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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 D&O
DEFENDANTS' MOTION TO DISMISS
SECOND 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

1 “D&O Defendants”), by and through their attorneys of record, HOLLAND & HART LLP, hereby
2 submit this Reply in support of their Motion to Dismiss the *Second Amended Complaint for*
3 *Damages* filed by Plaintiff Daniel E. Wolfus (“Wolfus” or “Plaintiff”) pursuant to Rules 12(b)(1),
4 (2) and (5) of the Nevada Rules of Civil Procedure (“NRCP”).

5 DATED this 2nd day of May 2018.

6
7 By /s/ David J. Freeman
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1 **REPLY MEMORANDUM IN SUPPORT OF D&O DEFENDANTS' MOTION TO**
2 **DISMISS SECOND AMENDED COMPLAINT**

3 I.

4 **INTRODUCTION**

5 Defendants' Motion conclusively demonstrated that the Plaintiff's Second Amended
6 Complaint should be dismissed for failure to state a claim. Plaintiff's Opposition reflects a
7 desperate attempt to avoid dismissal of his meritless claims. Unable to articulate a reasoned
8 response to the legal arguments presented in the Motion, Plaintiff's Opposition consists primarily
9 of cutting and pasting the factual allegations from the Second Amended Complaint, and offering
10 conclusory arguments that he has sufficiently pled the elements of each claim. Plaintiff ignores
11 many of the arguments presented in the Motion, the Opposition is replete with misstatements
12 regarding Defendants' positions, and Plaintiff badly misconstrues and misrepresents the holdings
13 of the cases he relies on to oppose the Motion.

14 The Motion should be granted because (1) Plaintiff has failed to demonstrate that his
15 breach of fiduciary duty claims are direct as opposed to derivative under the direct harm test in
16 the *Parametric Sound Corp.* decision, as the harm suffered by Defendants' alleged failure to
17 disclose material facts was the loss in company value; (2) Plaintiff cannot avoid the plain language
18 of the California securities law statute that provides that the exercise of a right to purchase stock
19 is not a purchase or sale under the statute; (3) California law does not govern the fraud and
20 negligent misrepresentation claims, and Plaintiff cannot show that either Nevada or British
21 Columbia would recognize Plaintiff's holder claims; (4) Plaintiff's fraud and misrepresentation
22 claims fail independently for failure to sufficiently plead reliance and causation (among others);
23 and (5) Nevada lacks personal jurisdiction over the D&O Defendants other than Mr. Yu.

24 Because Plaintiff has tried and failed in three opportunities to assert viable legal claims
25 against the Defendants, the Court should dismiss the Second Amended Complaint ("SAC") *with*
26 *prejudice*.

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II.

LEGAL ARGUMENT**A. Plaintiff's Breach of Fiduciary Duty and Aiding and Abetting Claims are Derivative.**

As with his initial Opposition, Plaintiff offers no meaningful response to the arguments that the internal affairs doctrine applies or that British Columbia law requires leave from the British Columbia Supreme Court to assert any derivative claims against the officers and directors of Midway.¹ EDCR 2.20(e). Nor does Plaintiff cite to any British Columbia law that would support the assertion of his breach of fiduciary duty claims.

Instead, Plaintiff offers the conclusory argument that his claims are direct, not derivative, because "if there is a recovery, damages would go to Wolfus for money lost in purchasing and holding his stock, not to the corporation." Opp. at Sec. III.B.² But Plaintiff clearly misunderstands the *Parametric Sound Corp.* decision. The Nevada Supreme Court found that to distinguish between direct and derivative claims, Nevada "courts should consider only '(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)'" 401 P.3d at 1100, 1107-08 (quoting *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d. 1031, 1033 (Del. 2004)). Plaintiff's simplistic argument that he lost money in purchasing and holding stock and therefore he would receive any recovery is entirely without merit. Plaintiff still alleges that the directors and officers failed to report negative information regarding Midway's Nevada operations, and that the value of Plaintiff's stock diminished as a result. SAC ¶ 65, 66, 86, 95, 96. Accordingly, the harm suffered by the D&O Defendants' omission of alleged material facts was a loss in the value of Midway stock. But this Court

¹ As discussed in the Motion, Nevada recognizes the internal affairs doctrine, which requires that British Columbia law applies (Mot. at 8-9), and Plaintiff's derivative claims fail to satisfy two separate and necessary preconditions for bringing an action on behalf of a British Columbian corporation: (1) providing notice to the directors prior to initiating the action; and (2) obtaining judicial permission from the Supreme Court of British Columbia to bring the derivative action prior to filing suit. Mot. at 9 (citing BCA §§ 232 & 233).

² Because Plaintiff did not number his pages in the Opposition, Defendants can only cite to the Sections of the Opposition brief.

1 previously analyzed these same claims and correctly determined that in applying the direct harm
2 test in *Parametric*, the company suffered the alleged harm and any benefit recovered based upon
3 the non-disclosure of the 2013 and 2014 “Undisclosed Facts” would be recovered by all of the
4 company’s shareholders. *See* Order Granting Defs.’ Mot. to Dismiss Am. Compl. Without
5 Prejudice (filed Jan. 5, 2018). Nothing in the Second Amended Complaint or in the Opposition
6 changes this Court’s analysis. Because Plaintiff’s breach of fiduciary duty claims are still
7 derivative in nature, Plaintiff lacks standing to assert them.

8 Plaintiff’s reliance upon *Citigroup v. AHW Investment*, 140 A.3d 1125 (Del. 2016) is
9 entirely misplaced. In that case, the court merely determined that the direct harm test in *Tooley*
10 did not apply in determining whether the plaintiff’s “holder” claims were direct or derivative
11 because both New York and Florida state law provided that holder claims belong to the
12 stockholder and not the corporation. But the *Citigroup* court ***was not analyzing breach of***
13 ***fiduciary duty claims***, but rather “holder” claims for fraud and negligent misrepresentation.
14 Plaintiff’s improper conflation of the arguments concerning breach of fiduciary duty and “holder”
15 claims—whether intentional or not—must be rejected.³ The breach of fiduciary duty claims in
16 the SAC still seek recovery for the diminution in value that the company—and in turn all
17 stockholders—would have suffered from the D&O Defendants’ alleged failure to disclose
18 material facts, which means they are derivative under the direct harm test adopted in *Parametric*.
19 Plaintiff’s effort to isolate himself from the harm suffered by all shareholders fails. *Feldman v.*
20 *Cutaia*, 951 A.2d 727, 733 (Del. 2008) (“Where all of a corporation’s stockholders are harmed
21 and would recover *pro rata* in proportion with their ownership of the corporation’s stock solely
22 because they are stockholders, then the claim is derivative in nature.”); *Lee v. Marsh & McLennan*
23 *Companies, Inc.*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 24 (N.Y. Sup. Ct. 2007) (holding that the
24 wrong is “entirely derivative, since [a]ny devaluation of stock is shared collectively by all the
25 shareholders, rather than independently by the plaintiff or any other individual shareholder.”).
26 Consequently, Plaintiff’s breach of fiduciary duty claims are derivative and should be dismissed.

27 _____
28 ³ Plaintiff’s holder claims fail independently for the reasons set forth in the Motion and Section II.C, *infra*.

1 **B. The California Securities Law Claim Still Fails as a Matter of Law**

2 As we explained in detail in the Motion, Plaintiff's California securities law claim fails
3 because Plaintiff cannot allege any misrepresentation by the D&O Defendants "in connection
4 with a purchase or sale of a security." Mot. at 13-16. Plaintiff's Opposition argues that because
5 Plaintiff "twice bought Midway stock in California directly from Midway," and "paid money for
6 the shares," the transaction constitutes "a sale of a security for value" and he has a viable
7 California securities law claim. Opp. at Sec. III.B. But Plaintiff's "purchases" were actually
8 exercises of stock options, as demonstrated by Plaintiff's allegations and as reflected in the Form
9 4s. See SAC ¶¶ 66, 87; Mot. Exs. I, J. Under the plain language of the California statute, purchases
10 and sales of stock options are deemed to occur at the time the stock options are granted, not at the
11 time the options are later exercised. CAL. CORP. CODE § 25017(e). That provision explicitly
12 states that:

13 Every sale or offer of a warrant *or right to purchase* or subscribe to
14 another security of the same or another issuer, as well as every sale
15 or offer of a security which gives the holder a present or future right
16 or privilege to convert the security into another security of the same
17 or another issuer, includes an offer and sale of the other security only
at the time of the offer and sale of the warrant or right or convertible
security and *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.

18 *Id.* (emphasis added).⁴ Plaintiff frivolously argues that "[a] buy of Midway common stock (by
19 exercise of an option) does not fall into the wording of the exception." Opp. Sec. III.B. But
20 Plaintiff provides no analysis explaining how his acquisition of the Midway stock options does
21 not fall squarely within the language of Section 25017. Nor do the cases upon which he relies
22 support such a proposition.⁵ D&O Defendants are not required to offer case law to support the

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24 ⁴ A stock option clearly fits within this definition. See <https://thelawdictionary.org/option/> ("An
25 option is a privilege existing in one person, for which he has paid money, *which gives him the*
26 *right to buy* certain merchandise or *certain specified securities* from another person, if he chooses,
at any time within an agreed period, at a fixed price, or to sell such property to such other person
at an agreed price and time.") (emphasis added).

27 ⁵ Contrary to the statement in Plaintiff's Opposition (Sec. III.B), the California Supreme Court in
28 *Stormedia v. Superior Court*, 976 P.2d 214 (Cal. 1999), neither cited to nor discussed Section
25017(e). The court *did* address Section 25400(e), but that section is completely irrelevant to the
exercise of stock options and therefore does not support Plaintiff's argument here.

1 plain language of the statute. Because Plaintiff acquired his stock options in 2009 (*see* Mot. Exs.
2 I, J) and there is no allegation of any misrepresentation in connection with his acquisition of the
3 options in 2009, Plaintiff fails to state a claim upon which relief can be granted and the California
4 securities law claim must be dismissed.

5 Nor does the Second Amended Complaint sufficiently allege that the D&O Defendants
6 made specific statements upon which Plaintiff supposedly relied. Instead, Plaintiff merely alleges
7 in conclusory fashion, and without any factual support, that “defendants caused Midway to make
8 material misstatements of fact.” SAC ¶ 1, 66, 87. But there are no allegations of facts
9 demonstrating that the D&O Defendants knew about the “2013 Undisclosed Facts” or the “2014
10 Undisclosed Facts” or that Defendants knew they were false at the time those statements were
11 supposedly made. Further, there is no allegation that the D&O Defendants made any statements
12 with the “intent to deceive or defraud” the Plaintiff.

13 Plaintiff relies upon *Arei II Cases*, 216 Cal. App. 4th 1004, 1015, 157 Cal. Rptr. 3d 368,
14 376 (2013) for the unremarkable proposition that officers and directors can be “secondary actors”
15 who assist in a primary violation. But the *Arei II* court found that the plaintiff in that case failed
16 to sufficiently allege a securities fraud claim where the plaintiff did not provide specific
17 allegations regarding the role of the defendants in the preparation or distribution of the private
18 placement memorandum or facts showing that that it provided material assistance to the violation.
19 *Id.* Plaintiff’s claim suffers the same deficiencies here – Plaintiff does not allege the specific role
20 of each of the D&O Defendants in preparing the public statements or allege how each D&O
21 Defendant supposedly knew about the allegedly “Undisclosed Facts.” Plaintiff merely alleges
22 that the each of the Defendants “was responsible for insuring that Midway publicly disclosed all
23 material information” SAC ¶ 64. But merely identifying their capacities is insufficient to
24 demonstrate each of the D&O Defendants’ participation in preparing the public disclosures, their
25 knowledge of the Undisclosed Facts, or their knowledge of the falsity or incompleteness of the
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1 public disclosures. Accordingly, Plaintiff has failed to allege facts sufficient to state a claim
2 against any of the D&O Defendants.⁶

3 Finally, as discussed in the Motion, the D&O Defendants cannot be secondary violators
4 when Plaintiff cannot establish a primary violation by Midway.⁷ Because Plaintiff's claims relate
5 to his exercise of options which were granted in 2009, Plaintiff cannot allege a primary violation
6 of Section 25501 by Midway, and therefore Plaintiff cannot state claims against the D&O
7 Defendants for secondary liability under Sections 25403 or 25504.

8 For these reasons, the California securities law claim must be dismissed, with prejudice.

9 **C. Plaintiff's Fraud and Negligent Misrepresentation Claims Must Be**
10 **Dismissed.**

11 As discussed at length in the Motion, Plaintiff's fraud and negligent misrepresentation
12 claims must be dismissed pursuant to NRCP 12(b)(5) for at least three reasons: *First*, California
13 law does not apply to Plaintiff's claims and neither Nevada nor British Columbia law recognizes
14 holder claims. *Second*, even if the Court applies California law, Plaintiff's fraud and negligent
15 misrepresentation claims fail because Plaintiff has failed to show reliance or causation. *Third*,
16 Plaintiff's fraud claim fails to allege scienter on the part of the D&O Defendants. And *fourth*,
17 Plaintiff's negligent misrepresentation claim fails because the D&O Defendants cannot
18 negligently misrepresent omitted facts as a matter of law.

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23 ⁶ Nor can Plaintiff amend his complaint based upon a self-serving declaration submitted in
24 Opposition to a Motion to Dismiss. *Barbera v. WMC Mortgage Corp.*, C 04-3738 SBA, 2006 WL
25 167632, at *2 n.4 (N.D. Cal. Jan. 19, 2006) ("It is axiomatic that the complaint may not be amended
by briefs in opposition to a motion to dismiss.") (quoting *Car Carriers, Inc. v. Ford Motor Co.*,
745 F.2d 1101, 1107 (7th Cir. 1984)). Accordingly, Plaintiff cannot rely on his declaration to
correct deficiencies in the Second Amended Complaint.

26 ⁷ In arguing that privity is not required for a secondary violation, Plaintiff misses the point of the
27 D&O Defendants' argument regarding privity. The D&O Defendants' argument is that Plaintiff
28 cannot assert a claim against the D&O Defendants as *primary* violators under Section 25501
because Plaintiff did not purchase the stock options from the D&O Defendants, and therefore there
is no privity between Plaintiff and the D&O Defendants. Mot. at 15-16.

1 ***1. California Law Does Not Apply to the Fraud and Negligent***
2 ***Misrepresentation Claims and the Court Should Not Recognize Holder***
3 ***Claims.***

4 Plaintiff argues that California law governs his common law fraud claims, but fails to offer
5 any analysis refuting the well-settled case law in the Motion demonstrating that under Nevada
6 law, the internal affairs doctrine applies. In doing so, Plaintiff grossly misrepresents that
7 Defendants do not “argue against application of California law on the inducement to purchase
8 part of the claim.”⁸ Opp. at Sec. III.E. In fact, the Motion says the ***exact opposite***. See Mot. at
9 18:10-11 (“because Midway is a Canadian corporation ***Canadian substantive law governs***
10 ***Plaintiff’s fraud and misrepresentation claims, not California law.***”) (emphasis added).
11 Plaintiff has failed entirely to respond to the D&O Defendants’ analysis in the Motion
12 demonstrating that the internal affairs doctrine requires application of Canadian law here.

13 Nor does Plaintiff dispute that the vast majority of jurisdictions in the United States refuse
14 to recognize “holder” claims for a variety of reasons, including because such claims are too
15 speculative. *E.g.*, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734-735, 95 S. Ct.
16 1917, 44 L. Ed. 2d 539 (1975) (refusing to recognize holder claims under federal securities law,
17 primarily due to their speculative nature and difficulties in proof); *Rivers v. Wachovia Corp.*, 665
18 F.3d 610, 619 (4th Cir. 2011) (holding that holder claims are “too speculative to litigate” as they
19 “involve only a hypothetical transaction”); *The Calibre Fund, LLC v. BDO Seidman, LLP*, 2010
20 WL 4517099 at *5 (Conn. Super. 2010) (“A decision not to sell but to hold onto securities may
21 be regrettable, but such decisions must always be made without the power of hindsight... . failure
22 to sell claims are ‘too speculative to be actionable’”); *WM High Yield Fund v. O’Hanlon*, 2005
23 WL 6788446 at *13 (E.D. Pa. 2005) (“the Court declines to find that the Pennsylvania Supreme
24 Court would find a cause of action in fraud for investors who were allegedly injured by holding
25 securities”). Plaintiff has cited no Nevada law, no British Columbia law, and no analysis of the
26 laws of either jurisdiction suggesting that either would recognize holder claims. And this Court

27 ⁸ Plaintiff’s Second Amended Complaint alleges that his fraud claim is based upon *Small v. Fritz*,
28 30 Cal. 4th 167, 171, 65 P.3d 1255 (Cal. 2003). SAC ¶ 128. Although *Small* concerned only a
 holder claim—not a fraud in the inducement claim, Defendants’ arguments in the Motion apply to
 both the fraudulent inducement and holder aspects of Plaintiff’s fraud claim.

1 should decline the invitation to legislate new Nevada law (or British Columbia law) by
2 recognizing such speculative holder claims.⁹

3 **2. Plaintiff's Holder Claims Fail to Sufficiently Allege Reliance and**
4 **Causation¹⁰**

5 Even if the Court were to find that California law applies to the fraud and negligent
6 misrepresentation claims, the claim is still subject to dismissal because Plaintiff's Complaint fails
7 to allege reliance and causation necessary to support the claims. Even in those jurisdictions, like
8 California, which recognize holder claims, the courts have specifically recognized the risk of
9 meritless and vexatious strike suits, and expressly limited "holder claims" to "stockholders who
10 can make a bona fide showing of actual reliance upon the misrepresentations." *E.g. Small*, 30 Cal.
11 4th at 184-85. The *Small* court found that to allege specific reliance, a plaintiff must allege "for
12 example, that if the plaintiff had read a truthful account of the corporation's financial status the
13 plaintiff would have sold the stock, **how many shares the plaintiff would have sold**, and **when**
14 **the sale would have taken place.**" *Id.* (emphasis added). The court also found that a plaintiff
15 "must allege actions, as distinguished from unspoken and unrecorded thoughts and decisions, that
16 would indicate that the plaintiff actually relied on the misrepresentations." Otherwise, the plaintiff
17 would "not stand out from the mass of stockholders who rely on the market...." *Id.*

18 Similarly, in *Anderson*, the district court on remand dismissed the plaintiff's holder claim
19 because he did not "sufficiently explain when exactly he relied on th[e] representations; how
20 many [] shares he would have sold, had he known of the company's financial troubles; or when
21 he would have executed that sale." *Anderson*, 2011 U.S. Dist. LEXIS 111217, at *19 (N.D. Ill.

22 ⁹ Plaintiff also states that Defendants have "dropped the claim that the common law fraud claim
23 was derivative." Opp. Sec. III.E. Not so. While *Citigroup v. AHW Investment*, 140 A.3d 1125
24 (Del. 2016) observed that holder claims are direct under New York and Florida state law, other
25 courts have found such fraud claims to be derivative in nature. *E.g., Rivers v. Wachovia Corp.*,
26 665 F.3d 610, 616 (4th Cir. 2011) (plaintiff's claim that he was induced to continue to hold his
Wachovia shares through a price decline was derivative because such losses were "common to all
Wachovia shareholders during the credit crisis"); *Arent v. Distribution Sciences, Inc.* 975 F.2d
1370, 1373-74 (8th Cir. 1992) (same). The Court need not address the issue here because Plaintiff's
fraud claim fails for several independent reasons.

27 ¹⁰ As discussed in the Motion, Plaintiff's exercises of stock options are not covered by the *Small*
28 decision because the exercise of stock options is an acquisition, not a holding, of shares. Mot. at
17.

1 Sept. 29, 2011). On a second appeal, the Seventh Circuit affirmed dismissal *with prejudice* for
2 failure to “explain how [plaintiff] could have avoided a loss on the shares he held, had [defendant]
3 made an earlier disclosure.” *Anderson v. Aon Corp.*, 674 F.3d 895, 897 (7th Cir. 2012).

4 Plaintiff alleges that he “carefully followed the public announcements and filings by
5 Midway.” SAC ¶ 87. But the Second Amended Complaint still does not specifically allege when
6 he decided to hold his stock; what specific information he relied on regarding the company’s
7 statements in order to hold his stock; what his plan was for selling the stock; how many Midway
8 shares he would have sold if he had known the “Undisclosed Facts;” or when he would have
9 executed each such sale. And, not surprisingly, Plaintiff’s Second Amended Complaint (and the
10 Opposition) fails to allege any facts demonstrating how Plaintiff would have known to sell his
11 shares at Midway’s February 2014 peak. SAC ¶ 106; *Chanoff v. U.S. Surgical Corp.*, 857 F. Supp.
12 1011, 1018 (D. Conn. 1994) (“plaintiffs have not alleged cognizable loss because plaintiffs cannot
13 claim the right to profit from what they allege was an unlawfully inflated stock value”). Unable
14 to present such particularized allegations of reliance and causation, Plaintiff must stand with the
15 millions of other stockholders—including the D&O Defendants—who lost money when
16 Midway’s declared bankruptcy in 2015. Plaintiff’s claim should be dismissed *with prejudice*.

17 3. Plaintiff’s Fraud Claim Fails For Lack of Scienter.

18 Plaintiff’s fraud claim fails for the additional and independent reason that he has failed to
19 plead scienter by the D&O Defendants. Plaintiff argues that paragraphs 105 and 110 of the SAC
20 adequately plead scienter. Opp. Sec. III.A.5. But paragraph 110 makes only the conclusory
21 allegation that “the failure by the 2014 Control Defendants to disclose the 2014 Undisclosed Facts
22 was intentional and done to encourage investors to retain and purchase Midway’s common stock.”
23 SAC ¶ 110. While Plaintiff’s Second Amended Complaint identifies “Undisclosed Facts”
24 allegedly known by the D&O Defendants but not disclosed to the public generally or to him (SAC
25 ¶¶ 64, 65, 66, 70, 86), Plaintiff does not allege how the D&O Defendants knew of the Undisclosed
26 Facts or how they had knowledge of any alleged misrepresentations in the public statements that
27 were made. Nor does Plaintiff allege with particularity how each of these particular alleged
28 omissions contributed to Midway’s filing of bankruptcy—as opposed to constituting mere

1 mismanagement of Midway. Of course, Midway's mismanagement in connection with the
2 operation of the Pan Mine cannot support fraud (or negligent misrepresentation) allegations in a
3 holder action. *See Anderson*, 614 F.3d at 367 (explaining that any alleged fraud merely "deferred
4 the time when the stock's price accurately reflected the value of Aon's business").

5 **4. The Negligent Misrepresentation Claim Fails Because the D&O**
6 **Defendants Could Not Negligently Misrepresent Omitted Facts.**

7 Plaintiff's negligent misrepresentation claim fails because Plaintiff has not alleged false
8 statements of fact made by the D&O Defendants, but rather that they omitted certain "Undisclosed
9 Facts." Specifically, the SAC merely lists certain "Undisclosed Facts" allegedly known by the
10 D&O Defendants but not disclosed to the public generally or to Plaintiff (SAC ¶¶ 65, 66, 70, 86).
11 But there are no allegations regarding which statements, if any, in Midway's press releases and
12 SEC filings are false or misleading. Nor does Plaintiff sufficiently alleged how any Defendant
13 made such alleged misrepresentations of a past of existing material fact "without reasonable
14 ground for believing it to be true." In his Opposition, Plaintiff argues that paragraph 63 alleges
15 that Midway issued a press release regarding the Record of Decision for the Pan project. *See Opp.*
16 *Sec. III.F.* But the SAC does not allege that this press release contained false statements. Nor
17 does Plaintiff allege that the other public statements listed in the SAC were false. However,
18 California law—upon which Plaintiff purportedly relies to support his claim—requires a "positive
19 assertion" by the defendant to sustain a claim for negligent misrepresentation. *Wilson v. Century*
20 *21 Great Western Realty*, 15 Cal. App. 4th 298, 306, 18 Cal. Rptr. 2d 779 (1993); *Byrum v. Brand*,
21 219 Cal. App. 3d 926, 942, 268 Cal. Rptr. 609 (1990). Because Plaintiff does not allege the D&O
22 Defendants made a false representation, but rather omitted material facts, the claim for negligent
23 misrepresentation should be dismissed. *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 835, 121 Cal.
24 Rptr. 2d 703 (2002) ("An essential element of a cause of action for negligent misrepresentation
25 is that the defendant must have made a misrepresentation as to a past or existing material fact.")
26 (citation omitted).

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D. The Court Should Dismiss Plaintiff's Second Amended Complaint With Prejudice.

Plaintiff has now had three opportunities to properly plead a claim upon which relief can be granted. Each time he has failed, and he has not demonstrated in the Opposition facts sufficient to show that he can plead legally cognizable claims. As discussed above, Plaintiff's Complaint does not suffer from mere "technical pleading arguments"—Plaintiff's claims fail as a matter of law. Courts have routinely dismissed complaints *with prejudice* where a plaintiff has been given an opportunity to correct the pleading deficiencies and has failed to do so. *E.g., Anderson*, 2011 U.S. Dist. LEXIS 111217, at *19 (N.D. Ill. Sept. 29, 2011), *aff'd*, 674 F.3d 895 (7th Cir. 2012) (dismissing holder claims with prejudice). The Court should dismiss the SAC with prejudice.

E. The Court Should Dismiss the D&O Defendants For Lack of Personal Jurisdiction

1. Plaintiff Concedes This Court Does Not Have General Jurisdiction Over the D&O Defendants.

In the Opposition, Plaintiff contends this Court has general jurisdiction over a single D&O Defendant, Frank Yu. *See* Opp. Sec. IV.A. The Court's general jurisdiction over Mr. Yu is not and has never been at issue before this Court. The D&O Defendants specifically acknowledged the Court's general jurisdiction with respect to Mr. Yu in the Motion. *See* Mot. at 26 n.28. Nevertheless, the claims asserted against Mr. Yu are still ripe for dismissal because this Court lacks subject matter jurisdiction and the SAC fails to state a claim upon which relief may be granted.

In the Motion, the non-resident D&O Defendants demonstrated that this Court should dismiss the SAC, pursuant to NRCP 12(b)(2), because exercising personal jurisdiction over the nonresident D&O Defendants, *other than Mr. Yu*, would be improper and offend due process. *See* Mot. at 28:4-29:21. Specifically, the D&O Defendants' contacts with the form state are not so "continuous and systematic" as to render [the defendant] essentially *at home* in the forum State." *See also Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 5, 342 P.3d 997, 1002 (2015) (citing *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. Adv. Op. 40, 328

P.3d 1152, 1156-57 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, --- U.S. ---, 131 S. Ct. 2846, 2851 (2011)) (emphasis added); *see also Daimler AG v. Bauman*, --- U.S. ---, 134 S. Ct. 746, 761 (2014). Because Plaintiff failed to respond entirely with respect to this issue (*see generally* Opp. Sec. IV.A.-B.), Plaintiff concedes this Court cannot exercise general jurisdiction over the remaining D&O Defendants. *See* EDCR 2.20(e) (“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.”). Accordingly, the Motion should be granted and the SAC dismissed pursuant to NRCP 12(b)(2).

2. Plaintiff’s Contrived Personal Jurisdiction Standard is Fictitious, Not Recognized By the Supreme Court of Nevada and Impermissibly Broad.

Plaintiff repeatedly misrepresents the scope of this Court’s personal jurisdiction in an attempt to cast an overly broad net to improperly reel the non-resident D&O Defendants into this action. The Opposition is riddled with erroneous and misleading legal citations that do not support the propositions with which the citation is associated. By way of example only, Plaintiff cites to *Fulbright* for the proposition that general jurisdiction exists when a party has simply “**sustained contacts** with the forum state” and specific jurisdiction exists when a non-resident has “minimum contacts with the forum state which are **related to the complaint**.” Opp. Sec. IV. (emphasis added). Similarly, Plaintiff cites to *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 700, 857 P.2d 740, 748 (1993), for the proposition that specific jurisdiction exists when a party “**intentionally involves** the forum.” *Id.* (emphasis added); *id.* Sec. IV.B. (“Defendants intentionally involved Nevada.”). As demonstrated in the Motion, neither *Fulbright*, *Trump* nor any other Nevada authority support these misleading propositions, which erroneously purport to expand the actual scope of this Court’s personal jurisdiction.¹¹ Plaintiff is playing fast and loose

¹¹ In *Fulbright*, the Supreme Court of Nevada recognized that a court may exercise general jurisdiction over a nonresident defendant only when its contacts with the forum state are so “‘continuous and systematic’ as to render [the defendant] essentially **at home** in the forum State.” *Fulbright*, 342 P.3d at 1001–02 (emphasis added). The standard for general jurisdiction is not, as Plaintiff contends, when “a party has sustained contacts with the forum state.” Opp. Sec. IV. The Supreme Court further recognized that, unlike general jurisdiction, specific jurisdiction is proper only where “‘**the cause of action arises from the defendant’s contacts with the forum**.’” *Id.* at 1002 (quoting *Trump*, 109 Nev. at 699, 857 P.2d at 748) (emphasis added). The standard for specific jurisdiction is certainly not, as Plaintiff states, when the “minimum contacts with the

1 by making the representation that these standards were adopted by the Supreme Court of Nevada.
2 Because Plaintiff's contrived jurisdictional standards cannot serve to expand the scope of this
3 Court's jurisdictional powers by giving it authority to unjustly reach across this continent and pull
4 the non-resident D&O Defendants into a Nevada courtroom, the Motion must be granted and the
5 case dismissed for a lack of personal jurisdiction.

6 **3. The Cases Cited in the Opposition Demonstrate That This Court Lacks**
7 **Specific Jurisdiction over the D&O Defendants.**

8 None of Plaintiff's cited cases support the exercise of specific jurisdiction. For example,
9 the breach of fiduciary claims asserted by the former clients in *Fulbright & Jaworski LLP v.*
10 *Eighth Judicial Dist. Court*, 342 P.3d 997 (2015) ("Fulbright I") and *Fulbright & Jaworski v.*
11 *Eighth Judicial Dist. Court*, 2017 WL 1813958 (June 27, 2017) ("Fulbright II"), arose directly
12 out of the investment meetings conducted in Nevada by the law firm's attorney. In this case,
13 Plaintiff's claims arise out of his alleged reliance upon purported material omissions contained in
14 Midway's SEC filings and press releases (*see* SAC ¶¶ 101, 106, 126, 127, 135, 136), which were
15 entirely drafted in and issued from the state of *Colorado* where Midway's principal place of
16 business and executive offices are located and were received and purportedly acted upon by
17 Plaintiff in the state of *California* (*see* SAC ¶ 1). Because Plaintiff has not alleged, and cannot
18 allege, that any of the D&O Defendants' allegedly tortious conduct (material omissions in public
19 filings) took place in Nevada, the D&O Defendants are not subject to specific personal jurisdiction
20 in Nevada.

21 Similarly, in *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 857 P.2d 740 (1993),
22 the Court exercised specific jurisdiction over Trump because he and his agent actively pursued a
23 future employee who lived in Nevada, negotiated an employment agreement with the employee
24 over a period of months while the employee lived in Nevada, and set up a trust in Nevada as part
25 of the agreement. *Id.* at 701-702. The Court reasoned that *because the action directly related to*

26
27 *forum state* [] are ***related to the complaint***" (Opp. Sec. IV) or "when a party intentionally involves
28 a forum" (*id.*). The standards recognized by the Supreme Court are significantly more narrow than
those proffered by Plaintiff so as not to offend due process.

1 *Trump's contacts with Nevada and arose, in part, from the consequences of Trump's conduct*
2 *in Nevada*, Trump should have reasonably anticipated being haled into court in Nevada. Unlike
3 in *Trump*, each of the Plaintiff's claims arise out of his reliance upon purported material omissions
4 contained in SEC filings and press releases drafted in and issued from the state of *Colorado* and
5 received and purportedly acted upon by Plaintiff in the state of *California*. Because none of the
6 D&O Defendants' allegedly tortious conduct took place in Nevada or was directed toward
7 Nevada, the Court lacks specific jurisdiction over the D&O Defendants.

8 Finally, in *Consipio Holding, BV v. Carlberg*, 282 P.3d 751 (2012), the Nevada Supreme
9 Court held that Nevada courts can exercise personal jurisdiction over nonresident officers and
10 directors who directly harm *a Nevada corporation*, reasoning that "[w]hen officer or directors
11 directly harm a Nevada corporation, they are *harming a Nevada citizen*. By purposefully
12 directing harm towards a *Nevada citizen*, officers and directors establish contacts with Nevada
13 and affirmatively direct conduct toward Nevada." *Id.*, 128 Nev. at ___, 282 P.3d at 755 (emphasis
14 added). But *Consipio* does not support the exercise of specific jurisdiction here because Plaintiff
15 is *not a Nevada citizen* and *Midway is not a Nevada corporation*. Plaintiff, a California citizen,
16 purports to assert direct claims against directors and officers, which makes the exercise of
17 personal jurisdiction even more tenuous.¹² Furthermore, the D&O Defendants did not perform
18 any of the alleged wrongful acts in Nevada, but rather Colorado, where the purported material
19 omissions were made in Midway's SEC filings and press releases. *See* SAC ¶¶ 101, 106, 126,
20 127, 135, 136. The only connection the D&O Defendants have to Nevada is attending the
21 ceremonial groundbreaking of the Pan Mine and the occasional board meeting, which did not give
22

23 ¹² Even with respect to a Nevada corporation, mere affiliation with a Nevada operation is not
24 enough to confer jurisdiction on nonresident defendants. *See Southport Lane Equity II, LLC v.*
25 *Downey*, 177 F. Supp. 3d 1286 (D. Nev. 2016). In *Southport Lane*, the court concluded that
26 accepting a position as an officer or director of a Nevada corporation does not demonstrate that a
27 defendant has purposefully availed himself of the privilege of conducting activities within the
28 forum state, and is thus insufficient to satisfy due process. 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).

1 rise to any of the claims asserted in the SAC. Because no Nevada corporation is involved in this
2 suit and the D&O Defendants did not expressly aim any conduct at Nevada associated with
3 Plaintiff's allegations of wrongdoing, this Court has no specific jurisdiction and must dismiss the
4 SAC.

5 **4. Plaintiff's Claims Do Not Arise Out of Defendants' Purported Forum-**
6 **Related Activity.**

7 Plaintiff's self-serving declaration fails to make a prima facie showing of specific
8 jurisdiction. In the declaration, Plaintiff contends Blacketor and Moritz were "often in Nevada"
9 as officers and/or directors of Nevada companies that were "involved with Midway and the Nevada
10 gold mines." *See* Opp. Sec. IV.B. Plaintiff further declares that Blacketor, Newell, Sheridan,
11 Sawchak, Knutson and Yu participated in various committees organized on behalf of the
12 nonresident Midway Gold. *See id.* Lastly, Plaintiff declares that one or more of the D&O
13 Defendants attended "frequent meetings," fundraising events, project review meetings, BLM
14 meetings with government officials, and board and staff meetings in Nevada. *Id.* But even if this
15 Court assumes *all* of these allegations are true, **this Court would still not have specific jurisdiction**
16 **over the D&O Defendants because Plaintiff's claims have absolutely nothing to do with (1) the**
17 **D&O Defendants' conduct as officers and/or directors of third-party Nevada entities, (2) the**
18 **knowledge the D&O Defendants' obtained from serving on committees or (3) the meetings the**
19 **D&O Defendants' purportedly attended in Nevada.** *Trump*, 109 Nev. at 699, 857 P.2d at 748
20 (specific jurisdiction is proper only where "the cause of action arises from the defendant's contacts
21 with the forum.").

22 The events that are the subject of this lawsuit are the purported material omissions made in
23 Midway's SEC filings and press releases (*see* SAC ¶¶ 101, 106, 126, 127, 135, 136), which were
24 drafted and issued in Colorado and purportedly received by Plaintiff in California, not the Nevada
25 actions of the D&O Defendants as executives of other, Nevada-based, non-party entities.
26 Tellingly, Plaintiff does not even attempt to explain how the material omissions contained in the
27 SEC filings and press releases "arose out of" the D&O Defendants' conduct as executives of the
28 Nevada entities, committee members or the meetings identified in the declaration. As a result,

1 Plaintiff failed to meet his burden of demonstrating his claims arise out of the D&O Defendants'
2 purported forum-related conduct. Absent such evidence there is no basis for the exercise of
3 specific jurisdiction, and dismissal of Plaintiff's SAC must follow.

4 **F. Plaintiff's Request For Jurisdictional Discovery Should Be Denied.**

5 Plaintiff's request for discovery and an evidentiary hearing with respect to personal
6 jurisdiction (*see* Opp. Sec. IV.C.) should likewise be denied. As discussed above, Plaintiff's
7 theories of personal jurisdiction fail to support the exercise of personal jurisdiction as a matter of
8 law. Accordingly, discovery would serve no purpose.

9 Moreover, Plaintiff has not identified any particular facts not currently available to him
10 that would otherwise be relevant to any of the jurisdictional issues currently before the Court.
11 stated above, even if Plaintiff were able to establish each of the theories identified above, such
12 activities do not constitute the purposeful availment necessary to give rise to personal jurisdiction
13 in Nevada.

14 Jurisdictional discovery is proper only where a plaintiff "demonstrate[s] how further
15 discovery would allow it to contradict the affidavits of [the defendant]." *Terracom v. Valley Nat'l*
16 *Bank*, 49 F.3d 555, 562 (9th Cir. 1995). The plaintiff must "specify the discovery it would
17 propound and how that discovery would lead to information that would help it overcome the
18 jurisdictional deficiencies" in its case. *Baca Gardening & Landscaping, Inc. v. Prizm Vinyl Corp.*,
19 2008 WL 4889030, at *6 (C.D. Cal. Nov. 12, 2008). Jurisdictional discovery is not warranted
20 where the parties "do not dispute pivotal facts bearing on the question of jurisdiction" and the
21 plaintiff "fails to meet its burden of establishing a prima facie case of personal jurisdiction against
22 [the defendant]." *Digitone Industrial Company, Ltd. v. Phoenix Accessories, Inc.*, 2008 WL
23 2458194, at *3 (D. Nev. Jun. 13, 2008).

24 Where, as here, a plaintiff fails to demonstrate that jurisdictional discovery would yield
25 sufficient facts to support the exercise of jurisdiction, the request for jurisdictional discovery is
26 properly denied. *See Forsythe v. Mukasey*, 2009 U.S. Dist. LEXIS 11755, at *9 n.5 (N.D. Cal.
27 Feb. 17, 2009) (denying jurisdictional discovery where plaintiffs "have failed to identify a theory
28 that, if established, would be sufficient to support a finding of either general or specific

jurisdiction”); *Home Gambling Network, Inc. v. Betinternet.com, PLC*, 2006 WL 1795554, at *5 (D. Nev. June 26, 2006) (Dawson, J.) (jurisdictional discovery denied where it “would not demonstrate sufficient facts to constitute a basis for jurisdiction”); *In re Dynamic Random Access Memory Antitrust Litig.*, 2005 WL 2988715, at *9 (N.D. Cal. Nov. 7, 2005) (denying jurisdictional discovery where “plaintiffs have made no showing that any sworn testimony presented by defendants is disputed, and have not pointed out the existence of any facts that, if shown, would warrant the exercise of personal jurisdiction”); *Abraham v. Agusta, S.P.A.*, 968 F. Supp. 1403, 1411 (D. Nev. 1997) (denying jurisdictional discovery where requested discovery would not confer general jurisdiction). Accordingly, Plaintiff’s request for jurisdictional discovery should be denied.

IV.

CONCLUSION

For the foregoing reasons, and those expressed in the Motion, the Court should dismiss the claims asserted in Plaintiff’s Second Amended Complaint *with prejudice*. Alternatively, the Court should dismiss the Second Amended Complaint as to all of the D&O Defendants (other than Mr. Yu) for lack of personal jurisdiction.

DATED this 2nd day of May 2018.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that on the 2nd day of May, 2018, I served a true and correct copy of the foregoing **D&O DEFENDANTS' MOTION TO DISMISS SECOND 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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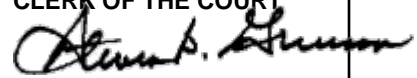
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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 SECOND
AMENDED COMPLAINT**

Date of Hearing: May 9, 2018
Time of Hearing: 10:30 a.m.

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 submit their Reply in Support of Motion
to Dismiss and Joinder to D&O Defendants' Reply in Support of Motion to Dismiss Second
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, the D&O Defendants' Reply, the Declarations of Messrs. Hale, Anderson and Klein submitted in connection with the underlying Motion and Joinder, the other pleadings and papers file in this action, and any argument of counsel the Court may allow at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Try as he may, Plaintiff Daniel Wolfus ("Plaintiff") failed to demonstrate how any of his claims against any of the defendants can survive the motion to dismiss stage. As articulated in all of the defendants' moving papers and again in the D&O Defendants' Reply, Plaintiff's claims are each either plainly barred as a matter of law or are otherwise insufficiently pled. Even if those deficiencies were not fatal to Plaintiffs' Second Amended Complaint (the "SAC"), which they are, Plaintiff has not satisfied his burden of demonstrating how the exercise of personal jurisdiction over any of the Hale Defendants would be reasonable or proper under these facts. For all of these reasons, Plaintiff's SAC fails and it should be dismissed with prejudice.

II. ANALYSIS

A. Each of Plaintiff's Claims Fail as a Matter of Law.

As an initial matter, each of Plaintiff's claims in his SAC are woefully deficient when viewed under the applicable law. Whether it is because his claims are improper derivative claims under Canadian law, his failure to plead an actual "sale" under California securities law, the impermissibility of his holder claims, or his simple failure to plead reliance, causation or scienter, among other reasons, each of Plaintiff's claims fail as a matter of law. While Plaintiff attempted to ignore or otherwise sidestep the applicable law, the D&O Defendants concisely addressed all of Plaintiff's legal shortcomings in its initial Motion, to which the Hale Defendants previously joined, as well as in their Reply, to which the Hale Defendants now join. In the interests of judicial economy, those arguments need not be repeated herein and, instead, the Hale

Defendants join each and every argument set forth in the D&O Defendants' Reply pursuant to EDCR 2.20(d).

B. Plaintiff Failed to Satisfy His Burden of Demonstrating that Exercise of Personal Jurisdiction Over Any of the Hale Defendants Is Reasonable or Proper.

It is a bedrock principle that the exercise of personal jurisdiction over any defendant must be reasonable. *Fulbright & Jaworski v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 5, 342 P.3d 997, 1001 (2015); *Baker v. District Court*, 116 Nev. 527, 532, 999 P.2d 1020, 1023 (2000). Plaintiff bears the burden of demonstrating the reasonable exercise of jurisdiction, "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). While Plaintiff is correct in noting it is his burden to present "some evidence" to support jurisdiction, merely producing a conclusory, vague declaration is not enough to satisfy this standard. Rather, Plaintiff was required to produce "some evidence *in support of all facts necessary for a finding of personal jurisdiction*" and such presentation must be done through the introduction of "competent evidence of *essential facts which establish a prima facie showing that personal jurisdiction exists.*" *Id.*, 109 Nev. at 693, 857 P.2d at 743-44 (emphasis added; internal quotation and citation omitted). Plaintiff failed on all accounts.

Fulbright & Jaworski I is instructive as it demonstrates the steps a plaintiff must go in order to satisfy its burden of demonstrating the reasonable exercise of personal jurisdiction. In *Fulbright & Jaworski I*, the plaintiff presented "some evidence" purportedly relating to the law firm defendant's activities in Nevada, including pro hac vice applications and lobbyist registrations. 342 P.3d at 1002. The plaintiff in that case also presented evidence in the form of correspondence with individuals in Nevada and evidence of a firm representative's participation in multiple investor presentations in Nevada. *Id.*, 342 P.3d at 1002-03. Despite this evidentiary presentation, certainly far more than a conclusory declaration from the plaintiff, the Nevada Supreme Court found this was not enough to even meet the "some evidence" standard upon which Plaintiff relies. *Id.*, 342 P.3d at 1004-05. That is because, even when taken as a whole, that

evidence did not establish necessary, essential facts to support a prima facie showing of personal jurisdiction or its reasonableness. *Id.*

In order to exercise specific personal jurisdiction¹ over any of the Hale Defendants Plaintiff was required to present evidence sufficient to demonstrate facts supporting a prima face case that: (1) each defendant purposefully availed him or itself of the privilege of serving the market in the forum or of enjoying the protection of the laws of the forum; (2) plaintiff's claim asserted in the complaint arises from each of the defendant's purposeful contact with the forum state; and, (3) the exercise of jurisdiction as a result is reasonable under the circumstances. *Budget Rent-A-Car v. Eighth Judicial Dist. Court*, 108 Nev. 483, 487, 835 P.2d 17, 20 (1992); *see also Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1157 (2014). As demonstrated in the Hale Defendants' Motion, the declarations of Messrs. Hale, Klein, and Anderson attached thereto, and as highlighted below, Plaintiff has not presented this Court with "some evidence" sufficient to establish essential facts supporting the exercise of jurisdiction over any of the Hale Defendants, and dismissal is appropriate.

1. Plaintiff's SAC Must Be Dismissed as to the Investment Entities.

Plaintiff's Opposition is wholly silent with respect to any purported contacts that Defendants INV-MID, LLC, EREF-MID II, LLC, or HCP-MID, LLC (the "Investment Entities") have with the State of Nevada or any argument as to how exercise of jurisdiction over any of them is reasonable. Such an intentional failure "may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same." EDCR 2.20(e). Nevertheless, even if the Court chose to look beyond the arguments raised in Plaintiff's Opposition and try to create an argument for Plaintiff by reading between the lines of Plaintiff's declaration, the factual allegations contained therein do nothing to save Plaintiff's claims against these Investment Entities.

¹ Plaintiff concedes that this Court cannot reasonably exercise general personal jurisdiction over any of the Hale Defendants. *See Opp.*, p. 28.

At best, Plaintiff makes passing references to the Investment Entities in his declaration alleging that Hale, Klein and/or Anderson were “appointed a director” by the Investment Entities at various times. *See* Wolfus Decl., ¶ 47. Even if Hale, Klein or Anderson’s actions could be attributed to the Investment Entities under Plaintiff’s conclusory and unexplained agency theory, that would not render personal jurisdiction proper or reasonable under these circumstances. As set forth in the Hale Declaration attached as Exhibit A to the Hale Defendants’ Motion, the Investment Entities are sole-purpose entities formed for the purpose of making equity investments in Midway (a Canadian corporation) for which none of its members reside or otherwise conduct business in the State of Nevada. Hale Defs.’ Mot., Ex. A, Hale Decl., ¶¶17-25. Most notably, Plaintiff does not allege, nor can he, that any of these Investment Entities were involved in any way in the disclosures made by Midway based on which all of Plaintiff’s claims arise. As any purported contacts the Investment Entities may have through their investment in a Canadian company do not relate to the facts underlying Plaintiff’s claims, exercise of personal jurisdiction over them is not proper nor is it reasonable. The Investment Entities must be dismissed from the case.

2. Plaintiff’s SAC Must Be Dismissed as to Anderson.

Plaintiff’s insistence on continuing to assert claims against Anderson is dumbfounding. On the face of the SAC, Plaintiff alleges that his claims are based on purported misrepresentations or omissions that took place either in December 2013 (SAC, ¶ 65) or in August 2014 (SAC, ¶85). At the same time, Plaintiff acknowledges that Anderson was not appointed to Midway’s board of directors until **November 2014**. SAC, ¶ 92; Wolfus Decl., ¶ 57. As a result, it was impossible for any of Plaintiff’s claims to arise from any of Anderson’s purported contacts with the State of Nevada while he was a member of Midway’s board of directors. Exercise of jurisdiction over Anderson is both improper and unreasonable under these circumstances and the SAC must be dismissed as to him as well.

1 **3. Plaintiff's SAC Must be Dismissed as to Hale and Klein.**

2 Plaintiff's SAC, Opposition, and declaration do little more than assert that Hale and Klein
3 served as a members of Midway's board of directors and on certain of the board's committees.
4 *See, e.g.,* Wolfus Decl., ¶¶ 44-50. Serving as a member of a board of directors of a Canadian
5 company with certain operations in Nevada does not make an individual subject to this State's
6 personal jurisdiction for all purposes. Nor does making an investment in such a company.
7 Instead, "what matters most in this analysis is not the corporation's own contacts with Nevada
8 but the individual Defendants' contacts with the State." *Southport Lane Equity II, LLC v.*
9 *Downey*, 177 F.Supp.3d 1286, 1296 (D. Nev. 2016). Nevertheless, Plaintiff ignores Defendants'
10 minimal contacts with the State, instead focusing on the activities of the company itself. Such
11 allegations do not support jurisdiction. *Id.*

12 While Plaintiff alleges without explanation that Hale "was actively involved in managing
13 Midway's mining operations" and that Klein "was very actively involve [sic] involved in
14 managing Midway's mining operations in Nevada" he does nothing to present evidence as to any
15 facts to support these bare conclusions that would demonstrate that either of them had actual
16 contacts with the State of Nevada. *See* Wolfus Decl., ¶¶ 44, 50. The Declaration is largely silent
17 as to when Hale or Klein were present in Nevada, what contacts or interactions they purportedly
18 had with the State of Nevada other than their roles as directors of a Canadian company with
19 operations in Nevada, or how those purported contacts allegedly gave rise to the claims at issue
20 in the SAC. *See* Wolfus Decl., ¶¶ 44-50. That is because Hale's and Klein's contacts with the
21 State, as demonstrated by their Declarations, were minimal and transitory at best. *See* Hale Defs.'
22 Mot., Ex. A, Hale Decl., ¶¶ 3-15, Ex. B, Klein Decl., ¶¶ 3-15. As set forth in the Hale
23 Defendants' Motion, such contacts are not a reasonable or proper basis to exercise jurisdiction
24 over Hale, Klein or any other defendant.

25 More importantly, Plaintiff fail to make any effort to demonstrate how any of Hale's or
26 Klein's purported contacts with the State of Nevada purportedly gave rise to the claims asserted
27 in the SAC. Plaintiff does not shy away from the fact that his claims are entirely based upon
28

1 purported misrepresentations or omissions contained in certain SEC filings or press releases. *See*,
2 *e.g.*, Opp., p. 2. However, Plaintiff completely ignores that those filings and press releases were
3 created and disseminated entirely out of the State of Colorado and received by Plaintiff in
4 California. *See* Brunk Mot., Ex. A, Brunk Decl., ¶20; SAC, ¶ 7. Even if Hale or Klein were
5 involved in reviewing or approving such filings and press releases, such are not contacts with the
6 State of Nevada nor would they relate in any way to the reasonableness of exercising jurisdiction
7 over them within this State.

8 Similarly, Plaintiff again tries to lead this Court astray by alleging that Klein “spent
9 substantial time in Nevada” performing due diligence in “August through November 2012” as
10 supposedly supporting the exercise of jurisdiction over him. *See* Wolfus Decl., ¶ 46. Again,
11 Plaintiff’s SAC is based on alleged misrepresentations and omissions in December 2013 and
12 August 2014, one to two years *after* those purported due diligence visits. Plaintiff makes no
13 attempt, because he cannot, to link those due diligence visits to the purported misrepresentations
14 or omissions in the subsequent years on which he bases his claims. Accordingly, those due
15 diligence trips are irrelevant to this Court’s analysis of whether to exercise specific personal
16 jurisdiction over Klein or any other defendant as a result of this purported contact.

17 Finally, Plaintiff’s argument in his declaration that Klein “is silent as to the length of time
18 he spent in Nevada” is simply false. *See* Wolfus Decl., ¶ 50. Klein addressed that very issue in
19 his own declaration previously submitted to the Court. *See* Hale Defs.’ Mot., Ex. B, Klein Decl.,
20 ¶¶ 14-15. Regardless, it is Plaintiff’s burden to present this Court with facts, not conclusory
21 allegations without any specificity, demonstrating each defendant’s contacts with the State of
22 Nevada in order to justify the exercise of personal jurisdiction over any of the defendants.
23 *Trump*, 109 Nev. at 693, 857 P.2d at 744. Plaintiff did no such thing.

24 Plaintiff has not presented “some evidence” of facts sufficient upon which to base
25 specific personal jurisdiction over either Hale or Klein and the SAC must be dismissed as to each
26 of them as well.

C. This Court Should Not Grant Plaintiff's Last-Ditch Request to Permit Jurisdictional Discovery.

Without any meaningful explanation or justification, Plaintiff requests the Court permit him to conduct jurisdictional discovery and to conduct an evidentiary hearing if the Court is inclined to grant the motions to dismiss. *See* Opp., p. 30. In order to justify a request for jurisdictional discovery, a plaintiff “must provide some basis to believe that discovery will lead to relevant evidence providing a basis for the exercise of personal jurisdiction and courts are within their discretion to deny requests based ‘on little more than a hunch that [discovery] might yield jurisdictionally relevant facts.’” *Pfister v. Selling Source, LLC*, 931 F.Supp.2d 1109, 1118 (D. Nev. 2013) (quoting *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008)). Mere statements that a party believes discovery would yield information supportive of jurisdiction is not enough to grant such a request. *Pfister*, 931 F.Supp.2d at 1118.

There is no legitimate basis for Plaintiff's request for jurisdictional discovery in light of the well-developed record before the Court. In response to the Hale Defendants' declarations itemizing their minor, intermittent contacts with the State of Nevada, Plaintiff merely proffers his own declaration conclusively stating that certain of the defendants were “actively involved” in Midway's operations. Plaintiff's bare allegation is not enough to confer jurisdiction. Moreover, and as the *Pfister* court found, when a request for jurisdictional discovery is “attenuated and based on bare allegations in the face of specific denials made by the defendants, the Court need not permit even limited discovery.” *Pfister*, 931 F.Supp.2d at 1118 (quoting *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006)). Plaintiff has not articulated any discovery that may change the facts or any reason why he could not present any other evidence that he believes exists refuting the Hale Defendants' declarations. Plaintiff's request for jurisdictional discovery and an evidentiary hearing is a mere afterthought and is not sufficiently supported to grant such a request. Plaintiff's request should be denied.

1 **III. CONCLUSION**

2 For the reasons set forth in this Reply, the underlying Motion and Joinder, and the D&O
3 Motion and Reply, the Hale Defendants respectfully request that this Court dismiss the SAC in
4 its entirety as to each of them with prejudice.

5 DATED this 2nd day of May, 2018.

6 GREENBERG TRAURIG, LLP

7 /s/ Christopher R. Miltenberger

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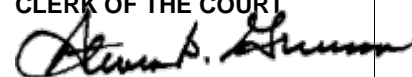
17 EREF-MID II, LLC, and HCP-MID, LLC

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 2nd day of May, 2018, 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 Second 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

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

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

1 asserted against him. Brunk also joins the Motion to Dismiss Second Amended Complaint
2 ("Motion") filed by Defendants Richard D. Moritz ("Moritz"), Bradley J. Blacketor
3 ("Blacketor"), Timothy Haddon ("Haddon"), Richard Sawchak ("Sawchak"), John W. Sheridan
4 ("Sheridan"), Frank Yu ("Yu"), Roger A. Newell ("Newell") and Rodney D. Knutson
5 ("Knutson") (collectively, the "D&O Defendants"), except for those portions of the Motion that
6 relate to personal jurisdiction as to the D&O Defendants. This Motion is made pursuant to Rule
7 12(b)(2) of the Nevada Rules of Civil Procedure ("NRCPP") and is based on the attached
8 Memorandum of Points and Authorities and the Declaration of Kenneth A. Brunk, attached as,
9 **Exhibit "A,"** together with the exhibits, the pleadings and papers on file herein, and any oral
10 argument this Court may allow.

11 DATED this 16th day of March, 2018.

12 **SANTORO WHITMIRE**

13  7351
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PLEASE TAKE NOTICE that the foregoing **KENNETH A. BRUNK'S MOTION TO DISMISS SECOND AMENDED COMPLAINT AND JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** will be brought before Department XXVII of the above-entitled Court on the **25** day of **Apr.**, 2018, at **10:30** a.m.

SANTORO WHITMIRE

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Las Vegas, Nevada 89135

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Denver, Colorado 80202

Attorneys for Defendant Kenneth A. Brunk

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

INTRODUCTION

In his Second Amended Complaint for Damages (hereinafter, "Complaint"), Plaintiff asserts against Brunk: (1) a claim for violation of California's Corporate Securities Act of 1968, California Corporations Code § 25000, *et seq.*; (2) a claim under California common law for breach of fiduciary duty; (3) a claim under California common law for aiding and abetting Midway's breach of fiduciary duty; (4) a claim under California common law for fraud; and (5) a claim under California common law for negligent misrepresentation. *See* Complaint, ¶¶ 99-147.

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 ground that this Court lacks personal jurisdiction over him. Brunk is not subject to general jurisdiction in Nevada because he does not reside, much less domicile, in Nevada, and his very limited contacts with Nevada do not render him at "home" in Nevada. Furthermore, Plaintiff's claims arise out of alleged material omissions contained in Midway's SEC filings and press releases, which were drafted in and issued from Colorado and communicated to the investing public in general. 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 over Brunk.

Further, Brunk joins the D&O Defendants' Motion to Dismiss Second Amended Complaint and the Memorandum of Point and Authorities in support thereof, except for those portions of the motion and memorandum that address 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. Like the claims asserted against the D&O Defendants, Plaintiff has failed to allege any misrepresentations by Brunk with the specificity required by law and he cannot show that he was in privity with Brunk as required by California law, given that Brunk did not personally sell any Midway stock to Plaintiff. *See* Declaration of Kenneth A. Brunk, Exh. A ¶ 23.

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. Complaint ¶ 17.¹

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 ¶ 15.

3. From May 2010 to May 2012, Brunk served as the president and Chief Operating Officer (“COO”) of Midway. Complaint ¶ 36. 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.*

4. During the time Brunk served as the President and the COO of Midway, his business office was located in Colorado. He did not frequently visit Nevada to perform his duties as President and COO. In fact, during this time, he visited Nevada approximately three to five times per year. All such visits were made in furtherance of his duties as President and COO. Declaration of Kenneth A. Brunk, Exh. A ¶ 16.

5. During the time Brunk served as the CEO and Chairman of the Board of Midway, his business office was located in Colorado. He did not frequently visit Nevada to perform his duties as CEO and Chairman of the Board. In fact, during this time, he visited Nevada approximately three to five times per year. All such visits were made in furtherance of his duties as CEO and Chairman of the Board. *Id.*, Exh. A ¶ 17.

6. During the time he served as President, COO, and CEO of Midway, Brunk also made regular trips on behalf of Midway to New York City, New York, Toronto, Ontario, and Vancouver British Columbia. During this time period, he visited each of these locations approximately three to five times per year. All such visits were made in furtherance of his duties

¹ For purposes of this Motion, the factual allegations in the Complaint are taken 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.

1 as President, COO and/or CEO, or as a board member of Midway. *Id.*, Exh. A ¶ 18.

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

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

11 9. In 2012, Midway and representatives of Hale Capital Partners, LP ("Hale")
12 engaged in negotiations for Hale to invest in Midway. Brunk was involved in these negotiations.
13 These negotiations occurred in New York and Colorado. None of the negotiations surrounding
14 this transaction occurred in Nevada. *Id.*, Exh. A ¶ 22.

15 10. During the time Brunk served as President and CEO of Midway, he attended
16 Midway's annual shareholder meetings. These meetings occurred primarily in Canada or
17 Colorado. *Id.*, Exh. A ¶ 21.

18 11. Brunk is a resident of Colorado and has been a resident of Colorado since 1991.
19 He does not currently reside in Nevada and has not resided in Nevada since 1991. *Id.*, Exh. A ¶¶
20 4-6. Brunk does not own any real property, personal property, or other assets in Nevada. *Id.*,
21 Exh. A, ¶¶ 7-8.

22 12. Brunk does not hold any Nevada licenses. *Id.*, Exh. A ¶ 9.

23 13. Brunk does not own or maintain any bank accounts in Nevada. *Id.*, Exh. A ¶ 10.

24 14. He does not maintain any telephone, facsimile or telex number in Nevada. *Id.*,
25 Exh. A ¶ 11.

26 15. He has never been a party to a lawsuit in Nevada, except for the instant case. *Id.*,
27 Exh. A ¶ 12.

28 16. Since 1991, Brunk has had only occasional and intermittent contact with Nevada

1 for personal or business visits. *Id.*, Exh. A ¶ 13.

2 17. He does not have family in Nevada. *Id.*, Exh. A ¶ 14.

3 18. Brunk has not personally sold any stock in Midway to the Plaintiff. *Id.*, Exh. A ¶
4 23.

5 **STANDARD OF REVIEW**

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

12 **ARGUMENT**

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

14 The Complaint should be dismissed pursuant to NRCP 12(b)(2) because the court lacks
15 personal jurisdiction over Brunk, a nonresident. The exercise of jurisdiction under the
16 circumstances would be improper and offend due process. The sole basis upon which Plaintiff
17 alleges jurisdiction is proper in this state is his assertion that that *one* of the Defendants resides in
18 Nevada. Complaint ¶¶ 15, 22. Neither Plaintiff, nor any other Defendant, including Brunk,
19 resides in Nevada. Midway is not a Nevada corporation and is not headquartered in Nevada.
20 Simply put, the domicile of one individual defendant does not convey jurisdiction over any of the
21 other defendants. Furthermore, like the other Defendants, Brunk’s contacts with Nevada were
22 not so continuous and systematic as to render any of them at “home” in this forum such that
23 exercising general jurisdiction in Nevada would be proper.

24 Moreover, each of the claims asserted in the Complaint arises out of Plaintiff’s reliance
25 upon purported material omissions contained in Midway’s SEC filings and press releases, which
26 were drafted in and issued exclusively from the state of Colorado, where Midway’s principal
27 place of business and its offices are located. Because Brunk’s contacts with Nevada are
28 insufficient as a matter of law and the claims asserted in this lawsuit do not arise from Brunk’s

1 purported contacts with the Nevada, this Court cannot exercise jurisdiction over Brunk.

2 ***1. Legal Standard for Personal Jurisdiction.***

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

13 Due process requirements are satisfied if the nonresident defendant’s contacts are
14 sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction, and it is
15 reasonable to subject the nonresident defendants to suit in the forum state.⁵ Courts may exercise
16 general or “all-purpose” personal jurisdiction over a defendant “to hear any and all claims
17 against it” only when the defendant’s affiliations with the forum state “are so constant and
18 pervasive as to render it essentially at home in the forum State.”⁶ By contrast, specific personal
19 jurisdiction comports with due process only where “the defendant’s suit-related conduct” creates
20

21 ² See *Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1156 (2014) (citing
22 *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 122 Nev. at 512, 516, 134 P.3d at 712, 714; *Trump*
23 *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).

24 ³ *Viega GmbH*, 328 P.3d at 1156; see also *Baker v. Dist. Ct.*, 116 Nev. 527, 531, 999 P.2d 1020, 1023
25 (2000).

26 ⁴ *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.

27 ⁵ *Viega GmbH*, 328 P.3d at 1156 (2014) (citing *Arbella*, 134 P.3d at 712, 714); *Daimler AG v. Bauman*,
134 S.Ct. 746, 762 n. 20, 187 L.Ed.2d 624 (2014)).

28 ⁶ *Daimler*, 134 S. Ct. at 751.

1 “a substantial connection with the forum state.”⁷

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

6 **2. This Court Lacks General Jurisdiction Over Brunk.**

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

16 As Plaintiff acknowledges, Brunk is not a resident of Nevada. Complaint ¶ 8. With no
17 supporting facts, Plaintiff concludes that Brunk’s contacts with Nevada were “so continuous and
18 systematic as to render him at home in Nevada” and that, to perform his job duties, Brunk was
19 frequently in Nevada. Complaint, ¶¶ 8, 36. On the contrary, the supporting Declaration
20 establishes that, with a few isolated exceptions, Brunk has had virtually no contact with Nevada.
21 In addition to the fact Brunk is not a resident of Nevada (Declaration of Kenneth A. Brunk, Exh.
22 A ¶¶ 4-6), he: does not own personal or real property, or have any other personal assets in
23 Nevada (Exh. A ¶¶ 7-8); does not hold any Nevada licenses (Ex. A ¶ 9); does not own or
24 maintain any bank accounts in Nevada (Ex. A ¶ 10); does not maintain any telephone, facsimile
25 or telex number in Nevada (Ex. A ¶ 11); and has never been a party to a lawsuit in Nevada,
26 except for the instant case (Ex. A ¶ 12). Moreover, Brunk has only occasionally traveled to

27 _____
28 ⁷ *Walden v. Fiore*, 134 S. Ct. 1115, 1121-22 (2014); *Goodyear Dunlop Tires Operations S.A. v. Brown*,
564 U.S. 915 (2011).

1 Nevada, primarily to fulfill his official corporate duties as COO or CEO or as a member of the
2 board of Midway. (Ex. A ¶¶ 13, 16-19, 21).

3 In sum, Brunk does not have the continuous and systematic contacts with Nevada
4 required to support a finding of general jurisdiction.

5 **3. This Court Also Lacks Specific Jurisdiction Over Brunk.**

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

8 [1] [t]he defendant must purposefully avail himself of the privilege of acting in
9 the forum state or of causing important consequences in that state, [2] the cause of
10 action must arise from the consequences in the forum state of the defendant's
11 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.

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

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

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

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

conduct” that would create a substantial connection between him and Nevada. *See generally*, Complaint. The only basis for jurisdiction asserted by Plaintiff is that at least one Defendant resided and still resides in Nevada. *See* Complaint ¶15. 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* Complaint ¶¶ 106, 111, 129, 130, 131, 132, 135, 136, 144 and 145. 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 ¶ 20. These filings and press releases were also received and purportedly acted upon by Plaintiff in the state of **California**. *See* Complaint ¶ 7. 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.⁸ 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 “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.* “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

⁸ *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 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. Complaint ¶ 1.

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

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

11 **CONCLUSION**

12 In addition to joining in the relief sought by the D&O Defendants by way of Defendant
13 Brunk's Joinder, this Court has no basis to exercise personal jurisdiction over Brunk because his
14 contacts with Nevada are insufficient as a matter of law, and because Brunk did not engage in
15 any suit-related conduct in Nevada in connection with the claims Plaintiff has asserted against
16 him. Brunk, therefore, respectfully requests that the Court grant this Motion and enter an order
17 dismissing the Complaint in its entirety.

18 DATED this 16th day of March, 2018.

19 **SANTORO WHITMIRE**

20 
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Nevada Bar No. 9691

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24 REBECCA DECOOK, ESQ.

(pro hac vice forthcoming)

25 **MOYE WHITE LLP**

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27 *Attorneys for Defendant Kenneth A. Brunk*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 16th day of March, 2018, a true and correct copy of the **OF KENNETH A. BRUNK'S MOTION TO DISMISS SECOND AMENDED COMPLAINT AND JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS SECOND 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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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 MOTION TO DISMISS
SECOND AMENDED COMPLAINT AND JOINDER IN D&O DEFENDANTS'
MOTION TO DISMISS SECOND AMENDED COMPLAINT**

I, Kenneth A. Brunk, pursuant to NRS 53.045 and under penalty of perjury in the state of

1 Nevada, hereby declare the following are true and correct to the best of my knowledge:

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

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

7 3. I make this Declaration In Support Of the Motion to Dismiss of Kenneth A.
8 Brunk and Joinder in D&O Defendants' Motion to Dismiss Second Amended Complaint.

9 4. I am a resident of Colorado.

10 5. I have been a resident of Colorado since 1991.

11 6. I am not currently a resident of Nevada and have not resided in Nevada since
12 1991.

13 7. I do not own any real property in Nevada.

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

15 9. I do not hold any Nevada licenses.

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

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

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

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

21 14. I do not have family in Nevada.

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

24 16. During the time I served as the president and chief operating officer ("COO") of
25 Midway, my business office was located in Colorado. I did not frequently visit Nevada to
26 perform my duties as President and COO. In fact, during this time, I visited Nevada
27 approximately three to five times per year. All such visits were made in furtherance of my
28 duties as President and COO.

17. 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. I did not frequently visit Nevada to perform my duties as CEO and Chairman of the Board. In fact, during this time, I visited Nevada approximately three to five times per year. All such visits were made in furtherance of my duties as CEO and Chairman of the Board.

18. 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, CEO, or as a board member of Midway.

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 Colorado, where Midway's principal place of business and executive offices were located. 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. 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.

22. 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.

23. I have never personally sold any stock in Midway to Plaintiff.

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 16th day of March, 2018.

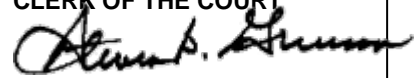
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**EIGHTH JUDICIAL DISTRICT COURT
DISTRICT OF NEVADA**

DANIEL E. WOLFUS,

Plaintiff,

CASE NO.: A-17-756971-B
DEPT NO.: 27

vs.

**CONSOLIDATED MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO MOTIONS TO
DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

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.

Date of hearing: 5.9.18
Time of hearing: 10:30 a.m.

Defendants.

I. INTRODUCTION

Company disclosures provide information for informed investment decisions. Both good and bad information must be disclosed to make investing as fair as possible for everyone.¹

When bad information is withheld, an investment may be made (or held) when - had bad information been disclosed - a different investment opportunity may have been pursued instead. That is, full and fair disclosure promotes the efficient functioning of markets, which is good for us all.

When the disclosure obligation is broken, harm may be caused to an investor. The law provides a remedy to an investor harmed by a breach of the disclosure obligation. The existence of a legal remedy promotes the overriding public policy goal of an efficient market by encouraging disclosure.

Defendants were Midway control persons. Midway made false disclosures and omitted bad information. Wolfus reasonably relied upon the false disclosures and was harmed by holding and buying more stock. Wolfus has a remedy.²

II. FACTS

In 1996, Midway was chartered in Canada. (SAC ¶23.) Midway was listed on the New York Stock Exchange, was subject to the Securities Exchange Act of 1934, and was obligated to file periodic reports with the SEC. (SAC ¶23.)

¹ See, generally; the Securities Act of 1933; the Securities Exchange Act of 1934; and, the Sarbanes-Oxley Act.

² “For every wrong there is a remedy.” *Small v. Fritz Companies*, 65 P.3d 1255 (Cal. 2003) (“Persons claiming that, for reasons of policy, they should be immune from liability for intentional fraud bear a very heavy burden of persuasion”); citing, Civ. Code §3523.

1 Prior to 2008, Midway was an exploration company which acquired and
2 explored gold and silver mineral properties located almost exclusively in Nevada.
3
4 (SAC ¶24.)

5 In February 2008, Wolfus began buying Midway common stock. (SAC ¶29.)

6 Prior to November 2008, Midway created a Disclosure Committee comprised of
7
8 members of its Board of Directors to ensure that Midway complied with its disclosure
9 obligations under United States securities laws. (SAC ¶25.)

10 In October 2008, Midway entered into an exploration and possible joint venture
11
12 agreement with a subsidiary of Barrick Gold Corp., for its Spring Valley project,
13 located 20 miles northeast of Lovelock, Nevada. (SAC ¶31.)

14 In November 2008, Wolfus became an outside director of Midway. (SAC ¶26.)

15
16 In 2009, Wolfus became the Chairman of the Board and the CEO of Midway;
17 until May 18, 2012, when he was replaced by Brunk. (SAC ¶27.)

18 In 2009, Midway was active in gold exploration at its Nevada properties of Pan,
19
20 Gold Rock (formerly the Monte), Spring Valley, Thunder Mountain, Roberts Creek,
21 Creek and Burnt Canyon. (SAC ¶30.)

22 Prior to May 2010, Midway decided to change from an exploration company to
23
24 a gold mining production company using the Pan project as its first production mine.
25 (SAC ¶35.) Pan is located about 22 miles southeast of Eureka, Nevada. (SAC ¶32.)

26 In May 2010, Brunk was hired as Midway's President and COO with the
27
28 primary job of bringing the Pan project into production. Brunk was required to

1 personally oversee mining and permitting in Nevada and was frequently in Nevada to
2 perform his job duties. Brunk was on the Disclosure Committee. (SAC ¶36.)

3
4 On July 20, 2010, Midway publicly announced the results of a favorable
5 preliminary economic assessment ("PEA") for the Pan project. The PEA included an
6 independent audit of an updated Midway mineral resource estimate. (SAC ¶37.)

7
8 On February 3, 2011, Midway filed an 8-K and Press Release with the SEC
9 which reported the Pan project was moving forward with "possible production as early
10 as 2013" and that Midway was working on a Prefeasibility Study for the Pan project.
11 The same day, Midway reported in the Annual Report filed on Form 10-K with the
12 SEC, it was "currently transitioning itself from an exploration company to a gold
13 production company with plans to advance the Pan gold deposit located in White Pine
14 County, Nevada through to production by as early as 2013." (SAC ¶39.)

15
16
17 On April 4, 2011, Midway issued a press release filed with the SEC which
18 reported it had secured a "positive Prefeasibility Study" for the Pan project. The PEA
19 was also filed with SEC and SEDAR. (SAC ¶40.)

20
21 In a September 12, 2011 press release filed with the SEC, Midway reported its
22 engineering team was finishing a mine plan and a Feasibility Study for the Pan project
23 and that the environmental team was working to complete a plan of operations for the
24 Pan mine to submit to the BLM for the Environmental Impact Statement. (SAC ¶41.)

25
26 On November 15, 2011, Midway reported by press release filed with the SEC
27 the favorable results of a Feasibility Study for the Pan project. (SAC ¶44.)
28

1 On December 20, 2011, Midway filed the Feasibility Study with the SEC. The
2 Study detailed the mineral exploration of the Pan project, estimated gold deposits, a
3 mining plan, a project budget of ~\$100 million, with a detailed breakdown of the
4 needed equipment, and a projection of anticipated revenue. The Feasibility Study was
5 never publicly updated or amended, and it was the basis on which all permits were
6 sought. (SAC ¶45; and, excerpts of study attached to the SAC at Exhibit 1.)
7

8
9 On January 9, 2012, Midway announced by press release that it qualified as a
10 Development Stage Entity under SEC guideline and that it had submitted a mine plan
11 of operations to the BLM and the NDEP. The mine plan followed the Feasibility
12 Study, with capital costs of ~\$100 million. (SAC ¶47.)
13

14 Prior to May of 2012, Wolfus was approached by Hale, of Hale Capital
15 Partners, with a financing proposal. Wolfus opposed the Hale proposal while Brunk
16 was a supporter. (SAC ¶49.)
17

18 By May 1, 2012, Wolfus owned 1,629,117 Midway shares. (SAC ¶29.)
19

20 In May of 2012, Brunk replaced Wolfus as CEO and Chairman of the Board.
21 (SAC ¶36 & 50.) Wolfus was then excluded from management. (SAC ¶50.)
22

23 On August 2, 2012, the Midway Board of Directors went from 5 to 6 members
24 when Klein was appointed. Klein was a Vice President of Hale Capital Partners. Hale
25 and Hale Capital Partners had access to Midway's books, records and staff through
26 Klein. (SAC ¶51.)
27
28

1 On August 16, 2012, Midway and Brunk reported by a press release that Pan
2 project engineering and permitting was advancing at a "rapid pace." (SAC ¶52.)

3
4 On September 10, 2012, Midway and Brunk reported by press release that the
5 Pan project was on schedule for "start-up of production in mid-2014". (SAC ¶53.)

6 On November 12, 2012, Midway announced by an 8-K and press release filed
7 with the SEC that a deal had been reached for private placement of \$70 million in
8 Midway Series A Preferred Shares to the Hale Investors; and, creation of a Budget
9 Work Plan Committee, which allowed Hale to control Midway and the Pan project.
10 (SAC ¶54; and, SAC Exhibits 2 & 3.)
11

12
13 On December 13, 2012, Midway filed an 8-K and Press Release with the SEC
14 which confirmed the Hale private placement and creation of the Budget Work Plan
15 Committee. (SAC ¶55; and, SAC exhibit 4.)
16

17 On March 22, 2013, Midway announced a draft environmental impact
18 statement, based on the Feasibility Study, was open for public comment. (SAC ¶56.)
19

20 On June 20, 2013, Midway held its annual meeting of shareholders. Brunk,
21 Hale, Newell, Sheridan, Yu, Knutson and Klein were elected as directors. (SAC ¶58.)
22

23 On July 30, 2013, a Midway press release that was issued and filed with the
24 SEC reported that it was exploring ways to reduce costs for the Pan project, expected
25 to issue a revised Feasibility Study in the third quarter of 2013, had made significant
26 progress in permitting, was pursuing a combination of project and equipment
27 financing alternatives, had received proposals from several major commercial funding
28

1 sources to secure the necessary capital to fund the Pan project and expected to pour
2 gold in August 2014. (SAC ¶59; and, SAC exhibit 5.)

3
4 On November 17, 2013, a Midway press release issued and filed with the SEC
5 reported that tests of ore from South Pan determined that leaching uncrushed ore could
6 be used, called Run of Mine, and would avoid the cost of crushing equipment until
7 operations moved to other areas of the Pan project. Midway also reported hiring
8 Sierra Partners to help find capital to fund operations. (SAC ¶60; and, SAC exhibit 6.)

9
10 On December 20, 2013, a Midway press release issued and filed with the SEC
11 announced receipt of the Record of Decision for the Pan project which completed the
12 BLM permitting process. (SAC ¶63; and, SAC exhibit 7.)

13
14 As of December 31, 2013, Brunk, Hale, Newell, Sheridan, Yu, Knutson and
15 Klein were directors of Midway; Brunk was the Chairman, President, and CEO;
16 Blacketor was a Senior Vice President and CFO; Moritz was the Senior Vice President
17 of Operations; Brunk, Blacketor, Newell, Yu and Klein were on the Disclosure
18 Committee; Sheridan, Yu and Knutson were on the Audit Committee; Brunk, Hale,
19 Sheridan, Yu and Klein were on the Budget/Work Plan Committee; and, Newell,
20 Sheridan and Yu were on the Environment, Health and Safety Committee. Each
21 Defendant was responsible for insuring that Midway publicly disclosed all material
22 information about the Pan project and that all the Pan project publicly disclosed
23 information was true and complete, was not misleading and did not omit material
24 facts; and, are collectively referred to as the 2013 Control Defendants. (SAC ¶64.)
25
26
27
28

1 As of December 13, 2013, the 2013 Control Defendants knew each of the
2 following 2013 Undisclosed Facts to be true, knew that each of the following facts
3 would be material to any reasonable investor in Midway including Wolfus, and knew
4 that none of those facts had been disclosed to the public or to Wolfus. The 2013
5 Undisclosed Facts at SAC ¶65 are:
6

7
8 A. Midway had been unable to raise sufficient cash either in the form of
9 equity or debt to allow it to complete the Pan project in the manner set forth in
10 the Feasibility Study as well as fund on-going operations until the Pan project
11 produced sufficient revenues to cover those expenses;

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

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

21 D. Modifying the permits to permit Run of Mine would have been time
22 consuming delaying the time when Midway could start the leaching process.
23 In late December and in early January 2014, Wolfus decided to exercise some

24 of his Midway stock options. The decision was based on careful review and
25 consideration of Midway's press releases and public filings, primarily those which
26 were issued after he ceased to be Midway's Chief Executive Officer. At the time,
27 Wolfus accepted Midway public statements and filings as true and complete, and
28 relied upon them in making the decision to buy stock. (SAC ¶66.)

1 On January 7, 2014, Wolfus notified Midway of his intention to exercise some
2 of his stock options. The 2013 Control Defendants were aware of this exercise. At
3 the time Wolfus was not aware of the 2013 Undisclosed Facts and would not have
4 bought stock had he been aware. Instead, Wolfus would have sold his position when
5 Midway's stock peaked in February 2014. (SAC ¶66.)
6

7
8 On January 15, 2014, Midway issued and filed with the SEC a Press Release
9 which reported that the Pan project was "fully permitted and construction is underway
10 with completion estimated for Q3 2014." (SAC ¶67; and, SAC at exhibit 8.)
11

12 On January 23, 2014, Wolfus closed his stock option exercise and bought
13 200,000 shares for \$100,636.00 USD. (SAC ¶69.)
14

15 Following the January purchase, Wolfus closely followed Midway stock price.
16 When Midway's stock peaked on or about February 14, 2014, at \$1.39, Wolfus
17 decided to continue to hold his shares. Wolfus made the decision to hold based on
18 public statements of Midway, including the statements that the Pan project was fully
19 permitted. Had Wolfus known any of the 2013 Undisclosed Facts or that the Pan
20 project was not fully permitted, he would have sold his shares. (SAC ¶70.)
21

22 On March 13, 2014, the Midway Annual Report on form 10-K reported that ore
23 from the South Pan pit would be processed Run of Mine. (SAC ¶71.)
24

25 On March 13, 2014, Midway issued a press release reporting that the Pan
26 project was fully permitted and that construction was underway. (SAC ¶72.)
27
28

1 On March 19, 2014, Midway announced in a Press Release that it had selected
2 Ledcor CMI as a mining contractor for the Pan project. (SAC ¶73.)

3
4 On April 24, 2014, Midway announced in a press release a plan to reduce
5 capital costs for the Pan project by using contract miners and by using Run of Mine on
6 the South Pit of the Pan project. Midway stated that Moritz had approved the release
7 and that Midway was "well-funded." (SAC ¶74; and, SAC exhibit 9.)

8
9 On May 21, 2014, Midway's SEC Form 10-Q quarterly report confirmed the use
10 of contract miners and Run of Mine. (SAC ¶76.)

11
12 On May 22, 2014, Midway issued and filed a press release with the SEC that
13 announced the execution of a \$55 million credit facility with Commonwealth Bank of
14 Australia for the Pan project. (SAC ¶77; and, SAC exhibit 10.)

15
16 On May 30, 2014, Midway filed with the SEC a prospectus for a prearranged
17 sale of ~\$25 million of common stock. The prospectus updated an earlier registration
18 statement. The funds were to be used in large part for the Pan project. The prospectus
19 did not disclose any of the 2013 or 2014 Undisclosed Facts. In June 2014, Midway
20 filed a press release with the SEC that announced completion of the sale. (SAC ¶78.)

21
22 On July 21, 2014, Midway filed a press release with the SEC that announced it
23 had closed on its credit facility with the Commonwealth Bank. (SAC ¶80.)

24
25 In its August 6, 2014, quarterly report filed on Form 10-Q with the SEC,
26 Midway reported that it had made a 5-year contract mining deal with Ledcor and had
27 paid a \$500,000 mobilization fee. (SAC ¶82.)
28

1 As of August 31, 2014, Brunk, Hale, Sawchak, Sheridan, Yu, Haddon and Klein
2 were each directors of Midway; Haddon was Chairman of the Board, Brunk was the
3 President and CEO; Blacketor was a Senior Vice President and CFO; Brunk,
4 Blacketor, Yu and Klein were each members of the Disclosure Committee; Sheridan,
5 Yu and Sawchak were each members of the Audit Committee; Brunk, Hale, Sheridan,
6 Yu and Klein were each members of the Budget/Work Plan Committee; and, Haddon,
7 Sheridan and Yu were each members of the Environment, Health and Safety
8 Committee. In those capacities, each Defendant was responsible for insuring that
9 Midway publicly disclosed all material information concerning the Pan project and
10 that all publicly disclosed information concerning the Pan project was true and
11 complete, was not misleading, and did not omit material facts; and, are collectively
12 referred to as the "2014 Control Defendants." (SAC ¶85.)

13 As of August 31, 2014, the 2014 Control Defendants knew each of 2013
14 Undisclosed Facts and the following 2014 Undisclosed Facts to be true, knew that
15 each of those facts would be material to any reasonable investor in Midway including
16 Wolfus, and knew that none of those facts had been disclosed to the public generally
17 or to Wolfus. The 2014 Undisclosed Facts at SAC ¶86 are:

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

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

1
2 C. Midway did not have the necessary facilities to process the gold solution
3 once the leaching had been completed and it would be a considerable period
4 before those facilities were constructed and permitted for operation.

5 In late August and early September 2014, Wolfus decided to exercise some of
6 his Midway stock options. Wolfus made his decision based on careful review,
7 consideration and reliance upon Midway's press releases and public filings, primarily
8 those which were issued after he purchased shares in January 2014. At the time,
9 Wolfus believed all Midway statements were true and that no material information had
10 been omitted. (SAC ¶87.)

12 On September 5, 2014, Wolfus notified Midway of his decision to exercise
13 some of his stock options. Wolfus made his decision in reliance upon Midway
14 disclosures. At the time Wolfus decided to buy stock, he did not know any of the
15 2013 or 2014 Undisclosed Facts, had no way of learning the Undisclosed Facts except
16 from the 2014 Control Defendants, and would not have bought stock had he known
17 the Undisclosed Facts. (SAC ¶87.)

20 On September 15, 2014, Midway filed a press release with the SEC that
21 announced a flood had occurred at the Pan project in July of 2014. (SAC ¶81.)

23 On September 15, 2014, Midway filed a press release with the SEC that
24 reported Ledcor mobilized on July 21, 2014. Midway did not disclose the lack of a
25 qualified employee to supervise the loading of ore onto leach pads. (SAC ¶82.)
26
27
28

1 On September 15, 2014, Midway filed a press release with the SEC that
2 announced that Ledcor had begun mining operations. The release suggested that
3 processing facilities would be ready by the end of the month. (SAC ¶90.)
4

5 On September 19, 2014, Wolfus closed a purchase of 1,000,000 shares for
6 \$783,778 USD. (SAC ¶89.)
7

8 On December 1, 2014, Midway filed a press release with the SEC which
9 reported that it had begun receiving funds on its Credit Facility. (SAC ¶94.)
10

11 On June 22, 2015, Midway announced its bankruptcy. (SAC ¶95.)
12

13 **III. THE SECOND AMENDED COMPLAINT IS CORRECTLY PLED**

14 Midway ran gold mining operations in Nevada. Midway had a large Nevada
15 footprint, including 11 wholly owned Nevada subsidiaries. In 2013 & 2014 Midway
16 issued press releases and filed SEC disclosures which painted a rosy picture of the
17 status of its Nevada gold mining operations, especially the Pan project.
18

19 The Pan project was important to the success of Midway. Pan was identified as
20 a viable gold mine, and Midway efforts concentrated on making Pan its first
21 production gold mine. (*See, e.g.*, SAC ¶32 & 35-47.)
22

23 The press releases and disclosures were false and misleading, the reality on the
24 ground at the Nevada Pan mine was not accurately described. In 2015, the reality on
25 the ground at Pan overcame the false picture of success, and Midway failed.
26

27 Wolfus bought stock in reliance on the false and misleading press releases and
28 SEC disclosures that described untrue progress at the Pan mine. Wolfus also held

1 stock in reliance on the false and misleading disclosures that described false progress
2 at the Pan mine. Wolfus suffered a loss caused by his reasonable reliance on the false
3 and misleading statements about the Pan mine.
4

5 **A. The SAC lays a sufficient factual predicate for all claims.**

6 The SAC lays out a proper foundation for the claims of Wolfus. Wolfus
7 provides factual detail of the who, what, when, where and how. Taking the facts
8 alleged as true, the motion to dismiss must be denied.
9

10 1. The fraudulent and misleading statements are identified.

11
12 Fraudulent and misleading press releases and/or SEC disclosure/filings are
13 identified in the SAC. *See, e.g.*, SAC at ¶47, 52, 53, 59, & 63, and SAC exhibits 5 &
14 7. Each statement is identified by date, its nature (SEC disclosure, press release) and
15 its relevant content. After identifying and describing the relevant content of each
16 press release and/or SEC disclosure/filing, the specific information which was
17 omitted, false or misleading is listed. *See, e.g.*, SAC at ¶65 & 86.
18
19

20 2. How each statement was false or misleading is explained.

21 The identified statements were fraudulent and misleading mainly because they
22 did not disclose material facts-bad information about the Pan project. The undisclosed
23 material facts are listed in the SAC. *See, e.g.*, SAC at ¶ 65 & 86.
24

25 Affirmative false statements about current events were also made. For example,
26 ¶ 63 and SAC exhibit 7 describe the false statement that permitting was completed at
27
28

1 the Pan project in December of 2013, when the Run of Mine method of operation had
2 not been permitted.

3
4 3. The when and where for each statement is provided.

5 The SAC identifies each fraudulent or misleading statement by date and how
6 the statement was made.

7
8 4. Those responsible are identified.

9 Midway is the primary violator for each fraudulent and misleading statement
10 under Cal. Corp. Code 24401. SAC at ¶103, 105, 108 & 110. Each defendant is
11 identified as a control person for joint and several secondary violator liability under
12 Cal. Corp. Code 25504. SAC at ¶64, 85, 104 & 109. The collaborative role of each
13 Defendant in drafting and/or approving each fraudulent and misleading statement, by
14 their membership in Midway committees, is described. *See, e.g.*, SAC at ¶64 & 85.
15 Collaboration creates liability. *Apollo Capital Fund v. Roth Capital*, 158 Cal.App.4th
16 226, 242 (2007).

17
18
19
20 5. Scierter is alleged.

21 Allegations of scierter are made. *See, e.g.*, SAC at ¶105 & 110. SAC at ¶110:

22 In violation of California Corporations Code § 25401, the pre-September 2014
23 public filings by Midway which discussed the Pan project were materially false
24 and misleading by failing to timely disclose each of the 2014 Undisclosed Facts
25 and the failure by the 2014 Control Defendants to disclose the 2014
26 Undisclosed Facts was intentional and was done to encourage investors to retain
27 and purchase Midway's common stock.
28

1 On their own, the allegations in ¶105 & 110 are sufficient. However, the
2 paragraphs are supported and must be read in context with the other factual assertions.

3
4 For example, on the non-disclosure of the Pan Run of Mine operations permit issue:

- 5 • ¶ 25, 64 & 85 explain the purpose of the Disclosure Committee is to ensure
6 accurate information is disclosed.
- 7
8 • ¶64 & 85 list Disclosure Committee members. More detail is provided
9 elsewhere. For example, ¶ 36 & 38 describe the role of Brunk and Moritz in
10 personally overseeing the Pan mine.
- 11
12 • ¶44, 45 & 46, detail the workings of the Pan mine as set forth in the
13 Feasibility Study (SAC at exhibit 1), and the permitting process.
- 14
15 • ¶47, 52, 53, 59, & 63, list the disclosures which relate to permitting the Pan
16 project, which was based upon the Feasibility Study method of operation.
- 17
18 • ¶ 60 described the change in operation at Pan to Run of Mine-which required
19 different permits from the Feasibility Study method of operation.
- 20
21 • ¶ 63 describes the December of 2013 press release which stated permitting
22 for Pan was complete. SAC at exhibit 7.
- 23
24 • ¶65 describes the misleading nature of the permitting disclosures (especially
25 exhibit 7), because permits were not obtained for a Run of Mine operation at
26 Pan, which would delay gold extraction from mined ore.
- 27
28

- ¶64 alleges how defendants knew the truth of the permitting issue at Pan by their membership in the governance committees, and that they knew the public was not told the truth.

Each cause of action provides more information. The SAC is factually detailed and provides what Defendants knew about Pan permitting, how they knew, why it was important, describes the public statements that did not tell the truth about Pan permitting, and asserts the intent to deceive. The same is true for the other important omissions and false statements detailed in ¶65 & 86.

6. Reasonable reliance for buying, holding, causation, and damages are alleged.

Reliance by Wolfus Midway public disclosures when deciding to buy and hold stock are described in the SAC. *See, e.g.*, SAC at ¶50, 66, 70 (holding), 87, 106 & 111. Wolfus had left the company, Wolfus relied upon public disclosures when making the decision to buy or hold stock, and Wolfus acted reasonably upon the disclosures. *See, e.g.*, SAC at ¶ 50, 66, 70 (holding), 87, 106 & 111.

There is no confusion over which public disclosures Wolfus relied upon:

In purchasing the 200,000 shares in January 2014, Wolfus had carefully read and reviewed and relied on the public filings of Midway and was unaware of the 2013 Undisclosed Facts.

SAC at ¶106; see also, ¶111. Wolfus relied on all public filings.

The who, what, when, where and how (number of shares and price) are described for the holding claim in ¶70. Wolfus satisfies causation by explaining had

1 he known the truth, he would not have purchased additional stock, and would instead,
2 have sold his entire position. *See, e.g.*, SAC at ¶¶64, 65, 70, 85 & 86. Resulting
3 damages are alleged in the SAC at ¶¶70, 112, 117-119, 126, 138 & 147.

5 **B. The First Cause of Action for Securities Fraud.**

6 Defendants dropped their claim that the securities fraud claim is derivative.

7
8 The cases cited by the defense hold that California's securities law provides a
9 private right of action by a buyer of a security, who purchased in reliance on public
10 filings which contain a material misstatement or omission. *California Amplifier v.*
11 *RLI Ins.*, 94 Cal.App.4th 102, 108-109 (2001); *Apollo Capital Fund v. Roth Capital*
12 *Partners*, 158 Cal.App.4th 226, 249 (2007); and, Cal. Corp. Code §§ 25401 & 25501.
13 The defense cases also recognize that California expends the liability of the seller of
14 the security to create joint and several liability for all persons who are directors,
15 officers or controlling persons of the seller. *Apollo*, 158 Cal.App.4th at 255-56; and,
16 Cal. Corp. Code § 25504.

17
18
19
20 California securities law applies when a purchase of stock originates in
21 California. Cal. Corp. Code § 25008; and, *Hall v. Superior Court*, 150 Cal App. 3d
22 411 (2003) (choice of forum and law provisions against public policy).³

23
24 Wolfus twice bought Midway common stock in California directly from
25 Midway. SAC ¶¶5A, 66, 89, 100, 102 & 107. Midway stock is a security. Cal. Corp.

26
27
28 ³ This is a securities case. It is not a commercial contract case. *NAF Holdings v. Li & Fung*, 118
A.3d 175 (Del. 2015) does not apply. California law applies to a security purchase in California.
Hall, 150 Cal App. 3d 411.

1 Code §25019.⁴ Wolfus paid money for the shares (SAC ¶69 & 89), which is a sale of
2 a security for value. Cal. Corp. Code §25017(a). Accordingly, Wolfus may pursue a
3 private right of action, pursuant to Cal. Corp. Code §25501 & 25504, for securities
4 fraud under Cal. Corp. Code §25401. Cal. Corp. Code §25401 states:

6 It is unlawful for any person to offer or sell a security in this state, or to buy or
7 offer to buy a security in this state, by means of any written or oral
8 communication that includes an untrue statement of a material fact or omits to
9 state a material fact necessary to make the statements made, in the light of the
circumstances under which the statements were made, not misleading.

10 Cal. Corp. Code §25401 creates liability for a primary securities violator. Joint and
11 several liability for security violations is extended to others, who are secondarily
12 liable, by Cal. Corp. Code § 25504:

14 Every person who directly or indirectly controls a person liable under Section
15 25501 or 25503, ... , every principal executive officer or director of a
16 corporation so liable, every person occupying a similar status or performing
17 similar functions, every employee of a person so liable who materially aids in
18 the act or transaction constituting the violation, ... , are 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 grounds to believe in the
existence of the facts by reason of which the liability is alleged to exist.

19 Joint and several liability is also extended by Cal. Corp. Code § 25504.1:

21 Any person who materially assists in any violation of Section ... 25401, ... with
22 intent to deceive or defraud, is jointly and severally liable with any other person
liable under this chapter for such violation.

23 A purchaser does not need privity with a secondary violator for imposition of
24 joint and several liability under § 25504 or §25504.1. *Moss v. Kroner*, 197 Cal. App.
25 4th 860, 875 (2011); and *California Amplifier*, 94 Cal.App.4th at 109. To state a claim
26 against a secondary violator, a Plaintiff must allege a primary violation of § 25401;

28 ⁴ Midway stock traded as “MDW”.

1 and, privity with the primary violator. *Ibid.* Wolfus alleged a primary violation by
2 Midway and privity with Midway, who sold Wolfus the stock. (SAC at ¶¶99-112.)

3
4 Control persons, directors and/or principal executives are secondarily liable
5 under §25504 for any primary violations of §25401 by Midway. Defendants are all
6 control persons, directors and/or principal executives of Midway. (SAC ¶¶64 & 85.)

7
8 A person may also be secondarily liable if they provide material aid and/or
9 assistance by preparing or assisting in the preparation of documents or otherwise
10 facilitating the securities fraud, even if they are not a control person, executive or
11 director. *Arei II Cases*, 216 Cal. App. 4th 1004 (2013). Wolfus described how each
12 Defendant was responsible for the accuracy of press releases and disclosures by their
13 membership on various corporate governance committees. (SAC at ¶¶64 & 85 (“In
14 those capacities, each was responsible for insuring that Midway publicly disclosed all
15 material information concerning the Pan project and that all publicly disclosed
16 information concerning the Pan project was true and complete, was not misleading
17 and did not omitted (sic) material facts.”).)

18
19 A stock buy in California is regulated by the Cal. Corp. Code. There is a
20 regulation exception for warrants and convertible securities. Cal. Corp. Code
21 §25017(e). A buy of Midway common stock (by exercise of an option) does not fall
22 into the wording of the exception. No warrants or convertible securities were
23 involved; thus, the buy is subject to California Securities law. *National Auto. & Cas.*
24 *Ins. v. Payne*, 261 Cal. App. 2d 403 (1968); and, *People v. Boles*, 95 P.2d 949 (Cal.

1 1939). No case is offered by the defense to support its claim of an exception. In
2 *Stormedia v. Superior Court*, 976 P.2d 214 (Cal. 1999), the California Supreme Court
3
4 found that Stormedia was a seller of securities with regard to its employee stock
5 purchase plan. While §25017(e) was cited, no exception was found.

6 The SAC states in detail all the elements for a violation of California Security
7
8 law. *Mueller v. San Diego Entertainment Partners*, 260 F.Supp.3d 1283 (2017). As
9 described in Section A above, the SAC lays out the who, what, when, where and how.
10 Scienter is described in detail, as are the false statements, reliance, causation and loss.
11

12 Wolfus alleged the specific written public filings and press releases containing
13 the false and misleading statements and omissions. SAC at ¶ 37, 39-45, 47, 52-57, 59,
14 60, 63, 65, 71-78, 80-84 and 86. The SAC at ¶46, 60, 63 and 67 alleges the knowingly
15 false representations regarding permitting. SAC ¶ 78 alleges an Offering Circular
16 where everything needed to be fully and accurately disclosed.
17

18 Falsity and materiality are alleged at SAC ¶ 65, 86, 105 and 110.
19

20 Wolfus has clearly and specifically alleged scienter. *Mueller* holds that all that
21 need be alleged is that the securities law violation was intentional or grossly negligent.
22 Wolfus alleged intentional misconduct by all Defendants, particularly the executive
23 officers and the members of the Disclosure and Audit committees who helped in the
24 drafting of the press releases alleged. See, e.g., SAC at ¶105, 110, 66, and 86.
25
26
27
28

1 Reasonable and actual reliance is alleged with specificity at SAC ¶ 50, 66, 70,
2 86-88, 106 and 111. While not required as part of his prima facie case, Wolfus
3
4 alleged when he learned of the true facts at SAC ¶ 97.

5 Defendants status imposing joint and several liability is alleged at SAC ¶ 64 and
6 85. While not required, also Wolfus alleged Defendants' participation in the drafting
7
8 and dissemination of the false and misleading statements by their status as either
9 executive officers and/or members of the Disclosure Committee, Audit Committee
10 and Budget/Work Plan Committee.

11 **C. The Second Cause of Action for Breach of Fiduciary Duty.**

12 The elements for breach of fiduciary duty are: (1) a fiduciary relationship; (2)
13
14 breach; and, (3) damages. *City of Atascadero v. Merrill Lynch, Pierce, Fenner &*
15
16 *Smith*, 68 Cal.App.4th 445 (1998); and, *Apollo*, 158 Cal.App.4th 226 (a properly
17 alleged fiduciary relationship can serve as the basis for an action for breach of a
18 fiduciary duty in a securities case).

19
20 Corporate officers and directors owe stockholders a fiduciary duty. *Meister v.*
21 *Mensinger*, 230 Cal. App. 4th 381 (2014). Defendants were officers and/or directors.
22 As such, Defendants owed stockholder Wolfus a fiduciary duty.

23
24 Section A above describes how the SAC details the false and misleading
25 statements made, and scienter. Intentionally lying about a material issue is dishonest
26 dealing and a breach of fiduciary duty. *Ibid*. Section A above describes how but for
27
28

1 Wolfus reliance on the false statements about progress at the Pan mine, he would not
2 have bought additional shares, but would have instead sold his position.

3
4 Wolfus claim is direct, it is not a derivative claim captured by the bankruptcy or
5 subject to Canadian law. The SAC describes a breach of the fiduciary duty to disclose
6 material information, not a diminution of value or a mismanagement claim. Claims
7 related to purchase (or holding) of stock are personal to the stockholder and therefore
8 direct. *Citigroup v. AHW Investment*, 140 A.3d 1125 (Del. 2016).

9
10 Wolfus holds the claim for breach of the fiduciary duty to disclose, as he was
11 owed the duty, he was the recipient of the false statements, and he acted in reliance
12 upon them. Wolfus suffered the harm. Secondly, if there is a recovery, damages
13 would go to Wolfus for money lost in purchasing and holding his stock, not to the
14 corporation. Defendants do not and cannot explain how damages on the claim
15 described in the SAC could be received by Midway. As such, the claim is direct
16 under *Parametric Sound v. Eighth Judicial Dist. Ct.*, 401 P.3d 1100 (Nev. 2017).

17
18 The fact that all stockholders suffered when the stock price went down does not
19 change a direct claim into a derivative one. The special injury rule was abandoned in
20 *Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031 (Del. 2004) (a stockholder
21 may sue for their direct injury even when all stockholders suffered the same injury).

22
23
24
25 **D. The Third Cause of Action for Aiding and Abetting a Breach of**
26 **Fiduciary Duty.**

27 The elements for aiding and abetting are: (1) the person knows the conduct of
28 another constitutes a breach of duty and gives substantial assistance or encouragement

1 to the person to so act; or, (2) the person gives substantial assistance to the other in
2 accomplishing a tort and the person's own conduct, considered separately, constituted
3 a breach of duty to a third person. *American Master Lease v. Idanta Partners*, 225
4 Cal.App.4th 1451, 1475 (2014). An aiding and abetting Defendant does not have to
5 owe an independent duty to the Plaintiff. *Id.*, at 1476.
6

7
8 Defendants were members of the Board, corporate governance committees of
9 Midway and/or principal executive officers. One purpose of the committees was to
10 ensure that Midway did not breach its fiduciary duty to honestly disclose information
11 to stockholders and the public. Section A above describes how Defendants aided and
12 abetted the false disclosures, despite their knowledge of the truth. The SAC satisfies
13 the elements for aiding and abetting set forth in *American Master Lease*.
14

15
16 The aiding and abetting claim is direct for the same reasons as the breach of
17 fiduciary duty claim.
18

19 **E. The Fourth Cause of Action for Common Law Fraud.**

20 The elements for fraud are: (1) a misrepresentation-that is, a false
21 representation, concealment or nondisclosure; (2) knowledge of falsity or scienter; (3)
22 intent to defraud-that is, to induce reliance; (4) justifiable reliance; and, (5) damage.
23
24 *Lazar v. Superior Court*, 909 P.2d 377, 380-81 (Cal. 1996).

25 Section A above describes all the elements of common law fraud detailed in the
26 SAC. The SAC properly identifies the who, what, when, why and where of the fraud
27 claim.
28

1 The claim is for fraud in inducing Wolfus to purchase shares and in inducing
2 Wolfus to hold shares. SAC at ¶128. Defendants argue that California law does not
3 apply to holder claims (D&O MTD at 18:1-11), but does not argue against application
4 of California law on the inducement to purchase part of the claim. *Small* holds that
5 by stating an intentional securities fraud claim, Wolfus stated all the elements of a
6 common law fraud claim. *Small*, 65 P.3d 1255.
7

8
9 California law applies to a holder claim for purchase of a security in California.
10 *NAF Holdings* was a commercial contract case and does not apply here.
11

12 Common law fraud claims are direct. Holder claims are direct. *Citigroup v.*
13 *AHW Investment*, 140 A.3d 1125 (Del. 2016). The defense dropped the claim that
14 the common law fraud claim was derivative.
15

16 **F. The Fifth Cause of Action for Negligent Misrepresentation.**

17 The elements for negligent misrepresentation are: (1) a misrepresentation of a
18 past or existing material fact; (2) without reasonable grounds for believing it to be
19 true; (3) with intent to induce another's reliance on the fact misrepresented; (4)
20 ignorance of the truth and justifiable reliance thereon by the party to whom the
21 misrepresentation was directed, and (5) damages. *Fox v. Pollack*, 181 Cal.App.3d
22 954, 962, 226 Cal.Rptr. 532 (1986).
23
24

25 Section A above describes how the SAC states all the elements of negligent
26 misrepresentation. Scienter and/or intent to defraud is not an element. *Small v. Fritz*
27
28

1 *Companies*, 65 P.3d 1255 (Cal. 2002). However, the scienter facts alleged satisfy the
2 second element.

3
4 The false facts described in Section A are not future events. For example, ¶63
5 describes the press release of December 20, 2013, which claimed that the permitting
6 process for Pan was completed. The press release addressed a past event, and was an
7 affirmative misrepresentation.
8

9 The claim for negligent misrepresentation is direct. The defense dropped the
10 argument that the common law fraud claim was derivative.
11

12 **G. Leave to Amend.**

13 The motion to dismiss focuses on technical pleading issues that were not
14 addressed in the ruling on the first motion to dismiss. Technical pleading arguments
15 should not absolve a Defendant of fraud. *Apollo*, 158 Cal App. 4th at 242 (2007).
16 Leave to amend is requested to address any areas of concern held by the Court.
17
18 *Schaffer Family Investors v. Sonnier*, 120 F.Supp.3d 1028, 1038 (C.D. Cal. 2015)
19
20 (leave to amend should be freely granted).

21 **IV. NEVADA HAS JURISDICTION OVER DEFENDANTS**

22 General jurisdiction exists when a party has sustained contacts with the forum
23 state. Specific jurisdiction exists when a non-resident has minimum contacts with the
24 forum state which are related to the complaint. *Fulbright Jaworski v. Eighth Judicial*
25 *Dist. Ct.*, 342 P.3d 997, 1001-02 (Nev. 2015).
26
27
28

1 The Nevada long arm provides jurisdiction over a non-resident if the exercise of
2 personal jurisdiction would not violate due process. NRS 14.065(1). “Due process
3 requires ‘minimum contacts’ between the defendant and the forum state ‘such that the
4 maintenance of the suit does not offend traditional notions of fair play and substantial
5 justice.’” *Trump v. Eighth Jud. Dist. Ct.*, 857 P.2d 740, 747 (Nev. 1993) (quoting
6 *Mizner v. Mizner*, 84 Nev. 268, 270, 439 P.2d 679, 680 (1968)). “[T]he defendant’s
7 conduct and connection with the forum State [must be] such that he should reasonably
8 anticipate being haled into court there.” *World–Wide Volkswagen Corp. v. Woodson*,
9 444 U.S. 286, 297, 100 S.Ct. 559 (1980).” *Consipio Holding v. Carlberg*, 282 P.3d
10 751 (Nev. 2012).
11

12 Specific jurisdiction exists when a party intentionally involves the forum.
13
14 *Trump*, 109 Nev. at 700, 857 P.2d at 748, citing, *Brainerd v. Governors of the*
15 *University of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989) (specific jurisdiction exists
16 if “the defendant intentionally directed his activities into the forum”).
17
18

19 When challenged, the party seeking jurisdiction must introduce “some
20 evidence” to establish a prima facie showing of jurisdiction. *Trump*, 857 P.2d at 743-
21 45 (1993). Once competent evidence of jurisdiction is presented, the court must
22 accept the proffered evidence as true; and, any remaining dispute over jurisdiction is
23 resolved at trial. *Ibid.*
24
25
26
27
28

1 **A. The Court has General Jurisdiction over Defendant Yu.**

2 Defendant Yu is a Nevada resident. Nevada has general jurisdiction over its
3
4 residents. Defendant Yu has not moved for dismissal based on jurisdiction.

5 **B. The Court has Specific Jurisdiction over the Remaining Defendants.**

6 Wolfus provides sufficient evidence of minimum contacts with Nevada, which
7
8 are related to the complaint, to establish a prima facie showing of specific jurisdiction.
9 Competent evidence establishes Defendants intentionally involved Nevada.

10 Brunk, Blacketor and Moritz, were officers and/or directors of Midway US a
11
12 Nevada Corp., which was involved with Midway gold mining in Nevada. Dec., at ¶3-
13 9. Brunk, Blacketor and Moritz were paid by Midway US. Brunk, Blacketor and
14
15 Moritz were also officers and/or directors of 11 Nevada companies that were involved
16
17 with Midway and the Nevada gold mines, including the Pan project. Dec., at ¶3-9.
18
19 Brunk, Blacketor and Moritz were often in Nevada at the Midway Ely office to
20
21 oversee mine operations, especially those at Pan. Moritz spent over half his time in
22
23 Nevada, primarily working on the Pan project. Dec., at ¶7-8.

24 Brunk, Blacketor, Newell, Yu and Klein were members of the Disclosure
25
26 Committee. One of the purposes of the Disclosure Committee was to ensure honest
27
28 disclosure of facts on the ground. Much of the disclosure was aimed at Nevada.
Brunk and Moritz based their Disclosure work on the knowledge gained during their
frequent visits to the operations in Nevada. Dec., at ¶10-13.

1 Frequent meetings were held in Ely and Las Vegas, Nevada. Brunk and Moritz
2 consistently attended, Newell concedes attendance at least once as well. The dates,
3 location and content of some meetings are described in detail in the Declaration at
4 ¶14-22. Progress at Pan was a big topic, as was permitting efforts. Both topics are
5 integral to the Complaint.
6

7
8 Brunk, Hale, Sheridan, Yu, Klein, Sheridan, Sawchak and Knutson were on
9 Audit and Work/Budget Midway committees. The committees had express
10 knowledge of events on the ground at Pan regarding operations, including permitting
11 and finances, which are integral to the complaint. Dec., at 23-26.
12

13 Brunk, Moritz and Yu attended fund raising events in Nevada. Dec., at 32.
14 Brunk and Moritz attended project review meetings in Wendover. Dec., at 42.
15

16 Brunk and/or Moritz attended BLM meetings, meet with Nevada lobbyists,
17 government officials, including Governor Sandoval, engineers, and geologists
18 concerning Midway Nevada operations, including the Pan project. All meetings
19 occurred in Nevada. Dec., at 33-42.
20

21 Blacketor attended all Board meetings held in Nevada and at least three staff
22 meetings in Ely. Dec., at 43.
23

24 Klein and Hale were on several committees, gained knowledge of the truth on
25 the ground, and did not disclose the truth. Hale was active in managing Midway,
26 including the Pan project. Klein was also active and spent a considerable amount of
27 time in Nevada. Dec., at 44-50.
28

1 Newell was an active manager of mining in Nevada, worked in Nevada, and
2 drafted press releases based on knowledge gained from his work. Dec., at pg. 13.

3
4 Defendants had more extensive contacts with Nevada. The contacts were all
5 related to mine business, including the Pan project; which is integral to the Complaint.

6 **C. Jurisdictional Discovery and Evidentiary Hearing.**

7
8 The contacts described are much greater than minimum, and satisfy all notions
9 of due process. For example, Brunk and Moritz were present in Nevada many more
10 times than Jane Macon in *Fulbright I & II*, and each visit dealt with gold mining in
11 Nevada, primarily the Pan project, and necessarily related to honest disclosure-which
12 is the focus of this case. However, should the Court elect to further explore
13 jurisdiction at an evidentiary hearing, Wolfus requests an opportunity to perform
14 jurisdictional discovery.
15
16

17 Dated this 18th day of April 2018.

18 /s/ James R. Christensen

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20 Nevada Bar No. 3861

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CERTIFICATE OF SERVICE

I CERTIFY SERVICE of PLAINTIFF'S CONSOLIDATED MEMORANDUM
OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS
PLAINTIFF'S SECOND AMENDED COMPLAINT was made this date by electronic
service (via Odyssey) to all parties currently shown on the Court's e-serve list of
recipients this 18th day of April, 2018.

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

EXHIBIT 1

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9 Attorneys for Plaintiff, DANIEL E. WOLFUS

11 **EIGHTH JUDICIAL DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 DANIEL E. WOLFUS,

14 Plaintiff,

15 vs.

16 KENNETH A. BRUNK; RICHARD
17 D. MORITZ; BRADLEY J.
18 BLACKETOR; TIMOTHY
19 HADDON; MARTIN M. HALE,
20 JR.; TREY ANDERSON;
21 RICHARD SAWCHAK; FRANK
22 YU; JOHN W. SHERIDAN;
23 ROGER A. NEWELL; RODNEY
24 D. KNUTSON; NATHANIEL
25 KLEIN; INV-MID, LLC, a
26 Delaware Limited Liability
27 Company; EREF-MID II, LLC, a
28 Delaware Limited Liability
Company; HCP-MID, LLC, a
Delaware Limited Liability
Company; and DOES 1 through 25.

Defendants.

CASE NO.: A-17-756971-~~C~~B
DEPT NO.: 10 27

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

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

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

6 2. As stated in my earlier declaration, I became a director of Midway Gold
7 Corp. ("Midway") in November 2008. In 2009, I became the Chairman of the Board
8 and Chief Executive Officer of Midway. In May 2012, I ceased to be the Chairman of
9 the Board and Chief Executive Officer of Midway.¹ As a director and officer of
10 Midway, I served from time to time on several of its committees including the
11 Disclosure Committee and the Audit Committee.

12 **Midway Gold US Inc. And Other Nevada Subsidiaries.**

13 3. At all times while I was a director of Midway, Midway had a wholly
14 owned subsidiary named Midway Gold US Inc. ("Midway US"). Midway US always
15 was and is a Nevada corporation with its registered agent located in Carson City,
16 Nevada. While I was a director of Midway, Midway US owned many of Midway's
17 Nevada gold properties and claims. One of those properties was Midway's Spring
18 Valley property and I also recall that Midway US was the Midway entity who joint
19 ventured that project with Barrick, a subsidiary of Barrick Gold Corporation.

20 4. It was the practice of Midway while I was a director to make Midway's
21 CEO and CFO officers of Midway US. I believe that both were also directors of
22 Midway US. This included me while I was CEO, Brunk while he was CEO and
23 Bradley J. Blacketor ("Blacketor") after he became CFO. Blacketor was likely also a
24 director of Midway US. Regardless of who was Midway US' officers and directors,
25 Midway US was controlled by Midway's Board of Directors, Midway's CEO and
26 Midway's CFO, including all of the individual defendants named in this action while
27 serving on Midway's Board.

28 ¹ Some of the moving papers suggest that I was replaced by Brunk in May 2013.
That is inaccurate.

1 5. When Kenneth A. Brunk ("Brunk") was hired by me to be Midway's
2 Chief Operating Officer, he also became an officer of Midway US. One of Brunk's
3 job duties as COO, was to manage Midway US' operations which were wholly in
4 Nevada. In that regard, Brunk travelled to Nevada to perform some of these duties.
5 Brunk's declarations are silent on his involvement with Midway US, although he was
6 the individual who was primarily responsible for managing the Spring Valley property
7 and the joint venture with Barrick Gold Corporation.

8 6. Both Brunk, Blacketor and I, while I was CEO, received part of our
9 compensation from Midway US.

10 7. In addition to Brunk and Blacketor, Richard D. Moritz ("Moritz") was
11 also directly involved in managing the Spring Valley project. Brunk hired Moritz to
12 assist Brunk in managing all of Midway's operations in Nevada including the Pan
13 project, the Gold Rock project and the Spring Valley project. These three projects
14 constituted over 90% of Midway's entire operations. During the time Moritz was with
15 Midway, he would spend over 50% of his working time in Nevada. Moritz was also
16 reported by Midway as receiving some or all his compensation from Midway US.
17 Moritz' declaration is silent on his involvement in Midway US including its Nevada
18 operations and is also silent on the amount of time he physically was present in
19 Nevada performing his duties, which duties primarily involved the Pan project and
20 secondarily involved the Gold Rock property, which was expected to be Midway's
21 second operating mine.

22 8. Midway leased an office building at 705 Avenue K, Ely, Nevada, where
23 both Midway and Midway US conducted business and which was used by Midway's
24 officers, including Brunk, Blacketor and Moritz when they were at the Pan mine.

25 9. In addition to Midway US, Brunk, Blacketor and Moritz were officers
26 and/or directors and controlling persons of the following Midway subsidiaries, each of
27 which is a Nevada corporation or LLC involved in owning or operating Midway's
28 business activities in Nevada during the relevant period: Midway Services Company;

1 GEH (U.S.) Holding Inc.; MDW-GR Holding Corp.; MDW Pan Holding Corp.;
2 Midway Exploration LLC, Midway Gold Realty LLC; Midway Gold Rock Mine Co.;
3 Midway Pan Mine Co.; Mine Services LLC; Nevada talon LLC; and RR Exploration
4 LLC. None of these Nevada based entities or these defendants' involvement in those
5 entities is discussed in their declarations.

6 **The Disclosure Committee**

7 10. Before I became CEO of Midway, Midway formed a Disclosure
8 Committee to review all of Midway's public filings, primarily press releases
9 principally directed to the Nevada news outlets and the Nevada mining groups, to
10 ensure that they were accurate, not misleading and did not omit any material facts.
11 One of the reasons why Midway formed this committee was directors should be
12 involved because all directors were jointly and severally liable for any false or
13 misleading public filings by Midway. I was a member of this committee and know
14 how it operated. From and after December 2013, the Disclosure Committee was
15 composed of Brunk, Blacketer, Newell, Yu and Klein.

16 11. The way the Disclosure Committee would operate is that the members of
17 the committee, including me while I was a member, would receive a draft press
18 release before it was issued. We were charged with reading and reviewing that draft
19 and reporting any problems with it, including any modifications or amendments we
20 believed should be made. We were not required to send a "no comment" response.

21 12. While I was CEO and Brunk was COO, Brunk was actively involved in
22 modifying draft press releases and involved in the drafting process even before the
23 draft was circulated to the committee. Insofar as the press releases dealt with
24 operations in Nevada, the information came primarily from Brunk and Moritz. Insofar
25 as the press releases dealt with financial information, the information came primarily
26 from the CFO or at his direction. If modifications or amendments were requested and
27 made, a revised draft was circulated to the Disclosure Committee and was not issued
28

1 by Midway until there were no further unresolved requests for modification or
2 amendment.

3 13. The declarations of Brunk, Blacketor, Newell, Yu and Klein are silent on
4 their involvement on the Disclosure Committee or their involvement in the drafting of
5 the public filings and press releases which were substantial and continuing. Note
6 again that these releases were principally directed to the Nevada news outlets and the
7 Nevada mining groups. To the extent that those declarations state that these
8 individuals were not involved in directly making misrepresentations and omissions in
9 press releases from and after May 2012, those declarations are false.

10 **Midway Board Meetings**

11 14. While I was a member of Midway's Board, all the meetings were
12 essentially conducted in the same manner. Moreover, Midway held several Board and
13 shareholder meetings in Nevada both in Ely and Las Vegas. These meetings were
14 generally personally attended by all Board members and the CFO. These meetings
15 included a Board meeting in Ely on January 13-14, 2014; the annual shareholders
16 meeting on June 18, 2014 at the Lionel Sawyer offices in Las Vegas, which Midway
17 executives used for Las Vegas meetings; the June 2014 Board meeting held in Las
18 Vegas and, as declared by Newell, an August 2014 Board meeting in Ely. Informal
19 Board meetings were held at the Pan mine in late March and early April 2014.

20 15. Prior to the meeting, each director would receive a Board package of
21 materials, including an agenda, prior minutes, financial information and significant
22 press releases, if any. Each director was required to review and be prepared to discuss
23 those materials at the meeting.

24 16. At the commencement of the meeting, the prior minutes were reviewed
25 and approved. Next would come reports by officers. I would generally give a brief
26 report first. The next report was very extensive and came from Brunk after he was
27 hired. Moritz, who attended the meetings after he was hired, would participate in
28 Brunk's report. The Brunk/Moritz report covered all of the Midway's mining

1 activities. The final report came from the CFO. This report covered financial matters
2 particularly how Midway's capital was being spent on operations in Nevada and what
3 was expected to be spent and for what purposes.

4 17. After Brunk was hired, 90% of the time spent in Board meetings involved
5 four of Midway's Nevada projects. Most of the time was spent discussing the Pan
6 project; a lesser amount of time was spent discussing the Gold Rock project; and the
7 other project which was discussed was the status of what Barrick was doing on the
8 Spring Valley project and the Tonopah project. What was primarily discussed was
9 what had been done since the last Board meeting, what was going to be done in the
10 near term; what the capital expenditures had been and would be on these projects; and
11 how additional capital would be acquired to fund primarily the Pan project. Much
12 time was spent by the directors asking questions and receiving information in
13 response. There were two primary purposes for these discussions. First, the Board
14 needed to determine what had been done and what needed to be done (and the cost) to
15 provide direction to management. Secondly, the Board needed to know what was
16 going on in Nevada to ensure that proper disclosure to investors and prospective
17 investors would be made.

18 18. After Brunk and Moritz were hired, there was virtually no discussion at
19 Board meetings on any non-Nevada operations of Midway.

20 19. All the persons attending Board meetings knew and discussed the fact
21 that the Board's decisions, except for locating additional capital, involved directing
22 activities taking place in Nevada and not elsewhere. This was particularly so when
23 Midway embarked on the process of securing permits for the Pan project from the
24 BLM office in Ely, Nevada, the Nevada Department of Environmental Protection
25 ("NDEP") in Carson City, Nevada and White Pine County in Ely, Nevada. Once the
26 permitting process was well underway, Nevada activities directed by the Board
27 accelerated as Midway needed to secure water and electricity to operate the Pan mine
28 and build roads to reach the Pan mine, secure mining equipment and acquire

1 additional property to build houses for mine workers. These activities were directly
2 managed by Brunk and Moritz.

3 20. At all times, Midway had Nevada shareholders and all the Defendants
4 were aware that those investors would receive, one way or another, all the information
5 contained in the important press releases issued by Midway. Additionally, Midway's
6 activities about the Pan project was "big news" in the Ely Nevada community and the
7 subject of frequent local press coverage. Finally, Midway's Pan activities were
8 important news in the Nevada mining community including those vendors supplying
9 Nevada mines. All the Defendants were aware of this and all expressed the need to
10 create a positive impression for Midway and the Pan project both from an investor and
11 community point of view but also to facilitate the permitting process, which in part
12 was dependant on Midway have a good reputation.

13 21. Midway received little or no press coverage outside of Nevada and
14 certainly no known coverage in Canada where Midway's only involvement was having
15 a charter issued in Canada.

16 22. The declarations of the Defendants are silent on any discussion of their
17 involvement in and control over all of Midway's activities in Nevada and any
18 discussions of the roles each played in directing Midway's Nevada activities. The
19 declarations suggest that each were merely "bumps on a log" observing the meetings
20 when in fact all were active participants in directing all of Midway's Nevada activities
21 and their doing so involved nearly all their time as directors.

22 **The Budget/Work Plan and Audit Committees**

23 23. In addition to the Disclosure Committee, Midway had or established two
24 other very important committees which were the Budget/Work Plan Committee and
25 the Audit Committee. During the relevant period, Brunk, Hale, Sheridan, Yu and
26 Klein were the members of the Budget/Work Plan Committee. During the relevant
27 period, Sheridan, Yu, Sawchak and Knutson were the members of the Audit
28 Committee, although Sawchak was replaced by Knutson during this time.

1 24. The Budget/Work Plan Committee was created at the demand of Hale
2 and the Hale Investment entities to control Midway as a condition of the Hale
3 Investment entities investing in Midway. This committee was responsible for
4 determining how much Midway would spend on its Nevada projects, primarily Pan.
5 Any decision to spend any material capital had to receive the unanimous vote of all of
6 the committee members, thereby giving the Hale Investment entities through Hale as
7 their designee to absolute power to veto any material expenditure by Midway.

8 25. The Audit Committee was responsible for reviewing and approving all
9 publically filed financial reports of Midway, which consolidated the financial reports
10 of Midway US.

11 26. Members of these two committees had heightened duties of investigation
12 and knowledge of Midway's Nevada activities, controlled what activities Midway
13 could conduct and how the financial and operational aspects of those activities was
14 reported in the public filings and press releases principally directed to the Nevada
15 news outlets and the Nevada mining groups.

16 27. The declarations of these committee members are silent as to their Nevada
17 directed activities and reporting as members of these committees. However, these
18 committee members were highly involved.

19 **The Defendants' Declarations.**

20 **Yu**

21 28. I have known Frank Yu ("Yu") since 2008 when he became a director of
22 Midway. I know that at all the times I have known him, Yu was and is a resident of
23 Clark County Nevada. Defendants' motion to dismiss admits general jurisdiction over
24 Yu and he provided no declaration.

25 29. As a director and committee member, Yu was actively involved in
26 managing the affairs of Midway and its Nevada subsidiaries on behalf of Midway.

27 30. Yu was also a member of Midway's Disclosure Committee and charged
28 with the responsibility of reviewing and approving all press releases issued by

1 Midway before they were made to ensure that they were accurate and complete, not
2 misleading and contained all necessary facts which required disclosure to ensure that
3 what Midway did disclose was not misleading.

4 31. Yu was also a member of the Budget/Work Plan and Audit committees so
5 his involvement with Midway and his role in the issuance of all press releases was
6 extensive. Yu did not submit any declaration but his motion admits general
7 jurisdiction over him. Nevada is where Yu usually performed his drafting duties with
8 respect to press releases from his home office in Las Vegas.

9 32. Yu also attended political fund-raising events with Brunk and Moritz in
10 Las Vegas to enhance Midway's reputation.

11 **Brunk**

12 33. I have known Brunk since the time I interviewed him to be the Chief
13 Operating Officer of Midway. I hired Brunk in May 2010 in that capacity to bring the
14 Pan Project in Nevada on line as an operating gold mine. Brunk was also a director
15 and a member of the Disclosure Committee with the same duties in that regard as Yu.
16 Brunk was also a member of the Budget/Work Plan Committee.

17 34. After I hired Brunk to manage the Pan project and while I was CEO,
18 Brunk regularly went to Nevada to oversee operations at the mine, to interface with
19 the regulators at BLM and NDEP. Brunk also went to Nevada as COO and CEO
20 extensively to interface with geologists, people drilling mining holes, vendors, lawyers
21 hired by Midway including Laura Granier, lobbyists to seek legislative influence
22 including former Senator Richard Bryant and Debra Struhsaker, Congressman Steven
23 Horsford, state legislators, Governor Brian Sandoval, White Pine County supervisors,
24 Nevada state water engineers, and other Midway projects. Brunk with Moritz also
25 attended periodic Project Review meetings in Wendover, Nevada with Midway's
26 personnel located in Nevada and others. Brunk also personally attended with Moritz
27 Nevada legislative fund-raising events. Brunk complained about the amount of time
28

1 he was required to spend in Nevada and hired Moritz to lessen his Nevada performed
2 activities.

3 35. In addition to the above, other trips to Nevada by Brunk included Annual
4 Engineering Review Meetings, Ely office Christmas parties, Midway project tours
5 with Midway stock analysts and Sheridan, Lumas Engineers meeting regarding water
6 issues, the Northwest Mining Association annual meeting, Project Evaluation
7 Meetings, and inspection trips to acquire equipment.

8 36. Brunk's declaration either stating or suggesting his minimal "boots on the
9 ground" activities in Nevada is simply false as are the number of times he admits to
10 attending Midway meetings held in Nevada.

11 37. Brunk was an active participant in the drafting of all Midway press
12 releases which I have alleged were false and misleading. He also signed as CEO, all
13 important public filings.

14 38. To the extent that the other Defendants acquired knowledge about the
15 Pan project and its financing after Brunk was hired, that knowledge was provided by
16 Brunk and Moritz after each was hired.

17 39. As noted above, Brunk was always an officer and probably a director of
18 Midway US, a Nevada corporation, all whose business operations were in Nevada.
19 After he became CEO of Midway, Brunk was the principal controlling person of
20 Midway US. Midway US compensated Brunk for his services.

21 40. In sum, Brunk's contacts with Nevada as COO and CEO of Midway were
22 continuous and substantial. It is my understanding that Brunk continues to work on
23 the Pan mine in his new job.

24 **Moritz**

25 41. I have known Moritz since July 2010. Moritz was specifically hired by
26 Brunk to oversee and manage all of Midway's Nevada mining operations including
27 Midway's offices in Nevada and Nevada based employees. Moritz was directly
28 supervised by Brunk who directed his Nevada based duties. Moritz was actively

1 involved in conducting Midway's mining operations in Nevada until his departure.
2 Moritz was in Nevada during much of his employment with Midway spending
3 probably more than 50% of his time there. Moritz was also an employee of Midway
4 US who paid part or perhaps all his compensation as Midway reported in its April
5 2014 Form 14A.

6 42. Moritz attended public comment events in Nevada related to Midway's
7 projects. Moritz participated with Brunk in meetings with Nevada state water
8 engineers. Moritz meet with geologists in Nevada. Moritz attended Nevada
9 legislative fund-raising events to enhance Midway's public reputation and influence,
10 particularly during the permitting process. Moritz participated with Brunk in periodic
11 Project Review meetings in Wendover, Nevada with Midway's personnel located in
12 Nevada and others. Moritz attended and Public Scope Meetings conducted by the
13 BLM. Moritz accompanied Brunk on equipment inspection trips, Christmas parties,
14 Annual Engineering Review meetings and stock analyst meetings. In sum, Moritz'
15 Nevada based activities were continuous and pervasive.

16 **Blacketor**

17 43. I have known of Blacketor since he was hired as Midway CFO in
18 December 2013 and have spoken with him on several occasions during which he
19 demonstrated to me that he was actively involved in managing Midway Nevada
20 mining operations and the financial operations related thereto. Blacketor was on the
21 Disclosure Committee and as such was actively involved in the preparation and
22 dissemination of Midway's press releases. Blacketor attended all Board meetings,
23 including those held in Nevada, and probably also attended all Audit Committee
24 meetings because that committee was charged with overseeing Blacketor's financial
25 reporting. Blacketor was an officer of Midway US, a Nevada corporation, and
26 received part of his compensation from Midway US. Blacketor reported that he
27 attended at least three Project Staff meetings in Ely, Nevada.

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48. Klein was a member of the Disclosure Committee involved in drafting the press releases principally directed to the Nevada news outlets and the Nevada mining groups.

49. Klein, like Hale, was a member of the Budget/Work Plan committee with the individual power to stop all capital expenditures by Midway.

50. Klein's declaration is silent as to the length of time he spent in Nevada or his involvement on the Disclosure Committee or his involvement on the Budget/Work Plan Committee. In sum and contrary to his declaration, Klein was very actively involve involved in managing Midway's mining operations in Nevada.

Newell

51. 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 and involved in drafting all press releases principally directed to the Nevada news outlets and the Nevada mining groups. Newell was involved in Midway related meeting in Eureka, Nevada, in June 2014. Newell was actively involve involved in managing Midway's mining operations in Nevada and issuing false and misleading press releases directed to Nevada news organizations until his departure in August 2014.

Sheridan

52. 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. Sheridan also attended Board and shareholder meetings of Midway in Nevada.

53. Sheridan was a member and Chairman of the Audit Committee and as such was fully aware that Midway would be unable to complete the Pan project in accordance with the permitted mining plan. As a director, he was aware of the press

1 releases and public filings and knew that the Nevada press had not been alerted to
2 Midway's financial difficulties.

3 54. Sheridan was a member of the Budget/Work Plan Committee and as such
4 controlled all of Midway's capital expenditures after that committee was formed. He
5 should understand Midway's failure was caused by its failure to have the necessary
6 capital to bring the Pan mine into profitable production.

7
8 **Sawchek**

9 55. Richard Sawchak ("Sawchak") became a director of Midway in June
10 2014. Sawchek was also a member of Midway's Audit Committee with the same
11 knowledge and participation as Sheridan noted above, at least during the time he was
12 on that committee.

13 **Knutson**

14 56. Rodney D. Knutson ("Knutson") replaced me as a director in June 2013.
15 Knutson was also a member of Midway's Audit Committee with the same knowledge
16 and participation as Sheridan noted above, at least during the time he was on that
17 committee. Yu also attended political fund-raising events with Brunk and Moritz in
18 Las Vegas to enhance Midway's reputation.

19 **Anderson**

20 57. Trey Anderson ("Anderson") became a director of Midway in November
21 2014. Like Hale, Anderson was appointed a director by the Hale Investors and was
22 their agent charged with protecting their investment and particularly overseeing what
23 funds of Midway would be expended in Nevada.

24 **Haddon**

25 58. I have known Timothy J. Haddon ("Haddon") since sometime in August
26 2014 when he became a director and Chairman of the Board of Midway. I have
27 spoken to Haddon on several occasions in that capacity. Based upon my personal
28

1 knowledge of the duties of Chairman, Haddon was actively involve involved in
2 managing Midway's mining operations in Nevada.

3 I declare under penalty of perjury under the laws of the United States and the
4 State of Nevada that the foregoing is true and correct and that I signed this declaration
5 on this 18th day of April 2018.

6 
7 Daniel E. Wolfus

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 11:00 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**

VOLUME 5 of 6

PART 1 OF 3

(PA0749-PA0883)

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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 5** 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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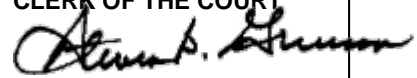
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 Rodney D. Knutson*

DISTRICT COURT
CLARK COUNTY, NEVADA

DANIEL E. WOLFUS,

Plaintiff,

v.

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

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.

**D&O DEFENDANTS' MOTION TO
 DISMISS SECOND 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

1 “D&O Defendants”), by and through their attorneys of record, HOLLAND & HART LLP, hereby
2 move this Court to dismiss the *Second Amended Complaint for Damages* filed by Plaintiff Daniel
3 E. Wolfus (“Wolfus” or “Plaintiff”) on February 5, 2018 (the “SAC”).

4 This Motion is made pursuant to Rules 12(b)(1), (2) and (5) of the Nevada Rules of Civil
5 Procedure (“NRCPP”) and is based on the attached Memorandum of Points and Authorities, the
6 *Declarations of Rodney D. Knutson, Bradley J. Blacketor, Richard Sawchak, John W. Sheridan,*
7 *Timothy Haddon, Roger A. Newell, and Richard D. Moritz*, which are attached hereto as **Exhibits**
8 “A” through “G,” respectively, together with the exhibits, the pleadings and papers on file herein,
9 and any oral argument this Court may allow.

10 DATED this 16th day of March, 2018.

11
12 By /s/ David J. Freeman

13 Robert J. Cassity, Esq.

14 David J. Freeman, Esq.

15 HOLLAND & HART LLP

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17 Las Vegas, Nevada 89134

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24 *Richard Sawchak, John W. Sheridan,*
25 *Frank Yu, Roger A. Newell and*
26 *Rodney D. Knutson*
27
28

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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE that the foregoing **D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** will be brought before Department XXVII of the above-entitled Court on the **25th** day of **April**, 2018, at **10:00** a.m. ~~xxx~~.

DATED this ___ day of March, 2018.

By /s/ David J. Freeman
Robert J. Cassity, Esq.
David J. Freeman, Esq.
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Frank Yu, Roger A. Newell and
Rodney D. Knutson*

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

I.

INTRODUCTION

This is Plaintiff's second attempt to state a claim against the former officers and directors and certain investors in Midway Gold Inc. ("Midway"), a now bankrupt Canadian corporation with its principal place of business in Englewood, Colorado. Plaintiff, a California resident, is the former CEO and Chairman of the Board of Midway. Plaintiff started buying and selling Midway stock in 2008 when he became a director of Midway. Over the years, Plaintiff actively traded Midway stock such that by May 2012, Plaintiff had accumulated 1,629,117 shares of Midway stock at favorable prices. Plaintiff was ousted as the CEO and Chairman in 2013, but continued as a director until June 2013.

Plaintiff seeks to recover the amounts he paid to exercise his expiring stock options on two occasions in 2014 allegedly in reliance upon false statements or omissions in Midway's press releases and SEC filings. Plaintiff also seeks to recover the market value of the stock he and his family owned in February 2014 when Midway's shares traded at their peak. Thus, relying on the false clarity of hindsight, Plaintiff alleges that had he known certain allegedly undisclosed facts, he would not have exercised the stock options in 2014; rather, he would have omnisciently sold all his common stock when Midway's stock reached its peak in February 2014.

On January 5, 2018, this Court entered an order granting *Defendants' Motion to Dismiss the Amended Complaint* without prejudice for lack of subject matter jurisdiction. *See* Order Granting Defendants' Motions to Dismiss Amended Complaint Without Prejudice (filed Jan. 5, 2018) (the "Order"). The Court concluded that Plaintiff's claims, which were premised on harm caused by the reduction in value of shares of stock, were inherently derivative in nature under the Direct Harm test adopted by the Nevada Supreme Court in *Parametric Sound Corp.* The Court further concluded it lacked subject matter jurisdiction because, under the internal affairs doctrine, British Columbia law vests exclusive jurisdiction in the Supreme Court of British Columbia to

1 adjudicate Plaintiff's derivative claims. Plaintiff fares no better in this, his second bite at the apple,
2 and the SAC should now be dismissed with prejudice.¹

3 First, as this Court previously found, it lacks subject matter jurisdiction over Plaintiff's
4 claims for breach of fiduciary duty and aiding and abetting Midway's breach of fiduciary duty.
5 These claims are still inherently derivative in nature under the Direct Harm test adopted by the
6 Nevada Supreme Court in *Parametric Sound Corp.* and British Columbia law vests exclusive
7 jurisdiction in the Supreme Court of British Columbia to adjudicate derivative claims.
8 Accordingly, this Court lacks subject matter jurisdiction over Plaintiff's derivative claims and the
9 claims must be dismissed.

10 Second, Plaintiff fails to state a primary violation of the California Corporate Securities
11 Act of 1968, which creates a private right of action for a purchaser of a security where the seller
12 engages in a material misrepresentation or omission of fact *in connection* with the purchase or
13 sale of said security. Because Plaintiff did not "purchase" a security in 2014 as a matter of law,
14 failed to allege *any* defendant made a statement directly to Plaintiff, let alone a false statement,
15 and failed to allege *any* defendant actually sold securities to Plaintiff, the SAC fails to state a
16 primary violation of the Act and the California state securities claim must be dismissed.

17 Next, the Court should dismiss with prejudice Plaintiff's so-called "holder claims" under
18 California law for common law fraud and negligent misrepresentation because (1) California law
19 does not apply to a publicly-traded Canadian corporation; (2) even if California law applied,
20 claims arising out of the exercise of stock options are not "holder claims"; (3) Plaintiff fails to
21 allege reliance and causation with the particularity required for asserting holder claims; and (4)
22 Plaintiff fails to plead scienter with the required specificity under Rule 9(b).

23 Lastly, the D&O Defendants are not subject to personal jurisdiction in Nevada. The D&O
24 Defendants are not subject to general jurisdiction because, with one exception, they do not reside,
25

26 ¹ The SAC alleges five causes of action: (1) a claim for violation of California's Corporate Securities Act of
27 1968, California Corporations Code § 25000, *et seq.*; (2) a claim for California common law breach of fiduciary duty;
28 (3) a claim for California common law aiding and abetting Midway's breach of fiduciary duty; (4) a claim for
California common law fraud; and (5) a claim for California common law negligent misrepresentation. A redlined
version of the SAC is attached hereto as **Exhibit "H"** for the Court's convenience.

1 much less domicile, in Nevada and their contacts with Nevada certainly do not render them at
2 “home” in this forum. Furthermore, Plaintiff’s claims arise out of his purported reliance upon
3 alleged material omissions contained in Midway’s SEC filings and press releases, which were
4 drafted in and issued from the state of Colorado and communicated to the investing public.
5 Because the claims asserted in this lawsuit do not arise from the D&O Defendants’ purported
6 contacts with the state of Nevada, this Court cannot exercise specific jurisdiction over them.

7 II.

8 FACTUAL BACKGROUND²

9 A. *The Parties.*

10 Non-party Midway Gold Corp. (“Midway”) was a publicly traded Canadian Corporation
11 incorporated under the Company Act of British Columbia³ with its principal executive offices
12 located in Englewood, Colorado.⁴ SAC ¶ 23. Midway was engaged in the business of exploring
13 and mining gold, primarily from mines located in Nevada and Washington. *Id.* ¶ 30. Midway
14 filed for Chapter 11 bankruptcy on June 22, 2015. SAC ¶ 95.

15 Plaintiff, currently a California resident, became an outside director of Midway in
16 November 2008. SAC ¶¶ 7, 26. In 2009, Plaintiff became Chairman of the Board and the Chief
17 Executive Officer of Midway, serving in both capacities until May 18, 2012 when he was replaced
18 by Defendant Kenneth Brunk. *Id.* ¶ 27.

19 Plaintiff began purchasing common stock of Midway in the open market in February 2008.
20 SAC ¶ 29. Plaintiff also acquired Midway stock option grants pursuant to an employee stock
21 option plan on January 7 and September 10, 2009. *See* SEC Form 4 for January 7 and September
22
23
24

25 ² For the purposes of this motion only, the factual allegations are taken as true as they are stated in the
26 Second Amended Complaint. The D&O Defendants do not admit to any of the allegations by this Motion and reserve
27 the right to challenge any of the allegations at any further stage of this litigation.

28 ³ The Business Corporations Act of British Columbia (“BCA”) replaced the former Company Act of British
Columbia on March 29, 2004.

⁴ Plaintiff has not brought any claims or lawsuits arising out of the same set of facts against Midway or the
D&O Defendants in the provincial courts of British Columbia, the place of Midway’s incorporation.

1 10, 2009, attached hereto as **Exhibits “I” and “J,”** respectively.⁵ As of May 1, 2012, Plaintiff
2 and his family owned over 1,629,117 shares of Midway common stock. SAC ¶ 29.⁶

3 **B. The 2011 Pan Mine Feasibility Study.**

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

10 In November 2011, when Plaintiff was still Midway’s Chairman and CEO, Midway
11 reported by press release filed with the SEC the results of a feasibility study for the Pan Project
12 prepared by an independent contractor, Gustavson Associates (the “2011 Pan Mine Feasibility
13 Study”). SAC ¶ 44 and SAC Ex. 1 at 9. On December 20, 2011, Midway filed the 2011 Pan Mine
14 Feasibility Study with the SEC. SAC ¶ 45. The 2011 Pan Mine Feasibility Study is attached as
15 Exhibit 1 to the SAC.

16 In 2012, Plaintiff claims that as CEO and Chairman of the Board of Midway, he was
17 primarily involved in securing capital for Midway to fund its operations. SAC ¶ 49. When Hale
18 Capital Partners LP offered to secure a \$70 million private placement of preferred stock, Plaintiff
19 purportedly opposed the transaction proposed by Hale, while Brunk was an ardent supporter. *Id.*

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

25 ⁵ D&O Defendants request that the Court take judicial notice of the SEC Forms 4. NRS 47.130; *In re MGM*
26 *Mirage Sec. Litig.*, 2:09-CV-01558-GMN, 2013 WL 5435832, at *4 (D. Nev. Sept. 26, 2013) (citing *In re Amgen*
27 *Inc. Sec. Litig.*, 544 F. Supp. 2d 1009, 1023-24 (C.D. Cal. 2008)) (observing that the court may take judicial notice
of SEC filings).

28 ⁶ As of December 23, 2014, and after the sale of some shares (at a profit), the combined shareholdings of
Wolfus and/or his assignors were 2,402,251 shares of Midway common stock.

1 **C. Midway's Alleged Misrepresentations and Omissions.**

2 Plaintiff claims that, by December 13, 2013, Midway's management and its Board
3 (including the D&O Defendants) knew the Pan Mine was being built and operated in ways that
4 were materially different from those assumed in the Pan Mine 2011 Study, but the Defendants
5 did not inform investors of the material impact on cash flows as a result of those differences.
6 SAC ¶ 65. Plaintiff generally alleges that "from and after May 18, 2012, Wolfus carefully read
7 and considered all press releases by Midway and the public filings made by Wolfus usually within
8 a day or two following their release" in order to decide whether to purchase additional shares or
9 sell his shares. *Id.* ¶¶ 50, 66, 87, 129, 130, 131. Plaintiff alleges that he was primarily concerned
10 with the status of the Pan project and the likelihood that this project would be profitably mining
11 gold and be revenue positive. *Id.* Plaintiff claims he determined from those public statements
12 and the absence of the 2013 Undisclosed Facts⁷ and 2014 Undisclosed Facts⁸ that profitable
13 mining operations would result in a substantial increase in the value of his Midway shares. *Id.* ¶¶
14 129-136. The SAC does not contain any allegations about any particular public statements after
15 December 1, 2014 until the announcement that it was filing for bankruptcy on June 22, 2015.

16 **D. Plaintiff's Exercise of Stock Options in January and September 2014.**

17 In late December 2013 and in early January 2014, Plaintiff alleges he "needed to decide
18 whether to exercise some of his Midway stock options which would soon be expiring." SAC ¶
19 66. Plaintiff alleges that "in order to make this investment decision, Wolfus carefully reviewed
20
21

22 ⁷ Plaintiff alleges that Defendants failed to disclose that (1) Midway was unable to raise sufficient cash to
23 complete the Pan Mine project in the manner set forth in the 2011 Pan Mine Feasibility Study, as well as fund on-
24 going operations until the Pan Mine project produced sufficient revenues to cover these expenses; (2) the Hale
25 Defendants blocked any consideration of the sale of Midway's material assets to generate additional revenue; (3)
26 Midway did not seek the proper permits and did not have the necessary facilities to process the gold solution once
27 leaching was completed; and (4) there would be a considerable delay before the facilities were constructed and
28 permitted for operations. SAC ¶ 65.

⁸ Plaintiff alleges Defendants failed to disclose that Midway (1) had a mining contractor poised to begin
loading ore directly on the leach pads at the Pan Mine despite Midway not having a qualified person on site to
supervise the loading; (2) did not have the permits authorizing it to deviate from the 2011 Pan Mine Feasibility Study;
and (3) did not have the necessary facilities to process the gold solutions once leaching had been completed. SAC ¶
86.

1 and considered Midway's press releases and public filings, primarily those that were issued after
2 he ceased to be Midway's Chief Executive Officer."⁹ *Id.*

3 The only stock purchase alleged to have been made by Plaintiff in 2014 was the *exercise*
4 *of stock options* granted to Plaintiff pursuant to an employee stock option plan on January 7 and
5 September 10, 2009. SAC ¶¶ 29, 66, 69, 87; Exs. I and J, respectively. On January 23, 2014,
6 Plaintiff exercised stock options by purchasing 200,000 shares at \$0.56/share for \$112,000
7 Canadian Dollars (\$100,636 USD). SAC ¶ 102. At that time, Midway's common stock was
8 selling at \$1.27 US dollars per share and its price was rising. *Id.*

9 Plaintiff claims that following his exercise of stock options on January 23, 2014,
10 "thereafter and on a daily basis checked the market price of Midway's stock." SAC ¶ 70. He
11 further contends that when Midway's stock reached a high on February 14, 2014, of \$1.39, he
12 decided to continue to hold his shares. *Id.* The SAC also alleges that, at the time he made this
13 decision to exercise his expiring options and not to sell his shares, he was unaware of the 2013
14 Undisclosed Facts or that the Pan Mine project was not fully permitted and that, had he known,
15 he and his family members would have sold all of the Midway shares at that time. *Id.* ¶¶ 70, 106,
16 111, 117.

17 In late August and early September 2014, Plaintiff alleges that he again "needed to decide
18 whether or not to exercise some of his options which would soon be expiring." SAC ¶ 87.
19 Plaintiff claims to have reviewed the press releases and SEC filings "primarily those that were
20 issued after he purchased shares in January 2014."¹⁰ *Id.*

21 On September 5, 2014, Plaintiff contends he notified Midway, once again, of his intent to
22 *exercise some of the stock options* granted to him in 2009 pursuant to Midway's stock option
23 plan. SAC ¶ 87; Ex. J.¹¹ On September 19, 2014, Plaintiff consummated his stock option exercise
24

25 _____
26 ⁹ Notably, the SAC does not specify which press releases or SEC filings Plaintiff reviewed at that time. Nor
does Plaintiff point to any specific misrepresentation contained in the filings upon which he purportedly relied.

27 ¹⁰ Notably, the SAC does not specify which press releases or SEC filings Plaintiff reviewed at that time.
Nor does Plaintiff point to any specific misrepresentation contained in the filings upon which he purportedly relied.

28 ¹¹ See *supra* n.5.

1 by purchasing 1,000,000 shares directly from Midway at a purchase price of \$0.86/share for
2 \$860,000 Canadian Dollars (\$783,778 USD). *Id.* ¶¶ 89, 107.¹²

3 ***E. The Midway Bankruptcy.***

4 The SAC generally alleges that from mid-September 2014 until the announcement of the
5 voluntary petition for bankruptcy on June 22, 2015, Midway’s press releases and SEC filings
6 provided only favorable information concerning the Pan Mine project. SAC ¶¶ 90-94. As a result
7 of the Midway Bankruptcy, all or virtually all of Midway’s assets have been sold and there are
8 no funds or recoveries by any common shareholders of Midway. Thus, the value of any common
9 stock held by any Midway shareholder, once Midway filed bankruptcy, became worthless. *Id.* ¶
10 96.

11 **III.**

12 **LEGAL ARGUMENT**

13 **A. Plaintiff’s Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary**
14 **Duty Claims Are Derivative and Governed by British Columbian Law and Must Be**
15 **Dismissed For Lack of Subject Matter Jurisdiction**

16 Plaintiff’s claims for breach of fiduciary duty (Count II) and aiding and abetting breach
17 of fiduciary duty (Count III) are derivative claims related to the D&O Defendants’ internal
18 management of Midway, a Canadian corporation. As a result, the internal affairs doctrine requires
19 this Court to apply the law of the jurisdiction where the corporation was incorporated (here,
20 British Columbia, Canada), to determine whether it has subject matter jurisdiction to hear the
21 claims. The Business Corporations Act (“BCA”), which governs British Columbia corporations
22 such as Midway, provides that the Supreme Court of British Columbia has exclusive jurisdiction
23 over derivative claims involving British Columbia corporations. Accordingly, this Court has no
24 subject matter jurisdiction over Plaintiff’s derivative claims contained in Counts II and III and
25 must dismiss the same.

26
27
28 ¹² At the time of this exercise, Midway’s common stock was trading at US\$1.01.

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

Rule 12(b)(1) 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). The burden of proving subject matter jurisdiction lies with the party asserting subject matter jurisdiction, the plaintiff or petitioner in an action. *Id.* 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).

2. Nevada Recognizes the Internal Affairs Doctrine

The Nevada Supreme Court has held that the “most significant relationship test governs choice of law issues in tort actions unless another, more specific section of the Second Restatement applies to the particular tort.” *Gen. Motors Corp. v. Eighth Judicial Dist. Court*, 122 Nev. 466, 134 P.3d 111, 116 (2006) (emphasis added). With regard to claims of breach of fiduciary duty, fraud and negligence by the directors or officers of a corporation, there is a more specific section that applies, namely, section 309. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1971). Section 309 states that, in general, “the local law of the state of incorporation will be applied to determine the existence and extent of a director’s or officer’s liability to the corporation, its creditors and shareholders” *Id.* This rule embodies the widely accepted choice-of-law principle often referred to as the “internal affairs doctrine.”¹³ The internal affairs doctrine is well established and generally followed throughout this country, including in Nevada.¹⁴

¹³ *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 224 (1997); *see also Batchelder v. Kawamoto*, 147 F.3d 915, 920 (9th Cir. 1998) (noting that, under the internal affairs doctrine, “the rights of shareholders in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated”); *Vaughn v. LJ Int’l, Inc.*, 94 Cal. Rptr. 3d 166, 225 (Cal. Ct. App. 2009) (applying internal affairs doctrine in concluding that the British Virgin Islands Business Companies Act governed appellant’s standing to bring his derivative claims against British Virgin Islands corporation and its directors in California).

¹⁴ *See, e.g., Fagin v. Doby George, LLC*, 525 Fed. App’x 618, 619 (9th Cir. 2013) (affirming a Nevada federal district court’s dismissal of a shareholder derivative action for lack of subject matter jurisdiction where, after applying the internal affairs doctrine, plaintiffs failed to obtain leave to assert said claims from Canada’s Yukon Supreme Court); *see also Dictor v. Creative Mgmt. Servs., LLC*, 223 P.3d 332, 335 (Nev. 2010) (noting that Nevada has adopted the RESTATEMENT (SECOND) OF CONFLICT OF LAWS as the relevant authority for its choice-of-law

1 Because Midway is a British Columbian corporation, Plaintiff's common law claims for
2 breach of fiduciary duty and aiding and abetting breach of fiduciary duty are governed by
3 Canadian law. As such, the Court must dismiss these inherently derivative claims because it lacks
4 subject matter jurisdiction.

5 **a. The BCA Vests Exclusive Jurisdiction in the Supreme Court of**
6 **British Columbia to Adjudicate Plaintiff's Derivative Claims.**

7 This Court lacks subject matter jurisdiction to hear Plaintiff's derivative claims because
8 exclusive jurisdiction is vested in the Supreme Court of British Columbia pursuant to Canadian
9 law. Specifically, Plaintiff's derivative claims fail to satisfy two separate and necessary
10 preconditions for bringing an action on behalf of a British Columbian corporation: (1) providing
11 notice to the directors prior to initiating the action; and (2) obtaining judicial permission from the
12 Supreme Court of British Columbia to bring the derivative action prior to filing suit.¹⁵ See BCA
13 §§ 232 & 233.

14 For derivative claims involving corporations that are incorporated in British Columbia,
15 the BCA requires the shareholder complainant to obtain leave of the Supreme Court of British
16 Columbia¹⁶ prior to asserting derivative claims against the company's directors. See BCA §
17 232(2). The Supreme Court of British Columbia may grant the complainant leave to assert the
18 derivative claims if, among other things, notice of the application for leave has been provided to
19 the company. See BCA § 233(1). In other words, a mandatory precondition to bringing a
20 derivative suit under the BCA is to apply for and obtain leave of the Supreme Court of British
21 Columbia to do so. Failure to comply requires dismissal of the action. United States courts,
22 including the District of Nevada and the Ninth Circuit, have similarly recognized they lack
23 jurisdiction to hear shareholder claims against Canadian corporations and their directors. *E.g.*,

24 _____
jurisprudence in tort cases); see also *Hausman v. Buckley*, 299 F.2d 696, 702 (2d Cir. 1962) (internal affairs doctrine
25 "is well established and generally followed throughout this country").

26 ¹⁵ As set forth above, the internal affairs doctrine requires this Court to look to Canadian law. For the
avoidance of doubt, the D&O Defendants hereby provide notice of their intent to raise an issue concerning the law
27 of a foreign country, Canada, pursuant to NRCP 44.1.

28 ¹⁶ The BCA states that derivative proceedings must be heard by "the court," which is defined as "the
Supreme Court." BCA § 1(1). The B.C. Interpretation Act clarifies that the term "Supreme Court" refers only to the
"Supreme Court of British Columbia." B.C. Interpretation Act, R.S.B.C. (1996), chapter 238 § 29.

1 *Fagin v. Doby George, LLC*, 525 Fed. App'x 618 (9th Cir. May 31, 2013) (affirming dismissal
2 from the District of Nevada for lack of subject matter jurisdiction).¹⁷

3 Here, Plaintiff failed to make application to and has not obtained leave from the Supreme
4 Court of British Columbia to bring a derivative action on behalf of Midway. Because British
5 Columbia law applies to Plaintiff's claims, and because Sections 232 and 233 of the BCA requires
6 Plaintiff to seek leave of the Supreme Court of British Columbia prior to bringing derivative
7 claims this Court cannot properly exercise jurisdiction over Plaintiff's derivative claims and they
8 must be dismissed.¹⁸

9
10 **b. Plaintiff's Fiduciary Duty Claims are Derivative Under the Direct Harm Test.**

11 Plaintiff asserts claims for breach of fiduciary duty and aiding and abetting Midway's
12 breach of fiduciary duty against the D&O Defendants arising out their purported failure to
13 disclose certain facts regarding the progress (or lack thereof) of the Pan Mine project prior to
14 Plaintiff's stock option exercises in 2014. SAC ¶¶ 114, 115. Plaintiff's breach of fiduciary duty
15 claims, as repleaded in the SAC, are still derivative under the Direct Harm test adopted by the
16 Nevada Supreme Court in *Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. Adv.
17 Op. 59, 401 P.3d 1100 (2017) ("Parametric").

18 Plaintiff goes to great lengths in the SAC to insist that none of his claims are brought
19 derivatively on behalf of Midway. See SAC ¶¶ 2, 3, 4, 5, 6, 114. But Plaintiff's failure to label
20 his claims "derivative" is of no moment. The Court may not simply accept a plaintiff's conclusory
21 allegation of direct harm. See, e.g., *Feldman v. Cutaia*, ("Feldman I") 956 A.2d 644, 659-60

22 ¹⁷ See also *Taylor v. LSI Logic Corp.*, 715 A.2d 837 (Del. 1998), *overruled on other grounds by Martinez*
23 *v. E.I. DuPont de Nemours & Co., Inc.*, 86 A.3d 1102, 1112 n. 42 (Del. 2014); *Locals 302 & 612 of Int'l Union of*
24 *Operating Engineers - Employers Const. Indus. Ret. Tr. v. Blanchard*, 04 CIV. 5954 (LAP), 2005 WL 2063852
25 (S.D.N.Y. Aug. 25, 2005); *Hollinger Int'l, Inc. v. Hollinger Inc.*, 2007 WL 1029089, *10 (N.D. Ill. Mar. 29, 2007)
(denying motion to amend complaint as futile because plaintiff "has not adequately explained why this Court has
jurisdiction to hear its rescission claims premised on the [Canada Business Corporations Act], when the CBCA itself
provides that those claims must be heard only in certain enumerated Canadian courts").

26 ¹⁸ Alternatively, the Ninth Circuit has found when dealing with similar issues of exclusive jurisdiction
27 rendered under the analogous Alberta (Canada) Business Corporations Act, derivative claims must be dismissed for
28 failure to state a claim. *Seismic Reservoir 2020, Inc. v. Paulsson*, 785 F.3d 330, 335-36 (9th Cir. 2015). Under either
scenario, pursuant to NRCP 12(b)(1) for lack of subject matter jurisdiction or NRCP 12(b)(5) for failure to state a
claim, Plaintiff's derivative claims do not survive a motion to dismiss. See *infra* Section III(B).

(Del. Ch. 2007), *aff'd* (“Feldman II”) 951 A.2d 727, 733 (Del. 2008) (recasting a derivative claim as direct is “disfavored by Delaware courts”). Courts determining whether a claim is direct or derivative must “look to the body of the complaint, not to the plaintiff’s designation or stated intention.” *Id.*; *see also Sweeney v. Harbin Elec., Inc.*, No. 3:10-cv-00685-RCJ-VPC, 2011 WL 3236114, **2-3 (D. Nev. July 27, 2011).

Despite Plaintiff’s attempt to replead his claims, the SAC still alleges diminution in value of Plaintiff’s stock holdings as a result of the Defendants’ purported concealment of corporate mismanagement, which diminution would have been suffered by every other Midway shareholder. It is undisputed that a diminution in stock value is an injury that does not give a stockholder standing to sue on his own behalf.¹⁹ In such a case, the wrong is “entirely derivative, since [a]ny devaluation of stock is shared collectively by all the shareholders, rather than independently by the plaintiff or any other individual shareholder.” *Lee v. Marsh & McLennan Companies, Inc.*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 24, 2007 WL 4303514 (N.Y. Sup. Ct. 2007);²⁰ *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).

In *Parametric*, the Nevada Supreme Court concluded that, to distinguish between direct and derivative claims, Nevada “courts should consider only ‘(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?’” 401 P.3d

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

²⁰ Canadian law on these issues is analogous. *See, e.g., Goldex Mines Ltd. v. Revill*, [1974] O.J. No. 2245 (finding that a personal or direct action is one “not arising simply because the corporation itself has been damaged, and as a consequence of the damage to it, its shareholders have been injured.”); *Burt v. McLaughlan*, [1992] A.J. No. 841 (noting the “clear acceptance” in Canadian law that “an action by a shareholder to recover for the decrease in the value of his shares is a derivative action rather than a personal action”).

1 at 1107-08 (quoting *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d. 1031, 1033 (Del.
2 2004)). The Direct Harm test does not permit Plaintiff to personally and directly recover for the
3 diminution in value caused by purported corporate mismanagement. The Direct Harm test
4 provides that such claims can only be asserted derivatively.²¹ Just as the Court correctly concluded
5 with regard to the allegations in Plaintiff's prior complaint, Plaintiff's allegations in Counts II and
6 III of the SAC describe classic injury inflicted on the corporation and identifies losses common
7 to all Midway shareholders who held Midway stock at the time of its bankruptcy filing.²² See
8 Order at ¶ 37. Nothing has changed. In the SAC, Plaintiff still seeks a recovery for injuries to the
9 corporation, which resulted in the loss of the market value of his stock. Accordingly, the
10 Plaintiff's fiduciary duty claims are derivative and should be dismissed for lack of standing.

11 Finally, it would be an unfair result if Plaintiff, a former corporate insider, is permitted to
12 maintain a direct action to circumvent the predicate shareholder derivative suit procedural
13 requirements of Rule 23.1 to recover his investment in Midway. See generally A.L.I., PRINCIPLES
14 OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, § 7.01 (1992). In addition,
15 disguising derivative claims as direct is a particularly appealing strategy to those plaintiffs who
16 seek to circumvent the recovery priorities of corporate creditors established in the bankruptcy
17 code.²³

19 ²¹ See *Manzo v. Rite Aid Corp.*, 28 Del. J. Corp. L. 819, 2002 WL 31926606, at *6 (Del. Ch. Dec. 19, 2002)
20 (to "the extent that plaintiff was deprived of accurate information upon which to base investment decisions, and as a
21 result, received a poor rate of return on her Rite Aid shares, she experienced an injury suffered by all Rite Aid
22 shareholders in proportion to their pro rata share ownership," this would give rise to a derivative claim.); *In re*
Imaging3, Inc., 634 F. App'x 172, 175 (9th Cir. 2015) ("The claims in Vuksich's state court litigation [for stock loss]
do not allege that Vuksich suffered an injury distinct from that suffered by other shareholders, and none of his claims
would allow him to recover any damages directly.").

23 ²² See *Rivers v. Wachovia Corp.*, 665 F.3d 610 (4th Cir. 2011) (citing *Kagan v. Edison Bros. Stores, Inc.*,
907 F.2d 690, 692 (7th Cir. 1990) ("[T]he nub of the problem is that the investors' injury flows not from what
happened to them ... but from what happened to [the company]."); *Capital Z Financial Services Fund II, L.P. v.*
Health Net, Inc., 43 A.D.3d 100, 109, 840 N.Y.S.2d 16, 23 (1st Dep't 2007) (plaintiffs' allegation of loss of entire
amount invested in stock to finance corporation's purchase of another corporation stated derivative not direct claim
because plaintiff's claim would require showing that corporation in which they invested went bankrupt, making their
loss only incidental to the "financial ruin" stemming from acquisition).

26 ²³ See *Kagan v. Edison Bros. Stores, Inc.*, 907 F.2d 690, 692 (7th Cir. 1990) (noting that direct recovery
27 improperly circumvents creditors in bankruptcy proceedings); *Mid-State Fertilizer Co. v. Exchange National Bank*,
877 F.2d 1333, 1335-37 (7th Cir. 1989) (same). Even irrespective of the bankruptcy context, allowing direct recovery
28 when the action is properly a derivative one fails to protect corporate creditors because the proceeds avoid the legal
ordering of creditors and investors. See *Kagan*, 907 F.2d at 692. ("Recovery by the corporation ensures that all of the

1 **B. Plaintiff Fails to State a Claim for Relief Under California Securities Law.**

2 The Complaint fails to state a violation of the California Corporate Securities Act of 1968
3 for at least three reasons. First, Plaintiff cannot allege that the 2013 or 2014 Undisclosed Facts
4 were made *in connection* with the “purchase or sale” of a security because the exercise of
5 Plaintiff’s stock options are deemed to be “a purchase or sale” *when the options were granted in*
6 *2009*, not when they were exercised in 2014. Second, Plaintiff also fails to allege any
7 misrepresentations by the D&O Defendants with the requisite specificity. Third, because none of
8 the D&O Defendants sold Midway stock to Plaintiff, he cannot show he was in privity with any
9 of the D&O Defendants, as required by the California statute.

10 **1. Legal Standard on a Rule 12(b)(5) Motion.**

11 When a plaintiff fails to “state a claim upon which relief can be granted,” the Court must
12 dismiss the claim upon motion under NRCP 12(b)(5). “In considering a motion to dismiss
13 pursuant to NRCP 12(b)(5) the court accepts a plaintiff’s factual allegations as true, but the
14 allegations must be legally sufficient to constitute the elements of the claims asserted.” *Sanchez*
15 *ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (citation
16 omitted). “To survive dismissal, a complaint must contain some ‘set of facts, which, if true, would
17 entitle the plaintiff to relief.’” *In re Amerco Derivative Litig.*, 127 Nev. 196, 211, 252 P.3d 681,
18 692 (2011) (citation omitted). “Dismissal is proper where the allegations are insufficient to
19 establish the elements of a claim for relief.” *Stockmeier v. Nevada Dep’t of Corr.*, 124 Nev. 313,
20 316, 183 P.3d 133, 135 (2008) (citations omitted).

21
22 **2. Plaintiff Fails to Allege Any Misrepresentation “In Connection with a**
 Purchase or Sale of a Security.”

23 **a. No Purchase or Sale Occurred in 2014.**

24 Plaintiff’s California securities fraud claim fails as a matter of law because he did not
25 purchase or sell a security in 2014 *in connection* with the 2013 or 2014 Undisclosed Facts. A
26 claim for securities fraud in California requires a plaintiff to show that the “defendant engaged in

27 _____

28 participants—stockholders, trade creditors, employees and others—recover according to their contractual and
statutory priorities.”)

1 a material misrepresentation or omission of fact, with scienter, *in connection* with the purchase
2 or sale of a security, and economic loss.” CAL. CORP. CODE §§ 25401, 25501 (emphasis added);
3 *Mueller v. San Diego Entm't Partners, LLC*, No. 16CV2997-GPC(NLS), 2017 WL 2230161, at
4 *8–9 (S.D. Cal. May 22, 2017); *see also California Amplifier, Inc. v. RLI Ins. Co.*, 94 Cal. App.
5 4th 102, 108-109 (2001). However, *purchases and sales are deemed to occur at the time stock*
6 *options are granted, not at the time options are exercised*. CAL. CORP. CODE § 25017(e).
7 Because Plaintiff acquired his stock options in 2009 (*see* Exs. I and J) (when he was Chairman of
8 the Board and Chief Executive Officer of Midway) and there are no allegations of any
9 misrepresentations or omissions made by Defendants in 2009, Plaintiff fails to state a claim upon
10 which relief can be granted.

11
12 **b. Plaintiff Fails to Allege a False Statement or Omission by Any of the D&O Defendants.**

13 Even if Plaintiff had purchased shares of Midway stock in 2014, the SAC would fail to
14 state a claim for relief because he fails to allege that any of the D&O Defendants made a false
15 statement or omission either to him or to the investing public. Rather, the SAC makes overly
16 broad generalizations that “defendants caused Midway to make material misstatements of fact”
17 in public filings and press releases, which were purportedly relied upon by him, caused him to
18 exercise his options and caused him to hold and not sell his Midway common stock. *See* SAC ¶¶
19 1, 66, 87.

20 Again, a claim for securities fraud under California law requires that a plaintiff show that
21 the “*defendant* engaged in a material misrepresentation or omission of fact, with scienter, in
22 connection with the purchase or sale of a security, and economic loss.” CAL. CORP. CODE §§
23 25401, 25501 (emphasis added). Plaintiff makes conclusory allegations that two overlapping
24 D&O Defendant groups, called the “2013 Control Defendants” and the “2014 Control
25 Defendants,” knew the “[2013 and/or 2014] Undisclosed Facts and knew that none of those facts
26 had been disclosed to the public generally or to Wolfus.” SAC ¶¶ 64, 65, 85, 86.

27 The SAC is fatally flawed, however, in that it does not contain *any* statements made by
28 the D&O Defendants. Rather, the SAC alleges—without any factual support—that all the

1 Defendants “knew each of the following facts [identified as either “2013 Undisclosed Facts” or
2 “2014 Undisclosed Facts”] to be true, knew that each of the following facts would be material to
3 any reasonable investor in Midway, including Wolfus and knew that none of those facts had been
4 disclosed to the public generally or to Wolfus.”²⁴ See SAC ¶¶ 65, 86. But even liberally
5 construing the allegations, the SAC does not adequately allege who made false or misleading
6 statements—and even those allegations do not plead facts showing why the statements were false
7 at the time they were made. Moreover, the SAC does not allege facts showing knowledge by the
8 speaker of the falsity when those statements were supposedly made.

9 Relying on a fraud by hindsight theory, however, Plaintiff alleges that he did not learn of
10 these Undisclosed Facts until after Midway filed bankruptcy in June 2015. But there is simply
11 no factual support for Plaintiff’s allegations that any of the D&O Defendants knew about the
12 Undisclosed Facts during their tenure at Midway. Without a specific misrepresentation by a
13 specifically identified defendant, Plaintiff’s claim for violations of the California securities statute
14 must fail. *Goodman v. Kennedy*, 18 Cal. 3d 335, 346 (1976) (dismissing case because plaintiff
15 failed to allege that defendant made an untrue statement of material fact or omitted a material
16 fact).²⁵ For each of these reasons, Plaintiff fails to state a claim for statutory securities fraud.

17
18 **c. The California Securities Act Requires Privity, But the D&O Defendants Are Not Sellers of Securities.**

19 Plaintiff’s California Securities Act claim fails for the additional reason that he does not
20 and cannot allege facts showing that he was in privity with any of the Defendants—which is
21 required for a Section 25501 claim. Sections 25401 and 25501 impose liability only on the “actual
22 seller” of the security. *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App.
23 4th 226, 253-54, 70 Cal. Rptr. 3d 199 (2007). In other words, there must be privity between
24 plaintiff and defendant—*i.e.*, defendant must have been the party who actually sold the security

25 ²⁴ Further piling inference on top of inference, the SAC alleges that “Wolfus is informed and believes and
26 thereon alleges that defendants and each of them were aware of this exercise.” SAC ¶ 87.

27 ²⁵ Moreover, Plaintiff’s allegations fail to allege with any particularity the specific content of the
28 misrepresentations made by each Defendant to Plaintiff. Rule 9(b) “require[s] plaintiffs to differentiate their
allegations when suing more than one defendant . . . and inform each defendant separately of the allegations
surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir.2007).

1 to (or purchased the security from) plaintiff. *See Apollo*, 158 Cal. App. 4th at 252-54, 70 Cal.
2 Rptr. 3d 199.

3 Plaintiff does not (and cannot) allege that he purchased any shares of Midway stock from
4 any Defendant. Rather, the Complaint clearly alleges that purchases were made directly from
5 Midway. SAC ¶¶ 100, 102, 103 (“Wolfus purchased in California 200,000 shares of Midway’s
6 common stock ***directly from Midway.***” “***Midway was the issuer*** of the shares purchased by
7 Wolfus.”) (emphasis added). Therefore, the D&O Defendants cannot be civilly liable for a
8 violation of Section 25401. *California Amplifier*, 94 Cal. App. 4th at 109, 113 Cal. Rptr. 2d 915
9 (stating that § 25501 “retain[s] the privity requirement from common law fraud”).

10 Nor can Plaintiff maintain a cause of action against the D&O Defendants as joint and
11 several tortfeasors or control persons of Midway under Sections 25403 or 25504. The California
12 Act imposes joint and several liability on persons who “directly or indirectly” control primary
13 violators of California’s securities laws or broker-dealers or agents who materially aid a primary
14 violation. CAL. CORP. CODE §§ 25403, 25504. To state a claim for control person liability,
15 Plaintiff must plead particularized facts establishing a primary violation of Sections 25401 and
16 25501. *In re Alliance Equipment Lease Program Sec. Litig.*, 2002 WL 34451621, *11 (S.D. Cal.
17 Oct. 15, 2002) (“Section 25504 requires a primary violation of 25501.”). Plaintiff’s claims against
18 the “2013 and 2014 Control Defendants” are based on the exercise of stock options in Midway
19 stock, ***which were granted in 2009***. Because Plaintiff does not allege violations of Section 25501,
20 he cannot state a claim for secondary liability under Sections 25403 or 25504.

21 Furthermore, Plaintiff failed to plead facts sufficient to support an inference that the D&O
22 Defendants controlled or materially aided and abetted a primary violator under Section 25504.
23 *See Weiss v. NNN Capital Fund I, LLC*, 2015 WL 11995251 (S.D. Cal. June 11, 2015). In the
24 absence of a viable claim of primary liability against Midway, Plaintiff cannot state a claim
25 against the D&O Defendants for control person liability under § 25504—particularly given that
26 the claims against the D&O Defendants are based solely on statements by Midway, which
27 Plaintiff has not shown to have been false or misleading when made.

1 **C. Plaintiff's Holder Claims for Common Law Fraud and Negligent Misrepresentation**
2 **Fail to State A Claim**

3 The SAC asserts claims for common law fraud and negligent misrepresentation committed
4 by non-party Midway and each of the Defendants for inducing Plaintiff to exercise his stock
5 options in January 2014 and September 2014 and inducing Plaintiff and his assignors, to hold and
6 not sell all their shares in February 2014. *See* SAC ¶¶ 127-138. Claims that are based upon a
7 party who alleges it was induced to hold onto stock, as opposed to sell stock, are commonly
8 referred to as "holder" claims. Thus, Plaintiff attempts to avoid the purchase or sale requirements
9 of his securities fraud claims by seeking to assert holder claims.

10 The vast majority of jurisdictions in the United States have categorically rejected holder
11 claims. *See, e.g., Tradex Global Master Fund SPC, Ltd v. Titan Capital Group III, LP*, 944
12 N.Y.S.2d 527, 529 (N.Y. App. Div. 2012) ("under New York law, such a 'holder claim' would
13 be precluded"); *Lagermeier v. Boston Scientific Corp.*, 2011 WL 2912642 at *6 (D. Minn. 2011)
14 ("Nor is such a [holder] claim cognizable under Minnesota common law"); *The Calibre Fund,*
15 *LLC v. BDO Seidman, LLP*, 2010 WL 4517099 at *5 (Conn. Super. 2010) ("A decision not to sell
16 but to hold onto securities may be regrettable, but such decisions must always be made without
17 the power of hindsight... . failure to sell claims are 'too speculative to be actionable'"); *WM High*
18 *Yield Fund v. O'Hanlon*, 2005 WL 6788446 at *13 (E.D. Pa. 2005) ("the Court declines to find
19 that the Pennsylvania Supreme Court would find a cause of action in fraud for investors who were
20 allegedly injured by holding securities"); *Rivers v. Wachovia Corp.*, 665 F.3d 610, 619 (4th Cir.
21 2011) (holding that holder claims are "too speculative to litigate" as they "involve only a
22 hypothetical transaction"). The Court should likewise reject Plaintiff's attempt to allege holder
23 claims because California law does not apply to a Canadian publicly-traded corporation, and there
24 is no Canadian case law that recognizes holder claims.

25 But even if the Court were allow Plaintiff to pursue holder claims under California law,
26 (1) Plaintiff's claims arising out of the exercise of stock options are not holder claims; (2) Plaintiff
27 fails to sufficiently allege reliance and causation for both fraud and negligent misrepresentation
28 claims; and (3) Plaintiff fails to plead scienter with the required specificity under Rule 9(b).

1 **1. California Law Does Not Apply to Plaintiff's Holder Claims**

2 Plaintiff's argument that California's substantive law governs his claims because he
3 resides in California must be rejected. Under Plaintiff's theory, each jurisdiction's substantive
4 decision to recognize holder claims would apply only to its own residents. The natural result
5 would be a "race to the bottom," because each jurisdiction could deprive only its own residents
6 of such claims. No jurisdiction, as a matter of substantive law, could uniformly prohibit such
7 claims. For this reason, only the law of the state of incorporation can establish "reliable and
8 efficient corporate laws," *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 181
9 (Del. 2015), that protect the control of corporation's board of directors over litigation based on
10 injury to the corporation. As set forth above, because Midway is a Canadian Corporation
11 Canadian substantive law governs Plaintiff's fraud and misrepresentation claims, not California
12 law.

13 **2. Plaintiff's Claims Arising Out of the Exercise of Stock Options are Not**
14 **Holder Claims Under *Small v. Fritz***

15 Even if California law were to apply, the Plaintiff's claims related to the exercise of stock
16 options are not holder claims. California law defines a holder claim as "a cause of action by
17 persons wrongfully induced to *hold* stock instead of selling it." *Small v. Fritz*, 30 Cal.4th 167, 171,
18 65 P.3d 1255 (Cal. 2003) (emphasis in original). Therefore, the fact that Plaintiff *acquired* stock
19 via exercise of the stock options negates any claim of "holding." *Id.* at 184, 65 P.3d at 1265
20 (distinguishing holder actions from other suits in which investors claim damages from the purchase
21 or sale of stock).

22 **3. Even if the Court Were To Apply California Law, Plaintiff Fails to**
23 **Sufficiently Allege Reliance or Causation**

24 Plaintiff alleges that he decided to hold his Midway shares after he exercised his stock
25 options in reliance upon Midway's allegedly false statements in press releases and SEC filings
26 concerning the Pan Mine's prospects, a so-called "holder's action," based on *Small v. Fritz*, 30
27 Cal.4th 167, 184 (2003). A complaint alleging fraud and negligent misrepresentation in a "holder
28 action" must also be pleaded with sufficient particularity, meaning that the plaintiff must plead
"facts which show how, when, where, to whom, and by what means the representations were

1 tendered.” *Lazar*, 12 Cal. 4th at 645, 909 P.2d at 981 (quotation omitted); *see also Small*, 30 Cal.
2 4th at 184, 65 P.3d at 1265 (holding that complaint for negligent misrepresentation in a holder
3 action must be “pled with the same specificity required in a holder's action for fraud.”); NRCP
4 9(b) (“[I]n alleging fraud or mistake, a party must state with particularity the circumstances
5 constituting fraud or mistake.”). *See also Anderson v. Aon Corp.*, No. 06 C 06241, 2011 WL
6 4565758, at *4 (N.D. Ill. Sept. 29, 2011), *aff’d*, 674 F.3d 895 (7th Cir. 2012).

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

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

22 *Id.* (emphasis added).

23 **a) Fraud.**

24 In California, the elements of fraud are: (1) misrepresentation; (2) knowledge of falsity
25 (or “scienter”); (3) intent to defraud; (4) justifiable reliance; and (5) resulting damage. *Small v.*
26 *Fritz Companies, Inc.*, 30 Cal. 4th 167, 173, 132 Cal. Rptr. 2d 490, 65 P.3d 1255, 1258 (2003)
27 (citing *Lazar v. Superior Court*, 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981, 984
28 (1996)). Plaintiff’s primary allegations of fraud are that the officers and directors of Midway

(other than himself) knew the Pan Mine was being built and operated in ways that were materially different from those assumed in the Pan Mine 2011 Study, but the D&O Defendants did not inform investors of the material impact on cash flows as a result of those differences. Apart from his assertions that Midway omitted material facts regarding the development and operation of the Pan Mine in its press releases and SEC filings, Plaintiff identifies no other circumstances or facts, which support an inference of intent or scienter relevant to Plaintiff's claims. Plaintiff lists certain "Undisclosed Facts" allegedly known by the D&O Defendants but not disclosed to the public generally or to him (SAC ¶¶ 65, 66, 70, 86), but Plaintiff has not alleged how any of the "Undisclosed Facts" demonstrate the D&O Defendants' knowledge of any alleged misrepresentations. Even more significantly, Plaintiff fails to explain with specificity how each of these alleged omissions contributed to Midway's filing of bankruptcy; each appears to relate more to Midway's purported mismanagement than fraud. Midway's mismanagement (as opposed to its fraud) is insufficient to support allegations in a holder action. *See Anderson*, 614 F.3d at 367 (explaining that any alleged fraud merely "deferred the time when the stock's price accurately reflected the value of Aon's business").

Plaintiff has also failed to sufficiently allege that he relied on any false representations regarding the Pan Mine. Plaintiff merely alleges that he relied on Midway's press releases and SEC filings "primarily those which were issued after he ceased to be Midway's Chief Executive Officer" (SAC ¶ 66) in choosing to exercise his stock options on January 23, 2014 at \$.56/share when the market price was \$1.27 and "its price was rising." SAC ¶ 201. In order to successfully plead "a bona fide claim of actual reliance," a plaintiff in a holder action "must allege specific reliance on the defendant's representations: for example, that if the plaintiff had read a truthful account of the corporation's financial status the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place." *Small*, 30 Cal.4th at 184, 65 P.3d at 1265.

Courts addressing California's holder's claims since *Small* have noted the difficulty plaintiffs face in meeting this standard. *See Anderson v. Aon Corp.*, 614 F.3d 361, 367 (7th Cir. 2010) (remanding holder's action for application of California law while noting that under *Small*

1 plaintiff had “a difficult road ahead” to show actual reliance and causal connection between
2 reliance and alleged injury); *see also In re Nat’l Century Fin. Enters.*, 846 F. Supp. 2d 828, 884
3 (S.D. Ohio 2012) (“holder claims are generally disfavored and recognized only in limited
4 circumstances”). Like the plaintiff in *Anderson*, Plaintiff cannot show the required a causal
5 connection between his reliance on Midway’s representations and his injury.

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

16 Just like the plaintiff in *Anderson*, Plaintiff here insists that he “carefully followed the
17 public announcements and filings by Midway” (SAC ¶ 87), and recites almost every public
18 announcement by Midway following his departure as CEO. But Plaintiff does not sufficiently
19 explain when exactly he relied on those representations to hold his stock; how many Midway
20 shares he would have sold had he known the impact on the company’s financials, or when he
21 would have executed each such sale. Nor does he sufficiently explain how he could have known
22 to sell his shares in February 2014 when Midway stock hit an all-time high. In this case, Plaintiff
23 does not stand apart from the millions of other stockholders who lost money when Midway’s
24 declared bankruptcy in 2015. As such, he cannot maintain a claim against the D&O Defendants
25 based on the pleading requirements set forth in *Small v. Fritz*.

26 **b) Negligent Misrepresentation.**

27 To state a claim for negligent misrepresentation, the plaintiff must establish: “(1) the
28 misrepresentation of a past or existing material fact, (2) without reasonable ground for believing

1 it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable
2 reliance on the misrepresentation, and (5) resulting damage.” *Apollo Capital Fund, LLC v. Roth*
3 *Capital Partners, LLC*, 158 Cal. App. 4th 226, 243, 70 Cal. Rptr. 3d 199, 213 (Cal. Ct. App.2007)
4 (citing *Shamsian v. Atlantic Richfield Co.*, 107 Cal. App. 4th 967, 983, 132 Cal.Rptr.2d 635, 647
5 (Ct.App.2003)). Under California law, the tort of negligent misrepresentation is a “species of
6 deceit.” *See Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 407, 11 Cal. Rptr. 2d 51, 834 P.2d 745
7 (1992). The SAC fails to satisfy *any* of the elements of a claim for negligent misrepresentation.

8 First, the SAC fails to allege a misrepresentation of a past or existing material fact by any
9 of the D&O Defendants. Rather, Plaintiff merely lists certain “Undisclosed Facts” allegedly
10 known by the D&O Defendants but not disclosed to the public generally or to him (SAC ¶¶ 65,
11 66, 70, 86). There are no allegations regarding which statements, if any, in Midway’s press
12 releases and SEC filings are misleading. Nor does Plaintiff sufficiently alleged how any
13 Defendant made such alleged misrepresentations of a past or existing material fact “without
14 reasonable ground for believing it to be true.” On these grounds alone, the claim for negligent
15 misrepresentation should be dismissed. *Cansino v. Bank of America*, 224 Cal. App. 4th 1462,
16 1469, 169 Cal. Rptr. 3d 619 (2014) (“Statements or predictions regarding future events are
17 deemed to be mere opinions which are not actionable.”) (citation omitted); *Gentry v. eBay, Inc.*,
18 99 Cal. App. 4th 816, 835, 121 Cal. Rptr. 2d 703 (2002) (“An essential element of a cause of
19 action for negligent misrepresentation is that the defendant must have made a misrepresentation
20 as to a past or existing material fact.”) (citation omitted).

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

1 2d 779; *see also In re Daisy Sys.*, 97 F.3d at 1181; *Byrum v. Brand*, 219 Cal. App. 3d 926, 942,
2 268 Cal. Rptr. 609 (1990).

3 For all the foregoing reasons, the SAC fails to state a claim for fraud or negligent
4 misrepresentation under California law and must be dismissed with prejudice.

5 **4. Plaintiff's Holder Claims Fail to Allege Scienter With the Specificity**
6 **Required by Rule 9(b).**

7 Finally, Plaintiff's claims for fraud and negligent misrepresentation fail to satisfy the
8 particularity requirements of Rule 9(b). That is, the pleader must state the time, place and specific
9 content of the false representations, as well, as the identities of the parties to the misrepresentation.
10 *Lazar v. Superior Court*, 12 Cal. 4th 631, 645, 909 P.2d 981 (1996); *Swartz*, 476 F.3d at 764; *see*
11 *also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (averments of fraud
12 must be accompanied by "the who, what, when, where, and how" of the misconduct
13 charged). Rule 9(b) "requires plaintiffs to differentiate their allegations when suing more than
14 one defendant.. and inform each defendant separately of the allegations surrounding his alleged
15 participation in the fraud." *Swartz v. KMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007).

16 The same heightened pleading standard applies to Plaintiff's negligent misrepresentation
17 claim in California. *See, e.g., Errico v. Pac. Capital Bank, N.A.*, 753 F. Supp. 2d 1034, 1049
18 (N.D.Cal.2010) (negligent misrepresentation sounds in fraud and is subject to Rule 9(b) pleading
19 requirements); *see also In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1176-77 (S.D.
20 Cal. 2010); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003).
21 As shown above, even liberally construed, the SAC does not adequately allege a false or
22 misleading statement—and fails to plead facts showing why the statements were false at the time
23 they were made, *i.e.*, scienter. Moreover, the SAC does not allege facts showing knowledge (by
24 the speaker) of the falsity or reliance. To the extent plaintiff has alleged that Midway made
25 statements or predictions regarding future events, such statements are not actionable. For this
26 additional reason, Plaintiff fails to state a claim for common law fraud or negligent
27 misrepresentation.
28

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

2 The SAC failed to remedy the personal jurisdiction deficiencies that plagued the prior
3 complaint.²⁶ Significantly, Plaintiff is not a Nevada resident; Midway is not a Nevada corporation;
4 Midway is not headquartered in Nevada; and the D&O Defendants²⁷ do not reside in Nevada,
5 which prompts the question: *Why was this matter filed in Nevada?*²⁸ The only new allegations
6 in the SAC relating to personal jurisdiction are found in paragraphs 8-19, which assert self-serving
7 conclusions of law that “while with Midway, [each of the defendants’] contacts with Nevada were
8 so continuous and systematic as to render him at home in Nevada.” SAC ¶¶ 8-19. However, these
9 factually deficient, conclusory statements do not and cannot establish personal jurisdiction.

10 Plaintiff continues to allege jurisdiction is proper in this state because *one* of the
11 Defendants resides in Nevada. But the domicile of one individual defendant does not convey
12 jurisdiction over the other defendants, each of which must be measured individually. The D&O
13 Defendants’ contacts with Nevada are not continuous and systematic so as to render any of them
14 at “home” in this forum for the exercise of general jurisdiction. Furthermore, Plaintiff’s claims
15 allege reliance upon purported material omissions contained in Midway’s SEC filings and press
16 releases, which were drafted in and issued from Colorado where Midway’s principal place of
17 business and its offices are located. Because the claims asserted in this lawsuit do not arise from
18 the D&O Defendants’ purported contacts with Nevada, Plaintiff cannot meet his burden of
19 showing that specific jurisdiction exists.

20
21
22

²⁶ During the prior hearing, the Court expressed “some concerns with jurisdictional arguments . . . [as it]
23 looks like Yu is probably the *only* person subject to general or specific jurisdiction.” See Hr’g Tr. at 39:6-8 (Nov. 1,
24 2017) (emphasis added).

25 ²⁷ For purposes of Section III(D), Defendant Frank Yu is not included in the defined term D&O Defendants.
26 Nevertheless, the claims asserted against Mr. Yu are still ripe for dismissal for the reasons stated in Sections III(A)-
27 (C).

28 ²⁸ When posed with the same question during the hearing on Defendants’ Motions to Dismiss, Plaintiff’s
counsel countered, “Well, why not Nevada?” Hr’g Tr. at 22:22 (Nov. 1, 2017). Plaintiff’s counsel argued he could
bring the suit wherever he wanted. See *id.* at 23:5-7 (“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.”).

1 **1. Legal Standard on a Rule 12(b)(2) Motion.**

2 Due process requirements are satisfied if the nonresident defendant's contacts are
3 sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction, and it is
4 reasonable to subject the nonresident defendants to suit in the forum state. *Viega GmbH v. Eighth*
5 *Judicial Dist. Court*, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1156 (2014) (citations omitted).
6 Courts may exercise general or "all-purpose" personal jurisdiction over a defendant "to hear any
7 and all claims against it" only when the defendant's affiliations with the forum state "are so
8 constant and pervasive as to render it essentially at home in the forum State." *Bauman*, 134 S.
9 Ct. at 751. By contrast, specific personal jurisdiction comports with due process only where "the
10 defendant's suit-related conduct" creates "a substantial connection with the forum state." *Walden*
11 *v. Fiore*, 571 U.S. ___, 134 S. Ct. 1115, 1121-22 (2014).

12 **2. This Court Lacks General Jurisdiction Over the D&O Defendants.**

13 General jurisdiction over a defendant allows a plaintiff to assert claims against that
14 defendant unrelated to the forum. *Viega GmbH*, 328 P.3d at 1157. General jurisdiction
15 approximates physical presence in the forum. *Schwarzenegger v. Fred Martin Motor Co.*, 374
16 F.3d 797, 801 (9th Cir. 2004). "This is an ***exacting standard***, as it should be, because a finding
17 of general jurisdiction permits a defendant to be hailed into court in the forum state to answer for
18 any of its activities anywhere in the world." *Id.* (emphasis added). Such broad jurisdiction is
19 available only in limited circumstances, when a non-resident defendant's contacts with the forum
20 state are so "'continuous and systematic' as to render [it] essentially ***at home*** in the forum State."
21 *Viega GmbH*, 328 P.3d at 1157 (internal citations omitted) (emphasis added). As recently
22 clarified by the United States Supreme Court, "only a limited set of affiliations with a forum will
23 render a defendant amenable to general jurisdiction there." *Bauman*, 134 S. Ct. at 760. "For an
24 individual, ***the paradigm forum for the exercise of general jurisdiction is the individual's***
25 ***domicile***. . . ." *Id.* (citations omitted) (emphasis added).

26 The Complaint does not and cannot allege that the D&O Defendants have the "substantial"
27 or "continuous and systematic" contacts with Nevada that would warrant the application of
28

1 general jurisdiction. *See, e.g., Trump*, 109 Nev. at 699. The supporting declarations establish that
2 with a few isolated exceptions, *none of the D&O Defendants*:

- 3 • Are residents of Nevada (Ex. A ¶ 3; Ex. B ¶ 3; Ex. C ¶ 3; Ex. D ¶¶
4 1, 4; Ex. E ¶ 3; Ex. F ¶ 3; Ex. G ¶¶ 2-3);
- 5 • Own personal or real property, or have any other personal assets in
6 Nevada (Ex. A ¶ 6; Ex. B ¶ 6; Ex. C ¶ 8; Ex. D ¶ 8; Ex. E ¶ 6; Ex. F
7 ¶ 6; Ex. G ¶ 6);
- 8 • Own or maintain any offices in Nevada (Ex. A ¶ 5; Ex. B ¶¶ 4, 11;
9 Ex. C ¶¶ 5, 14; Ex. D ¶¶ 5, 13; Ex. E ¶¶ 4, 12; Ex. F ¶¶ 4, 9; Ex. G
10 ¶ 10);
- 11 • Hold any Nevada licenses (Ex. A ¶ 8; Ex. B ¶ 9; Ex. C ¶ 12; Ex. D
12 ¶ 11; Ex. E ¶ 10; Ex. F ¶ 8; Ex. G ¶ 9);
- 13 • Own any interest in any companies or corporations organized in
14 Nevada or held any managerial or employment positions with any
15 such companies or corporations (Ex. A ¶ 15; Ex. B ¶ 10; Ex. C ¶ 13;
16 Ex. D ¶ 12; Ex. E ¶ 11);²⁹
- 17 • Own or maintain any bank accounts in Nevada (Ex. A ¶ 17; Ex. B ¶
18 13; Ex. C ¶ 16; Ex. D ¶ 15; Ex. E ¶ 14; Ex. F ¶ 11; Ex. G ¶ 12);
- 19 • Maintain any telephone, facsimile or telex number in Nevada (Ex.
20 A ¶ 18; Ex. B ¶ 14; Ex. C ¶ 17; Ex. D ¶ 16; Ex. E ¶ 15; Ex. F ¶ 12;
21 Ex. G ¶ 13);
- 22 • Been required to maintain, or maintained, a registered agent for
23 service in Nevada (Ex. A ¶ 19; Ex. B ¶ 15; Ex. C ¶ 18; Ex. D ¶ 17;
24 Ex. E ¶ 16; Ex. F ¶ 13; Ex. G ¶ 14); or
- 25 • Been a party to a lawsuit in Nevada, except for the instant case (Ex.
26 A ¶ 20; Ex. B ¶ 16; Ex. C ¶ 19; Ex. D ¶ 18; Ex. E ¶ 17; Ex. G ¶ 15).³⁰

27 The D&O Defendants have only occasionally traveled to Nevada, primarily in fulfilling
28 their official corporate duties as board members of Midway. Furthermore, the sections of the SAC
entitled “Parties” and “Jurisdiction and Venue” do not allege that any of the D&O Defendants
have any of the kinds of contacts with Nevada that might suffice for the exercise of general
jurisdiction. Thus, the D&O Defendants do not have the “continuous and systematic” contacts

²⁹ 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.

³⁰ Mr. Newell was a party to a lawsuit in Nevada.

1 with Nevada that would render them essentially at “home” in Nevada, which is necessary to
2 support a finding of general jurisdiction. *Viega GmbH*, 328 P.3d at 1157.

3 **3. This Court Lacks Specific Jurisdiction Over the D&O Defendants.**

4 In deciding whether exercising specific personal jurisdiction is appropriate, the Court
5 considers a three-prong test:

6 [1] [t]he defendant must purposefully avail himself of the privilege
7 of acting in the forum state or of causing important consequences in
8 that state. [2] The cause of action must arise from the consequences
9 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.

10 *Consipio Holding, BV v. Carlberg*, 128 Nev., Adv. Op. 43, 282 P.3d 751, 755 (2012) (quotation
11 omitted); *see also Viega GmbH*, 328 P.3d at 1157. As the United States Supreme Court
12 recognized: “whether a forum State may assert specific jurisdiction over a nonresident defendant
13 focuses on ‘the relationship among the defendant, the forum, and the litigation.’” *Walden*, 134 S.
14 Ct. at 1122 (internal citations omitted). For a state to exercise jurisdiction consistent with due
15 process, the suit must arise “out of contacts that the ‘defendant *himself*’ creates with the forum
16 State.” *Id.* (quoting *Burger King Corp.*, 471 U.S. at 475, 105 S. Ct. at 2174) (emphasis in
17 original).

18 In this case, Plaintiff has not alleged that the D&O Defendants engaged in any specific
19 “suit-related conduct” that would create a substantial connection between them and Nevada. *See*,
20 *generally*, SAC. The only basis for jurisdiction asserted in the SAC is that at least one Defendant,
21 *i.e.*, Frank Yu, resided and still resides in Nevada. SAC ¶ 16. Each of the claims asserted in the
22 SAC arise out of Plaintiff’s reliance upon purported material omissions contained in Midway’s
23 SEC filings and press releases. *See* SAC ¶¶ 101, 106, 126, 127, 135, 136. What matters for
24 specific jurisdiction purposes is that Plaintiff has not alleged, and cannot allege, that any of the
25 D&O Defendants’ allegedly tortious conduct (material omissions in public filings) took place in
26 Nevada. *See, generally*, SAC. Indeed, the SEC filings and press releases were entirely drafted
27 in and issued from the state of *Colorado* where Midway’s principal place of business and
28 executive offices are located. They were also received and purportedly acted upon by Plaintiff in

1 the state of *California*. See SAC ¶ 1. Absent evidence to the contrary, there is no basis for the
2 exercise of specific jurisdiction, and dismissal of Plaintiff's SAC must follow.

3 Even if Midway were a Nevada corporation (and it is not), mere affiliation with a Nevada
4 operation is not enough to confer jurisdiction on nonresident defendants. See *Southport Lane*
5 *Equity II, LLC v. Downey*, 177 F. Supp. 3d 1286 (D. Nev. 2016). In *Southport Lane*, a shareholder
6 brought direct and derivative action against a corporation's directors and officers, alleging breach
7 of fiduciary, unjust enrichment, and requesting a declaration that a shareholder's designee is a
8 member of the board and to declare void a transaction that diluted the shareholder's shares, and
9 requesting appointment of a receivership. The non-resident corporate officers and directors each
10 moved to dismiss for lack of personal jurisdiction and failure to state a claim. In granting the
11 motion to dismiss, the court held that non-resident director and officer defendants' mere affiliation
12 with the Nevada corporation was insufficient for personal jurisdiction. *Id.* at 1296. The court
13 recognized that "a mere connection between a defendant and a plaintiff that has contacts with the
14 forum state or that has been injured in the state is insufficient for personal jurisdiction under the
15 Due Process Clause." *Id.* As a result, the court concluded, "[s]ubjecting the directors or officers
16 of a corporation to jurisdiction in any forum in which a corporation operates or is incorporated
17 when the directors or officers have no personal contacts whatsoever with the forum state denies
18 them due process protection." *Id.* The court acknowledged, "what matters most in this analysis
19 is not the corporation's own contacts with Nevada but the *individual Defendants' contacts with*
20 *the State.*" *Id.* (emphasis added).

21 Here, the exercise of personal jurisdiction is even more tenuous because *Plaintiff is not a*
22 *Nevada citizen* and *Midway is not a Nevada corporation*. Furthermore, there is nothing in the
23 pleadings or declarations that provide this Court with a basis to support a finding that the D&O
24 Defendants had any contact with Nevada related to the purportedly wrongful conduct alleged in
25 the Complaint. The D&O Defendants did not perform any of the acts alleged against them in
26 Nevada, but rather Colorado. The only connection the D&O Defendants have to Nevada is
27 attending the ceremonial groundbreaking of the Pan Mine and the occasional board meeting.
28 However, Plaintiff's claims do not arise out of or relate to any representations made during the

1 groundbreaking or board meetings in Nevada. Because no Nevada corporation is involved in this
2 suit and the D&O Defendants did not expressly aim any conduct at Nevada associated with
3 Plaintiff's allegations of wrongdoing, this Court has no specific jurisdiction over the D&O
4 Defendants and must dismiss the Complaint.

5 **IV.**

6 **CONCLUSION**

7 For a second time, Plaintiff raises only conclusory allegations that the D&O Defendants
8 concealed material information with respect to the progress of the Pan Mine. But conclusory
9 allegations, without more, do not state a claim. The Court should therefore grant the D&O Motion
10 to Dismiss Plaintiff's Second Amended Complaint with prejudice.

11 Midway is a British Columbian corporation. The internal affairs doctrine requires that the
12 law of the forum of incorporation governs Plaintiff's derivative claims, regardless of the label,
13 and therefore, the BCA controls. Sections 232 and 233 of the BCA require Plaintiff to seek leave
14 of the Supreme Court of British Columbia before proceeding with its claims for breach of
15 fiduciary duty and aiding and abetting breach of fiduciary duty. Plaintiff did not seek such leave,
16 accordingly, this Court has no subject matter jurisdiction over Plaintiff's derivative claims, and
17 such claims should be dismissed.

18 California's state securities law, by its explicit terms, limits claims for misrepresentation
19 and omission to those "in connection with a purchase or sale" in California. Plaintiff failed to
20 allege any false statements were made by the D&O Defendants in connection with the "purchase
21 or sale" of a security because the exercise of Plaintiff's stock options are deemed to be "a purchase
22 or sale" when the options were granted in 2009, not when they were exercised in 2014, pursuant
23 to statute.

24 Next, the Court should dismiss with prejudice Plaintiff's so-called holder claims under
25 California law for common law fraud and negligent misrepresentation. Plaintiff fails to
26 sufficiently allege reliance, causation, and scienter with the required specificity under Rule 9(b).

27 Lastly, this Court continues to have no basis to exercise personal jurisdiction over the
28 D&O Defendants as their contacts are insufficient as a matter of law. D&O Defendants therefore

1 respectfully request that this Court grant the Motion and enter an order dismissing the Second
2 Amended Complaint in its entirety, with prejudice.

3 DATED this 16th day of March 2018.

4
5 By /s/ David J. Freeman

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7 David J. Freeman, Esq.

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17 *Richard Sawchak, John W. Sheridan,*

18 *Frank Yu, Roger A. Newell and*

19 *Rodney D. Knutson*

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that on the 16th day of March, 2018, I served a true and correct copy of the foregoing **D&O DEFENDANTS' MOTION TO DISMISS SECOND 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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EXHIBIT A

EXHIBIT A

DEC

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Rodney D. Knutson.*

DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, ,
Plaintiff,
v.

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

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.

**DECLARATION OF RODNEY D.
KNUTSON IN SUPPORT OF D&O
DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**

1 I, Rodney D. Knutson, hereby declare as follows:

2 1. Midway Gold Corp. ("Midway") was a Canadian Corporation incorporated
3 under the Company Act of British Columbia with its executive offices and principal place of
4 business in Colorado.

5 2. From June 2013 to June 2014, I was a member of the Board of Directors of
6 Midway.

7 3. During that time and continuing through today, I have resided in Aspen,
8 Colorado.

9 4. I conducted all of my business as a Director of Midway from my home in Aspen,
10 Colorado or at Midway's corporate offices located in Englewood, Colorado.

11 5. I do not have an office in Nevada.

12 6. I do not own any personal or real property in Nevada, nor do I have any other
13 personal assets in Nevada.

14 7. During the time I served as Director of Midway, I attended the Pan Mine ground
15 breaking ceremony and Board meeting in Nevada in January 2014.

16 8. I am an attorney who was licensed to practice law in the State of Colorado on
17 May 2, 1973.

18 9. I was employed as an associate attorney at Dawson, Nagel, Sherman & Howard
19 after graduation from the University of Denver College of Law in December 1972. The law
20 firm later changed its name to Sherman & Howard;

21 10. Although I never lived in Nevada, Sherman & Howard acquired another law firm
22 in Reno, Nevada and those attorneys became my partners. Indirectly, I therefore had minimal
23 contact with the State of Nevada, although not during my tenure as a Director of Midway;

24 11. Also, I have traveled to Nevada on several occasions (but not during the period
25 of June 2013 to June 2014) to work on legal matters for my Denver clients (before and after I
26 left Sherman & Howard) to attend my wife's birthday party in Las Vegas, to attend short trips
27 with friends, business associates and clients.

12. To the extent I attended other Board meetings, they were conducted in Colorado, not Nevada.

13. To the extent SEC filings or press releases were drafted, to the best of my knowledge and belief, they were drafted in Englewood, Colorado and issued out of Englewood, Colorado, not Nevada.

14. I have never resided in the State of Nevada;

15. I do not own an interest in any companies or corporations organized in the State of Nevada nor do I hold any managerial or employment positions with any such companies or corporations;

16. I do not hold a security interest in any real or personal property in the State of Nevada;

17. I do not maintain any bank accounts in the State of Nevada;

18. I do not maintain any telephone, facsimile or telex number in the State of Nevada;

19. I have not been required to maintain, or maintained, a registered agent for service in the State of Nevada;

20. I have not been a party to a lawsuit in the State of Nevada, except for the instant case;

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

DATED this 14th day of August 2017


RODNEY KNUTSON

EXHIBIT B

EXHIBIT B

1 **DEC**

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Frank Yu, Roger A. Newell and
Rodney D. Knutson.*

DISTRICT COURT
CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, ,
Plaintiff,
v.

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

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.

**DECLARATION OF BRADLEY J.
BLACKETOR IN SUPPORT OF D&O
DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**

1 I, Bradley J. Blacketor, hereby declare as follows:

2 1. From December 5, 2013 to July 6, 2015, I was the Chief Financial Officer of
3 Midway Gold Corp. ("Midway").

4 2. Midway was a Canadian Corporation incorporated under the Company Act of
5 British Columbia with its executive offices and principal place of business in Colorado.

6 3. At all relevant times I have resided in Lone Tree, Colorado.

7 4. I conducted all of my business as CFO of Midway in Midway's offices located in
8 Englewood, Colorado.

9 5. During my tenure as CFO of Midway, I travelled to Nevada approximately 6
10 times. I attended the ground breaking ceremony at the Pan Mine and board meeting in Ely,
11 Nevada on January 13-14, 2014; the annual meeting in Las Vegas in June 2014; Pan Project
12 staff meetings in July 2014, August 2014 and October 2014; and I visited the Pan Mine site with
13 representatives of Commonwealth Bank of Australia in January 2015.

14 6. I do not own any personal or real property in Nevada, nor do I have any other
15 personal assets in Nevada.

16 7. To the extent SEC filings or press releases were drafted, to the best of my
17 knowledge and belief, they were drafted in Englewood, Colorado and issued out of Englewood,
18 Colorado, not Nevada.

19 8. I have never lived in the State of Nevada;

20 9. I do not hold any licenses in the State of Nevada;

21 10. I do not own an interest in any companies or corporations organized in the State
22 of Nevada;

23 11. I do not maintain an office or other business premises of any kind in the State of
24 Nevada;

25 12. I do not hold a security interest in any real or personal property in the State of
26 Nevada;

27 13. I do not maintain any bank accounts in the State of Nevada;

14. I do not maintain any telephone, facsimile or telex number in the State of Nevada;

15. I have not been required to maintain, or maintained, a registered agent for service in the State of Nevada;

16. I have not been a party to a lawsuit in the State of Nevada, except for the instant case.

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

DATED this 15th day of August 2017

B79R

BRADLEY J. BLACKETOR

EXHIBIT C

EXHIBIT C

1 **DEC**

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Rodney D. Knutson.

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

16 DANIEL E. WOLFUS, ,

17 Plaintiff,

18 v.

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

24 Defendants.

CASE NO.: A-17-756971-C

DEPT. NO.: X

**DECLARATION OF RICHARD
SAWCHAK IN SUPPORT OF D&O
DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**

1 I, Richard Sawchak, hereby declare as follows:

2 1. Midway Gold Corp. ("Midway") was a Canadian Corporation incorporated
3 under the Company Act of British Columbia with its executive offices and principal place of
4 business in Colorado.

5 2. From June 2014 until June 2015, I was a member of the Board of Directors of
6 Midway.

7 3. While serving on the Board of Directors of Midway, I resided in Hamilton,
8 Virginia where I still reside.

9 4. I conducted almost all of my business as a Director of Midway from my home in
10 Hamilton, Virginia or at Midway's corporate offices located in Englewood, Colorado.

11 5. I do not have an office in Nevada.

12 6. As a Director of Midway, my only contact with Nevada was to attended the
13 annual meeting of Midway held in Las Vegas, Nevada in 2014.

14 7. Currently I am the Chief Financial Officer of a company located in McLean,
15 Virginia.

16 8. I do not own any personal or real property in Nevada, nor do I have any other
17 personal assets in Nevada.

18 9. To the extent I attended Board meetings they were conducted in Colorado, not
19 Nevada.

20 10. To the extent SEC filings or press releases were drafted, to the best of my
21 knowledge and belief, they were drafted in Englewood, Colorado and issued out of Englewood,
22 Colorado, not Nevada.

23 11. I have never lived in the State of Nevada.

24 12. I do not hold any licenses in the State of Nevada;

25 13. I do not own an interest in any companies or corporations organized in the State
26 of Nevada nor do I hold any managerial or employment positions with any such companies or
27 corporations;
28

1 14. I do not maintain an office or other business premises of any kind in the State of
2 Nevada;

3 15. I do not hold a security interest in any real or personal property in the State of
4 Nevada;

5 16. I do not maintain any bank accounts in the State of Nevada;

6 17. I do not maintain any telephone, facsimile or telex number in the State of
7 Nevada;

8 18. I have not been required to maintain, or maintained, a registered agent for service
9 in the State of Nevada;

10 19. I have not been a party to a lawsuit in the State of Nevada, except for the instant
11 case.

12 I declare under penalty of perjury under the law of the State of Nevada that the
13 foregoing is true and correct.

14 DATED this 14 day of August 2017

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17 RICHARD SAWCHAK
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EXHIBIT D

EXHIBIT D

1 **DEC**

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10 *Attorneys for Richard D. Moritz,*

11 *Bradley J. Blacketor, Timothy Haddon,*

12 *Richard Sawchak, John W. Sheridan,*

Frank Yu, Roger A. Newell and

13 *Rodney D. Knutson.*

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

16 DANIEL E. WOLFUS, ,

17 Plaintiff,

18 v.

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

25 Defendants.

CASE NO.: A-17-756971-C

DEPT. NO.: X

**DECLARATION OF JOHN W.
SHERIDAN IN SUPPORT OF D&O
DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**

1 I, John W. Sheridan, hereby declare as follows:

2 1. I am a citizen of Canada.

3 2. Midway Gold Corp. ("Midway") was a Canadian Corporation incorporated
4 under the Company Act of British Columbia with its executive offices and principal place of
5 business in Colorado.

6 3. From February 2012 to June 2015, I was a Director of Midway.

7 4. I currently reside in Kingston Ontario, Canada. During the time I served as a
8 Director of Midway, I resided in Vancouver, British Columbia.

9 5. I conducted all of my business as a Director of Midway from my Vancouver,
10 British Columbia home or at Midway's corporate offices located in Englewood Colorado.

11 6. I have not been to Nevada for professional reasons other than twice: once to
12 attend the groundbreaking ceremony at the Pan Mine and a Board meeting in January 2014 and
13 once in August 2014 to attend a Midway Board meeting in Ely Nevada.

14 7. To the extent I attended Board meetings they were held in Colorado, not Nevada,
15 with the exception of two board meetings referred to in paragraph 7 above.

16 8. I do not own any personal or real property in Nevada, nor do I have any other
17 personal assets in Nevada.

18 9. To the extent SEC filings or press releases were drafted, to the best of my
19 knowledge and belief, they were drafted in Englewood, Colorado and issued out of Englewood,
20 Colorado, not Nevada.

21 10. I have never lived in the State of Nevada;

22 11. I do not hold any licenses in the State of Nevada;

23 12. I do not own an interest in any companies or corporations organized in the State
24 of Nevada nor do I hold any managerial or employment positions with any such companies or
25 corporations;

26 13. I do not maintain an office or other business premises of any kind in the State of
27 Nevada;
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1 14. I do not hold a security interest in any real or personal property in the State of
2 Nevada;

3 15. I do not maintain any bank accounts in the State of Nevada;

4 16. I do not maintain any telephone, facsimile or telex number in the State of
5 Nevada;

6 17. I have not been required to maintain, or maintained, a registered agent for service
7 in the State of Nevada;

8 18. I have not been a party to a lawsuit in the State of Nevada, except for the instant
9 case.

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

12 DATED this 14th day of August 2017

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JOHN W. SHERIDAN

EXHIBIT E

EXHIBIT E

DEC

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Bradley J. Blacketor, Timothy Haddon,
Richard Sawchak, John W. Sheridan,
Frank Yu, Roger A. Newell and
Rodney D. Knutson.*

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.

CASE NO.: A-17-756971-C

DEPT. NO.: X

**DECLARATION OF TIMOTHY
HADDON IN SUPPORT OF D&O
DEFENDANTS' MOTION TO
DISMISS AMENDED COMPLAINT**

I, Timothy Haddon, hereby declare as follows:

1. Midway Gold Corp. ("Midway") was a Canadian Corporation incorporated under the Company Act of British Columbia with its executive offices and principal place of business in Colorado.

2. I was an outside director of Midway from August 2014 to June 2015.

3. I have resided in Denver, Colorado since 1989.

4. While a director of Midway, I conducted all of my business from my home or at Midway's corporate offices located in Englewood, Colorado, other than one business trip to New York.

5. While I visited Nevada for business reasons in 1987-1996, I have not been to Nevada for professional reasons except to visit Midway's and Pershing Gold's properties in 2014, prior to becoming a director of Midway.

6. I do not own any personal or real property in Nevada, nor do I have any other personal assets in Nevada.

7. To the extent I attended Board meetings they were conducted in Colorado, not Nevada.

8. To the extent SEC filings or press releases were drafted, to the best of my knowledge and belief, they were drafted in Englewood, Colorado and issued out of Englewood, Colorado, not Nevada.

9. I have never lived in the State of Nevada;

10. I do not hold any licenses in the State of Nevada;

11. I do not own an interest in any companies or corporations organized in the State of Nevada nor do I hold any managerial or employment positions with any such companies or corporations;

12. I do not maintain an office or other business premises of any kind in the State of Nevada;

13. I do not hold a security interest in any real or personal property in the State of Nevada;

14. I do not maintain any bank accounts in the State of Nevada;

15. I do not maintain any telephone, facsimile or telex number in the State of Nevada;

16. I have not been required to maintain, or maintained, a registered agent for service in the State of Nevada;

17. I have not been a party to a lawsuit in the State of Nevada, except for the instant case.

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

DATED this 21st day of August 2017



TIMOTHY HADDON

EXHIBIT F

EXHIBIT F

1 **DEC**

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Bradley J. Blacketor, Timothy Haddon,
Richard Sawchak, John W. Sheridan,
Frank Yu, Roger A. Newell and
Rodney D. Knutson.*

DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, ,
Plaintiff,
v.

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

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.

**DECLARATION OF ROGER A.
NEWELL IN SUPPORT OF D&O
DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**



1 I, Roger A. Newell, hereby declare as follows:

2 1. Midway Gold Corp. ("Midway") was a Canadian Corporation incorporated
3 under the Company Act of British Columbia with its executive offices and principal place of
4 business in Colorado.

5 2. From December 2009 to June 2015, I was a member of the Board of Directors of
6 Midway.

7 3. At all relevant times, I resided in Denver, Colorado.

8 4. I conducted all of my business as a Director of Midway from my home,
9 engineering offices or Midway's executive offices located in Colorado.

10 5. I have only traveled for professional reasons to Nevada on four occasions since
11 2014:

12 a. On January 14, 2014, I attended the ground breaking ceremony at the Pan
13 Mine;

14 b. On March 30 through April 1, 2014, I visited the Pan Mine for purposes
15 of viewing the first commercial gold production;

16 c. On June 18, 2014, I attended the 2014 annual meeting of Midway in Las
17 Vegas, Nevada and, on June 19, 2014, attended additional meetings in
18 Eureka, Nevada and at the Pan Mine; and

19 d. On August 5, 2014, I attended a Midway board meeting in Ely Nevada.

20 6. I do not own any personal or real property in Nevada, nor do I have any other
21 personal assets in Nevada.

22 7. To the extent SEC filings or press releases were drafted, to the best of my
23 knowledge and belief, they were drafted in Englewood, Colorado and issued out of Englewood,
24 Colorado, not Nevada.

25 8. I do not hold any licenses in the State of Nevada;

26 9. I have not opened or maintained an office or other business premises of any kind
27 in the State of Nevada;



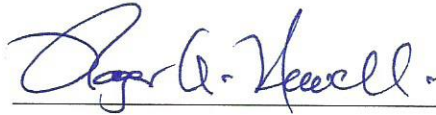
1 10. I have not held a security interest in any real or personal property in the State of
2 Nevada;

3 11. I have not opened or maintained any bank accounts in the State of Nevada;

4 12. I do not maintain any telephone, facsimile or telex number in the State of
5 Nevada;

6 13. I have not been required to maintain, or maintained, a registered agent for service
7 in the State of Nevada;

8 I declare under penalty of perjury under the law of the State of Colorado that the
9 foregoing is true and correct

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11 ROGER A. NEWELL
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EXHIBIT G

EXHIBIT G

1 **DEC**

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10 *Attorneys for Richard D. Moritz,*
11 *Bradley J. Blacketor, Timothy Haddon,*
12 *Richard Sawchak, John W. Sheridan,*
13 *Frank Yu, Roger A. Newell and*
14 *Rodney D. Knutson.*

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

16 DANIEL E. WOLFUS, ,

17 Plaintiff,
18 v.

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

24 Defendants.
25

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

**DECLARATION OF RICHARD D.
MORITZ IN SUPPORT OF D&O
DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**

1 I, Richard D, Moritz, hereby declare as follows:

2 1. Midway Gold Corp. ("Midway") was a Canadian Corporation incorporated
3 under the Company Act of British Columbia with its executive offices and principal place of
4 business in Colorado.

5 2. Since September 2016, I have resided in Wenatchee, Washington where I am
6 employed as an engineer by GRE Global Resources.

7 3. From July 2010 to May 2014, I was employed by Midway Gold. In July, 2010, I
8 was hired to be Vice President Project Development. In 2011, I was promoted to Senior Vice
9 President Operations. While employed by Midway Gold, I lived in Colorado and my office was
10 located in Englewood, Colorado at Midway Gold's corporate headquarters. I left Midway Gold
11 in May 2014.

12 4. While employed by Midway Gold, I would travel to Nevada approximately
13 every two weeks to visit a mine site. I attended the groundbreaking ceremony held on January
14 15, 2014 at the Pan mine.

15 5. I have not been to Nevada since May 2014.

16 6. I do not own any personal or real property in Nevada, nor do I have any other
17 personal assets in Nevada.

18 7. To the extent I attended Midway Gold Board meetings, none were in Nevada.

19 8. To the extent SEC filings or press releases were drafted, to the best of my
20 knowledge and belief, they were drafted in Englewood, Colorado and issued out of Englewood,
21 Colorado, not Nevada.

22 9. I do not hold any licenses in the State of Nevada;

23 10. I have not opened or maintained an office or other business premises of any kind
24 in the State of Nevada;

25 11. I have not held a security interest in any real or personal property in the State of
26 Nevada;

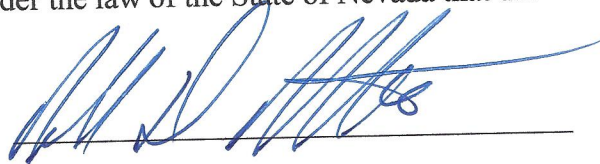
27 12. I have not opened or maintained any bank accounts in the State of Nevada;

1 13. I do not maintain any telephone, facsimile or telex number in the State of
2 Nevada;

3 14. I have not been required to maintain, or maintained, a registered agent for service
4 in the State of Nevada;

5 15. I have not been a party to a lawsuit in the State of Nevada.

6 I declare under penalty of perjury under the law of the State of Nevada that the
7 foregoing is true and correct

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9 Richard D. Moritz
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EXHIBIT H

EXHIBIT H

ACOM

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Attorney for Plaintiff, DANIEL E. WOLFUS

EIGHTH JUDICIAL DISTRICT COURT DISTRICT OF NEVADA

DANIEL E. WOLFUS,
Plaintiff,

~~VS~~ vs.

CASE NO.: A-17-756971-B

DEPT NO.: 10

~~CASE NO.: A-17-756971-C~~

~~DEPT NO.: 1~~ SECOND AMENDED
COMPLAINT FOR DAMAGES

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.

~~FIRST AMENDED COMPLAINT FOR
DAMAGES~~

Defendants.

COMES NOW Plaintiff DANIEL E. WOLFUS ("Wolfus") by and through his counsel of
record and hereby alleges, as follows:

NATURE OF THE CASE

1. Defendants caused Midway Gold Corp. ('Midway') to make material
misstatements of fact and to omit material facts necessary to make the statements made, in the
light of the circumstances under which the statements were made, not misleading. Defendants did

so in public filings and press releases which were relied upon by Wolfus and which caused Wolfus to purchase Midway's common stock and to hold and not sell Midway's common stock.

2. Wolfus seeks only his own damages. Wolfus does not seek damages for harm suffered by Midway or any other shareholder of Midway. All recoveries sought belong solely to Wolfus, not to Midway or any other shareholder of Midway.

3. Wolfus brings only his own personal claims and those belonging to his assignors. Wolfus does not bring any claim that could be brought against any of the Defendants by Midway.

4. Wolfus brings direct claims, which belong to solely to Wolfus and not Midway or any other shareholder of Midway as found in: Parametric Sound Corp. v. Eighth Judicial District Court Of The State Of Nevada, 133 Nev. Advance Opinion 59 (September 14, 2017); Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del.2004); Citigroup Inc., v. AHW Investment Partnership, 140 A.3d 1125 (Del. 2016); American Master Lease LLC v. Idanta Partners, Ltd., 225 Cal.App.4th 1451 (2014); and, Small v. Fritz Companies, Inc., 30 Cal.4th 167 (2003).

5. Wolfus alleges five causes of action.

A. The First Cause of Action is for violation of California's Corporate Securities Act of 1968, California Corporations Code §§ 25000 et seq. (the "Act"). Section 25401 makes it unlawful for Midway to sell its common stock in California "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." Section 25501 states Wolfus may recover personally, "the price at which the security was bought plus interest at the legal rate from the date of purchase." Wolfus purchased shares from Midway on January 23, 2014 and again on September

19, 2014 for \$100,636 and \$783,778. Defendants are liable to Wolfus for these damages pursuant to Sections 25403 and 25504 of the Act. Only Wolfus is entitled to recover damages for the two transactions.

B. The Second Cause of Action is for California common law breach of fiduciary duty owed by Midway's officers and directors directly to Wolfus as held in Meister v. Mensinger, 230 Cal.App.4th 381 (2014). This cause of action belongs solely to Wolfus and he is entitled to keep all recoveries thereon. While Midway also breached its fiduciary duties owed to Wolfus, Midway has not been joined because of the bankruptcy stay. Meister provides that Wolfus may recover the market value of the stock owned by Wolfus in February 2014 and the amount paid for the shares purchased on September 19, 2014, with interest at 10% per annum.

C. The Third Cause of Action is for California common law aiding and abetting a breach of fiduciary duty owed by Midway directly to Wolfus as held in American Master Lease LLC v. Idanta Partners, Ltd., 225 Cal.App.4th 1451 (2014). This cause of belongs solely to Wolfus and he may keep all recoveries thereon. American Master Lease provides that Wolfus may recover the market value of the stock owned by Wolfus in February 2014 and the amount paid for the shares purchased on September 19, 2014, with interest thereon at 10% per annum.

D. The Fourth Cause of Action is for California common law fraud committed both by Defendants for inducing Wolfus to purchase shares in January and September 2014, and inducing Wolfus to hold and not sell the shares in February 2014, as held in Small v. Fritz Companies, Inc., 30 Cal.4th 167 (2003). This cause of action belongs solely to Wolfus and he is entitled to keep all recoveries thereon. Small provides that Wolfus is entitled to recover the market value of the stock owned by Wolfus in February 2014 and the amount paid for the shares purchased on September 19, 2014, with interest thereon at 10% per annum.

E. The Fifth Cause of Action is for California common law negligent misrepresentation committed both by Defendants for inducing Wolfus to purchase shares in January and September 2014 and inducing Wolfus to hold and not sell the shares in February 2014, as held in Small v. Fritz Companies, Inc., 30 Cal.4th 167 (2003). This cause of action belongs solely to Wolfus and he is entitled to keep all recoveries thereon. Small provides that Wolfus may recover the market value of the stock owned by Wolfus in February 2014 and amount paid for the shares purchased on September 19, 2014, with interest thereon at 10% per annum.

6. Wolfus does not claim injury from a diminution of value of Midway's common stock, or any equity dilution, caused by issuance of additional shares of stock for inadequate consideration.

PARTIES

~~1. Plaintiff Daniel E.~~ 7. Wolfus (~~"Wolfus"~~) is an individual who all relevant times resides or resided in Los Angeles and Ventura Counties, California. Wolfus brings this action 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. Wolfus is the owner of all claims asserted in this action and is entitled to receive and retain all recoveries sought in this action. Wolfus does not assert any claim belonging to Midway and does not assert any claim for mismanagement of Midway.

~~2.8.~~ Defendant Kenneth A. Brunk ("Brunk") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado. While with Midway, Brunk's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~3.9.~~ Defendant Richard D. Moritz (“Moritz”) is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado. While with Midway, Moritz’s contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~4.10.~~ Defendant Bradley J. Blacketer (“Blacketer”) is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado. While with Midway, Blacketer’s contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~5.11.~~ Defendant Timothy J. Haddon (“Haddon”) is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado. While with Midway, Haddon’s contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~6.12.~~ Defendant Martin M. Hale, Jr., (“Hale”) is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of New York. While with Midway, Hale’s contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~7.13.~~ Defendant Trey Anderson (“Anderson”) is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of New York. While with Midway, Anderson’s contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~8.14.~~ Defendant Richard Sawchak (“Sawchak”) is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Virginia. While with

Midway, Sawchak's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~9~~15 Defendant Frank Yu ("Yu") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Clark County, Nevada.

~~10~~16 Defendant John W. Sheridan ("Sheridan") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Vancouver, Canada. While with Midway, Sheridan's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~11~~17 Defendant Roger A. Newell ("Newell") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado. While with Midway, Newell's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~12~~18 Defendant Rodney D. Knutson ("Knutson") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado.

While with Midway, Knutson's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~13~~19 Defendant Nathaniel E. Klein ("Klein") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of New York. While with Midway, Klein's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~14~~20 INV-MID, LLC; EREF-MID II, LLC and HCP-MID, LLC (collectively "Hale Investors") are each Delaware limited liability companies with their principal places of business in New York.

~~15.21.~~ The true names, identities and capacities of defendants DOES 1 through 25, inclusive are presently unknown to Wolfus who is informed and believes and thereon alleges that such defendants are liable to Wolfus in some manner presently undetermined as a result of the matters complained of herein. Wolfus will seek leave of Court, if necessary, to amend this First Amended Complaint when the true names, identities and capacities of said fictitiously-named defendants are identified.

JURISDICTION AND VENUE

~~16.22.~~ Among other reasons, jurisdiction and venue are proper in the District Court of Nevada, County of Clark in that Defendants, or at least one of them, at all relevant times resided in and still resides in Clark County, Nevada.

COMMON ALLEGATIONS

~~17.23.~~ Midway ~~Gold Corp. (“Midway”)~~ is a Canadian corporation incorporated under the Company Act of British Columbia on May 14, 1996 under a prior name which was changed to its current name on July 10, 2002. 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”). Those reports are public documents which may be accessed over the internet at

<https://www.sec.gov/cgi-bin/browse-edgar?company=midway+gold&owner=exclude>

&action=—getcompany. This website is commonly called Edgar. At all relevant times, Midway's principal executive offices were in Englewood, Colorado; but virtually all of Midway's business operations were in Nevada where its principal mining claims were located.

~~18.24.~~ Prior to 2008, Midway was an exploration stage company engaged in the acquisition, exploration, and, if warranted, development of gold and silver mineral properties primarily in ~~North America~~ Nevada. As an exploration stage company, Midway had no revenues from operations. Instead, Midway relied on capital raised by the sale of its common shares to fund its operations.

~~19.25.~~ Prior to November 2008, Midway created its Disclosure Committee comprised of members of its Board of Directors. Midway reported in public filings that the purpose of the Disclosure Committee was to ensure that Midway complies with its timely disclosure obligations as required under applicable Canadian and United States securities laws. No other formal charter for this committee was ever publicly disclosed.

~~20.26.~~ In November 2008, Wolfus became a director of Midway. At the time, Wolfus had 28 years of experience as a banker and investment banker with substantial experience in the capital markets. As an outside director, Wolfus was appointed to several committees of the Board.

~~21.27.~~ In 2009, Wolfus became the 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. As an officer of Midway, Wolfus ceased to be a member of any of the Board's committees.

~~22.28.~~ At some time prior to April 2011, Midway decided to expand its membership to include both the Chief Executive Officer and the Chief Operating Officer, at which time Wolfus

again became a member of the Disclosure Committee. Brunk at all relevant times was a member of the Disclosure Committee.

~~23~~29 Wolfus began purchasing common stock of Midway 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.

~~24~~30 At the time Wolfus became Chairman of the Board and CEO, Midway had the following properties in the exploratory stage where gold mineralization had been identified: Spring Valley, Pan, The Midway and Golden Eagle properties.

Midway's Thunder Mountain, Roberts Creek, Gold Rock (formerly the Monte) Creek and Burnt Canyon projects were then in the early stage of gold and silver exploration. Of these projects, all are in Nevada except the Golden Eagle property in Washington.

~~25~~31 In October 2008, Midway entered into an exploration agreement and possible joint venture agreement with a subsidiary of Barrick Gold Corporation for its Spring Valley project. The Spring Valley project was located 20 miles northeast of Lovelock, Nevada.

~~26~~32 Of its remaining properties, Midway's Pan Gold Project ("Pan") appeared to be the most promising. The Pan Gold property was 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.

~~27.~~[33.](#) Yu became a director of Midway also in November 2008 and served in that capacity at least up through June 2015. During that entire period, Yu served as a member or chairman of Midway's Disclosure Committee and Audit Committee.

~~28.~~[34.](#) Newell became a Director of Midway in December of 2009 and continued in that capacity until August of 2014. During a portion of his tenure as a director, Newell served as a member of Midway's Disclosure Committee and Audit Committee.

~~29.~~[35.](#) Prior to May, 2010, and based in part on substantial exploration of the Pan project, Midway made the decision to convert from a purely exploration company into a gold mining production company using the Pan project as its initial production mine.

~~30.~~[36.](#) 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. In that capacity, Brunk was required to personally oversee both mining activities in Nevada and permitting activities in Nevada and frequently was in Nevada to perform these duties. Brunk served in that capacity until May of 2012, at which time he also became the Chairman of the Board and Chief Executive Officer of Midway, replacing Wolfus in those positions. Brunk continued as Chairman of the Board until August 2014 and as Chief Executive Officer and President until December 2014. At all times Brunk was a director of Midway, he was also a member of Midway's Disclosure Committee. Midway reported in public filings that Brunk holds a degree in Metallurgical Engineering from Michigan Technological University and throughout his career had conducted numerous feasibility studies and has been responsible for designing, constructing, staffing and operating multiple mining operations and improving process efficiencies around the

world as well. Brunk was ~~initially~~ hired by Midway to take its Pan project, discussed below, into production.

~~31-37~~ On July 20, 2010, Midway ~~publically~~publicly announced the results of a favorable preliminary economic assessment (“PEA”) for the Pan project. The PEA included an independent audit of an updated mineral resource estimate prepared by the Midway. The PEA was prepared by ~~Gustayson~~Gustavson Associates, LLC (“~~Gustayson~~Gustavson”) and was ~~publically~~publicly available.

~~32-38~~ Moritz was the Senior Vice President of Operations at Midway from July 2010 to May 2014. Moritz was hired to primarily oversee the Pan project. To perform these duties, Moritz was frequently in Nevada to directly oversee mining operations.

~~33-39~~ On February 3, 2011, Midway filed an 8-K and Press Release with the SEC in which Midway reported that it was moving forward with its Pan project with “possible production as early as 2013” and that Midway was working on a Prefeasibility Study for the Pan project. In its Annual Report filed on Form 10-K with the SEC at the same time, Midway stated that it was “currently transitioning itself from an exploration company to a gold production company with plans to advance the Pan gold deposit located in White Pine County, Nevada through to production by as early as 2013.”

~~34-40~~ On April 4, 2011, Midway issued a press release filed with the SEC in which it reported that it had secured a “positive Prefeasibility Study” for the Pan ~~Project~~project. Midway also described in significant detail the method and manner by which Midway intended to mine the gold using conventional heap leaching methods prior to which the ore would be crushed by the primary in-pit mobile jaw crusher and secondary and tertiary cone crushers to a nominal 0.5 inches. Barren solution would then be distributed on the leach pad with drip tube emitters. The

entire Prefeasibility Study performed by ~~Gustayson~~Gustavson was filed with SEDAR and the SEC and was ~~publically~~publicly available on Edgar.

~~35.41.~~ In a September 12, 2011 press release filed with the SEC, Midway reported its engineering team was in the process of completing a mine plan and a Feasibility Study for the Pan ~~Project~~project and that the environmental team was working to complete a plan of operations for the proposed mine that will be submitted to the Bureau of Land Management (“BLM”) for evaluation and development of an Environmental Impact Statement.

~~36.42.~~ On October 6, 2011, Midway reported in a Press Release that Midway was negotiating with potential lenders to secure necessary funds for the Pan project.

Several major lenders had expressed interest in providing the necessary funds required for the Pan project.

~~37.43.~~ On November 1, 2011, Midway filed with the SEC a favorable Updated Mineral Resource Estimate for the Pan ~~Project~~project prepared by ~~Gustayson~~Gustavson.

~~38.44.~~ On November 15, 2011, Midway reported by press release filed with the SEC the results of the Feasibility Study for the Pan project prepared by ~~Gustayson~~Gustavson (“Feasibility Study”). Midway stated that its mining plan would be to crush, agglomerate and place the ore on a heap leach pad with recoveries estimated to average 75%. Midway also reported that the capital costs to build the mine were estimated to be \$99 million, including \$8.2 million in working capital and \$6.8 million contingency funds with total production costs projected to be \$824/oz. of gold recovered. At that time, the price of gold was ~~—~~≈\$1,700/oz.

~~39.45.~~ On December 20, 2011, Midway filed the Feasibility Study with the SEC. Excerpts of that Feasibility Study are attached hereto as Exhibit 1 and incorporated herein by this reference. Among other items, this Study provides a detailed history of the mineral exploration of

the Pan project, estimated gold deposits, an extremely detailed mining plan, a budget of ~~~~~\$100 million for the project along with an extremely detailed breakdown of the needed equipment, and a projection of anticipated revenues at different levels of gold prices. Midway participated in the creation of the Feasibility Study. The Feasibility Study was never ~~publically~~^{publicly} updated or amended and this study formed the basis on which all necessary permits were sought.

~~40.46.~~ In order to bring the Pan project into production, two major events needed to occur.

A. First, Midway needed to secure necessary permits, primarily environmentally related. The most difficult of these permits was the “Record of Decision” on a Final Environmental Impact Statement processed through the BLM. Additional environmental permits were also required to be issued by the State of Nevada. No assurances could be made in 2011 that these permits would be issued but the issuance of the permits would add significant value to Midway even if Pan was not taken into production. By year-end 2011, Midway had begun the permitting process for both the BLM and the Nevada Department of Environmental Protection (“NDEP”). These permits would be issued approving a specific mining plan and material changes to the plan would require modification or amendment of the environmental permits received. At all times, Midway sought these permits based upon the detailed mining plan set forth in the Feasibility Study, which required the three-stage crushing and agglomeration of the ore before it is placed on the heap leaching pad to a height not to exceed 30’. Generally, the heap leaching process required allowing a cyanide solution to percolate through the ore allowing the gold to attach to the cyanide. The resulting gold enriched solution then would go through another process where the gold was then separated from the cyanide solution after which further processing would take place. Most of the permitting process occurred in Nevada.

B. The other event was that Midway would need to generate the necessary capital not only to fund the plan set forth in the Feasibility Study but also to fund Midway's other projects and general overhead. At the time, Midway believed that it would need —\$120 million in capital to fund the foregoing up until the time that the Pan project was generating revenues. Midway was exploring raising this capital both by securing loans and through the sale of its common stock, which was the way Midway had historically raised capital.

~~41-47~~. On January 9, 2012, Midway issued a Press Release in which it announced that it qualified as a Development Stage Entity under SEC guidelines and that it had submitted a mine plan of operations to the BLM and the NDEP. The mine plan followed the plan set forth in the Feasibility Study with capital costs of —\$100 million.

~~42-48~~. Sheridan became a Director of Midway in February 2012 and continued in that capacity until June 2015. During a portion of his tenure as a director, Sheridan served as a member or Chairman of Midway's Disclosure Committee and Audit Committee.

~~43-49~~. Prior to May 2012, Midway was approached by Hale, who was the CEO and Portfolio Manager of Hale Capital Partners, LP who was seeking to negotiate what became a \$70 million private placement of preferred stock with investors who Hale would secure. At the time these negotiations commenced, Wolfus was the CEO and Chairman of the Board of Midway and was the officer primarily involved in securing capital for Midway to fund its present and future operations. Moreover, Wolfus had been spending substantial time locating sources to fund the projected costs of both the Pan project and Midway's other on-going operations. Wolfus was opposed to the transaction proposed by Hale and Brunk was an ardent supporter of the transactions.

~~44.~~50. In May 2012, Midway's Board of Directors decided to terminate Wolfus as its Chairman of the Board and Chief Executive Officer and replace him with Brunk. This change of control was effective May 18, 2012, and ~~publically~~publicly reported by Brunk and Midway on May 21, 2012. Wolfus continued as a director of Midway until its next annual meeting of shareholders; and, while Wolfus also remained a member of the Disclosure Committee, he was effectively excluded from all management decisions, excluded from all negotiations involving the proposed Hale transaction, never provided with any anticipated public disclosures for review and excluded from information he would need to review to perform any Disclosure Committee duties. Wolfus did receive board packages consisting of information provided to all directors in anticipation of a quarterly Board of Directors meeting and did participate in Board of Director's meetings which occurred prior to June 2013. From and after May 18, 2012, Wolfus carefully read and considered all press releases by Midway and the public filings made by Wolfus usually within a day or two following their release. Wolfus relied on this material in making all investment decisions concerning Midway including purchasing additional shares of Midway and whether to continue holding his and his assignors' Midway shares even though he was no longer involved with the management of Midway. Wolfus' share holdings were a material part of his investment portfolio in equity securities. As part of Wolfus' transition out of the management of Midway, Wolfus and Midway entered into a consulting arrangement primarily for the purpose of allowing certain of his stock options to vest. Each of the Defendants then with Midway knew of this purpose and knew that Wolfus' services as a consultant would never be utilized by Midway.

~~45.~~51. On August 2, 2012, the Board of Directors of Midway voted to increase the size of the Board from 5 to 6 members and appoint Klein as a director. Klein at the time was a Vice President of Hale Capital Partners. At the time of this appointment, Hale and Hale Capital

Partners, LP were continuing to negotiate the terms of the proposed Hale transaction, which at the time had not been ~~publically~~publicly disclosed. Klein's directorship provided Hale and Hale Capital Partners, LP with access to Midway's books and records and staff.

~~46.~~52. By press release dated August 16, 2012, Midway and Brunk reported that engineering and permitting for the Pan project was advancing at a "rapid pace."

~~47.~~53. By press release dated September 10, 2012, Midway and Brunk reported that it was on schedule for "start-up of production in mid-2014" on the Pan project.

~~48.~~54. By 8-K filed with the SEC and by Press Release also filed with the SEC and both dated November 21, 2012, Midway announced that agreements had been signed for the private placement of \$70 million in Series A Preferred Shares of Midway to the Hale Investors and generally described the terms and conditions of that sale. True and correct copies of that 8-K and Press Release are attached hereto as Exhibits 2 and 3, respectively, and incorporated ~~hereat~~herein by this reference. Wolfus is informed and believes and thereon alleges that at all relevant times the Hale Investors were controlled by Hale. Moreover, one of the terms of the forgoing transaction was the creation of a budget and work program committee, on which Hale or another director selected solely by the Hale Investors were required members. The purpose of this committee was to review and approve Midway's annual business and financing plans and capital and operating budgets or modifications thereto and its decisions had to be unanimous. Wolfus is informed and believes and thereon alleges that once this committee was formed, Hale and the Hale Investors acquired effective control of Midway and the Pan project.

~~49.~~55. On December 13, 2012, Midway filed an 8-K and Press Release with the SEC, a true and correct copy of which is attached hereto as Exhibit 4 and incorporated ~~hereat~~herein by this reference. Exhibit 4 reports that the Hale transaction had closed, that Hale had become a

director of Midway, and that Klein had resigned as a director, although he continued to attend Board meetings thereafter. In addition, Midway reported the formation of the “Budget Work Plan Committee as alleged above with Brunk, Hale, Newell and Sheridan as its members. At all relevant times thereafter, Hale remained a director and a member of the Budget Work Plan Committee of Midway.

~~50.~~56. On March 22, 2013, Midway announced that a draft environmental impact statement was available for public comment. Wolfus is informed and believes and thereon alleges that this statement was based on the mining plan set forth in the Feasibility Study.

~~51.~~57. On April 19, 2013, Midway issued its Definitive Proxy Statement which was filed with the SEC. This statement disclosed that the Board had not nominated Wolfus as a director but had nominated Knutson as a director and had nominated Klein as a director selected by the Hale Investors.

~~52.~~58. On June 20, 2013, Midway held its annual meeting of shareholders. Brunk, Hale, Newell, Sheridan, Yu, Knutson and Klein were each elected as directors. Wolfus ceased to be a director at this time, although Wolfus last participation with Midway’s Board ceased some time before.

~~53.~~59. On July 30, 2013, Midway issued and filed with the SEC a Press Release dated July 30, 2013, a true and correct copy of which is attached hereto as Exhibit 5 and incorporated herein by this reference. In that release, Midway reported that it was exploring ways to reduce costs for the Pan project, expected to issue a revised Feasibility Study in the third quarter of 2013, had made significant progress in permitting, was pursuing a combination of project and equipment financing alternatives, had received proposals from several major commercial funding

sources to secure the necessary capital to fund the Pan project until a positive cash flow had been achieved, and expected to pour gold in August 2014.

~~54.60.~~ On November 17, 2013, Midway issued and filed with the SEC a Press Release dated September 17, 2013, a true and correct copy of which is attached hereto as Exhibit 6 and incorporated ~~hereat~~herein by this reference. In this release, Midway reported that it had conducted tests of ore from South Pan and determined that it did not need to be crushed prior to leaching, and that a 92% recovery rate could be achieved after 58 days of leaching the ore at a height of 15'. This height is half of the 30' height which the Feasibility Study called for. Midway stated that leaching uncrushed ore, called Run of Mine, would avoid the need to secure crushing equipment until operations moved to other areas of the Pan project. Midway also reported that it had retained Sierra Partners to assist it in finding the necessary capital to fund operations.

~~55.61.~~ At year-end 2013 and in addition to Pan, Midway was moving forward with its Gold Rock project, also in White Pine County Nevada, as its second operating gold mine. Midway's Spring Valley project was also progressing primarily funded by Barrick.

~~56.62.~~ On December 5, 2013, Blacketor became the Chief Financial Officer and Senior Vice President of Midway. Blacketor was also a member of the Disclosure Committee.

~~57.63.~~ On December 20, 2013, Midway issued and filed with the SEC a Press Release, a true and correct copy of which is attached hereto as Exhibit 7 and incorporated herein by this reference. In this release, Midway announced that it had received its Record of Decision for the Pan project which completes the BLM permitting process.

~~58.64.~~ 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~~publicly disclosed all material information concerning the Pan project and that all ~~publically~~publicly 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 “2013 Control Defendants.”

~~59-65~~ 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;

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.

~~60. On~~ 66. In late December and in early January 2014, Wolfus needed to decide whether to exercise some of his Midway stock options which would soon be expiring. In order to make this investment decision, Wolfus carefully reviewed and considered Midway's press releases and public filings, primarily those which were issued after he ceased to be Midway's Chief Executive Officer. At the time, Wolfus had no reason to believe that any of the factual statements contained therein were false or that Midway had failed to omit material facts. In reliance thereon and on January 7, 2014, Wolfus notified Midway of his intention to exercise some of his stock options. Wolfus is informed and believes and thereon alleges that ~~defendants~~ Defendants, and each of them, were aware of this exercise. At the time Wolfus 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 ~~when Midway's stock peaked in February 2014.~~

~~61.67.~~ On January 15, 2014, Midway issued and filed with the SEC a Press Release, a true and correct copy of which is attached hereto as Exhibit 8 and incorporated ~~hereat~~ herein by this reference. In that release, Midway reported that the Pan project was "fully permitted and construction is underway with completion estimated for Q3 2014."

~~62-68.~~ Between January 7 and January 23, 2014, neither Midway nor any of the defendants provided Wolfus with any information not contained in Midway's then public filings, including the 2013 Undisclosed Facts.

~~63-69.~~ On January 23, 2014, Wolfus consummated his stock option exercise purchasing 200,000 shares for \$112,000 Canadian dollars which was then \$100,636 US dollars.

70. Wolfus thereafter and on a daily basis checked on the market price of Midway's stock. When Midway's stock peaked on or about February 14, 2014, at \$1.39¹, Wolfus decided to continue to hold his Midway shares and his assignors made the same decision based upon Wolfus advice. At the time Wolfus and his assignors made this decision to hold and not sell their Midway stock, Wolfus remained unaware of the 2013 Undisclosed Facts and also the fact that the Pan project was not fully permitted. Had Wolfus known any of the 2013 Undisclosed Facts or that the Pan project was not fully permitted, he and his assignors would have sold all of the Midway shares.

~~64-71.~~ In its March 13, 2014, Annual Report on form 10-K, Midway reported that ore from the South Pan pit would be process Run of Mine and would not be crushed or agglomerated as provided in the Feasibility Study or the mining plan submitted to secure the necessary permits for the Pan project.

~~65-72.~~ In a Press Release issued the same day, Midway again reported that the Pan project was fully permitted and that construction was underway.

~~66-73.~~ On March 19, 2014, Midway announced in a Press Release that it has selected Ledcor CMI, Inc. as its mining contractor for the Pan project.

~~67-74.~~ On April 24, 2014, Midway issued a Press Release. But for the hand interlineations, Exhibit 9 attached hereto and incorporated ~~hereat~~herein by this reference is a true

¹ The high at market closing per Bloomberg.

and correct copy of that release. In that release, Midway announced its intention to reduce the capital costs for the Pan project as set forth in the Feasibility Study by using contract miners to mine the ore and by proceeding Run of Mine on the South Pit of the Pan project. Midway stated that Moritz had approved the release and that Midway was “well f-funded.”

~~68~~75. On May 16, 2014, Midway reported that Moritz had resigned.

~~69~~76. Midway’s intention to use contract mining and Run of Mine was repeated in its May 21, 2014, quarterly report filed on Form 10-Q with the SEC.

~~70~~77. On May 22, 2014, Midway issued and filed with the SEC a Press Release, a true and correct copy of which is attached hereto as Exhibit 10 and incorporated herein by this reference. This release announced the execution of a \$55 million credit facility with Commonwealth Bank of Australia for the Pan project.

~~71~~78. On May 30, 2014, Midway filed with the SEC a prospectus for the sale of ~~—~~≈\$25 million worth of common stock in a prearranged sale. The prospectus updated an earlier registration statement. The funds were to be used in substantial part for the Pan project. Under applicable securities laws, this prospectus was required to disclose all material facts related to the Pan project, among other disclosures. However, this prospectus failed to disclose any of the 2013 Undisclosed Facts or any of the 2014 Undisclosed Facts alleged below. In June 2014, Midway reported in a Press Release filed with the SEC that it completed this sale transaction.

~~72~~79. On June 19, 2014, Sawchak became a director of Midway and Knutson ceased to be a director of Midway. During a portion of his tenure as a director, Sawchak served as Chairman of Midway’s Audit Committee.

~~73~~80. On July 21, 2014, Midway issued and filed with the SEC a Press Release announcing that it had closed on its Credit Facility from Commonwealth Bank of Australia.

Wolfus is informed and believes and thereon alleges that this Credit Facility was the largest loan Midway was able to secure.

~~74~~[81](#). In July 2014, there was a flood at the Pan project which delayed the project. The flood was not reported until Midway's September 15, 2014, press release filed with the SEC.

~~75~~[82](#). In its August 6, 2014, quarterly report filed on Form 10-Q with the SEC, Midway reported that it had made a 5-year contract mining deal with Ledcor and had paid a \$500,000 mobilization fee. On September 15, 2014, Midway reported in a Press Release filed with the SEC that Ledcor had in fact mobilized on site on July 21, 2014. At no time did Midway disclose what control, if any, it had over the timing of Ledcor's mining operations or the control that it had over Ledcor's loading ore on the leach pads. Loading of the ore on the leach pads according to the applicable permits then effect had to be carefully monitored and supervised by qualified individuals and only after the ore had been crushed and agglomerated in the manner described in the Feasibility Study and the mining plan. Even if the ore was to be loaded on the leach pads Run of Mine, it still had to be carefully monitored and supervised by qualified individuals and only to a height not exceeding 15'. Additional ore could not be loaded on the leach pad until the approximately 2 month leaching process had occurred. Wolfus was not aware of these facts until after June 2015.

~~76~~[83](#). By Press Release dated August 6, 2014, and filed with the SEC, Midway announced that Brunk would be leaving Midway but he remained [with Midway](#) until December 2014.

~~77~~[84](#). By Press Release dated August 19, 2014 and filed with the SEC, Midway announced the "retirement" of Newell and the appointment of Haddon as Chairman of the Board,

replacing Brunk in that role. Haddon also became a member of the Environment, Health and Safety Committee of Midway.

~~78:~~85 As of August 31, 2013, 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~~publicly disclosed all material information concerning the Pan project and that all ~~publically~~publicly 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.”

~~79:~~86 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.

~~80.~~ ~~On~~ 87. In late August and early September 2014, Wolfus needed to decide whether or not to exercise some of his Midway stock options which would soon be expiring. In order to make this investment decision, Wolfus carefully reviewed and considered Midway's press releases and public filings, primarily those which were issued after he purchase shares in January 2014. At the time, Wolfus had no reason to believe that any of the factual statements contained therein were false or that Midway had failed to omit material facts. In reliance thereon and on September 5, 2014, Wolfus notified Midway of his intention to exercise some of his stock options. Wolfus is informed and believes and thereon alleges that defendants and each of them were aware of this exercise. At the time Wolfus exercised these options he still was not aware of any of the 2013 Undisclosed Facts or the 2014 Undisclosed Facts, had no way of learning ~~the~~ ~~2014 Undisclosed Facts~~ those facts except from the 2014 Control Defendants, would not have exercised any of his options had he known those facts.

~~81.~~ 88. Between September 5 and 19, 2014, neither Midway nor any of the defendants provided Wolfus with any information not contained in Midway's then public filings, including the 2013 Undisclosed Facts and the 2014 Undisclosed Facts.

~~82.~~ 89. On September 19, 2014, Wolfus consummated his stock option exercise purchasing 1,000,000 shares for \$860,000 Canadian dollars which was then \$783,778 US dollars.

~~83.90.~~ On September 15, 2014, Midway announced by Press Release filed with the SEC that Ledcor had commenced mining operations. The release further suggested that the facilities to process the mine would be ready by the end of September.

~~84.91.~~ On October 14, 2014, Midway announced that William Zisch would become President and Chief Executive Officer of Midway on or about December 10, 2014 and that Brunk would depart Midway on Mr. Zisch's start date.

~~85.92.~~ By Current Report filed on form 8-K with the SEC and dated November 4, 2014, Midway announced the resignation of Klein and the appointment of Anderson as a director by the Hale Investors. Anderson also became a member of the Budget/Work Plan Committee of Midway.

~~86.93.~~ In its November 16, 2014, quarterly report on Form 10-Q filed with the SEC, Midway again provided only favorable information concerning the Pan project.

~~87.94.~~ By Press Release dated December 1, 2014 and filed with the SEC, Midway reported that it had begun receiving funds on its Credit Facility.

~~88.95.~~ On June 22, 2015, Midway announced that it ~~w3as~~was filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code and shortly thereafter filed for bankruptcy.

~~89.96.~~ As a result of the Midway Bankruptcy, all or virtually all of Midway's assets have been sold and there ~~will be~~are no funds or recoveries by common shareholders of Midway.

~~90.97.~~ Following the bankruptcy filing, Wolfus has learned or is otherwise informed and believed and thereon alleges that the following facts are true:

A. As of the end of 2013, Midway lacked sufficient resources in the form of capital or debt financing to bring the Pan project to a successful mining operation;

B. Hale and the Hale Investors blocked Midway from selling assets to create necessary capital;

C. In late 2013 or early 2014, material disagreements arose between Brunk and Hale, which resulted in Hale taking effective control of Midway and the Pan project even though Hale lacked the ability to manage the Pan project;

D. The ore in the entire Pan project was extremely clayey and would need to be crushed and agglomerated prior to leaching in order to profitably and timely extract gold; but rather than cut other costs so that the crushing and agglomeration equipment could be acquired, defendants, and each of them, decided not to purchase this necessary equipment;

E. Costly equipment was purchased by Midway which was not permitted to be used on the Pan project resulting in costly delays;

F. Midway never received the appropriate permits for Run of Mine operations;

G. Midway allowed Leducor to overload the leach pads in a manner which violated its operating permits and resulted in an inability to successfully leach the gold from the ore;

H. Midway allowed Leducor to begin loading the leach pads before it was capable of either performing the necessary heap leaching or capable of processing and refining for sale the resulting gold solution.

~~91~~98 Effective June 2, 2016, Wolfus, Brunk, Moritz, Blacketer, Haddon, Hale, Anderson, Sawchak, Yu, Sheridan, Newell, Knutson and Klein entered into a tolling agreement, a true and correct copy of which is attached hereto as Exhibit 11 and incorporated herein by this reference. This agreement tolled the statute of limitations on all claims from June 2, 2016 through September 25, 2016.

FIRST CAUSE OF ACTION
(SECURITIES FRAUD AGAINST
THE 2013 AND 2014 CONTROL DEFENDANTS)

~~92.~~99. Wolfus realleges the allegations contained in Paragraphs 1 through ~~91~~98 as though fully set forth ~~hereat~~herein.

~~93.~~100. This is a claim for securities fraud based upon the California Corporate Securities Law of 1968, California Corporations Code § 25000, et seq. (the “Act”)~~94. — At all~~
~~relevant times, Wolfus was and now is a resident of California. All purchases of Midway’s~~
~~common stock were made by Wolfus either for his own account or for his assignors. All~~
~~purchases of Midway’s common stock were made by Wolfus in California.~~ Section 25401 of the
Act makes it unlawful for Midway to sell its common stock in California “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.” Section 25501 Act creates a private
right of action for a purchaser and makes Midway, as the seller, liable to Wolfus, as the
purchaser, for “the price at which the security was bought plus interest at the legal rate from the
date of purchase.” Wolfus purchased shares from Midway on January 23, 2014 and again on
September 19, 2014 for \$100,636 US dollars and \$783,778, respectively and the legal rate of
interest thereon is at 10% per annum. In addition to Midway, Defendants, and each of them, are
liable for these damages pursuant to Sections 25403 and 25504. Only Wolfus is entitled to
recover these damages for these two transactions. Defendants, and each of them, knew that at the
time of purchase, Wolfus was a California resident entitled to pursue relief under the Act. All
purchases of Midway’s common stock were made by Wolfus in California.

~~95.~~101. Midway's common shares are securities as defined in California Corporations Code § 25019.

~~96. — As of October 8, 2013, Wolfus or his assignors owned 1,609,117 shares of Midway's common stock.~~

~~97.~~102. On January 23, 2014, Wolfus purchased in California 200,000 shares of Midway's common stock directly from Midway ~~through the exercise of stock options~~ at a purchase price of \$.56 Canadian dollars per share or approximately \$.50 US dollars per share. At that time, Midway's common stock was selling on the NYSE Amex exchange at \$1.27 US dollars per share and its price was rising ~~reaching nearly \$1.50 US dollars per share within the next 30 days.~~

~~98.~~103. Midway was the issuer of the 200,000 shares purchased by Wolfus and as such was liable for any written or oral communication contained in its public filings that included any untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in light of the circumstances under which the statements were made, not misleading.

~~99.~~104. Each of the 2013 Control Defendants are jointly and severally liable to Wolfus with Midway because of their positions as officers, directors and committee members of Midway and as such are deemed to be "controlling persons" under the Act. Moreover, each of the 2013 Control Defendants controlled Midway and had the ability and duty to ensure that its public filings were true, correct and complete, were not misleading and did not fail to disclose material facts.

~~100.~~105. 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.

~~101.—In exercising his options~~ 106. In purchasing the 200,000 shares in January 2014, Wolfus had carefully read and reviewed and relied on the public filings of Midway and was unaware of the 2013 Undisclosed Facts. Had Wolfus known any of the 2013 Undisclosed Facts, Wolfus would not have ~~exercised~~ purchased any ~~options~~ shares in January 2014 or ~~thereafter and~~ would have sold both his and his assignors common stock when the stock reached its peak in February 2014.

~~102.~~ 107. On 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~~ at a purchase price of \$.86 Canadian dollars per share, which was approximately \$.78 US dollars per share. ~~At that time, Midway's common stock was selling on the NYSE Amex exchange at \$1.03 per share and its price was rising reaching nearly \$1.20 per share within the next 30 days.~~

~~103.~~ 108. Midway was the issuer of the 1,000,000 shares purchased by Wolfus and as such was liable for any written or oral communication contained in its public filings that included any untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in light of the circumstances under which the statements were made, not misleading.

~~104.~~ 109. Each of the 2014 Control Defendants are jointly and severally liable to Wolfus with Midway because of their positions as officers, directors and committee members of Midway and as such are deemed to be "controlling persons" under the Act. Moreover, each of the 2014 Control Defendants controlled Midway and had the ability and duty to ensure that its public

filings were true, correct and complete, were not misleading and did not fail to disclose material facts.

~~105.~~110. 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.

~~106.—In exercising his options~~111. In purchasing shares in September 2014, Wolfus carefully reviewed and relied on the public filings of Midway and was unaware of the 2013 Undisclosed Facts or any of the 2014 Undisclosed Facts. Had Wolfus known any of the 2014 Undisclosed Facts or any of the 2013 Undisclosed Facts, Wolfus would not have ~~exercised~~purchased any ~~options~~shares in September ~~2014 and would have sold both his and his assignors remaining common stock when the stock reached its peak in October~~ 2014.

~~107.—All of the common stock owned by Wolfus and his assignors has become valueless except to the extent sold after January 23, 2014.~~

~~108.~~112. As a result ~~of misrepresentations and omissions of material facts~~, Wolfus has been damaged in an amount ~~to be proven at trial, but no event less than \$3,000,000. Wolfus is entitled to~~ of \$884,414.00 plus interest thereon at 10% per annum from date of purchase and reasonable attorney fees.

SECOND CAUSE OF ACTION

(BREACH OF FIDUCIARY DUTY

AGAINST THE 2013 AND 2014 CONTROL DEFENDANTS)

~~109.~~113. Wolfus realleges the allegations contained in Paragraphs 1 through ~~91, 94, 96, 97, 101, 98,~~ 102, ~~106 and~~ 103, 105 through 107 and 111, as though fully set forth ~~hereat~~ herein.

~~110.~~114. This is a claim for breach of fiduciary duty against the 2013 Control Defendants arising out of their failure to disclose the 2013 Undisclosed Facts prior to Wolfus stock ~~option-exercise~~purchase 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 Wolfus stock ~~option-exercise in September 2014.~~purchase in September 2014. This claim is based on California common law arising out of breaches of fiduciary duty owed by Midway's officers and directors directly to Wolfus and Wolfus' assignors as so held in Meister v. Mensinger, 230 Cal.App.4th 381 (2014). This is a cause of action which belongs solely to Wolfus and Wolfus' assignors who are entitled to keep all recoveries thereon. While Midway also breached its fiduciary duties owed to Wolfus and Wolfus' assignors, Midway has not been joined as a culpable defendant because of the bankruptcy stay precluding Wolfus from doing so. California law, as set forth in Meister, provides that Wolfus is entitled to recover all damages proximately caused by the breach which is the market value of the stock then owned by Wolfus and Wolfus' assignors in February 2014 and the consideration paid by Wolfus for the shares purchased on September 19, 2014, together with interest thereon at 10% per annum.

~~111.~~115. Each of the 2013 Control Defendants and 2014 Control Defendants were fiduciaries and owed Wolfus the fiduciary duty of full disclosure of all material facts then existing prior to Wolfus' exercise of his stock options in 2014.

~~112.~~116. Each of the 2013 Control Defendants and 2014 Control Defendants breached their fiduciary duties to Wolfus by failing to disclose the 2013 Undisclosed Facts prior to January 1, 2014 and by failing to disclose the 2014 Undisclosed Facts prior to September 2014.

117. Had Wolfus known any of the 2013 Undisclosed Facts, Wolfus would have sold all of his shares of Midway and all of his assignors' shares of Midway in February 2014, when Midway's stock reached its peak and would not have purchased any additional shares in January or September 2014.

~~113.~~118. As a result of defendants' breach of their fiduciary duties to Wolfus, Wolfus has been damaged in an amount to be proven at trial, but no event less than \$3,000,000. Wolfus is entitled to interest at 10% per annum.

~~114.~~119. Defendants conduct was fraudulent entitling Wolfus to an award of punitive damages in an amount to be proven at trial.

THIRD CAUSE OF ACTION

(AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY AGAINST ALL DEFENDANTS)

~~115.~~120. Wolfus realleges the allegations contained in Paragraphs 1 through ~~91, 94, 96, 97, 101, 102, 106, 107 and 114~~98, 102, 103, 105 through 107, 111, 115, 117 and 119, as though fully set forth ~~hereat~~herein.

~~116.—This is a claim for aiding and abetting Midway in breaching its fiduciary duties of full disclosure of all material facts then existing related to the Pan project prior to Wolfus' exercise of his stock options in 2014.~~121. This is a claim for California common law aiding and abetting a breach of fiduciary duty owed by Midway directly to Wolfus and Wolfus' assignors for which Defendants, and each of them, aided and abetted as so held in American Master Lease LLC v. Idanta Partners, Ltd., 225 Cal.App.4th 1451 (2014). This is a cause of action which belongs solely to Wolfus and Wolfus' assignors who are entitled to keep all recoveries thereon. While Midway also breached its fiduciary duties owed to Wolfus and Wolfus' assignors, Midway has not been joined as a culpable defendant because of the

bankruptcy stay precluding Wolfus from doing so. California law, as set forth in American Master Lease, provides that Wolfus is entitled to recover all damages proximately caused by the breach which is the market value of the stock then owned by Wolfus and Wolfus' assignors in February 2014 and the consideration paid by Wolfus for the shares purchased on September 19, 2014, together with interest thereon at 10% per annum.

~~117.~~122. Wolfus is informed and believes and thereon alleges that Does 1 through ~~220~~ are the underlying beneficial owners of the Hale Investors and as such indirectly through Hale controlled the Pan project and Midway at all times from and after June 2013.

~~118.~~123. Midway at all times after Wolfus ceased to be a member of Midway's Board of Directors owed Wolfus of full disclosure of all relevant facts related to the Pan project prior to selling 1,200,000 shares of Midway's common stock- to Wolfus in 2014.

~~119.~~124. Midway breached its fiduciary duties to Wolfus in 2014 by failing to disclose the 2013 Undisclosed Facts prior to January 2014 and by failing to disclose the 2014 Undisclosed Facts prior to September 2014.

~~120.~~125. Defendants, and each of them, knew of Midway's fiduciary duties to Wolfus and materially aided and abetted Midway in breaching its fiduciary duties.

~~121.~~126. Wolfus has been damaged in an amount to be proven at trial, but no event less than \$3,000,000. Wolfus is entitled to interest at 10% per annum.

FOURTH CAUSE OF ACTION

(FRAUD AGAINST THE 2013 AND 2014 CONTROL DEFENDANTS)

~~122.—Wolfus realleges the allegations contained in Paragraphs 1 through 91, 94, 96, 97, 101, 102, 106, 107 and 114 as though fully set forth hereat.~~127. Wolfus realleges the allegations contained in Paragraphs 1 through 98, 102, 103, 105 through 107, 111 and 109, as though fully set forth herein.

~~123. This is a claim for common law fraud for 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.~~

128. This is a claim for California common law and statutory fraud committed both by Midway and Defendants, and each of them, for inducing Wolfus to purchase shares in January and September 2014 and inducing Wolfus and Wolfus' assignors to hold and not sell their shares in February 2014. This claim is based on the holding in Small v. Fritz Companies, Inc., 30 Cal.4th 167 (2003). This is a cause of action which belongs solely to Wolfus and Wolfus' assignors who are entitled to keep all recoveries thereon. While Midway also defrauded Wolfus and Wolfus' assignors, Midway has not been joined as a culpable defendant because of the bankruptcy stay precluding Wolfus from doing so. California law, as set forth in Small, provides that Wolfus is entitled to recover all damages proximately caused by the fraud which is the market value of the stock then owned by Wolfus and Wolfus' assignors in February 2014 and the consideration paid by Wolfus for the shares purchased on September 19, 2014, together with interest thereon at 10% per annum.

129. In late December and in early January, Wolfus carefully reviewed all public filings and press releases of Midway issued after he ceased to be Midway's Chief Executive Officer in order to decide whether he should purchase additional shares of Midway or whether he should not make any further purchases and instead sell both his Midway shares and those of his assignors. Wolfus' assignors are immediate family members who totally relied on Wolfus' investment decisions. Wolfus was primarily concerned with the status of the Pan project and the likelihood that this project would begin profitably mining gold and be revenue positive. Wolfus determined from those public statements and the absence of the 2013 Undisclosed Facts that

profitable mining operations would result in a substantial increase in the value of their combined Midway shares.

130. Following Wolfus' share purchases in January 2014, Wolfus continued to review and rely upon Midway's public filings and press releases and closely monitored the market price of Midway's shares. When the market price of those shares peaked in February 2014, Wolfus was again called upon to decide whether to hold his shares and those of his assignors or whether to sell those shares. Wolfus determined from the publicly available information from Midway that he and his assignors should continue to hold their Midway shares. Had Wolfus learned of any of the 2013 Undisclosed Facts, he would have sold all of his Midway shares and his assignor's Midway shares in February 2014 when Midway's stock price began to fall from its peak.

131. In late August or early September, 2014, Wolfus again needed to make a decision as to whether to purchase additional Midway shares or refrain from making any further purchases and instead sell his shares and those of his assignors. Wolfus again carefully reviewed all public filings and press releases issued by Midway since December 2013. Had Wolfus learned of any of the 2013 Undisclosed Facts or any of the 2014 Undisclosed Facts at that time, he would have sold all of his Midway shares and his assignor's Midway shares in October 2014 when Midway's stock price began to fall from its peak.

132. Wolfus' reliance on the statements of fact contained in Midway's public filings and press releases and the absence of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts in those filings was reasonable.

~~124.~~133. The 2013 Control Defendants intentionally defrauded Wolfus by failing to disclose or causing Midway to disclose the 2013 Undisclosed Facts.

~~125.~~134. The 2014 Control Defendants intentionally defrauded Wolfus by failing to disclose or causing Midway to disclose the 2014 Undisclosed Facts.

~~126.~~135. Wolfus was ignorant of the 2013 Undisclosed Facts in January 2014, had no ability to learn the 2013 Undisclosed Facts prior to January 2014, and relied upon the absence of any disclosure of the 2013 Undisclosed Facts in exercising his stock options in January 2014 and in not selling all of his and his assignors' shares of Midway common stock prior to March, 2014.

~~127.~~136. Wolfus was ignorant of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts in September 2014, had no ability to learn any of those facts prior to September 2014, and relied upon the absence of any of any disclosure of those facts in exercising his stock options in September 2014 and in not selling all of his and his assignors' shares of Midway common stock prior to November, 2014.

~~128.~~137. Wolfus first learned of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts after June 2015.

~~129.~~138. Wolfus has been damaged in an amount to be proven at trial, but no event less than \$3,000,000. Wolfus is entitled to interest at 10% per annum.

~~FOURTH~~FIFTH CAUSE OF ACTION

(NEGLIGENT MISREPRESENTATION

AGAINST THE 2013 AND 2014 CONTROL DEFENDANTS)

~~130.~~139. Wolfus realleges the allegations contained in Paragraphs 1 through ~~91, 94, 96, 97, 101, 102, 106, 107 and 114~~98, 102, 103, 105 through 107, 111, 109, 129 through 132 and 135 through 137. as though fully set forth ~~hereat~~herein.

~~131.—This is a claim 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.~~^{140.} This is a claim for California common law and statutory negligent misrepresentation committed both by Midway and Defendants, and each of them, for inducing Wolfus to purchase shares in January and September 2014 and inducing Wolfus and Wolfus' assignors to hold and not sell their shares in February 2014. This claim is brought pursuant to the holding in *Small v. Fritz Companies, Inc.*, 30 Cal.4th 167 (2003). This is a cause of action which belongs solely to Wolfus and Wolfus' assignors who are entitled to keep all recoveries thereon. While Midway also made negligent misrepresentations and omissions to Wolfus and Wolfus' assignors, Midway has not been joined as a culpable defendant because of the bankruptcy stay precluding Wolfus from doing so. California law, as set forth in *Small*, provides that Wolfus is entitled to recover all damages proximately caused by the negligent misrepresentation which is the market value of the stock then owned by Wolfus and Wolfus' assignors in February 2014 and the consideration paid by Wolfus for the shares purchased on September 19, 2014, together with interest thereon at 10% per annum.

~~132.~~

^{141.} The 2013 Control Defendants negligently failed to disclose or cause Midway to disclose the 2013 Undisclosed Facts to Wolfus prior to his exercise of stock options in January 2014.

~~133.~~

^{142.} The 2014 Control Defendants negligently failed to disclose or cause Midway to disclose the 2014 Undisclosed Facts to Wolfus prior to his exercise of stock options in September 2014.

~~134.~~143. Because of their status, the 2013 Control Defendants and the 2014 Control Defendants owed Wolfus a duty of full disclosure of all relevant facts related to the Pan project prior to causing or allowing Midway to sell common stock to Wolfus.

~~135.~~144. Wolfus was ignorant of the 2013 Undisclosed Facts in January 2014, had no ability to learn the 2013 Undisclosed Facts prior to January 2014, and relied upon the absence of any disclosure of the 2013 Undisclosed Facts in exercising his stock options in January 2014 and in not selling all of his and his assignors' shares of Midway common stock prior to March, 2014.

~~136.~~145. Wolfus was ignorant of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts in September 2014, had no ability to learn any of those facts prior to September 2014, and relied upon the absence of any of any disclosure of those facts in exercising his stock options in September 2014 and in not selling all of his and his assignors' shares of Midway common stock prior to November, 2014.

~~137.~~146. Wolfus first learned of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts after June 2015.

~~138.~~147. Wolfus has been damaged in an amount to be proven at trial, but no event less than \$3,000,000. Wolfus is entitled to interest at 10% per annum.

PRAYER FOR RELIEF

WHEREFORE, Wolfus prays judgment against Defendants, as follows:

1. For damages in excess of \$~~15,000.00~~10,000.00, according to proof;
2. For exemplary or punitive damages, according to proof.
3. For interest thereon at 10% per annum;
- ~~3.~~4. For attorneys' fees;
- ~~4.~~5. For costs of suit; and

~~5~~6 For such other and further relief as the Court deems just and proper.

Dated this ~~2~~(5th) day of ~~June, 2017~~February, 2018.

/s/ James IZ. Christensen

James R. ~~C~~istensenChristensen Esq.

Nevada Bar No. 3861

James R. Christensen PC

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Las Vegas NV 89101

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(702) 272-0415 fax

jim@jchristensenlaw.com Attorney for Plaintiff

Document comparison by Workshare 9 on Thursday, February 08, 2018 1:27:19 PM

Input:	
Document 1 ID	file:///C:/Users/CE_Lantz/Desktop/Holly Sollod/2017-06-30 First Amended Complaint Without Exs.docx
Description	2017-06-30 First Amended Complaint Without Exs
Document 2 ID	file:///C:/Users/CE_Lantz/Desktop/Holly Sollod/2018-02-05 Second Amended Complaint for Damages Without Exs.docx
Description	2018-02-05 Second Amended Complaint for Damages Without Exs
Rendering set	Standard

Legend:	
<u>Insertion</u>	
Deletion	
Moved from	
<u>Moved to</u>	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	263
Deletions	216
Moved from	7
Moved to	7
Style change	0
Format changed	0

Total changes	493
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EXHIBIT I

EXHIBIT I

See Form 4

[Form 4 Filings](#)
[Insider Buys](#)
[Significant Buys](#)
[Penny Stocks](#)
[Insider Buying](#)
[Insider Sales](#)
[Insider Buy Sell Ratios](#)
[Stock Options](#)
[Insider Trading](#)
[Stock Screener](#)
[Insider Trading](#)
[Graph View](#)
[Insider Watch](#)

Wolfus Daniel E - Midway Gold Corp - For 2009-01-07

- About Form 4 Filing:** Every director, officer or owner of more than ten percent of a class of equity securities registered under Section 12 of the '34 Act must file with the [U.S. Securities and Exchange Commission \(SEC\)](#) a statement of ownership regarding such security. The initial filing is on Form 3 and changes are reported on Form 4. The Annual Statement of beneficial ownership of securities is on Form 5. The forms contain information on the reporting person's relationship to the company and on purchases and sales of such equity securities.
- Form 4 is stored in SEC's EDGAR database. EDGAR is Electronic Data Gathering, Analysis and Retrieval System. It is a registered trademark of the SEC.

"Insiders might sell their shares for any number of reasons, but they buy them for only one: they think the price will rise"
 - Peter Lynch ==>> [What is insider trading>>](#)

[Email a friend >>...](#)

Enter Stock Ticker Symbol or Cik: [Cik Lookup...](#)

Search By Company or Insider Name: Powered by Google

The following is an SEC EDGAR document rendered as filed.
 Here is the list of [insider trading transaction codes](#).

FORM 4

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(h) of the Investment Company Act of 1940

OMB APPROVAL

OMB Number: 3235-0287
 Expires: November 30, 2011
 Estimated average burden hours per response... 0.5

☐ Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. See Instruction 1(b).

1. Name and Address of Reporting Person [*] Wolfus Daniel E			2. Issuer Name and Ticker or Trading Symbol Midway Gold Corp [MDW]		5. Relationship of Reporting Person(s) to Issuer (Check all applicable) <input checked="" type="checkbox"/> Director <input type="checkbox"/> 10% Owner <input type="checkbox"/> Officer (give title below) <input type="checkbox"/> Other (specify below)	
(Last) (First) (Middle)			3. Date of Earliest Transaction (MM/DD/YY) 01/07/2009		6. Individual or Joint/Group Filing (Check Applicable Line) <input checked="" type="checkbox"/> Form filed by One Reporting Person <input type="checkbox"/> Form filed by More than One Reporting Person	
10350 WILSHIRE BLVD, #1604			4. If Amendment, Date Original Filed (MM/DD/YY)			
(Street)						
LOS ANGELES, CA90024						
(City) (State) (Zip)						

Table I - Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

1. Title of Security (Instr. 3)	2. Transaction Date (MM/DD/YY)	2A. Deemed Execution Date, if any (MM/DD/YY)	3. Transaction Code (Instr. 8)		4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)			5. Amount of Securities Beneficially Owned Following Reported Transaction(s) (Instr. 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Indirect Beneficial Ownership (Instr. 4)
			Code	V	Amount	(A) or (D)	Price			

Table II - Derivative Securities Acquired, Disposed of, or Beneficially Owned (e.g., puts, calls, warrants, options, convertible securities)

1. Title of Derivative Security (Instr. 3)	2. Conversion or Exercise Price of Derivative Security	3. Transaction Date (MM/DD/YY)	3A. Deemed Execution Date, if any (MM/DD/YY)	4. Transaction Code (Instr. 8)	5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instr. 3, 4, and 5)	6. Date Exercisable and Expiration Date (MM/DD/YY)		7. Title and Amount of Underlying Securities (Instr. 3 and 4)		8. Price of Derivative Security (Instr. 5)	9. Number of Derivative Securities Beneficially Owned Following Reported Transaction(s) (Instr. 4)	10. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instr. 4)	11. Nature of Indirect Beneficial Ownership (Instr. 4)
						Date Exercisable	Expiration Date	Title	Amount or Number of Shares				
Employee Stock Option (Right to Buy)	\$ 0.56 (1)	01/07/2009		A	200,000	01/07/2009	01/06/2014	Common Stock	200,000	\$ 0	200,000	D	

Reporting Owners

Signatures

Reporting Owner Name / Address	Relationships			
	Director	10% Owner	Officer	Other
Wolfus Daniel E 10350 WILSHIRE BLVD #1604 LOS ANGELES, CA90024	X			

/s/ Daniel E. Wolfus

01/15/2009

Signature of Reporting Person

Date

Explanation of Responses:

(1) Dollar value expressed in Canadian dollars.

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

* If the form is filed by more than one reporting person, see Instruction 4(b)(v).

** Intentional misstatements or omissions of facts constitute Federal Criminal Violations. See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).

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EXHIBIT J

EXHIBIT J

See Form 4

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Wolfus Daniel E - Midway Gold Corp - For 2009-09-10

- About Form 4 Filing:** Every director, officer or owner of more than ten percent of a class of equity securities registered under Section 12 of the '34 Act must file with the [U.S. Securities and Exchange Commission \(SEC\)](#) a statement of ownership regarding such security. The initial filing is on Form 3 and changes are reported on Form 4. The Annual Statement of beneficial ownership of securities is on Form 5. The forms contain information on the reporting person's relationship to the company and on purchases and sales of such equity securities.
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FORM 4

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(h) of the Investment Company Act of 1940

OMB APPROVAL

 OMB Number: 3235-0287
 Expires: November 30, 2011
 Estimated average burden hours per response... 0.5

- ☐ Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. See Instruction 1(b).

1. Name and Address of Reporting Person [*] Wolfus Daniel E		2. Issuer Name and Ticker or Trading Symbol Midway Gold Corp [MDW]		5. Relationship of Reporting Person(s) to Issuer (Check all applicable) <input checked="" type="checkbox"/> Director <input type="checkbox"/> 10% Owner <input type="checkbox"/> Officer (give title below) <input type="checkbox"/> Other (specify below)	
(Last) (First) (Middle)		3. Date of Earliest Transaction (MM/DD/YY) 09/10/2009		6. Individual or Joint/Group Filing (Check Applicable Line) <input checked="" type="checkbox"/> Form filed by One Reporting Person <input type="checkbox"/> Form filed by More than One Reporting Person	
10350 WILSHIRE BLVD, #1604		4. If Amendment, Date Original Filed (MM/DD/YY)			
(Street)					
LOS ANGELES, CA90024					
(City) (State) (Zip)					

Table I - Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

1. Title of Security (Instr. 3)	2. Transaction Date (MM/DD/YY)	2A. Deemed Execution Date, if any (MM/DD/YY)	3. Transaction Code (Instr. 8)		4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)			5. Amount of Securities Beneficially Owned Following Reported Transaction(s) (Instr. 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Indirect Beneficial Ownership (Instr. 4)
			Code	V	Amount	(A) or (D)	Price			

Table II - Derivative Securities Acquired, Disposed of, or Beneficially Owned (e.g., puts, calls, warrants, options, convertible securities)

1. Title of Derivative Security (Instr. 3)	2. Conversion or Exercise Price of Derivative Security	3. Transaction Date (MM/DD/YY)	3A. Deemed Execution Date, if any (MM/DD/YY)	4. Transaction Code (Instr. 8)		5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instr. 3, 4, and 5)	6. Date Exercisable and Expiration Date (MM/DD/YY)		7. Title and Amount of Underlying Securities (Instr. 3 and 4)		8. Price of Derivative Security (Instr. 5)	9. Number of Derivative Securities Beneficially Owned Following Reported Transaction(s) (Instr. 4)	10. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instr. 4)	11. Nature of Indirect Beneficial Ownership (Instr. 4)
				Code	V		Date Exercisable	Expiration Date	Title	Amount or Number of Shares				
Stock Option (Right to Buy)	\$ 0.86 (1)	09/10/2009		A		1,000,000	09/10/2009	09/09/2014	Common Stock	1,000,000	\$ 0	1,000,000	D	

Reporting Owners

Reporting Owner Name / Address	Relationships			
	Director	10% Owner	Officer	Other
Wolfus Daniel E 10350 WILSHIRE BLVD #1604 LOS ANGELES, CA90024	X			

Signatures

 /s/ Doris F. Meyer as attorney-in-fact for
Daniel E. Wolfus

09/14/2009

** Signature of Reporting Person

Date

Explanation of Responses:

(1) Dollar value expressed in Canadian dollars.

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

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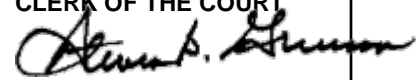
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EREF-MID II, LLC, and HCP-MID, LLC*

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 AND JOINDER
TO D&O DEFENDANTS' MOTION TO
DISMISS SECOND 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 move to dismiss Plaintiff Daniel E. Wolfus' ("Plaintiff") Second Amended Complaint pursuant to NRCP 12(b)(2) for lack of personal jurisdiction. Just like his misguided complaints before this one, Plaintiff fails to plead

1 any facts demonstrating that this Court can properly exercise personal jurisdiction over any of
2 the Hale Defendants. None of the claims at issues in Plaintiff's Second Amended Complaint
3 arise in any way out of the Hale Defendants' purported contacts with the State of Nevada and the
4 Hale Defendants have not otherwise purposefully vailed themselves of this Court's jurisdiction.
5 This Court cannot properly exercise jurisdiction over any of the Hale Defendants as a result and
6 the Second Amended Complaint must be dismissed as to each of them pursuant to NRCP
7 12(b)(2).

8 Further, pursuant to EDCR 2.20(d), the Hale Defendants also join in all of the arguments
9 raised in the remaining D&O Defendants' Motion to Dismiss Second Amended Complaint (the
10 "D&O Motion"). As set forth therein, this Court lacks subject matter jurisdiction over the claims
11 and Plaintiff has otherwise failed to plead his claims in compliance with the law. As such, even if
12 this Court could exercise jurisdiction over the Hale Defendants, which it cannot, dismissal of the
13 Second Amended Complaint is proper under NRCP 12(b)(1) and 12(b)(5).

14 This Motion and Joinder is made pursuant to NRCP 12(b)(1), (2) and (5) and is based
15 upon the following Memorandum of Points and Authorities, the Declarations of Messrs. Hale,
16 Anderson and Klein attached hereto, the Memorandum of Points and Authorities set forth in the
17 D&O Motion, the pleadings and papers file in this action, and any argument of counsel the Court
18 may allow at the time of hearing on this Motion and Joinder and the D&O Motion.

19 DATED this 16th day of March, 2018.

20 GREENBERG TRAURIG, LLP

21 /s/ Christopher R. Miltenberger

22 MARK E. FERRARIO, ESQ.

23 Nevada Bar No. 1625

24 CHRISTOPHER R. MILTENBERGER, ESQ.

25 Nevada Bar No. 10153

26 3773 Howard Hughes Parkway

27 Suite 400 North

28 Las Vegas, Nevada 89169

Counsel for Martin M. Hale, Jr.,

Trey Anderson, Nathaniel Klein, INV-MID, LLC,

EREF-MID II, LLC, and HCP-MID, LLC

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned counsel will bring the following **MOTION TO DISMISS AND JOINDER TO D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** on for hearing before Department XXVII, District Court, Clark County, Nevada on the 2 day of May, 2018, at 10:30 a.m or as soon thereafter as counsel may be heard.

DATED this 16th day of March, 2018.

GREENBERG TRAURIG, LLP

/s/ Christopher R. Miltenberger

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EREF-MID II, LLC, and HCP-MID, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Having now had three attempts to plead his claims against any of the Defendants, Plaintiff's Second Amended Complaint still falls woefully short. While all of Plaintiff's claims are deficient as a matter of law as set forth in the D&O Motion, Plaintiff's continued effort to assert claims against Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC¹ (the "Hale Defendants") in this jurisdiction is particularly egregious. None of the Hale Defendants reside in Nevada, transact business within this state, or otherwise demonstrate any indicia as to how exercise of jurisdiction over them could possibly be reasonable under the circumstances. Nor do any of the claims set forth in the

¹ INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC (the "Investment Entities") are sole-purpose entities serving as investment vehicles that were organized under the laws of the State of Delaware. *See* Hale Decl.,

Second Amended Complaint arise out of any of the Hale Defendants’ minimal, Nevada-related activity. In light of the incontrovertible facts, this Court should, at a minimum, dismiss the Second Amended Complaint as against each of the Hale Defendants for lack of personal jurisdiction.

II. SUMMARY OF ALLEGATIONS RELEVANT TO THE HALE DEFENDANTS^{2,3}

Midway is a Canadian corporation incorporated under the Company Act of British Columbia. Second Amended Complaint (“SAC”), ¶ 23. Historically, Midway was engaged in the acquisition, exploration and potential development of gold mineral properties throughout North America, but primarily from mines located in Nevada and Washington. *See, e.g., id.* at ¶¶ 24, 30.

Plaintiff is and at all relevant times was a resident of the State of California. *Id.* at ¶ 7. Plaintiff served as a member of Midway’s Board of Directors from November 2008 through June 2013, including serving as the company’s Chairman of the Board of Directors and Chief Executive Officer from sometime in 2009 through May 18, 2012. *Id.* at ¶¶ 26-27, 49. Both prior to, during, and after serving as a member of Midway’s Board of Directors and its CEO, Plaintiff either purchased Midway’s common stock on the open market or by exercising certain stock option grants issued during his tenure with the company. *See id.* at ¶ 29. Plaintiff does not allege that he purchased any common stock or was granted any stock option grants directly from any of the Hale Defendants or was solicited by any of the Hale Defendants in connection with any of his purchases or exercises of his grants. *See id.* at ¶¶ 29, 69-70, 87, 89.

In 2012, while Plaintiff was still Chairman of Midway’s Board of Directors and the Company’s CEO, Hale Capital Partners, LP (“HCP”) began investigating making a substantial

² The Hale Defendants incorporate by reference the Factual Background set forth in Section II of the D&O Motion as if fully set forth herein.

³ While the Hale Defendants dispute many of Plaintiff’s factual allegations, the summary set forth herein accepts such allegations as true simply for the purpose of this motion to the extent required by NRCP 12(b)(5). *See Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

1 investment in Midway. Am. Compl., ¶ 49. In August 2012, Nathaniel Klein (“Klein”), then a
2 Vice President at HCP, was appointed to Midway’s Board of Directors. *Id.* at ¶ 51.

3 On November 21, 2012, Midway announced via a press release and a Schedule 8-K filed
4 with the SEC, that the Company had reached an agreement whereby the Investor Entities (INV-
5 MID, LLC, as lead investor, and EREF-MID II, LLC and HCP-MID, LLC, as investors) would
6 acquire \$70 million in Series A Preferred Shares of Midway for \$70 million, pursuant to certain
7 stipulations and agreements. *Id.* at ¶ 54. This transaction closed on December 13, 2012. *Id.* at ¶
8 55. That day, Martin M. Hale, Jr. (“Hale”), HCP’s CEO and portfolio manager, was appointed
9 to Midway’s Board of Directors, and Klein resigned his directorship. *Id.* at ¶ 49, 55. Klein was
10 reelected to Midway’s Board of Directors on June 20, 2013, *id.* ¶ 58, but later resigned from the
11 Board on November 4, 2014. *Id.* at ¶ 92. Trey Anderson (“Anderson”) was appointed to serve as
12 a director, filling the spot vacated by Klein. *Id.* Plaintiff does not allege that he acquired any
13 stock in Midway or otherwise exercised stock option grants at any time after Anderson’s
14 appointment to the Board. *See id.* at ¶¶ 92-95.⁴

15 It bears repeating that Plaintiff does not allege that any statements made in any of the
16 press releases or Schedule 8-Ks issued by Midway relating to the HCP transaction, or, in fact,
17 relating to Midway at all, ever originated from Nevada as opposed to Midway’s executive offices
18 in Colorado. *See generally* SAC. He also concedes that he received any such statements in
19 California, not Nevada. *See id.* at ¶ 7. Although it is his burden to establish jurisdiction over
20 each of the Defendants, Plaintiff makes no attempt to demonstrate by alleging facts, as opposed
21 to hollow legal conclusions, as to how the Hale Defendants have subjected themselves to
22 jurisdiction within this State. *See id.* at ¶¶ 12-13, 19 (asserting the legal conclusion that Hale,
23 Anderson and Klein’s “contacts with Nevada were so continuous and systematic as to render him
24

25 _____
26 ⁴ Notably, Plaintiff admits that Anderson was not responsible for any of the alleged misleading statements or
27 omissions for which he basis any of his misguided claims. *See* SAC, ¶¶ 64, 85 (defining the 2013 and 2014 “Control
Defendants” as alleged by Plaintiff). Nevertheless, Plaintiff includes Anderson as a defendant in this action without
asserting any conduct whatsoever on his behalf related in any way to his claims.

at home in Nevada.”); *see, e.g., id.* at ¶ 20 (making **no** allegations with respect to **any** contacts of the Investment Entities with the State of Nevada).

III. ANALYSIS

A. Plaintiff Bears the Burden of Establishing Jurisdiction over Each Defendant.

The party seeking to invoke the Court’s jurisdiction bears the burden of presenting the Court with competent evidence sufficient to establish a *prima facie* showing of jurisdiction as to each defendant. *Trump v. District Court*, 109 Nev. 687, 693, 857 P.2d 740, 744 (1993) (“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.”). A plaintiff cannot establish jurisdiction by simply resting on its allegations, particularly when those allegations are mere statements of legal conclusions. *See Trump*, 109 Nev. at 692, 857 P.2d at 743. Plaintiff has not and cannot present sufficient facts to demonstrate that the exercise of personal jurisdiction over any of the Hale Defendants is proper in this case.

The Nevada Supreme Court has long held that in order for a court within this state to exercise personal jurisdiction over a nonresident defendant, the plaintiff must demonstrate: (1) that the requirements of the state’s long-arm statute have been satisfied, and (2) that due process is not offended by the exercise of jurisdiction. *Trump*, 109 Nev. at 698, 857 P.2d at 747. However, for all practical purposes, “since Nevada’s long-arm statute has been construed to extend to the outer reaches of due process, the two inquiries...may be collapsed into one.” *See id.* and *Baker v. District Court*, 116 Nev. 527, 532, 999 P.2d 1020, 1023 (2000) (Nevada’s long-arm statute, NRS 14.065, reaches the limits of due process set by the United States Constitution). Accordingly, under Nevada law, the essential inquiry is whether the exercise of personal jurisdiction satisfies due process.

The due process requirement protects a nonresident from binding judgments in forums with which it has established no meaningful contacts, ties, or relations. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). In order for a Nevada court to exercise personal jurisdiction over a nonresident defendant, the Due Process Clause of the Fourteenth Amendment

1 requires that the defendant have “minimum contacts” with the forum state such that the
2 maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”
3 *Baker*, 116 Nev. at 532, 999 P.2d at 1023 (citing *Mizner v. Mizner*, 84 Nev. 268, 270, 439 P.2d
4 679, 680 (1968) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).
5 Importantly, the forum state’s exercise of jurisdiction over a defendant must be reasonable. *Id.*

6 ***1. This Court Cannot Exercise General Jurisdiction Over the Hale***
7 ***Defendants.***

8 Plaintiff’s Amended Complaint failed to allege facts to support the exercise of
9 jurisdiction over any of the Hale Defendants and Plaintiff’s perfunctory revisions to his Second
10 Amended Complaint do nothing to remedy that fatal flaw. For the Court to exercise general
11 jurisdiction, Plaintiff must establish facts demonstrating that each of the Hale Defendants’
12 contacts with the State of Nevada are “substantial” or “continuous and systematic” such that
13 hailing them into this court is reasonable as they may, in effect, be deemed to be present in the
14 forum. *Budget Rent-A-Car v. Eighth Judicial Dist. Court*, 108 Nev. 483, 485, 835 P.2d 17, 19
15 (1992) citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). As
16 the United States Supreme Court recently explained, general jurisdiction should only be
17 exercised when the defendant’s contacts with the forum state “are so constant and pervasive as to
18 render it essentially at home in the forum State.” *Daimler AG v. Bauman*, -- U.S. --, --, 134 S.Ct.
19 746, 751 (2014).

20 As the Nevada Supreme Court has recognized, “[t]he level of contact with the forum state
21 necessary to establish general jurisdiction is high.” *Budget Rent-A-Car*, 108 Nev. at 485, 835
22 P.2d at 19; *see also Trump*, 109 Nev. at 699. In determining if exercising jurisdiction is proper,
23 the Court should look to factors such as whether the defendant is incorporated or licensed to do
24 business in the forum state, has offices, property, employees or bank accounts there, pays taxes
25 in the state or whether the defendant advertises, solicits business, or makes sales in the state.
26 *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 243 F. Supp. 2d 1073, 1083 (C.D. Cal.
27 2003) (citing cases), *aff’d*, 380 F.3d 1154 (9th Cir. 2004), *cert. granted*, 73 U.S.L.W. 3247 (U.S.

Dec. 10, 2004). The Hale Defendants have no such contacts and the Court cannot properly exercise general jurisdiction over any of them.

With respect to Hale, Klein and Anderson, Plaintiff alleges that each of them has contacts with Nevada that were “so continuous and systematic as to render him at home in Nevada.” See SAC at ¶¶12-13, 19. Stating such a legal conclusion does not make it so. Contrary to Plaintiff’s baseless allegations, Hale, Klein and Anderson have little if any contacts with the State of Nevada. None of them reside in the State of Nevada, nor have they ever been a resident of this state. Ex. A, Hale Decl., ¶ 5; Ex. B, Klein Decl., ¶ 5; Ex. C, Anderson Decl., ¶ 5. Nor do they own any real or personal property within the state, or hold any personal assets within the state. Ex. A, Hale Decl., ¶ 6; Ex. B, Klein Decl., ¶ 6; Ex. C, Anderson Decl., ¶ 6. Neither Hale, Klein, nor Anderson maintain any offices, bank accounts, telephone or fax numbers, or registered agents within the State of Nevada. Ex. A, Hale Decl., ¶¶ 7, 10, 11 and 12; Ex. B, Klein Decl., ¶¶ 7, 10, 11 and 12; Ex. C, Anderson Decl., ¶¶ 7, 10, 11 and 12. In fact, Hale, Klein and Anderson do not hold any licenses issued by any regulatory or administrative body in the State of Nevada, any interests in any companies organized under the laws of Nevada, or any managerial or employment positions with any such companies. Ex. A, Hale Decl., ¶¶ 8 and 9; Ex. B, Klein Decl., ¶¶ 8 and 9; Ex. C, Anderson Decl., ¶¶ 8 and 9. In short, Hale, Klein and Anderson’s minimal interactions with the State of Nevada relate to the rare vacation with friends and family, occasional attendance at a trade show or seminar, and perhaps a few visits to Midway’s Nevada operations for a board meeting, a groundbreaking, or general observations. Ex. A, Hale Decl., ¶¶ 14 and 15; Ex. B, Klein Decl., ¶¶ 14 and 15; Ex. C, Anderson Decl., ¶¶ 14 and 15. Such infrequent and inconsequential contacts do not satisfy the due process requirements to enable this Court to exercise general jurisdiction over them or for the Court to consider any of them to be “at home” in this state. *Bauman*, 134 S.Ct. at 751; *Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1157 (2014).

Notably, Plaintiff makes *no* effort to plead *any* facts claiming that any of the Investment Entities has any contacts with the State of Nevada, let alone continuous and systematic ones as

would be required to exercise general jurisdiction. See SAC at ¶ 20. Instead, and as Plaintiff concedes in his Second Amended Complaint, each of the Investment Entities is a limited liability company organized under the laws of the State of Delaware. SAC at ¶ 20; Ex. A, Hale Decl., ¶ 16. Each of the Investment Entities is a sole-purpose entity formed for the purpose of making investments in Midway. Ex. A, Hale Decl., ¶ 17. None of the individual members or managers of any of the Investment Entities are residents of the State of Nevada or entities organized under the laws of the State of Nevada. *Id.* at ¶18. In light of the nature of those entities, none of the Investment Entities owns property in Nevada, maintains offices, telephone numbers, or registered agents in Nevada, holds any licenses in Nevada, or otherwise conducts business in the State of Nevada. *Id.* at ¶¶ 20 - 24. Again, none of the Investment Entities could be considered to be “at home” in this state, and this Court cannot exercise general jurisdiction over any of them. *Bauman*, 134 S.Ct. at 751; *Viega GmbH*, 328 P.3d at 1157.

2. This Court Cannot Exercise Specific Jurisdiction over any of the Hale Defendants.

Plaintiff’s Second Amended Complaint fails to allege any facts with respect to the Hale Defendants that would permit this Court to exercise personal jurisdiction over any of them. This Court may only invoke specific jurisdiction over a defendant when the plaintiff establishes through facts each of the following: (1) that the defendant purposefully availed itself of the privilege of serving the market in the forum or of enjoying the protection of the laws of the forum; (2) that plaintiff’s claim asserted in the complaint arises from the defendant’s purposeful contact with the forum state; and, (3) that the exercise of jurisdiction as a result is reasonable under the circumstances. *Budget Rent-A-Car*, 108 Nev. at 487, 835 P.2d at 20; *see also Viega GmbH*, 328 P.3d at 1157. Plaintiff’s Second Amended Complaint does not contain facts to meet its burden with respect to any of these elements.

No Purposeful Availment. To survive a motion to dismiss, Plaintiff must demonstrate that the Hale Defendants purposefully availed themselves of Nevada’s laws or markets by intentionally directing their conduct toward Nevada. *Trump*, 109 Nev. at 702, 857 P.2d 750.

Plaintiff's Second Amended Complaint does not contain any allegations that any of the Hale Defendants directed any of their actions towards Nevada, as opposed to the operations of a Canadian company. Importantly, having a relationship with a company that may conduct some business operations in Nevada is not enough to establish specific jurisdiction over a nonresident defendant. *See Southport Lane Equity II, LLC v. Downey*, 177 F.Supp.3d 1286 (D. Nev. 2016). Further, any of the other Defendants' purported contacts with the State of Nevada cannot be attributed to any of the Hale Defendants or a basis to find them subject to this Court's specific jurisdiction. *See Downey*, 177 F.Supp.3d at 1296 ("[W]hat matters most in this analysis is not the corporations own contacts with Nevada but the individual Defendants' contacts with the state.") Plaintiff cannot satisfy the threshold element of identify any conduct that purports to represent the Hale Defendants purposefully availing themselves to the jurisdiction of this state.

No Claim Arising from Forum Related Activity. A plain reading of the Second Amended Complaint demonstrates that none of the claims asserted therein arise out of the Hale Defendants' purported limited contacts with the State of Nevada. Instead, all of Plaintiff's claims are based on his allegations that Midway, in its public filings and press releases, either misrepresented statements or omitted statements from those statements. *See e.g., id.* at ¶¶ 59, 90. Even if those statements could somehow be attributed to any of the Hale Defendants, which they cannot, all such filings and press releases were disseminated from Midway at its Englewood/Denver, Colorado executive headquarters. In fact, the Second Amended Complaint allege that any of the Hale Defendants made any representations at all, let alone directly to Plaintiff in the State of Nevada. Rather, Plaintiff alleges that he received any representations upon which he bases his claims from the company in his home in California. *See SAC* at ¶7. In short, Plaintiff cannot articulate how his claims purportedly arise out of the Hale Defendant's transient contacts with the state and jurisdiction over any of the Hale Defendants is improper as a result.

Exercise of jurisdiction is unreasonable. Even if Plaintiff could somehow demonstrate that the Hale Defendants had purposefully availed themselves of the privilege of doing business

1 in Nevada, or that his claims arose out of the Hale Defendant's incidental contacts with the State,
2 this Court should still not exercise jurisdiction over them as it would be unreasonable to do so
3 under the circumstances. As the United States Supreme Court noted in long ago in *International*
4 *Shoe Co.*, exercise of personal jurisdiction over a defendant is only appropriate if there are
5 sufficient "minimum contacts" between the nonresident defendant and the forum state so that the
6 maintenance of the suit does not "offend traditional notions of fair play and substantial justice."
7 *International Shoe Co.*, 326 U.S. at 316. As expressed above at length, none of the Hale
8 Defendants have any sufficient "minimum contacts" with the State of Nevada that would render
9 exercise of jurisdiction reasonable in any situation. *See also* Ex. A, Hale Decl.; Ex. B, Klein
10 Decl.; Ex. C, Anderson Decl.

11 Nevertheless, even if there were "minimum contacts" for this Court to consider, exercise
12 of specific jurisdiction over any of the Hale Defendants would still be unreasonable. The
13 Nevada Supreme Court has held that the Court should consider the following factors in
14 determining if exercise of jurisdiction would be reasonable: (1) the interstate judicial system's
15 interest in obtaining the most efficient resolution of controversies; (2) the forum state's interest
16 in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief;
17 and (4) the interest of several states in furthering substantive social policies. *Trump*, 109 Nev. at
18 701, 857 P.2d at 749 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292
19 (1980)). None of these factors weigh in favor of exercising jurisdiction and dragging the Hale
20 Defendants into Court in Nevada. Nevada has no interest, let alone a compelling interest, in
21 adjudicating a dispute between a non-resident Plaintiff and non-resident defendants. This is
22 particularly the case where none of the alleged conduct at the heart of the Second Amended
23 Complaint took place in Nevada and where the harm was not suffered in Nevada. Nor does this
24 Court have any interest in adjudicating claims Plaintiff pleads under the laws of the State of
25 California.

As the Hale Defendants lack contacts with the State of Nevada, and after weighing the relevant factors, exercise jurisdiction in this situation would offend “traditional notions of fair play and substantial justice” such that dismissal is proper.

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

Although Plaintiff was granted leniency by the Court and permitted to amend his complaint for a third time, he failed to remedy the same fatal flaws that the Court found in the Amended Complaint and as otherwise previously addressed by the parties’ in their prior motions to dismiss. Plaintiff’s failure to cure these defects in his latest pleading demonstrates why his Second Amended Complaint should be dismissed with prejudice.

In the interests of judicial economy and efficiency, the Hale Defendants hereby joint in the D&O Motion in its entirety. In doing so, the Hale Defendants hereby adopt and incorporate the arguments set forth therein by reference in this Motion in their entirety. The Hale Defendants reserve the right to argue the legal arguments and positions set forth in the D&O Motion at the time of the consolidated hearing on this Motion and Joinder and the D&O Motion.

IV. CONCLUSION

Plaintiff’s latest effort to replead his claims against the Defendants fails on both the law and facts. As set forth in the D&O Motion, Plaintiff lacks standing to pursue his claims as they are derivative in nature and his claims are otherwise insufficiently pled. Regardless, even if his claims were adequately pled, this Court should still dismiss all of the Hale Defendants from this case as this Court has no jurisdiction over any of them. Either way, Plaintiff’s Second Amended

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1 Complaint fails and it should be dismissed in its entirety.

2 DATED this 16th day of March, 2018.

3 GREENBERG TRAURIG, LLP

4 /s/ Christopher R. Miltenberger

5 MARK E. FERRARIO, ESQ.

6 Nevada Bar No. 1625

7 CHRISTOPHER R. MILTENBERGER, ESQ.

8 Nevada Bar No. 10153

9 3773 Howard Hughes Parkway, Suite 400 North
10 Las Vegas, Nevada 89169

11 *Counsel for Martin M. Hale, Jr.,*
12 *Trey Anderson, Nathaniel Klein, INV-MID, LLC,*
13 *EREF-MID II, LLC, and HCP-MID, LLC*

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 16th day of March, 2018, I caused a true and correct copy of the foregoing *Motion to Dismiss and Joinder to D&O Defendants Motion to Dismiss Second 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

EXHIBIT A

1 **DECL**
MARK E. FERRARIO, ESQ.
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CHRISTOPHER R. MILTENBERGER, ESQ.
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ferrariom@gtlaw.com
7 miltenger@gtlaw.com

8 *Counsel for Defendants Martin M. Hale, Jr.,*
Trey Anderson, Nathaniel Klein, INV-MID, LLC,
9 *EREF-MID II, LLC, and HCP-MID, LLC*

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 DANIEL E. WOLFUS,

13 Plaintiff,

14 v.

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

21 Defendants.
22

Case No.: A-17-756971-B

Dept. No.: XXVII

**DECLARATION OF MARTIN M.
HALE, JR. IN SUPPORT OF MOTION
TO DISMISS AND JOINDER TO D&O
DEFENDANTS' MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

23 I, Martin M. Hale, Jr., declare under penalty of perjury of the laws of the United States
24 and the State of Nevada as follows:

25 1. I am a Defendant in the above-captioned matter. This Declaration is made and
26 based upon my own personal knowledge. If called upon to testify to the contents of this
27 Declaration, I am legally competent to testify to its contents in a court of law.

1 2. I make this Declaration in support of the Hale Defendants' Motion to Dismiss and
2 Joinder to D&O Defendants' Motion to Dismiss Second Amended Complaint filed
3 contemporaneously herewith.

4 3. I have served as a member of Midway Gold Corporation's ("Midway") Board of
5 Directors since December 13, 2012.

6 4. Plaintiff's allegation in the Second Amended Complaint that while with Midway
7 my contacts with the State of Nevada were "so continuous and systematic as to render [me] at
8 home in Nevada" is patently false and without any basis in fact as demonstrated herein.

9 5. I am not now, nor have I ever been, a resident of the State of Nevada.

10 6. I do not own any personal or real property in the State of Nevada, nor do I have
11 any personal assets in the State of Nevada.

12 7. I do not own or maintain any business or personal offices in the State of Nevada.

13 8. I do not hold any licenses from any agency, governing body, or regulatory agency
14 within the State of Nevada for any purpose.

15 9. I do not own any interest in any companies organized under the laws of the State
16 of Nevada or having its principal place of business in the State of Nevada. Nor do I hold any
17 managerial or employment positions with any such companies or organizations.

18 10. I do not maintain any bank accounts in the State of Nevada.

19 11. I do not have or maintain any telephone or facsimile numbers in the State of
20 Nevada.

21 12. I have never been required to maintain, nor have I maintained, a registered agent
22 for service in the State of Nevada.

23 13. I have never been a party to any lawsuits in the State of Nevada, except for the
24 instant case.

25 14. My interactions with Nevada are very limited. Between December 2012 and the
26 present, I traveled to Nevada on approximately four occasions in connection with my position as
27 a member of Midway's Board of Directors or in connection with the investments made in

1 Midway by INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC (the “Investment
2 Entities”). These visits included attending one board meeting in the State of Nevada, visiting
3 Midway’s Nevada operations for a groundbreaking ceremony, and perhaps on one or two other
4 occasions to generally observe Midway’s Nevada operations.

5 15. Outside of the rare visit to Nevada in connection with observation of Midway’s
6 Nevada operations, my interactions with the State of Nevada are even more limited. Over the
7 last decade, I have traveled to Nevada, and in particular Las Vegas, on a few occasions for
8 personal vacations with friends and family and attended an hour of one personal development
9 seminar that included two colleagues from work in addition to a few friends and approximately
10 100 other attendees.

11 16. Each of the Investment Entities named as Defendants in the above-captioned
12 action is a limited liability company organized under the laws of the State of Delaware.

13 17. Each of the Investment Entities is a sole-purpose entity formed for the purpose of
14 making an equity investment in Midway, a publicly traded Canadian corporation incorporated
15 under the laws of British Columbia with its principal executive offices located in Englewood,
16 Colorado.

17 18. None of the individual members of any of the Investment Entities are residents of
18 the State of Nevada. INV-MID, LLC is managed by Hale Fund Management, LLC, a Delaware
19 limited liability company, and its other member is neither a resident of Nevada or entities
20 organized under the laws of Nevada. EREF-MID, LLC is managed by Hale Fund Management,
21 LLC, a Delaware limited liability company, and its other members are neither residents of
22 Nevada or entities organized under the laws of Nevada. HCP-MID, LLC is solely owned by Hale
23 Capital Partners, LP, is a Delaware limited partnership with its principal place of business in
24 New York, New York.

25 19. None of the Investment Entities conducts any business in the State of Nevada.

26 20. None of the Investment Entities owns any personal or real property in the State of
27 Nevada.

1 21. None of the Investment Entities owns or maintains any offices in the State of
2 Nevada.

3 22. None of the Investment Entities hold any licenses from any agency, governing
4 body, or regulatory agency within the State of Nevada for any purpose.

5 23. None of the Investment Entities hold any telephone or facsimile numbers in the
6 State of Nevada.

7 24. None of the Investment Entities have ever been required to maintain, nor have
8 they maintained, a registered agent for service in the State of Nevada.

9 25. None of the Investment Entities have ever been a party to any lawsuits in the State
10 of Nevada, except for the instant case.

11 26. I declare under penalty of perjury under the laws of the United States and the
12 State of Nevada that the foregoing is true and correct and that I signed this declaration on this
13 16th day of March, 2018.

14
15
16 /s/ Martin M. Hale, Jr.
 MARTIN M. HALE, JR.

EXHIBIT B

1 **DECL**
MARK E. FERRARIO, ESQ.
2 Nevada Bar No. 1625
CHRISTOPHER R. MILTENBERGER, ESQ.
3 Nevada Bar No. 10153
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7 miltenger@gtlaw.com

8 *Counsel for Defendants Martin M. Hale, Jr.,*
Trey Anderson, Nathaniel Klein, INV-MID, LLC,
9 *EREF-MID II, LLC, and HCP-MID, LLC*

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 DANIEL E. WOLFUS,

13 Plaintiff,

14 v.

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

21 Defendants.
22

Case No.: A-17-756971-B

Dept. No.: XXVII

**DECLARATION OF NATHANIEL
KLEIN IN SUPPORT OF MOTION TO
DISMISS AND JOINDER TO D&O
DEFENDANTS' MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

23 I, Nathaniel Klein, hereby declare as follows:

24 1. I am a Defendant in the above-captioned matter. This Declaration is made and
25 based upon my own personal knowledge. If called upon to testify to the contents of this
26 Declaration, I am legally competent to testify to its contents in a court of law.

27 2. I make this Declaration in support of the Hale Defendants' Motion to Dismiss and
28

1 Joinder to D&O Defendants' Motion to Dismiss Second Amended Complaint filed
2 contemporaneously herewith.

3 3. I served as a member of Midway Gold Corporation's ("Midway") Board of
4 Directors from August 8, 2012 until December 13, 2012, and again from June 20, 2013 until
5 approximately November 4, 2014.

6 4. Plaintiff's allegation in the Second Amended Complaint that while with Midway
7 my contacts with the State of Nevada were "so continuous and systematic as to render [me] at
8 home in Nevada" is patently false and without any basis in fact as demonstrated herein.

9 5. I am not now, nor have I ever been, a resident of the State of Nevada.

10 6. I do not own any personal or real property in the State of Nevada, nor do I have
11 any personal assets in the State of Nevada.

12 7. I do not own or maintain any business or personal offices in the State of Nevada.

13 8. I do not hold any licenses from any agency, governing body, or regulatory agency
14 within the State of Nevada for any purpose.

15 9. I do not own any interest in any companies organized under the laws of the State
16 of Nevada or having its principal place of business in the State of Nevada. Nor do I hold any
17 managerial or employment positions with any such companies or organizations.

18 10. I do not maintain any bank accounts in the State of Nevada.

19 11. I do not have or maintain any telephone or facsimile numbers in the State of
20 Nevada.

21 12. I have never been required to maintain, nor have I maintained, a registered agent
22 for service in the State of Nevada.

23 13. I have never been a party to any lawsuits in the State of Nevada, except for the
24 instant case.

25 14. My interactions with Nevada are very limited. Between 2012 and 2014, I traveled
26 to Nevada on approximately four occasions in connection with my position as a member of
27 Midway's Board of Directors or in connection with the investments made in Midway by INV-

1 MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC (the “Investment Entities”). These visits
2 included conducting due diligence relating to the potential investment by the Investment Entities,
3 attending one board meeting in the State of Nevada, visiting Midway’s Nevada operations for a
4 groundbreaking ceremony, and perhaps on one or two other occasions to generally observe
5 Midway’s Nevada operations.

6 15. Outside of the rare visit to Nevada in connection with observation of Midway’s
7 Nevada operations, my interactions with the State of Nevada are even more limited. Over the
8 last decade, I have traveled to Nevada, and in particular Las Vegas, on a few occasions for
9 personal vacations with friends and family. While I have attended a few industry trade shows
10 and conventions in Las Vegas, Nevada over the past decade, I have not conducted any business
11 in the State of Nevada other than attending such conventions.

12 16. I declare under penalty of perjury under the laws of the United States and the
13 State of Nevada that the foregoing is true and correct and that I signed this declaration on this
14 16th day of March, 2018.

15
16 /s/ Nathaniel Klein
NATHANIEL KLEIN

EXHIBIT C

1 **DECL**
2 MARK E. FERRARIO, ESQ.
3 Nevada Bar No. 1625
4 CHRISTOPHER R. MILTENBERGER, ESQ.
5 Nevada Bar No. 10153
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14 *Counsel for Defendants Martin M. Hale, Jr.,*
15 *Trey Anderson, Nathaniel Klein, INV-MID, LLC,*
16 *EREF-MID II, LLC, and HCP-MID, LLC*

17 **DISTRICT COURT**
18 **CLARK COUNTY, NEVADA**

19 DANIEL E. WOLFUS,

20 Plaintiff,

21 v.

22 KENNETH A. BRUNK; RICHARD D.
23 MORITZ; BRADLEY J. BLACKETOR;
24 TIMOTHY HADDON; MARTIN M.
25 HALE, JR.; TREY ANDERSON;
26 RICHARD SAWCHAK; FRANK YU;
27 JOHN W. SHERIDAN; ROGER A
28 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 TREY
ANDERSON IN SUPPORT OF
MOTION TO DISMISS AND
JOINDER TO D&O DEFENDANTS'
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

I, Trey Anderson, declare under penalty of perjury of the laws of the United States and the State of Nevada as follows:

1. I am a Defendant in the above-captioned matter. This Declaration is made and based upon my own personal knowledge. If called upon to testify as to the contents of this Declaration, I am legally competent to testify to its contents in a court of law.

2. I make this Declaration in support of the Hale Defendants' Motion to Dismiss and Joinder to D&O Defendants' Motion to Dismiss Second Amended Complaint filed contemporaneously herewith.

3. I have served as a member of Midway Gold Corporation's ("Midway") Board of Directors since November 4, 2014.

4. Plaintiff's allegation in the Second Amended Complaint that while with Midway my contacts with the State of Nevada were "so continuous and systematic as to render [me] at home in Nevada" is patently false and without any basis in fact as demonstrated herein.

5. I am not now, nor have I ever been, a resident of the State of Nevada.

6. I do not own any personal or real property in the State of Nevada, nor do I have any personal assets in the State of Nevada.

7. I do not own or maintain any business or personal offices in the State of Nevada.

8. I do not hold any licenses from any agency, governing body, or regulatory agency within the State of Nevada for any purpose.

9. I do not own any interest in any companies organized under the laws of the State of Nevada or having its principal place of business in the State of Nevada. Nor do I hold any managerial or employment positions with any such companies or organizations.

10. I do not maintain any bank accounts in the State of Nevada.

11. I do not have or maintain any telephone or facsimile numbers in the State of Nevada.

12. I have never been required to maintain, nor have I maintained, a registered agent for service in the State of Nevada for any purpose.

13. I have never been a party to any lawsuits in the State of Nevada, except for the instant case.

14. My interactions with Nevada are very limited. As a member of Midway's Board of Directors, I attended one board meeting and a few site visits in the State of Nevada.

15. My interactions with the State of Nevada other than in connection with my

1 membership on Midway's Board of Directors are even more limited. Over the last decade, I
2 have traveled to Nevada on a few occasions for personal vacations with friends and family and
3 attended a personal development seminar that included two colleagues from work in addition to a
4 few friends and approximately 100 other attendees. While I have attended a few industry trade
5 shows and conventions in Las Vegas, Nevada, and one or two site visits for an unrelated project
6 outside of Reno, Nevada over the past decade, I have not personally conducted any business in
7 the State of Nevada.

8 16. I declare under penalty of perjury under the laws of the United States and the
9 State of Nevada that the foregoing is true and correct and that I signed this declaration on this
10 16th day of March, 2018.

11
12 /s/ Trey Anderson
13 TREY ANDERSON
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