

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

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

Respondents,

And

DANIEL E. WOLFUS,

Real Parties in Interest.

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Supreme Court No. 76052

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

**PETITIONERS' APPENDIX
FOR WRIT OF PROHIBITION
OR ALTERNATIVELY,
MANDAMUS**

VOLUME 6 of 6

(PA0979-PA1056)

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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 6** 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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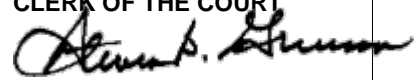
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DANIEL E. WOLFUS,

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

1 Defendant Kenneth A. Brunk (“Brunk”), by and through his counsel, hereby submits this
2 Reply in Support of Motion to Dismiss the Second Amended Complaint for lack of personal
3 jurisdiction as to all claims asserted against him. Brunk also joins the Reply in Support of
4 Motion to Dismiss Second Amended Complaint (“Motion”) filed by Defendants Richard D.
5 Moritz (“Moritz”), Bradley J. Blacketor (“Blacketor”), Timothy Haddon (“Haddon”), Richard
6 Sawchak (“Sawchak”), John W. Sheridan (“Sheridan”), Frank Yu (“Yu”), Roger A. Newell
7 (“Newell”), and Rodney D. Knutson (“Knutson”) (collectively, the “D&O Defendants”), except
8 for those portions of the Motion that relate to personal jurisdiction as to the D&O Defendants.
9 This Reply is made pursuant to Rule 12(b)(2) of the Nevada Rules of Civil Procedure (“NRCP”)
10 and is filed in support of Kenneth A. Brunk’s Motion to Dismiss Second Amended Complaint
11 and Joinder in D&O Defendants’ Motion to Dismiss Second Amended Complaint. It is based on
12 the points and authorities alleged therein, as well as the attached Memorandum of Points and
13 Authorities, together with the exhibits, the pleadings, and papers on file herein, and any oral
14 argument this Court has allowed or may allow.

15 DATED this 2nd day of May, 2018.

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INTRODUCTION

Plaintiff filed his original complaint in this matter nearly a year ago. Thereafter, Defendants filed motions to dismiss, the parties briefed the motions, this Court held a hearing thereon, and the Court dismissed the complaint for lack of personal jurisdiction. Now, after nearly a year, hundreds of pages of briefing, and a prior hearing on the exact same issue, Plaintiff is once again before this Court with an amended complaint that offers little new information and seeks to have this Court reverse its previous ruling that it has no jurisdiction over Brunk. Plaintiff's second effort at pleading personal jurisdiction over Brunk is no better than his first, and for that reason the Court should dismiss Plaintiff's Second Amended Complaint.

In his previous complaint, Plaintiff alleged that this Court had general and specific jurisdiction over Brunk. Plaintiff appears to have abandoned his general jurisdiction argument and now only argues that the Court has specific jurisdiction over Brunk, a nonresident. To prove specific jurisdiction, the defendant's actions in the forum state must give rise to the claims for relief asserted in the complaint. Here, there is no such connection: Plaintiff's claims arise solely out of alleged material omissions contained in Midway's SEC filings and press releases, which were drafted in and issued exclusively from Colorado. The fundamental disconnect between the alleged actions giving rise to Plaintiff's claims for relief and Brunk's contacts with Nevada is dispositive of the issue of personal jurisdiction over Brunk. Brunk therefore moves the Court to deny Plaintiff's request for jurisdictional discovery and/or an evidentiary hearing and dismiss the claims asserted against him in the Second Amended Complaint ("Complaint") under NRCP 12(b)(2).

Additionally, Brunk joins the D&O Defendants' Reply in Support of Motion to Dismiss Second Amended Complaint and the Memorandum of Point and Authorities in support thereof, pursuant to NRCP 12(b)(1) and (5), 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. As with the claims asserted against the D&O Defendants, Plaintiff's claims must be dismissed because, *inter alia*, his fraud and misrepresentation claims do not plead reliance and causation sufficiently and do not plead

any misrepresentations by Brunk with the specificity required by law; his breach of fiduciary duty and aiding and abetting this breach claims are derivative; and Plaintiff cannot show that exercising a stock option is a purchase or sale under the California statute on which he relies.

ARGUMENT

A. Plaintiff Misstates the Legal Standard for Specific Jurisdiction.

Before a court can obtain personal jurisdiction over a nonresident defendant, due process requires the plaintiff show that the nonresident's contacts are sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction, and if it is reasonable to subject the nonresident defendant to suit in the forum state. *See Viega GmbH v. Eighth Judicial Dist. Ct.*, 328 P.3d 1152, 1156 (2014) (citing *Arbella*, 134 P.3d 710, 712, 714 (Nev. 2006)); *Daimler AG v. Bauman*, 134 S.Ct. 746, 762 n. 20, 187 L.Ed.2d 624 (2014). It is the plaintiff's burden to prove that the exercise of jurisdiction over a defendant is reasonable, and this burden never shifts to the challenging party. *See Trump v. Dist. Court*, 857 P.2d 740, 744 (1993). It appears that Plaintiff has abandoned his argument relative to general jurisdiction and now only relies on his argument (rejected once already by this Court) that Nevada has specific jurisdiction over Brunk. Yet Plaintiff's argument still fails.

Plaintiff asserts that specific jurisdiction "exists when a non-resident has minimum contacts with the forum state which are related to the complaint." Plaintiff's Consolidated Memorandum of Points and Authorities in Opposition to Motions to Dismiss ("Opp'n"), 26:24-26. In support of this assertion, Plaintiff cites *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court*, 343 P.3d 997 (Nev. 2015). However, that case does not stand for the proposition for which Plaintiff asserts it. *See id.* In fact, nowhere is the term "related to the complaint" included in *Fulbright*. *See id.* Plaintiff employs similarly empty jargon by asserting that specific jurisdiction "exists when a party intentionally involves the forum" but does not define what "intentionally involves the forum" means in this context, thus proposing a meaningless standard for personal jurisdiction. Opp'n, 27:14-25. Plaintiff ultimately concludes that Brunk's contacts with Nevada were "integral to the Complaint," thus concluding he has met his contrived standard for specific jurisdiction." *Id.* at 30:4-5.

1 The Court is no doubt well-aware of the proper factors Plaintiff must demonstrate in
2 order to establish specific jurisdiction:

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

9 *Viega GmbH*, 328 P.3d at 1157 (emphasis added); *Arbella*, 134 P.3d at 712, 714.

10 As explained below, Plaintiff's argument fails most evidently with respect to the second
11 factor of this test. In order to prove this Court has specific jurisdiction over Brunk, Plaintiff must
12 prove that Brunk took actions in Nevada, the consequences of which gave rise to Plaintiff's
13 claims for relief. Plaintiff cannot do this, so his Complaint must be dismissed.

14 **B. None of the Contacts Plaintiff Has Ever Alleged Against Brunk Gave Rise to the**
15 **Causes of Action Plaintiff Asserts in His Amended Complaint.**

16 **1. Plaintiff's Claims Stem Exclusively From Documents Filed in Colorado.**

17 In his Complaint, Plaintiff asserts five claims for relief against Brunk. *See* Compl. ¶¶ 99-
18 147. The basis for *all* of Plaintiff's claims for relief is that Midway's press releases and SEC
19 filings contained either omissions or misstatements that ultimately damaged Plaintiff. *See*
20 Opp'n, 18:6-27:25; *see* Compl., ¶¶ 106, 111, 129, 130, 131, 132, 135, 136, 144, and 145.
21 Plaintiff's securities fraud claim contends Plaintiff "purchased [Midway stock] in reliance on
22 public filings which contain a material misstatement or omission." *See* Opp'n, 18:6-22:10.
23 Plaintiff's breach of fiduciary duty claim asserts Brunk breached his fiduciary duty by making
24 "false and misleading statements" in the press releases and SEC filings on which Wolfus
25 allegedly relied. *See id.* at 22:11-23:24. Similarly, the breach of fiduciary duty that Brunk is
26 accused of aiding and abetting is the issuance of the same "false and misleading statements."
27 *See id.* at 23:25-24:17. Plaintiff's common law fraud is based on, yet again, the "false
28 representations" made in the press releases and SEC filings that allegedly induced Plaintiff to
buy and hold Midway stock. *See id.* at 14:10-19, 24:19-25:14. And again, Plaintiff's negligent
misrepresentation claim centers solely on a "misrepresentation of a past or existing material fact"

1 contained in those same filings and press releases. *See id.* at 25:16-26:10.

2 Plaintiff defines the “fraudulent and misleading statements” on which his claims rely *only*
3 as “press releases and/or SEC disclosure/filings.” *See id.* at 14:10-19, 24:19-25:14. Plaintiff
4 does not allege, for example, that he had any direct conversation with Brunk in which Brunk
5 mislead him. *See* Opp’n. Plaintiff does not allege Brunk individually emailed him and omitted
6 material information. *See id.* Nor does Plaintiff allege Brunk provided him false information in
7 any other form. *See id.* ***Every single misrepresentation, misleading statement, or omission***
8 Plaintiff alleges Defendants made he argues was made in a press release or SEC filing. *See id.*;
9 *see* Compl. Therefore, the submission of these documents is the only action that could give rise
10 to Plaintiff’s claims.

11 **2. None of the Releases or Disclosures Was Created in Nevada.**

12 Another key flaw in Plaintiff’s argument is that *every* press release and SEC filing
13 Midway issued was issued ***in and/or from Colorado***, and Plaintiff does not argue otherwise. *See*
14 Compl.; *see* Opp’n. In fact, Plaintiff has not alleged *any* activity Brunk took in Nevada that
15 could serve as the basis for Plaintiff’s claims for relief. *See* Compl.; *see* Opp’n. ***Even if all of***
16 ***the contacts that Plaintiff now alleges Brunk had with Nevada did occur***, which Brunk does
17 not concede, ***none of them has anything to do with the claims Plaintiff asserts against Brunk.***
18 Thus, even if true, Plaintiff’s assertions regarding Brunk’s contacts with Nevada do not confer
19 specific jurisdiction over Brunk.

20 Further, Plaintiff mischaracterizes Brunk’s intermittent contacts with Nevada in an
21 apparent attempt to create the false impression that those contacts somehow related to the press
22 releases and SEC filings filed in Colorado, upon which Plaintiff’s claims exclusively rely.
23 Plaintiff first asserts that “[m]uch of the disclosure was aimed at Nevada” yet provides neither
24 any facts nor legal authority to support this assertion.¹ Opp’n, 28:21-24. The assertion fails for
25 several reasons, the most obvious being that the press releases and SEC filings were accessible
26 online by individuals in all fifty states in the Union, as well as anywhere else in the world with
27

28 ¹ It is axiomatic that arguments of counsel, such as this, “are not evidence and do not establish the facts of the case.” *See Nev. Ass’n Servs. v. Eighth Judicial Dist. Court of Nev.*, 338 P.3d 1250, 1256 (Nev. 2014).

internet access. *See* Compl., ¶ 7.

Moreover, press statements made outside of the forum state and transmitted into the forum cannot provide the basis for personal jurisdiction. *See Graziose v. Am. Home Prods. Corp.*, 161 F.Supp.2d 1149 (D. Nev. 2001). Also, “maintenance of a passive website alone” and a “mere web presence” are insufficient to establish personal jurisdiction. *See Brayton Purcell, LLP v. Recordon & Recordon*, 606 F.3d 1124, 1129 (9th Cir. 2010) (citing *Holland Am. Line, Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007)). Thus, as a matter of law the fact that the press releases and SEC filings could be accessed from Nevada cannot establish personal jurisdiction over Brunk.

Plaintiff also asserts that “Brunk...based [his] Disclosure work on the knowledge gained during [his] frequent visits to the operations in Nevada.” Opp’n, 28:25-27. Yet again, even if this were true, Plaintiff either does not understand or obscures the basis for his own argument: Plaintiff contends Brunk knew the truth about the mine, and he then went back to Midway’s Colorado headquarters and lied about them in press releases and SEC filings. *See* Compl.; *see* Opp’n. Thus, even under Plaintiff’s strained construct, the wrongdoing Plaintiff alleges against Brunk – the supposed lies and omissions – would have occurred in Colorado, regardless of where Brunk may have discovered the underlying, contrary facts. Using Plaintiff’s reasoning, if Midway had owned a mine in Guam, and Brunk had visited that mine and then reported on it from Colorado, Brunk could be fairly haled into court in Guam. Fanciful, to be sure, but the point is that just because Brunk learned something about the company in one location does not mean he can be haled into court there for an action he took at company headquarters in suburban Colorado. The fact that the Pan mine was located in the continental United States does not make Plaintiff’s argument any less absurd.

C. Jurisdictional Discovery and an Evidentiary Hearing Are Not Necessary and Would Squander the Time of the Court and the Parties.

At the end of his brief, Plaintiff makes a cursory plea for jurisdictional discovery and an evidentiary hearing on the issue of personal jurisdiction. *See* Opp’n, 30:6-16. Yet, jurisdictional discovery is necessary “only if it is possible that the plaintiff can demonstrate the requisite

jurisdictional facts if afforded that opportunity.” *St. Clair v. Chico*, 880 F.2d 199, 201 (9th Cir. 1989). When the “extra-pleading material demonstrates that the controlling questions of fact are undisputed, additional discovery [is] useless.” *Id.* at 202. Additionally, where a plaintiff’s assertion of personal jurisdiction “appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the Court need not permit even limited discovery...” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) (quoting *Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 562 (9th Cir. 1995)).

As a threshold matter, it is stunning that, having filed his first complaint nearly than a year ago and having litigated the issue of personal jurisdiction for nearly as long, Plaintiff only now requests jurisdictional discovery and an evidentiary hearing on the issue. This request was available to Plaintiff during the entirety of the prior fight over Plaintiff’s prior failed Complaint, and yet he never requested these tools. Now, at the eleventh hour and facing the demise of his most recent inadequate Complaint, Plaintiff demands he be entitled to discovery and a hearing. Such delay is offensive to the finality of the pleading process.

Neither jurisdictional discovery nor an evidentiary hearing could uncover any new information relevant to the issue of personal jurisdiction because ***all of the information Plaintiff needs to prove specific jurisdiction over Brunk is in the public domain.*** Indeed, Plaintiff himself provides the evidence fatal to his request in his Complaint. *See* Exhibits 2-10 to Compl. Plaintiff provides two Midway SEC filings in support of his Complaint, each of which lists British Columbia as Midway’s place of incorporation and Englewood, Colorado as the address of its principal executive offices. *See* Exs. 2, 4 to Compl. Plaintiff also provides seven Midway press releases, each of which states it was issued from “Denver, Colorado.” *See* Exs. 3, 5-10 to Compl.

Finally, Plaintiff notes that he himself was a director of the company, the CEO of the company, or both for over four years, and Plaintiff admits Midway’s principal executive offices were located in Colorado. *See* Compl. ¶¶ 23, 26-27, 58. As a former director and CEO of the company, Plaintiff knows exactly how and where Midway filed its SEC filings and press releases. Thus, discovery and an evidentiary hearing will tell Plaintiff nothing he does not

1 already know about any facts that could give rise to jurisdiction over Brunk.

2 **CONCLUSION**

3 Ultimately, Plaintiff has *still* has not alleged his causes of action arise from the
4 consequences of Brunk's limited contacts with Nevada. All of Plaintiff's claims stem from the
5 alleged misstatements and omissions contained in Midway's press releases and SEC statements,
6 none of which were drafted in, filed in, or directed specifically toward the state of Nevada.
7 Therefore, this Court does not have general or specific jurisdiction over Brunk, and the exercise
8 of jurisdiction under the circumstances would – still – offend due process. Plaintiff's Complaint
9 must be dismissed without affording Plaintiff jurisdictional discovery or an evidentiary hearing,
10 which will not uncover any information that Plaintiff does not already have.

11 Brunk also joins the request for relief sought by the D&O Defendants by way of
12 Defendant Brunk's Joinder.

13 DATED this 2nd day of May, 2018.

14 **SANTORO WHITMIRE**

15 /s/ Jason D. Smith

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 2nd day of May, 2018, a true and correct copy of
**KENNETH A. BRUNK’S REPLY IN SUPPORT OF MOTION TO DISMISS SECOND
AMENDED COMPLAINT AND JOINDER IN D&O DEFENDANTS’ REPLY IN
SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT** was served
electronically with the Clerk of the Court using the Eighth Judicial District Court’s eFileNV
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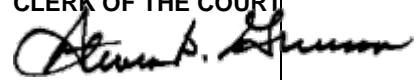
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An employee of SANTORO WHITMIRE



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

DANIEL WOLFUS,
Plaintiff,
vs.

RICHARD MORITZ,
Defendant.

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

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE
WEDNESDAY, MAY 09, 2018

**RECORDER'S TRANSCRIPT OF HEARING
ALL PENDING MOTIONS**

APPEARANCES:

For the Plaintiff: JAMES R. CHRISTENSEN, ESQ.
SAMUEL T. REES, ESQ.

For the Defendants
Directors and Officers: ROBERT J. CASSITY, ESQ.
DAVID J. FREEMAN, ESQ.
Martin M. Hale, Jr.: MARK E. FERRARIO, ESQ.
CHRIS MILTENBERGER, ESQ.
Kenneth A Brunk: JASON D. SMITH, ESQ.
ERIC B. LIEBMAN, ESQ.

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER

TRANSCRIBED BY: MANGELSON TRANSCRIBING

1 Las Vegas, Nevada, Wednesday, May 09, 2018

2
3 [Case called at 11:39 a.m.]

4 THE COURT: Please remain seated. Calling the case of
5 Wolfus versus Moritz. Appearances, please. Let's start on one side and
6 go all the way over. On your right, please.

7 MR. REES: Good aft -- nope, we're still morning. Samuel
8 Rees, Your Honor, appearing on behalf of Plaintiff Wolfus.

9 THE COURT: Thank you.

10 MR. CHRISTENSEN: Jim Christensen on behalf of Plaintiff.

11 THE COURT: Thank you.

12 MR. FREEMAN: David Freeman on behalf of the Director and
13 Officer Defendants.

14 THE COURT: Thank you.

15 MR. CASSITY: Robert Cassity of Holland and Hart on behalf
16 of the D&O Defendants, Your Honor.

17 THE COURT: Thank you.

18 MR. MILTENBERGER: Good morning, Your Honor. Chris
19 Miltenberger on behalf of the Hale Defendants. Mark Ferrario is also
20 here with me as -- on behalf of the Hale Defendants as well,

21 THE COURT: Thank you.

22 MR. LIEBMAN: Eric Liebman, Your Honor, appearing pro hoc
23 vice from the Moye White law firm in Chicago -- Chicago? Denver,
24 excuse me. I'm from Chicago. And my Las Vegas Counsel, Jason
25 Smith from the Santoro Whitmire law firm is here with me as well for

1 Kenneth A. Brunk.

2 THE COURT: Thank you, all.

3 And before we being, let me just give you an update. It's
4 11:43. We can start the trial at 1:30, so you can have an hour. You can
5 go until 12:45.

6 So this is first the D&O Defendant's Motion to Dismiss with
7 Joinder. And then we have the Hale Defendant's Motion to Dismiss with
8 Joinder. And then we have the Brunk Motion to Dismiss the Second
9 Amended Complaint and Joinder. So I would like to take all three
10 together, have one Opposition, and one Reply. And normally we would
11 do it in the order they were briefed. Everybody comfortable with that
12 procedure?

13 MR. CASSITY: Yes, Your Honor.

14 MR. CHRISTENSEN: Yes, Your Honor.

15 THE COURT: Very good. Then let me hear your -- from you,
16 please.

17 MR. CASSITY: Yes, Your Honor. Again, Robert Cassity on
18 behalf of the D&O Defendants. And, Your Honor, just to give you a
19 preview I think that our plan is that I'll plan to address most of the
20 arguments -- I think each of the other Defendants' Counsel will address
21 their personal jurisdiction arguments and hopefully we can streamline it
22 for the Court. I know that Your Honor's read the papers and I know that
23 we've --

24 THE COURT: I did.

25 MR. CASSITY: -- been here once before. I was telling

1 Counsel that it feels a little bit like Groundhog Day, with a lot of the same
2 arguments that --

3 THE COURT: I reread the transcript of the last hearing. And,
4 again, my apologies to everyone for our calendar. By mistake we had a
5 long matter that didn't get on the calendar or I would have called you to
6 move it until -- so I could give you more time. So it was my error and I'm
7 sorry.

8 MR. CASSITY: Not a problem, Your Honor. I think that we
9 can streamline our argument today and, you know, with the benefit of
10 the Court having read the papers, I think we can be brief.

11 But this is now the Plaintiff's third attempt to properly plead
12 claims against the Defendants, as the Court will recall. It was just a few
13 months ago that the Court dismissed their Amended Complaint. The
14 Court reviewed the allegations and determined that the claims were
15 derivative in nature rather than direct. But the Court gave Mr. Wolfus an
16 opportunity to amend his Complaint to address those deficiencies to see
17 if he could plead a direct claim.

18 And unfortunately, the claims are really still the same claims.
19 They're still direct -- or excuse me, they're still derivative in nature as
20 opposed to direct. The Complaint otherwise fails to state a claim upon
21 which relief can be granted. And our third basis to dismiss is a lack of
22 personal jurisdiction.

23 As the Court will recall Mr. Wolfus was the prior -- was the
24 former CEO and chairman of the board of Midway Gold, which is a
25 Canadian organization, which was organized under British Columbia

1 law. He served as CEO until 2012 and continued as a director until early
2 2013.

3 The allegations of the Complaint are still the same. The sum
4 and substance are the same. The same allegations that there were
5 omitted facts that were not disclosed to the public or to Mr. Wolfus.
6 Same allegations that he on two occasions in 2014 exercised his stock
7 options. They were granted to him years before at low-market prices.
8 And he alleges that if he had known about these allegedly undisclosed
9 facts, he would have not exercised his stock options and would have
10 sold all his stock when the market was at its peak for this particular
11 company.

12 So let me address the -- first the breach of fiduciary claim.
13 Again, Your Honor, we think it's a derivative claim. They didn't change
14 any of the allegations so we're looking at the same thing. They do
15 allege a number of times that they think the claims are really direct and
16 not derivative, but this Court is not bound by their characterization of
17 their claims. The Court has to do its own analysis of the claims to
18 determine whether they are direct or derivative in nature.

19 And given that we have the same allegations of misrep -- or
20 failure to disclose material facts, it's the same issue. It's the same arm
21 that was alleged in the First Complaint and the Second Complaint, and
22 that is that there was a failure to disclose facts. The value of the stock
23 then suffers when the facts are then -- or later known and the Plaintiff's
24 diminished value of its stock.

25 So the harm was the loss of the value of stock and just like the

1 Court found the first time around, the same claims were derivative
2 applying the direct harm test in the *Parametric* case. And, again, that
3 requires that we look to what -- who suffered the harm and who had
4 received the remedy. There's nothing in the Opposition and nothing in
5 the Complaint that changes the Court's analysis from the first time that
6 we were here last Fall. The same holds true with Canadian law. We've
7 cited a couple of cases from Canadian law in our motion as well.

8 They cite to the *City Group versus AAHW Investment* case,
9 which is a Delaware case that analyzed holder claims; not breach of
10 fiduciary claims, but holder claims. And they've looked to whether the
11 Direct Harm test applied in that Court and the Court said well, for holder
12 claims we don't apply the Direct Harm test under *Tooley*. Well, that
13 doesn't fly with respect to Nevada claims here under the Direct Harm
14 test that we do apply in interpreting whether fiduciary duty claims are
15 subject to dismissal. And the attempt to conflate fiduciary duty claims
16 with their fraud claim should be rejected by this Court.

17 If you turn to the California Securities law claim, Your Honor,
18 and be mindful that we talked about this at length I think at the last
19 hearing and we were dealing with the Section 25017, subsection E, and
20 under the plain language of that statute the purchases and sales of stock
21 options are deemed to occur at the time of the issuance of the stock
22 option, not at the time of the exercise of the option.

23 Just to quote briefly from the actual language of the statute, it
24 says: Neither the exercise of the right to purchase, nor the issuance of
25 securities pursuant thereto is an offer or sale.

1 That language is fatal to these claims. They've said nothing in
2 their Opposition to rebut that, other than we see in their allegations of
3 the Complaint they say instead of the exercised options they now say he
4 purchased shares. Well, the purchase of those shares was pursuant to
5 an exercise of those stock options. We've seen that in the forum for
6 that we attached to our motion.

7 And we don't need to case law to interpret plain language of
8 the statute that clearly governs these claims here and shows that they're
9 subject to dismissal.

10 I'm going to turn to the fraud and negligent misrepresentation
11 claims. What he did in his Amended Complaint, Your Honor, is he says
12 well, this claim is made pursuant to *Small v. Fritz*. So that's a California
13 law case that recognizes holder claims. And first, California law does
14 not apply to the Plaintiff's claims.

15 We've cited cases to the Court that show that under the
16 internal affairs doctrine, the law of the state of incorporation governs the
17 duties and responsibilities of Directors and Officers. They don't rebut
18 that, they don't offer any real contradiction to that other than to say well,
19 I'm a California resident, so California law governs all of my claims.

20 They don't cite Nevada case law, they don't cite British
21 Columbia case law, which recognizes -- which would recognize holder
22 claims and for good reason, there is no such authority. And as we've
23 explained in the motion, most states throughout the country refuse to
24 recognize holder claims because holder claims are inherently
25 speculative because they don't look at this actual transaction, they

1 require the Court to look at some hypothetical transaction of oh, I would
2 have sold, if I had known this at this point in time.

3 But even those cases that do recognize holder claims still
4 require -- and courts talk about how it's almost impossible to plead a
5 holder claim because of the specificity that you need to prove to show
6 that, you know, actually would have sold this stock. And a lot of the
7 cases it'll be that I had a plan with my broker, we were going to sell at
8 this point, based upon this disclosure we determined to hold our shares
9 so I told the broker not to sell when the stock hit this price and we held
10 the shares.

11 All we have here, Your Honor, is allegations that I read all of
12 the press releases and I relied on everything and oh, if I had known
13 everything I would have bought -- or I would have sold when it -- the
14 stock hit its peak in February of 2014. So we have the same problem of
15 an inherently speculative claim.

16 And by the way, as I was looking through the redline they --
17 when they -- one of the allegations that they changed with respect to the
18 October -- or the September exercise of options, they had said --
19 previously they said well, we would have sold our shares at their peak in
20 October 2014.

21 So we had both this oh, I would have sold my shares at their
22 peak in February 2014 and then with respect to the second exercise
23 they initially said oh, we would have sold it at its peak in October, they've
24 come back and changed that and now they're only saying oh, we
25 wouldn't have pur -- we wouldn't have exercised the options. I don't

1 know which -- they'll have to -- you know, later, if this case were ever to
2 advance -- I don't think it can, but it -- but ferret that out through that
3 process.

4 But even if the Court were to apply California law to these
5 claims, we don't think that should -- the claims fail because they've not
6 demonstrated reliance and causation. The case law requires that they
7 talk about how many shares they would have sold, at what specific date
8 they would have sold them, if they had a truthful account of the financial
9 status of the company, and we don't have that here.

10 All we have is these generalized allegations that oh, I was
11 following the press releases and then I would have sold it at its peak.
12 Well, they have no allegations that show well, how would you have
13 known to sell it at its peak. How could -- you know, how would you have
14 determined that it was at its peak in February that you would have sold it
15 without kind of omnisciently looking back long after the fact, after the
16 bankruptcy, they would come back and say oh, I would have sold it at its
17 peak when the stock had later declined and ultimately Midway had filed
18 bankruptcy?

19 So we have all of these deficiencies with the holder claims, but
20 let's talk about the fraud and the scienter issue as well. Because they --
21 what they need to show -- and when we have multiple Defendants you
22 always have to show what each Defendant knew, when they knew it,
23 how that impacted the disclosure, or failure to disclose, and how there
24 was scienter in that failure to disclose to cause them -- cause the
25 Plaintiff to purchase the shares and the Plaintiff relies upon that.

1 We don't have any of that with respect of each of the
2 Defendants. What we do have is some additional allegations that seem
3 to be more related to personal jurisdiction that show oh, well they served
4 on this committee or they served on that committee, but there was no
5 real allegation that shows when did each of these Director Defendants
6 know these supposedly undisclosed facts and failed to disclose that
7 knowingly and intending to cause you to rely upon that
8 misrepresentation or failure to disclose?

9 And of course that also ignores that none of the Director
10 Defendants exercised -- you know, that none of them were selling their
11 stock. It's not as though they've invested themselves. These all -- all
12 these directors went down with all the company shareholders after the
13 company filed bankruptcy. But we don't have any allegations that show
14 when they knew it, what they knew, and how they had a duty to disclose
15 and failed to comply with that. So we lack a particularity in that respect.

16 And with respect to negligent misrepresentation, that claim
17 fails because the Directors and Officers couldn't negligently omit facts as
18 a matter of law. The issue is brief -- well briefed by the parties.
19 California law, if it were to apply, requires a positive assertion. So they
20 have to make some affirmative representation that is false or misleading
21 and here we only have allegations that they've made -- they've failed to
22 disclose material facts. We don't have a positive assertion of facts.

23 Finally, Your Honor, I'm going to address the personal
24 jurisdiction issues that. I know the Court's extraordinarily familiar with
25 personal jurisdiction and I would point out first that they totally

1 abandoned -- the first time they were arguing general and specific
2 jurisdiction, they've totally abandoned the general jurisdiction outside of
3 Mr. Yu, who resides here, who's never been the subject of a challenge
4 of personal jurisdiction.

5 But what we have, we have a Nevada resident, we have -- or
6 excuse me, a -- not a Nevada resident. We have a California resident,
7 the Plaintiff, we have a -- Midway is a Canadian company. And we have
8 Directors and Officers who don't reside in Nevada, but rather Canada,
9 Colorado, Virginia, and Washington. And none of the purportedly
10 misleading disclosures were drafted in or issued out of Nevada, but
11 rather Colorado.

12 So let's take a look -- I'm just going to briefly touch on the
13 specific jurisdiction given they've abandoned their general jurisdiction
14 arguments. And as we know there must be purposeful availment of the
15 privilege of acting in the forum. The cause of action must arise from the
16 consequences in the forum state of the Defendant's activities and those
17 activities must have a substantial enough connection with the forum
18 state to make the exercise of jurisdiction a reasonable.

19 Again, what we have here are claims that arise out of -- the
20 Plaintiff's alleged reliance upon alleged omitted facts or material
21 omissions by the Directors and Officers and Midway's SEC filings and
22 press releases. We've seen -- in his affidavit he talks about some of the
23 connections. Oh, they came here for this meeting. Not much that
24 rebutted any of the statements that we had in the affidavits that we
25 submitted to the Court.

1 But the problem that they have is that none of the
2 connections, none of the activities that they were alleged to have
3 participated in, in Nevada, these board meetings or other committee
4 meetings that they may have attended, none of those are the source or
5 the basis of the claims that they're asserting here. They're asserting
6 claims related to the failure to make disclosures and those disclosures
7 originated in Colorado where the corporate office is for those purposes.
8 So even if we assume the truth of all of those contacts with Nevada, we
9 don't have a connection between the cause of action and those contacts
10 with Nevada.

11 They make kind of a last ditch effort to say hey, Judge, if
12 you're not satisfied, let's have some jurisdictional discovery. But in order
13 to be entitled to jurisdictional discovery, they have to identify particular
14 facts they would establish -- be able to establish through that discovery
15 what they believe that discovery is then going to show and then how that
16 discovery is going to lead to the exercise of personal jurisdiction over the
17 D&O Defendants. They've not met their burden in doing that and so we
18 would ask the Court to dismiss on the alternative grounds of personal
19 jurisdiction.

20 Finally, Your Honor, this has been their third attempt, so now
21 their Second Amended Complaint. The Court has given them ample
22 opportunity to correct the deficiencies of their claims and they simply
23 don't have viable claims as a matter of law and we ask the Court to
24 dismiss that with prejudice at this time.

25 THE COURT: Thank you, Mr. Cassity.

1 Mr. Miltenberger.

2 MR. MILTENBERGER: Good morning, Your Honor. Chris
3 Miltenberger on behalf of the Hale Defendants. We join in all of the
4 remarks that Mr. Cassity has eloquently set forth for you. They all are
5 applicable to each and every one of the Hale Defendants. And we
6 believe that the case should be dismissed based on the failure of lack of
7 subject matter jurisdiction, based on the failure of insufficient pleadings.

8 If you look at it in the -- within the scope of the Hale
9 Defendants, the lack of sufficiency in the pleading is -- really comes to
10 light with respect to the Hale Defendants. There's nothing in here talking
11 about what Mr. Hale allegedly knew or didn't know, why he believed it
12 was false. The same is true as to Mr. Klein. Even more inexplicably we
13 have these investment entities that were brought in who simply made an
14 investment in a Canadian corporation that had some operations in
15 Nevada.

16 There's nothing in the Complaint that demonstrates that it was
17 involved in any representations or errors or omissions that were
18 allegedly misleading in press releases or SEC violations. So in light of
19 those issues, the claims should all be dismissed with respect to all the
20 Hale Defendants and all the Defendants as a whole based on those --
21 lack of subject matter jurisdiction and for the failure to plead with
22 particularity.

23 Nevertheless, even if Your Honor doesn't go that path,
24 personal jurisdiction is another equally valid basis to reject this
25 Complaint as -- with respect to the Hale Defendants. In particular, when

1 you look at the Hale Defendants, we're looking at specific jurisdiction.
2 Again, it is a disclosure or a SEC statement, allegedly made from
3 Colorado, disseminated to someone in California; how does that relate
4 to someone who invested in a company -- in a Canadian company that
5 has operations in Nevada?

6 There's no allegations or explanation in the Opposition as to
7 how specific personal jurisdiction would be applicable to any of those
8 investment entities. And the same goes for Mr. Hale, Mr. Anderson, and
9 Mr. Klein. There's no explanation in any of the Opposition as to how
10 there is specific personal jurisdiction as to how Plaintiff's claims arise out
11 of the limited contacts that each of those individuals had with respect to
12 this company.

13 And based on all those reasons, we request that you dismiss
14 the Complaint with prejudice. Thank you.

15 THE COURT: Thank you.

16 And Mr. Liebman.

17 MR. LIEBMAN: Thank you, Your Honor. Counsel.

18 I guess I'll be the first one to say good afternoon, Your Honor.
19 And it's wonderful to be back in the sunny state of Nevada again and
20 thank you, again, for allowing me to appear pro hoc vice in your court.

21 As I stated earlier, I represent Kenneth A. Brunk, one of the
22 Directors and Officers. We join in all the arguments that have been
23 made by my distinguished Counsel, Mr. Cassity and Mr. Miltenberger,
24 with respect to the claims. And I also am just going to touch on the
25 alternative ground of personal jurisdiction. I was glad that Mr. Cassity

1 used the analogy of Groundhog Day because I had already picked out
2 it's déjà vu all over again. So at least I didn't have to scratch that or
3 think of something else.

4 But getting to the point of the case -- well -- and -- the point of
5 the case and the distinction between the First Amended Complaint and
6 the Second Amended Complaint and -- actually let me back up for a
7 second. I would like to point out to the Court and my Counsel touched
8 on this.

9 Before a Complaint was actually filed in this case, the parties
10 were sent a draft Complaint and so this actually goes back to February
11 2016. I believe it's February, it might have been March 2016. The
12 parties engaged in back and forth, there were several draft Complaints
13 sent and it was finally in 2017 that the First Amended Complaint was
14 filed -- that might have been the beginning of -- yeah, the beginning of
15 2017 and 2018, the Second Amended Complaint was filed.

16 So with respect to the additional facts that we're now seeing in
17 the Declaration that's attached to the Opposition to Plaintiff's -- Plaintiff's
18 Opposition to the Motion to Dismiss. Discovery or notwithstanding, the
19 Plaintiff has had more than two years at this and not only has made
20 several attempts within this courtroom, but also extrajudicially to
21 persuade the Defendants that there's a claim to persuade the Court that
22 there's a claim and has failed to date.

23 And I think it's important to recognize, especially with respect
24 to the request for additional jurisdictional discovery or an evidentiary
25 hearing on a jurisdictional discovery, how long this process has been

1 playing out and how many opportunities the Plaintiff has had to heed the
2 Court's statements and the Court's order and to otherwise bolster its
3 pleadings to properly state claims under the Nevada Rules of Civil
4 Procedure.

5 With respect to the Declaration that is attached to Plaintiff's
6 Opposition to the three Defendant -- the three Motions to Dismiss filed
7 by the Defendants, the Declaration, at first blush -- and if you do a red
8 line of it, it has a number of additional statements in it or additional facts,
9 but at a closer -- closer scrutiny reveals that they really are the exact
10 same facts. They're the same -- and Mr. Brunk, in his Declaration here
11 and his Declaration in a prior pleading never says that he's never been
12 to Nevada. Everybody agrees there was a groundbreaking out there
13 and there have been some board meetings held out there and this was
14 all -- I believe the Court has read the transcript from last time and so this
15 was all mentioned there.

16 The only thing that's changed is the Plaintiff has now added to
17 a -- before Mr. Brunk said yes, I did make four trips out, yes, I did go to
18 the mine. Now they say well, he went out on this date and while he was
19 out there he did this. He met with this legislator or he surveyed activities
20 at the mine.

21 But the point is, as Mr. Cassity correctly pointed out, that --
22 and I'll just -- I know it's a three element test but the Court of course is
23 very familiar with the jurisdictional -- the specific jurisdiction requirement
24 and I'll distill it down from their three points. The conduct has to have to
25 do with the claim and the harm, both of those. And all these additional

1 points -- and let me just turn to it really quickly to make an exam -- give
2 Your Honor a couple examples.

3 Whenever I say really quickly it takes longer than I thought it
4 would.

5 And there is a specific section on Mr. Brunk in this Declaration
6 pointing out that he went to interface with geologists, people drilling
7 mining holes, vendors, lobbyists. Mr. Brunk never denied that he went
8 out there to do those things or that he went out there, this just says what
9 he went out there to do. But the claims in this case, as the Court
10 observed in its order issued on January 8th, 2018, that -- well, let me
11 back up, the Court didn't say that in its order.

12 But the point is, Your Honor, that none of these claims -- or
13 none of these allegations in the Declaration have anything to do with the
14 claims in -- that are alleged in the Complaint.

15 And I do remember what I was going to say about the order.
16 The Court did point out in the order outside of the context of jurisdiction,
17 that essentially what we have here are five claims and that's -- the fraud
18 claim, the securities claim, the Court knows what they are.

19 That these claims all essentially -- and the Court pointed this
20 out in the order, all essentially involve the same underlying facts and the
21 same underlying harm and that's that there's these 2013 undisclosed
22 facts and these 2014 undisclosed facts. And that in various press
23 releases and in various SEC filings. And those are the only two issues
24 here, press releases and SEC filings. There's no allegations of direct
25 statements, e-mails, correspondences, these are all statements that

1 were made to the world, that were made accessible I guess nowadays
2 worldwide, to anybody who has the internet.

3 And so all of these claims, all five of the claims, although
4 styled as different claims, the negligent misrepresentation and such, all
5 involve nothing but press releases and the SEC filings. And even with
6 additional detail about what Mr. Brunk did when he was in Nevada, none
7 of these issues have anything to do with Mr. Brunk's press releases -- or
8 there are no allegations in the Complaint -- in the Second Amended
9 Complaint with respect to these items -- tying these items in any way to
10 Mr. Brunk's press releases -- or not Mr. Brunk's, Midway's press
11 releases or to Midway's SEC filings. All of which -- and this is well-
12 briefed -- all of Midway's filings, press releases generated and/or filed in
13 Colorado. He asked various members of Midway, visited the mine at
14 various times, but none of the press releases came out of there and
15 none of the SEC filings and the Edgar system came out of there, those
16 all came out of Colorado.

17 And, again, in the Second Amended Complaint, which is third
18 opportunity that the Plaintiff has had to state a claim and assert
19 jurisdiction over these Defendants and Mr. Brunk, Mr. Brunk has
20 mentioned in three paragraphs -- or four paragraphs in the Complaint.
21 One paragraph, which is so conclusory that it need not have been said:
22 Well with Midway, Brunk's contacts with Nevada were so continuous and
23 systematic as to render him at home in Nevada.

24 Ironically, that's the test for general jurisdiction. They did not
25 make the general jurisdiction argument against Mr. Brunk, but even so,

1 that is such a conclusory allegation that it doesn't -- it almost doesn't say
2 anything at all.

3 Again, in Paragraph 36 of the Second Amended Complaint
4 states Mr. Brunk was hired by Midway as its president and chief
5 operating officer with the primary assignment of the Pan Project.

6 That's undis --

7 THE COURT: Paragraph 36, I have it up.

8 MR. LIEBMAN: I'm sorry?

9 THE COURT: Paragraph 36 --

10 MR. LIEBMAN: Yes.

11 THE COURT: -- of the Second Amended Complaint --

12 MR. LIEBMAN: Yes.

13 THE COURT: -- you just read that.

14 MR. LIEBMAN: Okay. So it's Paragraph 36, Your Honor, and
15 Paragraphs 52 and 53 refer to press releases and Mr. Brunk saying
16 various things about the -- that the mine was on schedule for startup of
17 production in mid-2014. A, that's not something that ties to the claim --
18 to the press release -- that the claim -- well, it was from the press
19 release but it doesn't tie to the actual claims in this case.

20 2, nowhere in the Complaint does it say that Mr. Brunk knew --
21 was making these statements that they -- it doesn't say that they were
22 false statements, it doesn't say that Mr. Brunk knew they were false
23 statements, and doesn't say that he omitted to make any false
24 statements, which I think would be fatal to the claim, even if it were not
25 subject to the heightened requirement for pleading fraud with

1 particularly.

2 But particularly in this case, with a requirement to plead with
3 particularity, there's no connection there between the blames and the
4 statements that were made. That's all that's been added.

5 THE COURT: Thank you, Mr. Liebman. Mr. Christensen.

6 MR. LIEBMAN: Thank you very much, Your Honor.

7 THE COURT: Thank you.

8 MR. CHRISTENSEN: Thank you, Your Honor. We were
9 going to break this up into two different parts. I was going to address
10 jurisdiction, Mr. Rees was going to address the remainder. Unless Your
11 Honor has any particular preference, I'll go first then I'll turn it over to Mr.
12 Rees.

13 THE COURT: However you choose.

14 MR. CHRISTENSEN: Thank you, Your Honor.

15 This Court has admitted jurisdiction over Frank Yu. The
16 question for the Court now is over how many other Defendants are
17 subject to jurisdiction in Nevada. Just generally, because the claims of
18 Dan Wolfus rise out of the Defendant's gold mine-related activities in
19 Nevada, denial of the motion is proper.

20 Mr. Brunk cited some case law in their Motion to Dismiss at
21 page 10, lines 18 through 27 and I think they really kind of crystalized
22 what we're looking at and understate why this is a factually intensive
23 analysis. They write at line 18, page 10: For an exercise of specific
24 jurisdiction to comport with due process, the lawsuit must arise out of
25 contacts that Defendant himself creates with the forum state.

1 That's from *Walden* quoting the famous Burger King case.

2 They go on and they conclude with this sentence: In other
3 words, the minimum contacts analysis looks to the Defendant's contacts
4 of the forum state itself, not the Defendant's contacts with the persons
5 who reside there.

6 And that's kind of reflected in the Ninth Circuit standard which
7 was mentioned in the *Southport* case cited by the Defense in one of the
8 Replies. And in the first prong of that three-prong analysis that tries to
9 apply that factual analysis, that leads down from Burger King to decide
10 whether or not it's fair for someone to be held to answer for a wrong in a
11 courtroom here in Nevada.

12 One of the things the Ninth Circuit looks for is whether the
13 Defendant consummated some transaction with the forum. It's
14 actually -- it's consummate some transaction with the forum. So, let's
15 take a look at what the Defendants did and because at this stage of the
16 proceedings, because jurisdiction has been challenged, it's our
17 obligation to produce some facts. I'm not going to rely upon any
18 statements made in the Complaint, but I'm going to go directly to the
19 Declaration of Mr. Wolfus.

20 So what does Mr. Wolfus lay out? He lays out, beginning in
21 his Declaration at page 2, kind of the Midway setup here in Nevada. He
22 had Midway out of Canada offices and Colorado with all of its major
23 operations here in Nevada. But then you also had at least ten
24 subsidiaries, all Nevada-based, all which related to the gold mine
25 activities. And some of which paid -- for example, MidwayUS, paid

1 some of these directors. So they're getting paid from Nevada
2 subsidiaries for work on Nevada Gold mines.

3 At Paragraph 6 of the Declaration, Mr. Wolfus states that
4 Brunk, Blacketor, and then later on in Paragraph 7, he mentions that
5 Moritz all received compensation from MidwayUS, a Nevada subsidiary.

6 In Paragraph 7, he talks about what -- some of what Brunk,
7 Blacketor, and Moritz did in relation to the gold mines here in Nevada.
8 Brunk hired Moritz to assist Brunk in managing all of Midway's
9 operations in Nevada, including the Pan Project. Goes on to talk about
10 it, how those Nevada projects made up 90 percent of what Midway did.

11 Goes on to say Moritz, when Moritz was with Midway, half of
12 his working time was spent in Nevada. These are not occasional visits
13 for a board meeting once a year. He's spending half of his time here in
14 this state, working on the gold mine. And it's -- Mr. Moritz doesn't
15 disclaim in his Declaration.

16 Although if you take all of those declarations as a whole, they
17 certainly seem to set up a question of fact concerning how often these
18 folks were here in Nevada. Goes on to describe the building in Ely,
19 leased by Midway and how operations were run for the gold mines out of
20 the office in Ely.

21 Paragraph 9 goes on to describe how Brunk, Blacketor, and
22 Moritz were officers of all of those ten other subsidiaries, which are all
23 Nevada-based.

24 The Declaration then goes on to describe the disclosure
25 committee and what it did and who was on it and how it did its work and

1 why it was important. The disclosure committee was set up to makes
2 rue the information that went out to the public concerning the status of
3 the Nevada gold mines, in part, was accurate and correct and didn't omit
4 important information.

5 Brunk was involved, Blacketor was involved, Newell was
6 involved, Yu and Klein were all involved on this disclosure committee.
7 The disclosure committees reviewed any proposed press release or
8 disclosure from wherever they were and then they would make
9 comments or not make comments, if they didn't have any.

10 It's specifically noticed that -- for example -- and this is a major
11 theme and I'll touch on this a couple of times. Repeatedly, every single
12 Motion to Dismiss, every Reply says everything was drafted in Colorado
13 and everything -- all of the press releases and all of the Edgar filings
14 were filed out of Colorado.

15 There is a question of fact concerning where these things
16 were drafted. Mr. Wolfus says quite clearly that Yu used to draft his
17 press releases in his home office in Las Vegas, Nevada. So to the
18 extent that there's a claim here that jurisdiction should not be found
19 because press releases were not drafted in Nevada, that's specifically
20 and directly contradicted by the Declaration of Mr. Wolfus.

21 This is where jurisdictional discovery would be useful. We
22 could see where these other folks were when they were drafting press
23 releases or disclosures. Whether Mr. Moritz, when he was drafting the
24 parts of the press releases that he contributed to concerning the mine
25 operations in Nevada, which are of particular importance to Mr. Wolfus

1 were drafted when he was spending half of his time here in Nevada.
2 That's an important issue.

3 There's some sort of an argument that because this has been
4 going on for two years, there's been some waiver or something. I don't
5 understand that. There's been two years without discovery. If you recall
6 back, there's some mention of the *Fulbright* cases and in the Reply as --
7 for example, they're comparing the information provided in *Fulbright I*
8 with what we have submitted to the Court.

9 Well, they had discovery before those issues were raised in
10 *Fulbright I*. And they get even more discovery in a hearing before the
11 decision in *Fulbright II*. That motion challenging personal jurisdiction
12 wasn't brought up until later on in the game and there was some
13 discovery, there was some disclosures that were had. We have had
14 none. We haven't had a 16.1. We haven't had any document
15 disclosures.

16 The -- there is an attempt by the Defense to minimize the
17 number of meetings here in Nevada. Going on, for example, in the
18 Wolfus Declaration at Paragraph 14 and at other locations in the
19 Declaration, it describes just some of the meetings that were had here in
20 Nevada. Board meetings were held in Nevada, in Ely and in Las Vegas.
21 They were generally attended by all the board meetings and the CFO.

22 There was a board meeting at Ely in January 13/14, 2014.
23 Annual shareholder's meeting, January 18th, 2014 at Lionel Sawyer here
24 in Las Vegas. June 2014 board meeting held in Las Vegas and
25 declared by Newell there was a meeting in Ely. There are also informal

1 meetings held at the Pan Mine in March and April.

2 So that's only a small period of 2014. There were a lot of
3 meetings held here in Nevada. And a large part of discussion at each of
4 these meetings was the Pan Mine and the other gold mines in Nevada.
5 The lead-in to Paragraph 17, 90 percent of the time spent in board
6 meetings after Brunk came on board was spent discussing Nevada gold
7 mining operations.

8 In Paragraph 19, it talks about one of the items of discussion
9 at the board meetings -- and this was the effort to secure permits from
10 the Nevada Department of Environmental Protection, NDEP. This was
11 activity directed to Nevada and because permits weren't issued,
12 although not for the eventual mode of operation used at the mine, those
13 were consummated transactions in the state. The Board was at -- knew
14 of those activities and some of them were active in it. It goes on -- the
15 effort to get the permits from NDEP and all of the interactions with them
16 were managed by Brunk and Moritz.

17 The next paragraph talks about how press releases were
18 directed to Nevada in large part. That was because the mine was a part
19 of the Nevada mining community. It hired miners, there was capital
20 improvements at the site, they were putting in roads, bringing
21 water/electric, they were bringing mining equipment, they were bringing
22 mining companies, leasing. It was a moderately -- it was a thing of
23 interest to the Nevada mining community.

24 And it's interesting, Brunk, in Footnote Number 1 of his Reply,
25 alleges that that's simply the argument of Counsel that these press

1 releases were aimed, at least in part to the Nevada mining community.
2 Well, no it's not. That came out of Paragraph 20 and 21 and also
3 Paragraph 13 of the Wolfus Declaration. This isn't just something that
4 we wrote in a brief, this is what Dan Wolfus knows because he used to
5 be on the Board.

6 And it also goes on to 22 and points out how the Declarations
7 are silent to their involvement in getting permits from NDEP. They're
8 silent as to how much they wrote these press releases. These are all
9 issues that are of play and go to whether jurisdiction is proper in Nevada
10 because they go to the level of their involvement and what was going on
11 in Nevada and in creating press releases that were misleading or that
12 had omissions of fact. They're also goes to the fact that they were on
13 the disclosure community and that was their job to prevent those things
14 from happening.

15 The budget work plan and audit committee is next discussed
16 by Mr. Wolfus and that was an important committee because that had
17 the ability to say yay or nay to financial decisions of the company. As a
18 result they knew everything. If you were on that committee, you knew
19 the status of permit at the Pan mine and whether they had properly
20 permitted run-of-mine operations, as opposed to the crushing and
21 agglomeration that was put in the feasibility study, that they actually had
22 permits for. You knew that.

23 And he lists out in the Declaration who's on it, during the
24 relevant period; Brunk, Hale, Sheridan, Yu, and Klein were members of
25 that committee. Also during the relevant period, also Sawchak and

1 Knutson were members of the audit committee, which worked hand-in-
2 hand with the budget committee.

3 Then the Declaration addresses the individual Defendants.
4 And let's start with Yu. Paragraph 31: Nevada is where Yu usually
5 performed his drafting duties with respect to press releases from his
6 home office in Las Vegas.

7 Well that directly contradicts one of the major building blocks
8 of every single motion and reply.

9 We need discovery to go how far -- to see how far that went.
10 Right now we don't know where Brunk and Moritz were when they
11 drafted press releases because we haven't had the opportunity to
12 perform discovery. It's imp -- we don't know that and it's impossible for
13 us to know that. We do know where Yu was and we do know the way
14 the process worked; that you added in information and you added in
15 content or you reviewed content where you were. Because these things
16 went out via e-mail.

17 Yu attended political fundraising events with Brunk and Moritz
18 in Las Vegas to enhance Midway's reputation. That's addressed later
19 on in -- for Brunk in Paragraph 34. Again, this is not just coming to
20 Nevada once or twice like Jane Macon did, she attended one meeting in
21 *Fulbright I* --

22 THE COURT: It was two, but --

23 MR. CHRISTENSEN: Or two meetings, right.

24 THE COURT: -- not that it matters.

25 MR. CHRISTENSEN: Yeah, one or two. They're coming

1 here, they're meeting with Senator Richard Bryan, they're meeting with
2 Congressman Horsford, Governor Sandoval, White Pine supervisors,
3 water engineers. They're meeting with -- they're doing project review
4 meetings in Wendover. They're attending legislative fundraising events.

5 They're interfacing with geologists, vendors, lawyers. They're
6 meeting with Laura Granier. They're meeting with Deborah Struhsacker;
7 although I'm not sure if that's in her role on NPRI or whether -- in her
8 consulting -- you know, she has a consulting business in Reno. Those
9 meetings are going on here in Nevada.

10 There were -- in Paragraph 35, there were other trips to
11 Nevada by Brunk, including annual engineer review meetings. Ely office
12 Christmas parties. Project tours with stock analysts and Sheridan.
13 Meeting with Loomis engineers regarding water issues. The Northwest
14 mining Association annual meeting. Project evaluation meetings.
15 Inspection trips for equipment.

16 Brunk says that basically -- I mean, the inference you get from
17 reading his Declaration, sure, I went to Nevada a couple of times, but it
18 wasn't that much. That's directly contradicted by the Wolfus Declaration.
19 So there's a question of fact there.

20 Moritz, same thing, he tries to minimize his contact with
21 Nevada. Again, in Paragraph 41, Wolfus says Moritz was here 50
22 percent of his time. That's not just one or two visits. If you take a look at
23 the *Southport* case, again, which is cited. You can take a look at that
24 and it's very interesting, Judge Jones put in some bullet points of the
25 three folks that he dismissed out of that case and talks about -- in each

1 of those bullet points lists how little contact they had with Nevada. I can
2 tell you none of those folks have spent half their time in the state,
3 working on the gold mine that there's the lawsuit over.

4 It then goes on for Blacketor. Blacketor was an Officer of
5 MidwayUS, a Nevada corporation. Received part of his compensation
6 from Nevada US. So he's receiving his compensation from a Nevada
7 company for work that he's doing in Nevada on a Nevada gold mine.

8 Paragraph 44 addresses Hale. Hale had been in the mix
9 since May/December of 2012 and he was a part of the budget work plan
10 committee, which means that he had access to everything and he was
11 also involved in press releases and disclosures. So to the extent that he
12 knew run of mine was not permitted, but allowed a press release or a
13 disclosure after he reviewed it to go out, that's omission. Or that's a
14 misrepresentation.

15 Again, we go through Klein and Newell. Each of these, Mr.
16 Wolfus goes on through and talks about what they did and he puts quite
17 a bit of detail in here, excepting the last few folks, starting with Sawchak.
18 But he puts in quite a bit of detail in here and that's a fair amount of
19 detail considering that we haven't had any discovery in this case.

20 Now, it was pointed out by -- or it was argued by one of the
21 Defendants that we've never asked for jurisdictional discovery before
22 and of course that's incorrect, I raised that at the last hearing. We never
23 really got to that point because the Court made the decision based upon
24 the direct derivative issue. And we never really got to the personal
25 jurisdiction issue.

1 So to the extent the Court has an issue concerning proper
2 jurisdiction for any of these Defendants, we request that we actually be
3 allowed to take some -- or to do some discovery. Like find out where
4 Moritz was when he penned press releases or disclosures because the
5 content of these disclosures is what's important, not whether a scrivener
6 was the one who fed it into the machine in Colorado, but who put the
7 content in and who had the obligation to review it and where did they
8 gain that knowledge.

9 Not only where were they -- where they were when they wrote
10 it because that question is in play. But the question that isn't in play is
11 where they got all this information. Well, they got all that information on
12 the ground here in Nevada.

13 Unless Your Honor has any questions, I'll turn it over to --

14 THE COURT: I don't.

15 MR. CHRISTENSEN: -- Mr. Rees.

16 THE COURT: Thank you, Mr. Christensen.

17 MR. CHRISTENSEN: Thank you.

18 THE COURT: MR. Rees.

19 MR. REES: Good afternoon. Thank you, Your Honor. I
20 appreciate the fact that Your Honor allows me to appear --

21 THE COURT: Oh --

22 MR. REES: -- pro hoc vice.

23 THE COURT: -- I think it's in the rules.

24 MR. REES: This --

25 THE COURT: Our Supreme Court says it's okay.

1 MR. REES: Absolutely. But I asked your permission and you
2 granted it, so I appreciate that opportunity.

3 One of the things that I am is a longstanding California lawyer
4 and the claims that we have here in connection with this case are all
5 California claims.

6 Now, we did something different in our Opposition than what
7 was done in the motion. What we tried to do in our Opposition is after
8 laying out the facts chronologically, we specifically went through and
9 said here are the paragraphs where you could find specific things like
10 scienter, reliance, et cetera, specific places. And then we went through
11 the Complaint sort of first cause of action, securities law, on through.

12 Now, one of the things that I thought was real interesting
13 because you keep hearing a lot of generalized arguments, which just
14 simply don't accurately reflect the Complaint. For instance, one of the
15 arguments you heard, the very first thing, is Mr. Wolfus' all -- claims, all
16 involve the diminution in market value of Midway. Boy is that a whopper.

17 Paragraph 6 of the Second Amended Complaint says he
18 makes no such claims. Mr. Wolfus' damage claims are based upon
19 stock that he purchased in February, specific amount of stock, stock that
20 he purchased in September, and the value of his stock in February of
21 2014. They are specific, have nothing to do -- actually it's a defense
22 issue as to what the value of the stock is today. But that's, you know,
23 whether or not there is a mitigation. That's not the claim that's here.

24 Now, it would seem to me I would be a little miffed if I was
25 asked to issue an order saying California Securities Law claim is that Mr.

1 Wolfus brought is a derivative claim which is what was asked of you in
2 connection with the first motion, only to have that be abandoned. And
3 the reason why it was abandoned is I hope Your Honor read -- and I
4 apologize for giving you a bunch of California case law to have an
5 opportunity to read because I know we've got to go get those cases and
6 they're quite as easy.

7 But I hope you read the *Apollo* case because the *Apollo* case,
8 what a great case because it basically is on all of these claims. And the
9 *California Amplifier* case. Both of those cases are really great cases.
10 Both of those cases were cited by the other side as their authority in
11 connection with the motions. And one of the things that is really
12 important from those two cases is both of those cases specifically says
13 that a claim based upon California Securities Law is a private claim held
14 by the shareholder is not a derivative claim.

15 They cited the Court to these great California cases which
16 said that whatever they were trying to advance to the Court before, gee,
17 that was erroneous.

18 I'm sorry?

19 THE COURT: Oh, I just -- I'm having a bout of allergies today.
20 Sorry. I coughed. It -- don't worry, I'm not sick.

21 MR. REES: Oh, I apologize. But listen, I clearly invite
22 questions because I want to make sure that you understand what the
23 claim is. But our claim under 25401 and 25501, the Securities Law
24 claim, is primarily against Midway. And that's what those cases say.
25 The primary obligor, the one who issues those statements, is Midway.

1 The other Defendants here are a liable, not necessarily because they
2 issued the statements, although they were part and parcel involved in
3 that, they are liable because of their status.

4 And the cases that we cited and the statute that we cited,
5 which is 25504 and 504.1 both say -- principally 504, say if you are a
6 director of a corporation that violates 25401, you are jointly and severally
7 liable. It's a status issue. So the question is -- none of these guys says
8 we weren't directors, none of these guys says we weren't principal
9 officers, none of these guys say they weren't controlled persons, which
10 is the basis for liability. You don't go through the scienter with regard to
11 them, you have to allege the scienter with regard to Midway under the
12 Securities Law claim.

13 So we cited the case that is directly on point. We talked about
14 the stock being purchased in California, which is why California law
15 applies to it. The stock -- all of the stock was purchased with California.
16 We talked about the stock as being a security under 25019.

17 Now, interestingly enough, we keep getting this argument that
18 oh, my God, it's not the purchase of stock that is the violation. You have
19 to go back to when stock options were exercised. Do they cite any
20 cases? Absolutely not. Are there cases to the contrary? Absolutely,
21 that's what we cited, which they didn't want to discuss.

22 25017(e) deals with warrants. We don't have a warrant issue
23 here. *People v. Bowles* specifically talked about -- it's the only case
24 which really interprets 25017(e) and it says it's not a stock option. It's
25 not an employee stock option, it's two different stocks in connection

1 with -- that's the only way that arises.

2 But we went one further. We did a nice California Supreme
3 Court case involving the exercise a stock option, which resulted in the
4 purchase of security. That was the *Star Media* case where the Court
5 said it was the purchase of the security which forms the basis of the
6 claim. So they have no cases.

7 They make a silly argument based in 25017(e). We've cited
8 *National Auto, People versus Bowles, California Amplifier, Star Media,*
9 *and Apollo*, all of which discussing and applying in connection with this,
10 the claim here is Wolfus purchased common stock and common stock is
11 defined as a security. And that's the basis of the claim. So that
12 argument just falls apart.

13 Now, let me go back to the second claim because we got the
14 claim that breach of fiduciary duty -- and again, you're hearing this is a
15 derivative claim and not a direct claim. Is it? I mean, it probably could
16 be, but is it? No. So we cited the specific elements required to satisfy a
17 breach of fiduciary duty and those are contained in the *Atascadero* and
18 in the *Apollo* case, which was a direct claim, not a derivative claim.

19 And in the *Apollo* case, they sent it back down to say gee, you
20 haven't properly alleged that you were owed a fiduciary duty. Well, we
21 have alleged that we were -- Mr. Wolfus was owed a fiduciary duty
22 because Officers and Directors of a corporation owed the shareholders
23 directly a fiduciary duty. Nobody has denied that. That's common law,
24 not only -- it is -- I don't mean common law as in -- I mean, it's a very
25 common provision in both California, Nevada, and virtually the entire

1 world over.

2 So it is a direct right. There is a fiduciary duty that was owed.
3 The claims are personal and that's really interesting because, you know,
4 I'm going to come back to the *City Group* case because I thought that
5 was very important.

6 Let me move to the aiding and abetting case. I hope you liked
7 reading the *American Master* case; that was a really great case. And
8 there understand that can't -- couldn't possibly be a derivative claim,
9 notwithstanding their statement because the one who's fiduciary duty
10 was breached was Midway's fiduciary duty to Wolfus.

11 It's the other Defendants who aided and abetted in Midway's
12 breach. Midway can't own the claim, it is the tortfeasor. So that can't
13 be. But in any event, we've cited *American Master*, we told you what the
14 elements were in our brief. We showed you exactly where all of those
15 elements were pled and we went through.

16 Now we get down to the common law fraud claim. And the
17 elements are the same in California as they are in Nevada. But we cited
18 the *Lazar* case and the *Small* case.

19 Now, again, there's two aspects of the common law fraud
20 claim. One, there is common law fraud in connection with the two
21 purchases, the September and the February purchases of stock. But
22 there is also the holder claim. That is a claim that says if you would
23 have done something I would have sold the stock that I had. Now we've
24 seen because they keep citing other courts and other jurisdictions, there
25 are a bunch of jurisdictions that say there is no such thing as a holder

1 claim.

2 California isn't one of them. California went exactly the
3 opposite way. And we cited to the *Small* case, which is the California
4 Supreme Court and says that you may bring a holder claim. And his
5 claim has been very specifically alleged. He said if you would have told
6 me this stuff in connection at the time that I'm really reviewing everything
7 very carefully because I've got to decide whether to buy the February
8 stock or not, I wouldn't have bought, I would have instead kept my eye
9 on the market and sold everything. And the time he would have sold it
10 was February of 2014. We show a specific time, a specific amount of
11 shares, a specific purchase sales price that existed in the market at that
12 time.

13 And the last case -- area we get to is negligent
14 misrepresentation. Now that's different. And if you read the *Fox* and the
15 *Small* case, you will see that for a negligent misrepresentation claim to
16 be made, you can't base it on omissions. It must be based on a false
17 statement. And so we have clearly alleged in the Complaint that when
18 these Defendants went out and said in late 2013 we are fully permitted
19 to do the Pan Mine; that was a whopper. That was a knowing,
20 intentional, false statement. Not an omission, false statement.

21 And the permitting is very important. You can't dig a shovel to
22 dig out gold in Nevada without having to come and avail itself of all of
23 Nevada's laws, particularly its environmental laws because you got to
24 get the permits. And here, they had a permit, but they had a permit for a
25 mining operation that they had already announced they had abandoned.

1 They were supposed to do agglomeration and crushing to a
2 height no higher than 20 or 30 feet on the leach pads and instead they
3 said no, we've now decided we can go run of the mine. Well, guess
4 what, the specific manner in which you mine in Nevada is the subject of
5 a permit. And that's what was alleged.

6 What was alleged is the permit they got would have allowed
7 them to mine in Nevada if they crushed and agglomerated the material
8 and did it in a specific way because the leaching process uses some
9 very dangerous chemicals. And that's why you need the permits. And
10 instead they said we're not going to do it so it was not permitted, they
11 knew it wasn't permitted. Now --

12 THE COURT: So may I ask for your conclusion, please?

13 MR. REES: Absolutely. Because I am --

14 THE COURT: Thank you.

15 MR. REES: -- at 12:45. If you look at page 21 of our -- and I
16 apologize, they weren't numbered. But the --

17 THE COURT: That's fine.

18 MR. REES: -- 21st page of our Opposition, you're going to find
19 where we summarized here's where the reliance is, here's where this is,
20 here's what that is. So you've got all of those with specificity. And I
21 thank Your Honor for your indulgence.

22 THE COURT: Thank you. If we can take that in reverse
23 order. If you can hold it to three minutes each, that would be great. Mr.
24 Liebman, then Mr. Miltenberger, and then Mr. Cassity.

25 MR. LIEBMAN: Yes, Your Honor. Thank you very much.

1 With respect to the point about the press releases and the
2 website and -- Mr. Brunk alleges that -- in his Declaration that any
3 involvement that he had with press releases and SEC filings was made
4 in Colorado. There's nothing rebutting that. There's no allegation in the
5 Complaint, there's no allegation on information and belief.

6 That -- it's particularly relevant that Wolfus was integrally
7 involved in this company up until mid-2013 and thus would have had this
8 knowledge or if Mr. Brunk was going off to Florida or Helsinki to draft
9 these things, that's something that particularly given the detail Plaintiffs
10 allege, that's something that they could have alleged but didn't.

11 Furthermore -- and we say it in our brief on page 6, the
12 *Graziose* case, the *Braden Purcell* case, and the *Holland American Line*
13 case; two from the Ninth Circuit, one from the District in Nevada, stating
14 that present statements made outside the forum state transmitted
15 outside cannot provide a basis for personal jurisdiction, nor can a
16 passive website, which is where the press releases were posted.

17 And then just one more point and I'll turn this over to Counsel.
18 Your Honor, on the point of specificity, one point struck me because
19 scienter is an important part of these claims and the claim -- the Plaintiffs
20 have made the point, both in oral argument and in their brief that
21 Paragraphs 105 and 110 of their Complaint do plead scienter with
22 specificity and just referring -- they both say the same thing, which is that
23 the Defendant's action was intentional.

24 The Defendant's action forewarns. I respectfully submit that
25 that's not the specificity, particularity that's required to plead an

1 elemental fraud claim under security -- California Securities Act or under
2 California common law.

3 Thank you very much, Your Honor.

4 THE COURT: Thank you.

5 MR. MILTENBERGER: Counsel started and ended his
6 remarks -- Mr. Rees did, with saying look at the Complaint, we tell you
7 that it's a direct claim, not a derivative claim; see, we say it in the
8 Complaint. And he ended his remarks with look at page 21 of our Brief it
9 said where we say reliance. You know --

10 THE COURT: Well, and you guys filed motions under Rule
11 12. We have affidavits on both sides. Yeah.

12 MR. MILTENBERGER: Exactly. And we just encourage you,
13 Your Honor, take a look at that is the *Parametric* cases says we don't
14 just say what do you call it in your Complaint? Look at the facts. What
15 are the actual underlying allegations and harm being claimed there?
16 And that's how you determine if it's direct or derivative. Same thing
17 when it goes to the pleading and whether it's sufficient or not. Just
18 because you say that there's reliance, that's not enough. There has to
19 be facts.

20 And specifically, if you go back and look at the cites that were
21 provided by Plaintiff, with respect to the Hale Defendants, there is no
22 specificity whatsoever regarding Mr. Hale or Mr. Klein and what -- and
23 his scienter or anything issues of what representations they allegedly
24 made.

25 With respect to the personal jurisdiction issue, you really not

1 need even get there, they should be dismissed with prejudice based on
2 all the reasons Mr. Cassity already stated. But with respect to personal
3 jurisdiction, when you look at the investment entities, you didn't hear
4 anything to day, nor do you see anything in the Opposition as to how
5 they could potentially be subject to jurisdiction in this Court, specifically
6 on specific jurisdiction.

7 Same thing for Mr. Anderson, you heard nothing here today.
8 Interestingly, he was added to the Board after the 2013 and 2014
9 alleged omitted facts. So how he could have aided and abetted in those
10 lack of disclosures is beyond me.

11 With respect to Klein and Mr. Hale as well, there simply is not
12 enough there. The claims arise from what was disseminated from
13 Colorado to someone in California and how Mr. Hale or Mr. Klein are
14 involved in that is pled nowhere here and it is in no way related to any
15 contacts with Nevada for which this Court could exercise specific
16 jurisdiction.

17 THE COURT: Thank you.

18 MR. CASSITY: Thank you, Your Honor. I join in the
19 comments of Counsel. I just wanted to point out a couple of things. I
20 heard a lot of talk during the personal jurisdiction discussion about Mr.
21 Yu. We've never challenged Mr. Yu -- jurisdiction over Mr. Yu, so that
22 whole litany of items about what Mr. Yu's contacts were in Nevada is
23 completely irrelevant to that discussion.

24 The difference between this case and the other cases, well
25 *Fulbright* in particular is that cause of action related and arose out of the

1 contacts with Nevada and the meetings in Nevada.

2 THE COURT: Well, at least part, right.

3 MR. CASSITY: Yeah. And then with respect to the California
4 Securities Law claim, Counsel referred to the *People v. Bowles* decision.
5 Again, I remind the Court that that decision was 30 years before the
6 California statute was even enacted.

7 We talked about the *Star Media* case. That case didn't even
8 refer to the subsection at issue. Again, the plain language of subsection
9 E of 25017 does apply to the exercise of stock options to say that that is
10 not a purchaser of sale under Securities Law. On that I'll submit, Your
11 Honor.

12 THE COURT: Thank you.

13 MR. CASSITY: We ask the Court to dismiss with prejudice
14 and alternatively ask for dismissal for the other D&O Defendant's, other
15 than Mr. Yu for lack of personal jurisdiction.

16 THE COURT: Thank you. I'm -- like I did last time I'm going
17 to take it under advisement. My initial thoughts on reading the brief, I
18 have a few issues I have to reconsider and reread your briefs. I'm going
19 to set it down for a status, chambers only, on May 22nd, with the hope
20 that I can have something to you by then. I realize that's a delay, but it's
21 only two weeks.

22 So, thank you all for your appearance today. Any time you
23 have a hearing in this case, assuming it goes forward, at least in some
24 part, please schedule a time where I can give you all the time you need
25 because every time I have to compact your arguments, I am concerned

1 that you won't get justice you require.

2 So, please, on scheduling issues -- really, in all business court
3 cases -- because first of all, we want to give you the time you need, but I
4 also don't want your clients to send you here and pay for you to come
5 here and not get the time you need. So thank you all.

6 MR. LIEBMAN: Thank you, Your Honor.

7 MR. CHRISTENSEN: Thank you.

8 MR. CASSITY: Thank you, Your Honor.

9 MR. REES: Thank you, Your Honor.

10 MR. MILTENBERGER: Thank you, Your Honor.

11 [Proceeding concluded at 12:50 p.m.]

12 *****

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

24 
25 Brittany Mangelson
Independent Transcriber

A-17-756971-B

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Securities (NRS 90)

COURT MINUTES

May 18, 2018

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

May 18, 2018 3:00 AM Minute Order

HEARD BY: Alf, Nancy **COURTROOM:**

COURT CLERK: Nicole McDevitt

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- COURT FINDS after review on March 16, 2018, Defendants Richard D. Moritz, Bradley J. Blacketer, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell, and Rodney D. Knutson filed 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 filed a Motion to Dismiss and Joinder to D&O Defendants Motion to Dismiss Second Amended Complaint. Defendant Kenneth A. Brunk filed Kenneth A. Brunk s Motion to Dismiss Second Amended Complaint and Joinder in D&O Defendants Motion to Dismiss Second Amended Complaint.

COURT FURTHER FINDS after review these matters came on for hearing on May 9, 2018, at which counsel presented argument. The Court being apprised of the matters and having considered the arguments of counsel, as well as the pleadings and papers on file, the matter is deemed submitted.

COURT FURTHER FINDS after review the parties do not dispute that the Court has general jurisdiction over Defendant Frank Yu.

COURT FURTHER FINDS after review the first cause of action is for Securities Fraud. Cal. Corp.

PRINT DATE: 05/18/2018

Page 1 of 3

Minutes Date: May 18, 2018

PA1031

Code 25401 provides: It is unlawful for any person to offer or sell a security in this state, or to buy or offer to buy a security in this state, 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.

COURT FURTHER FINDS after review Cal. Corp. Code 25017(a) provides: Sale or sell includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. Sale or sell includes any exchange of securities and any change in the rights, preferences, privileges, or restrictions of or on outstanding securities. Further, Cal. Corp. Code 25017(e) provides: Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, includes an offer and sale of the other security only at the time of the offer or sale of the warrant or right or convertible security; but neither the exercise of the right to purchase or subscribe or to convert nor the issuance of securities pursuant thereto is an offer or sale.

COURT FURTHER FINDS after review under the plain language of Cal. Corp. Code 25017(e), neither the exercise of the right to purchase shares nor the issuance of securities pursuant thereto is an offer or sale. The sale or offer is deemed to occur at the time of the offer or sale of the right to purchase the share. Though Plaintiff contends this provision relates to stock warrants, stock warrants are listed separately from rights to purchase and is separated by the word or, implying that the provision applies to both warrants and rights to purchase shares. Plaintiff claims the alleged misrepresentations, namely the 2013 and 2014 Material Facts impose liability on Defendants under Cal. Corp. Code 25401 for the alleged misleading sale. However, since the application of Cal. Corp. Code 25017(e) indicates the sale occurred in 2009 when the stock options were issued, and there are no allegations that the sale in 2009 contained any untrue statement of a material fact or an omission of the same. Accordingly, the Securities Fraud cause of action fails as a matter of law and is dismissed with prejudice as to all Defendants.

COURT FURTHER FINDS after review the remaining causes of action Breach of Fiduciary Duty, Aiding and Abetting a Breach of Fiduciary Duty, Fraud, and Negligent Misrepresentation are sufficiently pled in the Second Amended Complaint.

COURT FURTHER FINDS after review the Court finds it appropriate to determine the sufficiency of personal jurisdiction against certain remaining Defendants through jurisdictional discovery.

COURT FURTHER FINDS after review because the parties do not dispute that the Court has general jurisdiction over Defendant Frank Yu, there will be no jurisdictional discovery as to determining the sufficiency of personal jurisdiction over Mr. Yu.

COURT FURTHER FINDS after review Plaintiff does not oppose Defendants' contention that the Court lacks personal jurisdiction over INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC. Further, the Second Amended Complaint alleges that these Defendants are each Delaware LLCs with principal places of business in New York. Second Am. Compl. 20. Accordingly, as there are no allegations nor showings that the Court has personal jurisdiction over these Defendants, the Complaint is dismissed with prejudice as to INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC.

COURT ORDERS for good cause appearing and after review the parties may conduct jurisdictional discovery related to the Defendants not already addressed by this minute Order: Richard D. Moritz, Bradley J. Blacketer, Timothy Haddon, Richard Sawchak, John W. Sheridan, Roger A. Newell, Rodney D. Knutson, Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, and Kenneth A. Brunk. Jurisdictional discovery is limited to each of these Defendants' contacts with Nevada related to the planning, preparation, and issuance of the SEC filings and Press Releases that predicate the Breach of Fiduciary Duty, Aiding and Abetting a Breach of Fiduciary Duty, Fraud, and Negligent Misrepresentation causes of action.

COURT FURTHER ORDERS for good cause appearing and after review Plaintiff is limited to four sets of ten interrogatories per Defendant, and answers must be served within ten days of service of the interrogatories.

COURT FURTHER ORDERS for good cause appearing and after review, Plaintiff is limited to four depositions lasting two hours each, per Defendant, which may occur upon not less than ten days notice. These discovery mechanisms are independent of the NRCP allowances for general discovery, yet limited to the jurisdictional issues enumerated here. The parties will initially have 90 days to complete jurisdictional discovery, with jurisdictional discovery closing August 19, 2018. Status Check SET for July 26, 2018 at 11:00 a.m. to determine the status of jurisdictional discovery.

COURT FURTHER ORDERS for good cause appearing and after review, Mr. Cassity is to prepare and submit the Order in compliance with EDCR 7.21, allowing each other party the opportunity to review and approve the form prior to submission.

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

ORDR

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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.

Defendants.

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

**ORDER REGARDING DEFENDANTS'
MOTIONS TO DISMISS SECOND
AMENDED COMPLAINT**

Electronic Filing Case

This matter came before this Court for hearing on May 9, 2018 at 10:30 a.m., on
Defendants Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John

1 W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson (collectively, the “D&O
2 Defendants”) *D&O Defendants’ Motion to Dismiss Second Amended Complaint* (the “Motion”),
3 Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID
4 II, LLC and HCP-MID, LLC (collectively, the “Hale Defendants”) *Motion to Dismiss and Joinder*
5 thereto (the “Hale Joinder”) and Defendant Kenneth A. Brunk (“Brunk”) *Motion to Dismiss and*
6 *Joinder* thereto (the “Brunk Joinder”), wherein the D&O Defendants, Hale Defendants and Brunk
7 (collectively, the “Defendants”) moved this Court to dismiss the *Second Amended Complaint for*
8 *Damages* filed by Plaintiff Daniel E. Wolfus (“Wolfus” or “Plaintiff”) on February 5, 2018 (the
9 “Second Amended Complaint” or “SAC”).

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

17 Having carefully considered the D&O Defendants’ Motion, Hale Joinder, Brunk Joinder,
18 Plaintiff’s *Consolidated Memorandum of Points and Authorities in Opposition to Motions to*
19 *Dismiss*, the Defendants’ respective reply briefs filed in support of the Motion, together with all
20 declarations filed in support of and opposition to the Motion and Joinders, including the exhibits
21 to the declarations, the oral argument of counsel presented at the hearing on this matter, and good
22 cause appearing, the Court decides the submitted issues as follows:

23 FACTUAL ALLEGATIONS

24 1. Midway Gold Corp. (“Midway”) was a publicly traded Canadian Corporation
25 incorporated under the Company Act of British Columbia, with its principal executive offices
26 located in Englewood, Colorado. SAC ¶ 23.

2. Midway was engaged in the business of exploring and mining gold, primarily from mines located in Nevada and Washington (*see id.* ¶¶ 24, 30), including the Pan Mine located at the northern end of the Pancake mountain range in Western Pine County, Nevada (*see id.* ¶ 32).

3. Defendants are alleged to be former directors, officers and/or controlling persons of Midway. SAC ¶¶ 8-20. Defendants INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC are each Delaware limited liability corporations with their principal places of business in New York. SAC ¶ 20.

4. Plaintiff, a California resident, became an outside director of Midway in November 2008 and began purchasing Midway common stock in the open market in February 2008. *Id.* ¶¶ 7, 26 and 29.

5. In 2009, Plaintiff became Chairman of the Board and the Chief Executive Officer of Midway, serving in both capacities until May 18, 2012 when he was replaced by Brunk. *Id.* ¶ 27.

6. Plaintiff also received stock option grants pursuant to Midway's qualified employee stock option plan on January 7, 2009 and September 10, 2009. *See* Mot. Exs. H, I.

7. At the time Plaintiff became Chairman of the Board and CEO, Midway had properties in the exploratory stage where gold mineralization had been identified (*see* Compl. at ¶ 30), including the Pan Mine (*see id.* ¶ 32).

8. Prior to May 2010, Midway made the decision to convert from a purely exploration company into a gold mining production company using the Pan Mine as its initial production mine. *Id.* ¶ 35.

9. In late 2011, when Plaintiff was still Midway's Chairman and CEO, an independent contractor, Gustavson Associates, completed a feasibility study on the Pan Mine, which predicted over 1 million ounces of gold existed at the mine, and could be commercially mined (the "2011 Pan Mine Study"). *Id.* ¶ 44; *Id.* Ex. 1 at 9.

1 10. Midway disclosed the study to the public in December 2011 (*see id.* ¶ 45), and
2 stated it was converting to a production company to bring the Pan Mine online as a profitable
3 revenue stream.

4 11. Plaintiff alleges that, by either mid or late 2013, Midway's management and its
5 board (including the D&O Defendants) knew the Pan Mine was being built and operated in ways
6 that were materially different from those assumed in the 2011 Pan Mine Study, but the Defendants
7 did not inform investors of the material impact on cash flows as a result of those differences. *Id.*
8 ¶ 65.

9 12. Specifically, Plaintiff alleges the Defendants failed to disclose that Midway (a)
10 was unable to raise sufficient cash to complete the Pan Mine project in the manner set forth in the
11 2011 Pan Mine Study, as well as fund on-going operations until the Pan Mine project produced
12 sufficient revenues to cover these expenses, and (b) did not seek the proper permits and did not
13 have the necessary facilities to process the gold solution once leaching was completed, and there
14 would be a considerable delay before the facilities were constructed and permitted for operations.
15 *Id.* ¶¶ 65, 86.

16 13. On January 23, 2014, Plaintiff exercised stock options by purchasing 200,000
17 shares at \$0.56/share for \$112,000 Canadian Dollars (\$100,636 USD). *Id.* ¶ 69.

18 14. On September 19, 2014, Plaintiff exercised his stock option by purchasing
19 1,000,000 shares at \$0.86/share for \$860,000 Canadian Dollars (\$783,778 USD). Plaintiff's
20 purchase was also as a result of his exercising certain of his qualified employee stock options. *Id.*
21 ¶¶ 87, 88, 89.

22 15. Plaintiff has asserted claims against Defendants arising out of the Defendants'
23 alleged failure to disclose certain facts regarding the progress (or lack thereof) of the Pan Mine
24 project prior to Plaintiff's stock option exercises in 2014.

25 16. Plaintiff alleges that had he known these undisclosed facts, he would not have
26 exercised his stock options in either January 2014 or September 2014. Plaintiff also alleges that
27 he and his family were induced to hold their stock when, had they known the material facts, they
28

1 would have sold their stock when Midway's stock price reached its peak on February 28, 2014.
2 See Compl. ¶¶ 106, 111, 114, 117, 124, 130, 131, 144-145.

3 **CONCLUSIONS OF LAW**

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

14 18. Plaintiff's first cause of action is for Securities Fraud under the California
15 Corporate Securities Act. Cal. Corp. Code § 25401 provides: "It is unlawful for any person to
16 offer or sell a security in this state, or to buy or offer to buy a security in this state, by means of
17 any written or oral communication that includes an untrue statement of a material fact or omits to
18 state a material fact necessary to make the statements made, in the light of the circumstances
19 under which the statements were made, not misleading."

20 19. Cal. Corp. Code § 25017(a) provides: "Sale or sell includes every contract of sale
21 of, contract to sell, or disposition of, a security or interest in a security for value. Sale or sell
22 includes any exchange of securities and any change in the rights, preferences, privileges, or
23 restrictions of or on outstanding securities."

24 20. Further, Cal. Corp. Code § 25017(e) provides: "Every sale or offer of a warrant or
25 right to purchase or subscribe to another security of the same or another issuer, as well as every
26 sale or offer of a security which gives the holder a present or future right or privilege to convert
27 the security into another security of the same or another issuer, includes an offer and sale of the
28

1 other security only at the time of the offer or sale of the warrant or right or convertible security;
2 but neither the exercise of the right to purchase or subscribe or to convert nor the issuance of
3 securities pursuant thereto is an offer or sale.”

4 21. After review of the plain language of Cal. Corp. Code § 25017(e), the Court
5 concludes that neither the exercise of the right to purchase shares nor the issuance of securities
6 pursuant thereto is an offer or sale. The sale or offer is deemed to occur at the time of the offer
7 or sale of the right to purchase the share.

8 22. Although Plaintiff contends this provision relates to stock warrants, stock warrants
9 are listed separately from rights to purchase and is separated by the word “or,” implying that the
10 provision applies to both warrants and rights to purchase shares.

11 23. Plaintiff claims the alleged misrepresentations, namely the 2013 and 2014 Material
12 Facts impose liability on Defendants under Cal. Corp. Code § 25401 for the alleged misleading
13 sale. However, the application of Cal. Corp. Code § 25017(e) indicates that the sale occurred in
14 2009 when the stock options were issued, and there are no allegations that the sale in 2009 was
15 based upon any untrue statement of a material fact or an omission of the same. Accordingly, the
16 California Securities Fraud cause of action fails as a matter of law and is subject to dismissal with
17 prejudice as to all Defendants.

18 24. The Court further finds that the remaining causes of action Breach of Fiduciary
19 Duty, Aiding and Abetting a Breach of Fiduciary Duty, Fraud, and Negligent Misrepresentation
20 are sufficiently pled in the Second Amended Complaint.

21 25. Defendants, with the exception of Frank Yu, have also moved for dismissal on the
22 basis of lack of personal jurisdiction pursuant to NRCP 12(b)(2).

23 26. Rule 12(b)(2) of the Nevada Rules of Civil Procedure (“NRCP”) allows a party to
24 seek dismissal of a complaint for lack of personal jurisdiction. NRCP 12(b)(2); *Trump v. District*
25 *Court*, 109 Nev. 687, 693, 857 P.2d 740, 744 (1993).

26 27. The Court may exercise general personal jurisdiction over a defendant when the
27 defendant’s contacts with the State of Nevada are so “substantial” or “continuous and systematic”
28

1 such that hailing them into court would be reasonable as they may be deemed to be present within
2 this state. *Budget Rent-A-Car v. Eighth Judicial Dist. Court*, 108 Nev. 483, 485, 835 P.2d 17, 19
3 (1992).

4 28. Alternatively, the Court may exercise specific personal jurisdiction over a
5 defendant where: (1) purposefully availed itself of the privilege of acting within the state or of
6 causing important consequences in the state; (2) the cause of action arises from defendant's
7 purposeful contacts with the forum state; and (3) those contacts with the forum state were
8 substantial enough to make the exercise of jurisdiction over the defendant reasonable. *Consipio*
9 *Holding, BV v. Carlberg*, 128 Nev. Adv. Op. 43, 282 P.3d 751, 755 (2012).

10 29. The Court determined that Plaintiff does not oppose Defendants' contention that
11 the Court lacks personal jurisdiction over INV-MID, LLC, EREF-MID II, LLC, and HCP-MID,
12 LLC. These Defendants are each Delaware LLCs with principal places of business in New York.
13 SAC ¶ 20.

14 30. This Court cannot exercise general personal jurisdiction over Defendants INV-
15 MID, LLC, EREF-MID II, LLC and HCP-MID, LLC, as Plaintiff has not alleged such jurisdiction
16 nor has he made any such showing supporting the exercise of such jurisdiction.

17 31. Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC have not
18 purposefully availed themselves of the privilege of acting within this State or causing any
19 important consequences within this State.

20 32. Plaintiff's causes of action do not arise from any of Defendants INV-MID, LLC,
21 EREF-MID II, LLC and HCP-MID, LLC's purposeful contacts with this State.

22 33. It would be unreasonable to exercise specific personal jurisdiction over
23 Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC under these
24 circumstances.

25 34. Accordingly, as there are no allegations nor showings that the Court has personal
26 jurisdiction over these Defendants, the Complaint is dismissed with prejudice as to INV-MID,
27 LLC, EREF-MID II, LLC, and HCP-MID, LLC.

1 filings and Press Releases that predicate the Breach of Fiduciary Duty, Aiding and Abetting a
2 Breach of Fiduciary Duty, Fraud, and Negligent Misrepresentation causes of action, as follows:

3 1. Plaintiff is limited to four sets of ten interrogatories (i.e., Plaintiff may serve four
4 separate defendants with a set of ten interrogatories), and answers must be served within ten days
5 of service of the interrogatories.

6 2. Plaintiff is limited to four depositions lasting two hours each (i.e., Plaintiff may
7 take depositions of four defendants, each lasting up to two hours), which depositions may occur
8 upon not less than ten days' notice.

9 3. These discovery mechanisms are independent of the Nevada Rules of Civil
10 Procedure allowances for general discovery, yet shall be limited to the jurisdictional issues
11 enumerated herein.

12 4. The parties will initially have 90 days to complete jurisdictional discovery, with
13 jurisdictional discovery closing on August 19, 2018.

14 ///

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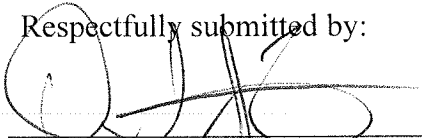
1 IT IS FURTHER ORDERED that a Status Check is hereby set for July 26, 2018 at 11:00
2 a.m. to determine the status of jurisdictional discovery.

3 IT IS SO ORDERED.

4 DATED this 6th day of June 2018.

5 Nancy Alf
6 DISTRICT COURT JUDGE

7 Respectfully submitted by:

8 

9 Robert J. Cassity, Esq. (9779)

10 David J. Freeman, Esq. (10045)

11 HOLLAND & HART LLP

12 9555 Hillwood Drive, 2nd Floor

13 Las Vegas, Nevada 89134

14 Holly Stein. Sollod, Esq. (*Admitted Pro Hac Vice*)

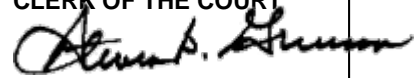
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19 *Bradley J. Blacketer, Timothy Haddon,*
20 *Richard Sawchak, John W. Sheridan,*
21 *Frank Yu, Roger A. Newell and*
22 *Rodney D. Knutson*

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

23 **DISTRICT COURT**

24 **CLARK COUNTY, NEVADA**

25 DANIEL E. WOLFUS, ,

26 Plaintiff,

27 v.

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

Defendants.

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

**NOTICE OF ENTRY OF ORDER
REGARDING DEFENDANTS'
MOTIONS TO DISMISS SECOND
AMENDED COMPLAINT**

Electronic Filing Case

///

///

1 Please be advised that the Order Regarding Defendants' Motions to Dismiss Second
2 Amended Complaint was on June 6, 2018, a copy of which is attached hereto.

3 DATED this 7th day of June, 2018.

4 By /s/ David Freeman

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

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June 2018, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT** was served by the following method(s):

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

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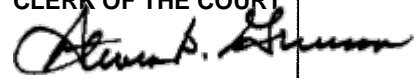
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DISTRICT COURT
CLARK COUNTY, NEVADA

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; 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.

**ORDER REGARDING DEFENDANTS'
MOTIONS TO DISMISS SECOND
AMENDED COMPLAINT**

Electronic Filing Case

This matter came before this Court for hearing on May 9, 2018 at 10:30 a.m., on
Defendants Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John

1 W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson (collectively, the “D&O
2 Defendants”) *D&O Defendants’ Motion to Dismiss Second Amended Complaint* (the “Motion”),
3 Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID
4 II, LLC and HCP-MID, LLC (collectively, the “Hale Defendants”) *Motion to Dismiss and Joinder*
5 thereto (the “Hale Joinder”) and Defendant Kenneth A. Brunk (“Brunk”) *Motion to Dismiss and*
6 *Joinder* thereto (the “Brunk Joinder”), wherein the D&O Defendants, Hale Defendants and Brunk
7 (collectively, the “Defendants”) moved this Court to dismiss the *Second Amended Complaint for*
8 *Damages* filed by Plaintiff Daniel E. Wolfus (“Wolfus” or “Plaintiff”) on February 5, 2018 (the
9 “Second Amended Complaint” or “SAC”).

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

17 Having carefully considered the D&O Defendants’ Motion, Hale Joinder, Brunk Joinder,
18 Plaintiff’s *Consolidated Memorandum of Points and Authorities in Opposition to Motions to*
19 *Dismiss*, the Defendants’ respective reply briefs filed in support of the Motion, together with all
20 declarations filed in support of and opposition to the Motion and Joinders, including the exhibits
21 to the declarations, the oral argument of counsel presented at the hearing on this matter, and good
22 cause appearing, the Court decides the submitted issues as follows:

23 FACTUAL ALLEGATIONS

24 1. Midway Gold Corp. (“Midway”) was a publicly traded Canadian Corporation
25 incorporated under the Company Act of British Columbia, with its principal executive offices
26 located in Englewood, Colorado. SAC ¶ 23.

2. Midway was engaged in the business of exploring and mining gold, primarily from mines located in Nevada and Washington (*see id.* ¶¶ 24, 30), including the Pan Mine located at the northern end of the Pancake mountain range in Western Pine County, Nevada (*see id.* ¶ 32).

3. Defendants are alleged to be former directors, officers and/or controlling persons of Midway. SAC ¶¶ 8-20. Defendants INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC are each Delaware limited liability corporations with their principal places of business in New York. SAC ¶ 20.

4. Plaintiff, a California resident, became an outside director of Midway in November 2008 and began purchasing Midway common stock in the open market in February 2008. *Id.* ¶¶ 7, 26 and 29.

5. In 2009, Plaintiff became Chairman of the Board and the Chief Executive Officer of Midway, serving in both capacities until May 18, 2012 when he was replaced by Brunk. *Id.* ¶ 27.

6. Plaintiff also received stock option grants pursuant to Midway's qualified employee stock option plan on January 7, 2009 and September 10, 2009. *See* Mot. Exs. H, I.

7. At the time Plaintiff became Chairman of the Board and CEO, Midway had properties in the exploratory stage where gold mineralization had been identified (*see* Compl. at ¶ 30), including the Pan Mine (*see id.* ¶ 32).

8. Prior to May 2010, Midway made the decision to convert from a purely exploration company into a gold mining production company using the Pan Mine as its initial production mine. *Id.* ¶ 35.

9. In late 2011, when Plaintiff was still Midway's Chairman and CEO, an independent contractor, Gustavson Associates, completed a feasibility study on the Pan Mine, which predicted over 1 million ounces of gold existed at the mine, and could be commercially mined (the "2011 Pan Mine Study"). *Id.* ¶ 44; *Id.* Ex. 1 at 9.

1 10. Midway disclosed the study to the public in December 2011 (*see id.* ¶ 45), and
2 stated it was converting to a production company to bring the Pan Mine online as a profitable
3 revenue stream.

4 11. Plaintiff alleges that, by either mid or late 2013, Midway's management and its
5 board (including the D&O Defendants) knew the Pan Mine was being built and operated in ways
6 that were materially different from those assumed in the 2011 Pan Mine Study, but the Defendants
7 did not inform investors of the material impact on cash flows as a result of those differences. *Id.*
8 ¶ 65.

9 12. Specifically, Plaintiff alleges the Defendants failed to disclose that Midway (a)
10 was unable to raise sufficient cash to complete the Pan Mine project in the manner set forth in the
11 2011 Pan Mine Study, as well as fund on-going operations until the Pan Mine project produced
12 sufficient revenues to cover these expenses, and (b) did not seek the proper permits and did not
13 have the necessary facilities to process the gold solution once leaching was completed, and there
14 would be a considerable delay before the facilities were constructed and permitted for operations.
15 *Id.* ¶¶ 65, 86.

16 13. On January 23, 2014, Plaintiff exercised stock options by purchasing 200,000
17 shares at \$0.56/share for \$112,000 Canadian Dollars (\$100,636 USD). *Id.* ¶ 69.

18 14. On September 19, 2014, Plaintiff exercised his stock option by purchasing
19 1,000,000 shares at \$0.86/share for \$860,000 Canadian Dollars (\$783,778 USD). Plaintiff's
20 purchase was also as a result of his exercising certain of his qualified employee stock options. *Id.*
21 ¶¶ 87, 88, 89.

22 15. Plaintiff has asserted claims against Defendants arising out of the Defendants'
23 alleged failure to disclose certain facts regarding the progress (or lack thereof) of the Pan Mine
24 project prior to Plaintiff's stock option exercises in 2014.

25 16. Plaintiff alleges that had he known these undisclosed facts, he would not have
26 exercised his stock options in either January 2014 or September 2014. Plaintiff also alleges that
27 he and his family were induced to hold their stock when, had they known the material facts, they
28

1 would have sold their stock when Midway's stock price reached its peak on February 28, 2014.
2 See Compl. ¶¶ 106, 111, 114, 117, 124, 130, 131, 144-145.

3 **CONCLUSIONS OF LAW**

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

14 18. Plaintiff's first cause of action is for Securities Fraud under the California
15 Corporate Securities Act. Cal. Corp. Code § 25401 provides: "It is unlawful for any person to
16 offer or sell a security in this state, or to buy or offer to buy a security in this state, by means of
17 any written or oral communication that includes an untrue statement of a material fact or omits to
18 state a material fact necessary to make the statements made, in the light of the circumstances
19 under which the statements were made, not misleading."

20 19. Cal. Corp. Code § 25017(a) provides: "Sale or sell includes every contract of sale
21 of, contract to sell, or disposition of, a security or interest in a security for value. Sale or sell
22 includes any exchange of securities and any change in the rights, preferences, privileges, or
23 restrictions of or on outstanding securities."

24 20. Further, Cal. Corp. Code § 25017(e) provides: "Every sale or offer of a warrant or
25 right to purchase or subscribe to another security of the same or another issuer, as well as every
26 sale or offer of a security which gives the holder a present or future right or privilege to convert
27 the security into another security of the same or another issuer, includes an offer and sale of the
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1 other security only at the time of the offer or sale of the warrant or right or convertible security;
2 but neither the exercise of the right to purchase or subscribe or to convert nor the issuance of
3 securities pursuant thereto is an offer or sale.”

4 21. After review of the plain language of Cal. Corp. Code § 25017(e), the Court
5 concludes that neither the exercise of the right to purchase shares nor the issuance of securities
6 pursuant thereto is an offer or sale. The sale or offer is deemed to occur at the time of the offer
7 or sale of the right to purchase the share.

8 22. Although Plaintiff contends this provision relates to stock warrants, stock warrants
9 are listed separately from rights to purchase and is separated by the word “or,” implying that the
10 provision applies to both warrants and rights to purchase shares.

11 23. Plaintiff claims the alleged misrepresentations, namely the 2013 and 2014 Material
12 Facts impose liability on Defendants under Cal. Corp. Code § 25401 for the alleged misleading
13 sale. However, the application of Cal. Corp. Code § 25017(e) indicates that the sale occurred in
14 2009 when the stock options were issued, and there are no allegations that the sale in 2009 was
15 based upon any untrue statement of a material fact or an omission of the same. Accordingly, the
16 California Securities Fraud cause of action fails as a matter of law and is subject to dismissal with
17 prejudice as to all Defendants.

18 24. The Court further finds that the remaining causes of action Breach of Fiduciary
19 Duty, Aiding and Abetting a Breach of Fiduciary Duty, Fraud, and Negligent Misrepresentation
20 are sufficiently pled in the Second Amended Complaint.

21 25. Defendants, with the exception of Frank Yu, have also moved for dismissal on the
22 basis of lack of personal jurisdiction pursuant to NRCP 12(b)(2).

23 26. Rule 12(b)(2) of the Nevada Rules of Civil Procedure (“NRCP”) allows a party to
24 seek dismissal of a complaint for lack of personal jurisdiction. NRCP 12(b)(2); *Trump v. District*
25 *Court*, 109 Nev. 687, 693, 857 P.2d 740, 744 (1993).

26 27. The Court may exercise general personal jurisdiction over a defendant when the
27 defendant’s contacts with the State of Nevada are so “substantial” or “continuous and systematic”
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1 such that hailing them into court would be reasonable as they may be deemed to be present within
2 this state. *Budget Rent-A-Car v. Eighth Judicial Dist. Court*, 108 Nev. 483, 485, 835 P.2d 17, 19
3 (1992).

4 28. Alternatively, the Court may exercise specific personal jurisdiction over a
5 defendant where: (1) purposefully availed itself of the privilege of acting within the state or of
6 causing important consequences in the state; (2) the cause of action arises from defendant's
7 purposeful contacts with the forum state; and (3) those contacts with the forum state were
8 substantial enough to make the exercise of jurisdiction over the defendant reasonable. *Consipio*
9 *Holding, BV v. Carlberg*, 128 Nev. Adv. Op. 43, 282 P.3d 751, 755 (2012).

10 29. The Court determined that Plaintiff does not oppose Defendants' contention that
11 the Court lacks personal jurisdiction over INV-MID, LLC, EREF-MID II, LLC, and HCP-MID,
12 LLC. These Defendants are each Delaware LLCs with principal places of business in New York.
13 SAC ¶ 20.

14 30. This Court cannot exercise general personal jurisdiction over Defendants INV-
15 MID, LLC, EREF-MID II, LLC and HCP-MID, LLC, as Plaintiff has not alleged such jurisdiction
16 nor has he made any such showing supporting the exercise of such jurisdiction.

17 31. Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC have not
18 purposefully availed themselves of the privilege of acting within this State or causing any
19 important consequences within this State.

20 32. Plaintiff's causes of action do not arise from any of Defendants INV-MID, LLC,
21 EREF-MID II, LLC and HCP-MID, LLC's purposeful contacts with this State.

22 33. It would be unreasonable to exercise specific personal jurisdiction over
23 Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC under these
24 circumstances.

25 34. Accordingly, as there are no allegations nor showings that the Court has personal
26 jurisdiction over these Defendants, the Complaint is dismissed with prejudice as to INV-MID,
27 LLC, EREF-MID II, LLC, and HCP-MID, LLC.

28

1 filings and Press Releases that predicate the Breach of Fiduciary Duty, Aiding and Abetting a
2 Breach of Fiduciary Duty, Fraud, and Negligent Misrepresentation causes of action, as follows:

3 1. Plaintiff is limited to four sets of ten interrogatories (i.e., Plaintiff may serve four
4 separate defendants with a set of ten interrogatories), and answers must be served within ten days
5 of service of the interrogatories.

6 2. Plaintiff is limited to four depositions lasting two hours each (i.e., Plaintiff may
7 take depositions of four defendants, each lasting up to two hours), which depositions may occur
8 upon not less than ten days' notice.

9 3. These discovery mechanisms are independent of the Nevada Rules of Civil
10 Procedure allowances for general discovery, yet shall be limited to the jurisdictional issues
11 enumerated herein.

12 4. The parties will initially have 90 days to complete jurisdictional discovery, with
13 jurisdictional discovery closing on August 19, 2018.

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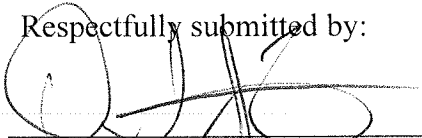
1 IT IS FURTHER ORDERED that a Status Check is hereby set for July 26, 2018 at 11:00
2 a.m. to determine the status of jurisdictional discovery.

3 IT IS SO ORDERED.

4 DATED this 6th day of June 2018.

5 Nancy Alf
6 DISTRICT COURT JUDGE

7 Respectfully submitted by:

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