale of their stock and FPI's solvency (*Elliott v. Elliott, supra, 231 Cal.App.2d at p. 213*; cf. *Medi-Cen Corp. v. Birschbach (1998) 123 Md.App. 765, 778–779 [720 A.2d 966, 972–*

[28] Citing *Ward v. Taggart (1959) 51 Cal.2d 736, 744 [336 P.2d 534]*, AML argues in its supplemental brief that defendants are not entitled to a credit for their $2.3 million investment because "expenses that aided the wrongdoer in accomplishing the wrongdoing cannot be deducted" and "[a]mounts expended to further breaches of fiduciary duty are not valid deductions from [defendants'] profits." This argument confuses the price of a wrongfully acquired asset with the costs associated with its acquisition. "One who misappropriates the property of another is not entitled to deduct any of the costs of the transactions by which he accomplished his wrongful conduct." (*A & M Records, Inc. v. Heilman (1977) 75 Cal.App.3d 554, 570 [142 Cal. Rptr. 390]*.) The purchase price of the misappropriated property, however, is not a transactional cost. (See *Rest.3d Restitution and Unjust Enrichment, § 51*.) Indeed, in *Ward* the Supreme Court held that the defendant was not entitled to a deduction for commissions and other transaction costs, but the defendant did receive a credit for the $4,000 per acre purchase price of the property **[***85]** he misappropriated and resold for $5,000 per acre, so that the plaintiff recovered a judgment "representing the $1,000 per acre secret profit." (*Ward, supra, at pp. 739–740, 742, 744*.)

973] [discussing the effect of doubtful collectability on the value of a converted asset], or even evidence that defendants intentionally chose not to collect the full amount due for the sale of their FPI stock in **[*1493]** order to minimize their liability in this litigation. (See *Elliott, supra, at p. 212*; *Janiszewski v. Behrmann (1956) 345 Mich. 8, 29 [75 N.W.2d 77, 93]* [court will not "permit the tortious taker to escape by paying only the give-away price at which he sold, regardless of fair value"].)

CA(21)[⬆] **(21)** Finally, the trial court should instruct the jury, consistent with the Restatement, that ***HN23***[⬆] "'[w]here a person is entitled to a money judgment against another because by fraud, duress or other consciously tortious conduct the other has acquired, retained or disposed of his property, the measure of recovery for the benefit received by the other is the value of the property **[***87]** at the time of its improper acquisition, retention or disposition, or a higher value if this is required to avoid injustice where the property has fluctuated in value … .' (*Rest., Restitution, § 151*, p. 598.)" (*Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 698–699 [38 Cal. Rptr. 3d 36]*;[29] see *Gerstle v. Gamble-Skogmo, Inc. (E.D.N.Y. 1969) 298 F.Supp. 66, 100–101* ["the restitutional basis of recovery is the value of the property at the time the sale was consummated or a higher value at a subsequent time if the value of the property has thereafter fluctuated …"].) Such an instruction will assist the jury in deciding how to value the second $2.9 million payment, which defendants essentially claim decreased to $400,000. " 'Where the subject matter is of fluctuating value, and where the person deprived of it might have secured a higher amount for it had he not been so deprived, justice to him may require that the measure of recovery be more than the value at the time of deprivation. *This is true where the recipient knowingly deprived the owner of his property or where a fiduciary in violation of his duty used the property of the beneficiary for his own benefit.* In such cases the person deprived **[***88]** is entitled to be put in substantially the position in which he would have been had there not been the deprivation, and this may result in granting to him an amount **[**583]** equal to the highest value reached by the subject matter within a reasonable time after the tortious conduct.' " (*Hutt v. Dean Witter Reynolds, Inc. (D.Mass. 1990) 737 F.Supp. 128, 134*; see *Roxas v. Marcos (1998) 89 Hawaii 91, 152 [969 P.2d 1209, 1270]* [amount of damages for conversion of gold "is the highest value of the gold between—and including—the date of conversion and a reasonable time thereafter"]; *American General Ins. Co. v. Equitable General Corp. (E.D.Va. 1980) 493 F.Supp. 721, 765* [for purposes of rescission, court valued stock "at the highest value attained within a reasonable time" after announcement of merger].)
[*1494]

DISPOSITION

The judgment is reversed as to the amount of defendants' unjust enrichment. In all other respects, it is affirmed. The order denying defendants' motions for judgment notwithstanding the verdict and new trial is reversed to the extent it denies a new trial on the issue of the amount of defendants' unjust enrichment, and in all other respects it is affirmed. The trial court is directed to grant a new trial on the issue of the amount of defendants' unjust enrichment only. The parties are to bear their own costs on appeal.

Perluss, P. J., and Zelon, J., concurred.

On May 27, 2014, the opinion was modified to read as printed above.

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[29] *Colgan v. Leatherman Tool Group, Inc.* involved claims under the false advertising law, *Business and Professions Code section 17500*, and the unfair competition law, *Business and Professions Code section 17200*. (*Colgan v. Leatherman Tool Group, Inc., supra, 135 Cal.App.4th at p. 672*.) As noted, nonrestitutionary disgorgement is not available for these claims. (*Id. at pp. 696–697*; see fn. 21, *ante*.) **[***89]** The issue of how to value an asset that fluctuates in value or that trades in a limited market, however, arises whether the plaintiff is seeking restitutionary disgorgement based on what the plaintiff lost or nonrestitutionary disgorgement based on what the defendant gained.

EXHIBIT 3

Cal Corp Code § 25017

Deering's California Codes are current with legislation of the 2017 Regular Session through urgency Chapters 1-15, 17-26, 28-134, 136-249; and non-urgency Chapters 1-12, 14-104, 106-129, 131-167, 169-175, 177-185, 187-206, 208-224, 226-239, 242-248.

Deering's California Codes Annotated > CORPORATIONS CODE > Title 4 Securities > Division 1 Corporate Securities Law of 1968 > Part 1 Definitions

§ 25017. "Sale" or "sell"; "Offer" or "offer to sell"

(a) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. "Sale" or "sell" includes any exchange of securities and any change in the rights, preferences, privileges, or restrictions of or on outstanding securities.

(b) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(c) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing constitutes a part of the subject of the purchase and is considered to have been offered and sold for value.

(d) A purported gift of assessable stock involves an offer and sale.

(e) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, includes an offer and sale of the other security only at the time of the offer or sale of the warrant or right or convertible security; but neither the exercise of the right to purchase or subscribe or to convert nor the issuance of securities pursuant thereto is an offer or sale.

(f) The terms defined in this section do not include: (1) any bona fide secured transaction in or loan of outstanding securities; (2) any stock dividend payable with respect to common stock of a corporation solely (except for any cash or scrip paid for fractional shares) in shares of such common stock, if the corporation has no other class of voting stock outstanding; provided, that shares issued in any such dividend shall be subject to any conditions previously imposed by the commissioner applicable to the shares with respect to which they are issued; or (3) any act incident to a transaction or reorganization approved by a state or federal court in which securities are issued and exchanged for one or more outstanding securities, claims, or property interests, or partly in that exchange and partly for cash, and nothing in this division shall be construed to prohibit a court from applying the protections described in Section 25014.7 or 25140 and the regulations adopted thereunder when approving any transaction involving a rollup participant.

History

Added Stats 1968 ch 88 § 2, operative January 2, 1969. Amended Stats 1980 ch 579 § 1; *Stats 1998 ch 48 § 2 (SB 1200)*.

Annotations

Notes

Historical Derivation:

Amendments:

Note—

Historical Derivation:

(a) Former Corp C § 25009, as added Stats 1949 ch 384 § 1, amended Stats 1949 ch 388 § 1.

(b) Stats 1917 ch 532 § 2, as amended Stats 1919 ch 148 § 1, Stats 1921 ch 658 § 1, Stats 1923 ch 50 § 1, Stats 1925 ch 447 § 1, Stats 1929 ch 707 § 1, Stats 1931 ch 423 § 1, Stats 1933 ch 898 § 1, Stats 1935 ch 166 § 1, Stats 1937 ch 477 § 1, Stats 1945 ch 399 § 1, Stats 1947 ch 198 § 1.

Amendments:

1980 Amendment:

Substituted "transaction or reorganization approved by a state or federal court" for "judicially approved arrangement or reorganization" after "(3) any act incident to a" in subd (f).

1998 Amendment:

Substituted "that exchange and partly for cash, and nothing in this division shall be construed to prohibit a court from applying the protections described in Section 25014.7 or 25140 and the regulations adopted thereunder when approving any transaction involving a rollup participant" for "exchange and partly for cash" at the end of subd (f).

Note—

Stats 1998 ch 48 provides:

> SEC. 9. In enacting Section 2 of this act, the Legislature finds and declares that the Thompson–Killea Limited Partnership Act of 1992 added specified protections for limited partners in connection with rollup transactions, and that the courts may be reviewing rollup transactions through the court approval process without recognizing the availability of the important protections afforded to investors under the Corporate Securities Law of 1968. Therefore, the courts are encouraged to apply the protections described in *Section 25014.7 or 25140 of the Corporations Code* and any regulations adopted thereunder to ensure that these investor protections are not overlooked or avoided through the court approval process.

Notes to Decisions

1. Generally

Person engaged to sell original issue stock in two corporations is broker or agent, required to be licensed, notwithstanding that he is director of one corporation and that his compensation, consisting of shares in corporations, is to be paid by stockholders rather than corporations. *Kennerson v. Salih Bros. (Cal. App. 1954), 123 Cal. App. 2d 371, 266 P.2d 871, 1954 Cal. App. LEXIS 1195*, overruled, *Fomco, Inc. v. Joe Maggio, Inc. (Cal. Oct. 27, 1960), 8 Cal. Rptr. 459, 356 P.2d 203, 1960 Cal. LEXIS 263*.

Section does not contravene *US Const Fourteenth Amendment*. *People v. Sears (Cal. App. 2d Dist. Jan. 30, 1956), 138 Cal. App. 2d 773, 292 P.2d 663, 1956 Cal. App. LEXIS 2433*.

Court's determination that transaction was sale of security was not avoided by defendants' claim that there was no evidence that permit for sale of security was not obtained where case proceeded on assumption by court and all counsel that there was no permit in existence. *Rivlin v. Levine (Cal. App. 2d Dist. 1961), 195 Cal. App. 2d 13, 15 Cal. Rptr. 587, 1961 Cal. App. LEXIS 1422*.

It is obvious from express reference in this section to change in rights, preferences, privileges, or restrictions on outstanding shares as being a sale, and general prohibition of sale without permit in former Corp C § 25500, that legislature intended to protect actual shareholders as well as potential ones. *Keeler Street Development Co. v. Department of Invest., Div. of Corps. (Cal. App. 1st Dist. 1964), 227 Cal. App. 2d 760, 39 Cal. Rptr. 44, 1964 Cal. App. LEXIS 1231*.

That word "issue" in § 25507, requiring Commissioner of Corporations to issue permit if he finds plan of business and proposed issuance of securities are fair and just and that issuance will not work fraud on purchaser, includes change in present stockholders' existing rights as mentioned in this section is necessary conclusion, else section would be rendered useless. *Keeler Street Development Co. v. Department of Invest., Div. of Corps. (Cal. App. 1st Dist. 1964), 227 Cal. App. 2d 760, 39 Cal. Rptr. 44, 1964 Cal. App. LEXIS 1231*.

Under this section, permit of the Commissioner of Corporations is necessary to make effective amendment to articles of incorporation making previously nonassessable shares assessable. *Keeler Street Development Co. v. Department of Invest., Div. of Corps. (Cal. App. 1st Dist. 1964), 227 Cal. App. 2d 760, 39 Cal. Rptr. 44, 1964 Cal. App. LEXIS 1231*.

Corporation has power to amend its articles to provide for power of assessment, but changes in rights of outstanding securities are subject to permit. *Keeler Street Development Co. v. Department of Invest., Div. of Corps. (Cal. App. 1st Dist. 1964), 227 Cal. App. 2d 760, 39 Cal. Rptr. 44, 1964 Cal. App. LEXIS 1231*.

2. Place of Performance of Contract

In determining whether permit for sale of securities is required in California, place of performance of executory contract for the sales is all important. *Robinson v. Cupples Container Co. (N.D. Cal. Sept. 14, 1970), Fed. Sec. L. Rep. (CCH) ¶2893, 316 F. Supp. 1362, 1970 U.S. Dist. LEXIS 10249*, aff'd, *(9th Cir. Cal. Mar. 25, 1975), 513 F.2d 1274, 1975 U.S. App. LEXIS 15498*.

3. What Constitutes Sale

A transfer of securities within purview of the Corporate Securities Act for a pecuniary consideration constitutes a sale. *O'Connell v. Union Drilling & Petroleum Co. (Cal. App. 1932), 121 Cal. App. 302, 8 P.2d 867, 1932 Cal. App. LEXIS 1155*.

A single transaction, if it meets the definition of a sale within the California Securities Act is sufficient to come within the purview of the act. *Cecil B. De Mille Productions, Inc. v. Woolery (9th Cir. Cal. Aug. 29, 1932), 61 F.2d 45, 1932 U.S. App. LEXIS 4185*.

Option to buy stock is included in definition of sale in *People v. Otterman (Cal. App. 2d Dist. Oct. 4, 1957), 154 Cal. App. 2d 193, 316 P.2d 85, 1957 Cal. App. LEXIS 1608*.

"Sale" includes contract of sale, attempt to sale, option of sale and offer to sell. *Stonehocker v. Cassano (Cal. App. 2d Dist. Oct. 28, 1957), 154 Cal. App. 2d 732, 316 P.2d 717, 1957 Cal. App. LEXIS 1692*.

A security includes any stock, and a sale includes every disposition or attempt to dispose of a security or interest in a security for value; a sale may be done directly or by agent and includes offer to sell, attempt to sell, solicitation of sale and contract of sale. *People v. Acres (Cal. App. 4th Dist. Sept. 25, 1959), 174 Cal. App. 2d 42, 344 P.2d 327, 1959 Cal. App. LEXIS 1663*.

"Sale" or "sell," under Corporate Securities Act, includes all of following, whether done directly or by agent, circular letter, advertisement, or otherwise: offer to sell; attempt to sell; solicitation of sale; option of sale; contract of sale; taking of subscriptions; exchange; any change in rights, preferences, privileges, or restrictions on outstanding securities. *Morris v. Aerojet-General Corp. (Cal. App. 2d Dist. 1960), 183 Cal. App. 2d 609, 6 Cal. Rptr. 906, 1960 Cal. App. LEXIS 1798*.

Sale of interest in purported limited partnership was in reality sale of security within meaning of Corporate Securities Act, and was void because not done in compliance with requirements of that act, where there was no element of mutual selection of those who would constitute membership of partnership, defendant merely going about among his relatives, friends and acquaintances seeking those who would invest in his enterprise in return for share of contemplated profits, and those who were called limited partners never met together but, whether they were individuals or groups of investors, one by one were designated by defendant as money for venture was forthcoming from time to time. *Rivlin v. Levine (Cal. App. 2d Dist. 1961), 195 Cal. App. 2d 13, 15 Cal. Rptr. 587, 1961 Cal. App. LEXIS 1422*.

With reference to the Corporate Securities Act, word "sale" should be construed according to statute's definition; in addition, § 25001 requires that the act's definitions and general provisions govern its construction. *Keeler Street Development Co. v. Department of Invest., Div. of Corps. (Cal. App. 1st Dist. 1964), 227 Cal. App. 2d 760, 39 Cal. Rptr. 44, 1964 Cal. App. LEXIS 1231*.

Where articles of incorporation provide for assessability of shares, no permit is necessary to make assessments and corporation may assess for lawful purposes by following applicable code provision, but where shares are nonassessable according to articles and it is sought to make them assessable, rights of shareholders would be changed and such change would fall within definition of "sale" which requires permit. *Keeler Street Development Co. v. Department of Invest., Div. of Corps. (Cal. App. 1st Dist. 1964), 227 Cal. App. 2d 760, 39 Cal. Rptr. 44, 1964 Cal. App. LEXIS 1231*.

A written employment contract between a land development consultant and a development corporation was illegal and unenforceable, where it contained a provision for payment of the consultant's annual salary in stock of the corporation, and where no permit for the sale of securities had been obtained from the Corporations Commissioner as required by former Corp Code, § 25500, at the time the agreement was made; such proposed payment to plaintiff in stock of defendant corporation contemplated a "sale," within the meaning of former Corp Code, § 25009, broadly defining that term. *Lawn v. Camino Heights, Inc. (Cal. App. 3d Dist. Mar. 11, 1971), 15 Cal. App. 3d 973, 93 Cal. Rptr. 621, 1971 Cal. App. LEXIS 969*.

In a class action by individuals who purchased stock in a California corporation against the corporation and individual corporate officers alleging market manipulation in violation of Corp C § *25400*, out-of-state purchasers had a remedy under Corp C § *25500*. The argument that "in this state" as used in § 25400 reflects legislative intent to proscribe only conduct intended to manipulate the California market for a stock and, therefore, the remedy created by § 25500 is available only to persons who purchase or sell an affected stock in California had been considered and rejected. Although defendant corporation argued that it should not be deemed to have sold, offered to sell, purchased, or offered to purchase shares during the class period because the complaint did not allege that any of the transactions took place on the open market, and denied the false and misleading statements were made to induce employees to purchase defendant's stock through employee stock purchase plan, the statutory definitions of "offers to sell" and "sale," which govern under § 25400(d) include no reference to the forum in which the sale takes place. The statute applies to all forms of securities defined in § 25019, not simply stocks, and many of those securities are not traded in an open market. § 25400 does not provide expressly or by implication that there must be an offer for, or a sale or purchase of a security on the open market. *StorMedia Inc. v. Superior Court (Cal. May 27, 1999), 20 Cal. 4th 449, 84 Cal. Rptr. 2d 843, 976 P.2d 214, 1999 Cal. LEXIS 2973*.

4. Transactions Not Constituting Sales

A contract for the purchase of units of the capital stock of a Nevada corporation which was made in Nevada is not controlled by the California law. *Los Angeles Fisheries, Inc. v. Crook (9th Cir. Cal. Mar. 16, 1931), 47 F.2d 1031, 1931 U.S. App. LEXIS 3656*.

Buyer of units in a corporation when informed of the invalidity of a sale of the units in California was bound by a letter authorizing an agent to subscribe for the units for him in Nevada, although he did not read the letter. (Corporate Securities Act ch 352; Stats 1917 p 673 § 2 subsecs 3, 7–9 [amended by Stats 1929 p 1251], and pp 675, 679 §§ 3, 12). *Los Angeles Fisheries, Inc. v. Crook (9th Cir. Cal. Mar. 16, 1931), 47 F.2d 1031, 1931 U.S. App. LEXIS 3656*.

Where plaintiff, as a syndicate subscriber, furnished part of the money with which to acquire land and placed it in escrow with defendant, title to the land thereafter being taken in defendant's name as trustee and a declaration of trust being executed under which defendant held title merely as trustee and which declared interests respectively of syndicate subscribers, the transaction did not amount to a "sale" within Corporate Securities Act § 2 subd 9. *Faires v. Title Ins. & Trust Co. (Cal. App. 1936), 15 Cal. App. 2d 350, 59 P.2d 428, 1936 Cal. App. LEXIS 67*.

Declaration in the trust changing interest of syndicate members from real property to personal property did not so affect their interest as to bring it within the Corporate Securities Act, where this was done

merely for convenience in administering the trust and there was no sale of any interest at that time nor any offering of any interest to anyone. *Faires v. Title Ins. & Trust Co. (Cal. App. 1936), 15 Cal. App. 2d 350, 59 P.2d 428, 1936 Cal. App. LEXIS 67*.

If a mutual friend brings together one who owns a security and one who may desire to buy it, or who has a friend who might buy it, it does not result as a matter of law that the intermediary was negotiating for or dealing in securities or soliciting a sale even though he expected to be paid for his trouble. *Freeman v. Jergins (Cal. App. 1954), 125 Cal. App. 2d 536, 271 P.2d 210, 1954 Cal. App. LEXIS 1917*.

A retransfer by purchaser to vendors of fractional interest in tract of oil land in escrow, under agreement giving such right, is not subject to Corporate Securities Act so as to require permit for retransfer, and in suit by purchaser for specific performance of the agreement it is no defense that such permit has not been obtained. *Rice v. May (9th Cir. Cal. Feb. 29, 1956), 231 F.2d 389, 1956 U.S. App. LEXIS 4640*.

Completion of proposed merger of two corporations without first securing permit from Commissioner of Corporations finding that terms of proposed merger were fair, just and equitable did not constitute sale of security within meaning of Corp Code § *25009*, subd (a), defining sale as any change in rights, preferences, privileges, or restrictions on outstanding securities. *Giannini Controls Corp. v. Superior Court of Los Angeles County (Cal. App. 2d Dist. 1966), 240 Cal. App. 2d 142, 49 Cal. Rptr. 643, 1966 Cal. App. LEXIS 1331*.

5. Offer, Attempt, or Solicitation

Agreement to reach agreement to sell stock is, at least, "offer to sell." *People v. Jaques (Cal. App. 1st Dist. 1955), 137 Cal. App. 2d 823, 291 P.2d 124, 1955 Cal. App. LEXIS 1268*.

Where there is delivery of stock with intent to transfer title, act may be violated, since offer or attempt to make sale comes within statutory definition of sale. *People v. Mills (Cal. App. 2d Dist. Feb. 8, 1957), 148 Cal. App. 2d 392, 306 P.2d 1005, 1957 Cal. App. LEXIS 2373*, cert. denied, *(U.S. 1957), 355 U.S. 841, 78 S. Ct. 55, 2 L. Ed. 2d 46, 1957 U.S. LEXIS 491*.

Offer or attempt to make sale of securities comes within statutory definition of sale. *People v. Mason (Cal. App. 2d Dist. 1960), 184 Cal. App. 2d 317, 7 Cal. Rptr. 627, 1960 Cal. App. LEXIS 1882*, cert. denied, *(U.S. 1961), 366 U.S. 904, 81 S. Ct. 1046, 6 L. Ed. 2d 203, 1961 U.S. LEXIS 1286*.

Offer or attempt to sell security comes within definition of sale, and sale made without appropriate permit constitutes crime. *People v. Clark (Cal. App. 2d Dist. 1963), 215 Cal. App. 2d 734, 30 Cal. Rptr. 487, 1963 Cal. App. LEXIS 2553*, cert. denied, *(U.S. Sept. 1, 1963), 375 U.S. 943, 84 S. Ct. 350, 11 L. Ed. 2d 274, 1963 U.S. LEXIS 92*.

In a prosecution for unlawful offer and sale of securities, the evidence was sufficient to support defendant's conviction of an unlawful offer to sell securities in violation of Corp. Code, § *25110*, where the record showed that defendant had signed an agreement to give the other party to the agreement 500,000 shares of National Food Services Marketing, Inc. when that party had provided to defendant the wherewithal and labor to construct and completely finish building a prototype kiosk. Regardless of whether anything of value actually passed to defendant from the other party to the agreement, the writing signed by defendant constituted an offer to sell securities within the meaning of Corp. Code, § *25017*, and

the record showed that the shares had not been registered. The offer was unlawful, notwithstanding that it had not been accepted by full performance. Actual transfer of consideration is not necessary to constitute an unlawful offer to sell securities. *People v. Kline (Cal. App. 1st Dist. Sept. 12, 1980), 110 Cal. App. 3d 587, 168 Cal. Rptr. 185, 1980 Cal. App. LEXIS 2310*.

6. Elements, Tests, and Indicia

The understanding or misunderstanding of parties as to whether a transaction is a loan or a sale of a security within the Corporate Securities Act (Stats 1917 p 673, as amended; Deering's Gen Laws, Act 3814) is not determinative of its legal effect; this must be ascertained from acts done in entering the contract and the language of the statute. *People v. Sidwell (Cal. 1945), 27 Cal. 2d 121, 162 P.2d 913, 1945 Cal. LEXIS 224*.

A corporation participates in a sale of securities within this section when it accepts proceeds or portion of proceeds of sale. *Tevis v. Blanchard (Cal. App. 1954), 122 Cal. App. 2d 731, 266 P.2d 85, 1954 Cal. App. LEXIS 1107*.

The fact that stock contemplated in a sale which comes within this section is to be issued and delivered at a future date does not constitute a defense to an action for damages based on failure of seller to secure a permit from Commissioner of Corporations. *Sampson v. Sapoznik (Cal. App. 1954), 124 Cal. App. 2d 704, 269 P.2d 205, 1954 Cal. App. LEXIS 1796*.

Payment of consideration for issuance of security is not essential element of "sale" under this section. *Ogier v. Pacific Oil & Gas Development Corp. (Cal. App. 1st Dist. 1955), 135 Cal. App. 2d 776, 288 P.2d 101, 1955 Cal. App. LEXIS 1424*.

As between parties, it is not essential to transfer of shares of stock that certificates be delivered. *Kirkpatrick v. Tapo Oil Co. (Cal. App. 2d Dist. Sept. 12, 1956), 144 Cal. App. 2d 404, 301 P.2d 274, 1956 Cal. App. LEXIS 1734*.

Understanding or misunderstanding of parties as to nature of transaction is not determinative of its legal effect under Corporate Securities Law. *Stoner v. Bisno (Cal. App. 2d Dist. July 16, 1958), 162 Cal. App. 2d 164, 327 P.2d 922, 1958 Cal. App. LEXIS 1848*.

Understanding or misunderstanding of parties to transaction with respect to whether or not it constitutes sale of security within meaning of Corporate Securities Act is not determinative of its legal effect. *Rivlin v. Levine (Cal. App. 2d Dist. 1961), 195 Cal. App. 2d 13, 15 Cal. Rptr. 587, 1961 Cal. App. LEXIS 1422*.

Normally, whether a person is acting as an investment counselor or as a broker is a question of fact for the jury. *James De Nicholas Associates, Inc. v. Heritage Constr. Corp. (Cal. App. 2d Dist. Mar. 16, 1970), 5 Cal. App. 3d 421, 85 Cal. Rptr. 233, 1970 Cal. App. LEXIS 1448*.

A letter indicating that plaintiff's company had considered purchasing a security investment company for itself and that plaintiff was merely accepting consideration from defendant for waiving its own rights to purchase the controlling stock of that company and for furnishing to defendant information acquired by plaintiff about the company could not be construed as establishing, as a matter of law, that defendant was engaging in the business of giving advice as an investment counselor. *James De Nicholas Associates, Inc.*

v. Heritage Constr. Corp. (Cal. App. 2d Dist. Mar. 16, 1970), 5 Cal. App. 3d 421, 85 Cal. Rptr. 233, 1970 Cal. App. LEXIS 1448.

The California Corporate Securities Act was designed to prevent deception, exploitation of ignorance, and all unfair dealings in the issuance of securities. *Sandor v. Ruffer, Ballan & Co. (S.D.N.Y. Jan. 19, 1970), Fed. Sec. L. Rep. (CCH) ¶2563, 309 F. Supp. 849, 1970 U.S. Dist. LEXIS 13165*.

7. Consideration

A transaction by which one agrees to set aside to another a percentage interest in an oil well as consideration for a loan to complete the well does not constitute a "loan," for which no permit is required under the Corporate Securities Act, where the promissory note and the agreement are executed as parts of one transaction, and where the agreement constitutes an inducement to make the loan rather than an incidental and subordinate matter. *People v. Sidwell (Cal. 1945), 27 Cal. 2d 121, 162 P.2d 913, 1945 Cal. LEXIS 224*.

Transaction by which investors were given option to buy stock in corporation in consideration of their making purported loans to it, did not fall within provisions of Corp C § *25017*, subd (c), but constituted violation of act. *People v. Whelpton (Cal. App. 1950), 99 Cal. App. 2d 828, 222 P.2d 935, 1950 Cal. App. LEXIS 1788*.

8. Solicitation; Privileges to Convert

Certificates of beneficial interest in a subdivision trust were offered to the "public" within contemplation of the Corporate Securities Act, where persons to be solicited were selected at random, although former purchaser of securities from the corporations which offered the securities for sale had been invited to invest in the syndicate. *Mary Pickford Co. v. Bayly Bros., Inc. (Cal. 1939), 12 Cal. 2d 501, 86 P.2d 102, 1939 Cal. LEXIS 197*.

Transaction did not fall within purview of exception of statute respecting "privilege pertaining to a security giving the holder the privilege to convert," where option given by defendants was clear on its face and did not provide for exchange of one security for another security of same corporation. *People v. Boles (Cal. App. 1939), 35 Cal. App. 2d 461, 95 P.2d 949, 1939 Cal. App. LEXIS 443*.

9. Assignments; Disposition

An assignment or agreement to assign a portion of a major lease, executed in connection with an agreement under which assignor parted with or agreed to part with portions of oil thereafter to be saved, when considered together, constituted a sale of a "security" within Corporate Securities Act, which was illegal if carried out without a permit. *El Claro Oil & Gas Co. v. Daugherty (Cal. App. 1936), 11 Cal. App. 2d 274, 53 P.2d 1028, 1936 Cal. App. LEXIS 334*.

Sales of certificates of beneficial interest in the subdivision trust which were made in pursuance of a general plan to dispose of substantial portions of such interests to raise capital to carry out the venture, in absence of a permit, constituted a violation of the act. *Mary Pickford Co. v. Bayly Bros., Inc. (Cal. 1939), 12 Cal. 2d 501, 86 P.2d 102, 1939 Cal. LEXIS 197*.

An agreement by one to set aside to another a percentage interest in an oil well as consideration for a loan to complete the well, and on its completion to make proper application for permission to transfer said interest to the lender or his nominee, constitutes a "sale" or a "disposition" of the per cent of production within Corporate Securities Act § 2, par (a), subd 8. *People v. Sidwell (Cal. 1945), 27 Cal. 2d 121, 162 P.2d 913, 1945 Cal. LEXIS 224*.

10. Escrow

The issuance of stock and placing of same in escrow for the buyers is a violation of the Corporate Securities Act. *Tatterson v. Kehrlein (Cal. App. 1927), 88 Cal. App. 34, 263 P. 285, 1927 Cal. App. LEXIS 22*.

Sale of escrowed corporate stock was not in violation of Corporate Securities Law (former Corp C § 25009, see now Corp C §§ *25017* et seq.) where sellers were bona fide owners of stock, having received it in payment for services rendered in organization of corporation, and sale was made solely for their own accounts, where conditions placed on escrow were complied with in making sale, where transaction was conditioned on approval by Corporations Commissioner and such approval was obtained, and where sellers received no consideration from buyer before such approval was given. *Kendall v. Mattison (Cal. App. 2d Dist. 1966), 239 Cal. App. 2d 784, 49 Cal. Rptr. 177, 1966 Cal. App. LEXIS 1820*.

Transactions whereby California investors advanced cash to plaintiffs in return for escrow agreements purportedly transferring undescribed interests in ranch property in Nevada and Utah on the basis of one percent of the property for each $5,000 invested constituted sales of securities within the meaning of the Corporate Securities Law, and the interests sold were void as having been made without a permit. *Clejan v. Reisman (Cal. App. 2d Dist. Mar. 11, 1970), 5 Cal. App. 3d 224, 84 Cal. Rptr. 897, 1970 Cal. App. LEXIS 1433*.

11. Foreign Corporation's Transaction

A sale in violation of the Corporate Securities Act § 2(a)(8) was made by a foreign corporation without a permit to offer stock for sale in this state, where the offer to sell and acceptance occur here, the purchaser mails his check to the corporation's agent in the state of its incorporation, the certificates are signed and sealed in its executive offices here, mailed to such agent and mailed from there to the purchaser here. *Leven v. Legarra (Cal. App. 1951), 103 Cal. App. 2d 319, 229 P.2d 383, 1951 Cal. App. LEXIS 1174*.

Where corporation incorporated under laws of another state but doing substantial business in this state, residents of which held over 30 per cent of corporation's outstanding shares, attempted to change voting rights of common stock from cumulative to straight voting, such attempted change amounted to sale of a security within meaning of Corporate Securities Act. *Western Air Lines, Inc. v. Sobieski (Cal. App. 2d Dist. 1961), 191 Cal. App. 2d 399, 12 Cal. Rptr. 719, 1961 Cal. App. LEXIS 2066*.

12. Action and Proceedings

In action to recover for services in introducing defendants to certain persons whose efforts resulted in sale of defendants' stock, a finding that plaintiff did not agree to render, or render, any services as a broker is a finding that he did not agree to make, or make, an offer to sell or an attempt to sell and that he did not

solicit a sale of stock. *Freeman v. Jergins (Cal. App. 1954), 125 Cal. App. 2d 536, 271 P.2d 210, 1954 Cal. App. LEXIS 1917*.

In action to recover money allegedly paid for securities sold in violation of Corporate Securities Act, defended on theory that contract between parties constituted joint venture, judgment for plaintiff is not reversible because court did not expressly find that transaction was not a joint venture, where finding that transaction constituted sale of securities is inconsistent with any theory that contract was joint venture, and necessarily constitutes a finding that it was not, and where any finding on issue would, under evidence, have necessarily been adverse to defendant. *Goldberg v. Paramount Oil Co. (Cal. App. 2d Dist. July 17, 1956), 143 Cal. App. 2d 215, 300 P.2d 329, 1956 Cal. App. LEXIS 1592*.

In view of fact that this section defines "sale" or "sell" as every "disposition, or attempt to dispose, of a security," also "an offer to sell; an attempt to sell; a solicitation of a sale" charge of selling is included in charge of offering to sell. *People v. Mills (Cal. App. 2d Dist. Aug. 18, 1958), 162 Cal. App. 2d 840, 328 P.2d 1049, 1958 Cal. App. LEXIS 1950*.

13. Evidence

Illegal sale of corporate securities was established by evidence that, prior to issuance of state permit for their sale, purchasers signed subscription agreement and contemporaneously delivered check payable to corporation which was receipted for and indorsed by officers of corporation and deposited in special corporate account. *Randall v. Beber (Cal. App. 1951), 107 Cal. App. 2d 692, 237 P.2d 994, 1951 Cal. App. LEXIS 1969*.

A sale of securities within this section, such as requires authorization of Commissioner of Corporations, and not coming within the exception of former Corp C § 25152, (see now Corp C § *25104*), is properly found under evidence that all officers and directors of corporation agreed to sell to plaintiff all stock issued or about to be issued by corporation, and that plaintiff had purchase money into corporation treasury. *Sampson v. Sapoznik (Cal. App. 1954), 124 Cal. App. 2d 704, 269 P.2d 205, 1954 Cal. App. LEXIS 1796*.

Statement in defendant's letter to complaining witness that "At the time the corporation is formed we will issue new stock" at designated sum per share, coupled with such witness' letter to defendant stating he was sending named sum "for eventual investment" in corporation and defendant's acceptance of check and cashing it, are sufficient to show "sale" of "security" under Corporate Securities Law. *People v. Jaques (Cal. App. 1st Dist. 1955), 137 Cal. App. 2d 823, 291 P.2d 124, 1955 Cal. App. LEXIS 1268*.

Conclusion that transaction violated Corporate Securities Law is sustained by evidence that, without permit to issue stock in certain corporation, defendant officer thereof, in consideration of previous investment and additional money, sold plaintiff a percentage interest in profits from motion picture to be produced by corporation. *Voss v. Friedgen (Cal. App. 2d Dist. Apr. 25, 1956), 141 Cal. App. 2d 135, 296 P.2d 424, 1956 Cal. App. LEXIS 1821*.

Finding that certain transactions were loans and that there were no sales, offers to sell, or transfers of securities within proscription of Corporate Securities Law was supported by evidence that plaintiff gave check in various amounts to defendants and signed form letter directing that one defendant loaned funds to organization that was about to build under co-operative joint deed of trust to collective joint unit of

which plaintiffs were to comprise part, which unit was to participate in net profits of operations of enterprise, that amounts of checks were deposited in trust account from which other checks were drawn and funds used in connection with enterprise, and that plaintiffs joined in scheme with full knowledge. *Stoner v. Bisno (Cal. App. 2d Dist. July 16, 1958), 162 Cal. App. 2d 164, 327 P.2d 922, 1958 Cal. App. LEXIS 1848*.

Finding that business opportunity broker did not violate act by arranging for sale of radio broadcasting company and its radio station because majority shareholder of company agreed to sell his stock in company was proper where evidence showed that broker was engaged to secure buyer for radio station business, not to find buyer for stock, and broker did not learn that shareholder wished to sell his stock until buyers and sellers were brought together. *Stoll v. Mallory (Cal. App. 1st Dist. Sept. 16, 1959), 173 Cal. App. 2d 694, 343 P.2d 970, 1959 Cal. App. LEXIS 2557*.

Sale of security without permit in violation of Corporate Securities Act, rather than joint venture, was established by evidence where there was no showing of any participation by plaintiff in conduct of enterprise, where contract contemplated that he would play passive role of investor only, and plaintiff did not expect to reap profits from his own services or any other active participation in enterprise. *Rivlin v. Levine (Cal. App. 2d Dist. 1961), 195 Cal. App. 2d 13, 15 Cal. Rptr. 587, 1961 Cal. App. LEXIS 1422*.

Evidence was sufficient to support denial of permit to make previously nonassessable shares assessable where, though corporation claimed liability under pending suit, decision in case was not final, though it was claimed corporation was in danger of falling into category of personal holding company subject to 85 per cent income tax, it had acquired properties to take it out of that class, and though it showed substantial tax liability, decision imposing it had been appealed and its net worth was substantially in excess of its liability. *Keeler Street Development Co. v. Department of Invest., Div. of Corps. (Cal. App. 1st Dist. 1964), 227 Cal. App. 2d 760, 39 Cal. Rptr. 44, 1964 Cal. App. LEXIS 1231*.

Opinion Notes

Attorney General's Opinions

Sale of apartment house to multiple purchasers as tenants in common with each purchaser designated owner of particular apartment as sale of securities. 11 Ops. Cal. Atty. Gen. 81.

Plan whereby individual enters into trust agreement with bank as trustee for purchase of particular shares to be furnished by corporation subject to Corporate Securities Act as not a sale requiring a permit. 12 Ops. Cal. Atty. Gen. 154.

Agreement calling for contribution by members of motion picture cast, in return for appearance in picture plus share in proceeds, as sale of securities. 15 Ops. Cal. Atty. Gen. 78.

Necessity for securing permit from corporation commissioner for exchanges of stock pursuant to amendment of articles of incorporation. *36 Ops. Cal. Atty. Gen. 12*.

Whether stamps or metered tapes to be sold by company or its agents desiring to engage in prepaid freight transportation plan constitute securities. *36 Ops. Cal. Atty. Gen. 194*.

Research References & Practice Aids

Cross References:

When offer of sale of security and offer to sell or to buy deemed made in this state: Corp C § *25008*.

"Security": Corp C § *25019*.

Communication of consent to contract: CC § *1581*.

Investment securities: UCC §§ *8101* et seq.

Administrative Code and Agency References:

Definitions: 10 Cal Code Reg §§ *260.017* et seq.

Legend or escrow of stock dividend shares or split shares: 10 Cal Code Reg § *260.103.5*.

Federal Cross References:

Who is "forced seller" for purposes of maintenance of civil action under sec. 10(b) of Securities Exchange Act of 1934 (*15 USCS sec. 78j(b)* and SEC Rule 10b–5. *59 A.L.R. Fed. 10*.

Jurisprudences:

Am Jur 2d (Rev) Securities Regulation—State § 46.

Legal Periodicals:

The no–sale theory. 47 Cal. L. Rev. 112.

Changes in rights, preferences, privileges, and restrictions on outstanding securities under Corporate Securities Law. 14 Hastings L.J. 94.

Alternatives to bankruptcy for the business debtor. *51 LA Bar Jnl. 135*.

"Sale" under California Corporate Securities Law of 1968. 9 Santa Clara Law. 81.

Preliminary negotiations and the sophisticated investor under the California Corporate Securities Law of 1968. *46 S.C. L. Rev. 856*.

Securities offerings on the Internet. 43 Prac Law No. 8, p. 19.

Treatises:

Cal. Forms Pleading & Practice (Matthew Bender) ch 162 "Corporations: Issuance Of Shares".

Cal. Forms Pleading & Practice (Matthew Bender) ch 515 "Securities And Franchise Regulation".

Cal. Legal Forms, (Matthew Bender) § *2.32[2]*.

Cal. Legal Forms, (Matthew Bender) § *3.142*.

Cal. Legal Forms, (Matthew Bender) § *6.12[1]*.

Cal. Legal Forms, (Matthew Bender) § *6.12[2]*.

Cal. Legal Forms, (Matthew Bender) § *6.12[3]*.

Cal. Legal Forms, (Matthew Bender) § *6.12[4]*.

Cal. Legal Forms, (Matthew Bender) § *6.40*.

Cal. Legal Forms, (Matthew Bender) § *6.111*.

Cal. Legal Forms, (Matthew Bender) § *6.116*.

Cal. Legal Forms, (Matthew Bender) § *6H.20[1]*.

Cal. Legal Forms, (Matthew Bender) § *6H.20[2]*.

Cal. Legal Forms, (Matthew Bender) § *6H.21[3]*.

Cal. Legal Forms, (Matthew Bender) § *6H.120*.

Cal. Legal Forms, (Matthew Bender) § *6H.241[1]*.

Cal. Legal Forms, (Matthew Bender) § *6H.250[1]*.

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Cal. Legal Forms, (Matthew Bender) § *6J.02[2]*.

Cal. Legal Forms, (Matthew Bender) § *6J.19[3]*.

Cal. Legal Forms, (Matthew Bender) § *6J.121*.

Cal. Legal Forms, (Matthew Bender) § *6J.203[1]*.

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Current techniques for financing California high technology start–up corporations. 4 CEB Bus L Practitioner No. 2 p 41.

Rutter Cal Prac Guide, Corporations §§ 7:266 et seq.

9 Witkin Summary (10th ed) Corporations §§ 239, 410.

11 Witkin Summary (10th ed) Community Property § 200.

Annotations:

Sale of memberships in club or similar organization as sale of securities within provisions of securities acts. *87 ALR2d 1140*.

Sales as "isolated" or "successive," or the like, under state securities acts. *1 ALR3d 614*.

What constitutes "public" or "private" offering within meaning of state securities regulation. *84 ALR3d 1009*.

Hierarchy Notes:

Cal Corp Code

Cal Corp Code Tit. 4, Div. 1

Cal Corp Code Tit. 4, Div. 1, Pt. 1

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