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 Party in Interest.

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Supreme Court No. 76052
District Court No. A-17-756971-B

ANSWER OF REAL PARTY IN INTEREST TO PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

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RULE 26.1 DISCLOSURE

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

1. Daniel E. Wolfus is an individual and is represented by James R. Christensen of James R. Christensen, PC, and Samuel T. Rees, of counsel, Bleau Fox, PLC.

Dated this 26th day of September 2018.

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ROUTING STATEMENT

This case originates from business court and it does not involve an issue of first impression or of statewide impact. The court below implicitly found a holder cause of action had been stated under existing California law. Therefore, this case is presumptively assigned to the court of appeals pursuant to NRAP 17(b)(7).

STATEMENT OF THE ISSUES PRESENTED

1. Did the District Court err when the court found that the Wolfus stock purchaser and holder claims are direct, as those types of claims could not possibly belong to the company, Midway?

2, Did the District Court err when the court found that the Wolfus Second Amended Complaint (SAC) sufficiently pled a holder claim under California law pursuant to *Small v. Fritz Companies*, 65 P.3d 1255 (Cal. 2003)?

3. May Petitioners challenge by Writ the District Court use of California law to analyze the direct holder claim of Wolfus, when the choice to apply California law was not explicitly decided in the court below?

4. Is a request for extraordinary relief appropriate to contest the denial of a motion to dismiss the holder portion, and not the purchaser portion, of a fraud and a negligent misrepresentation cause of action?

I. Introduction: Why a Writ is Not Appropriate

Petitioners did not carry the heavy burden to justify this court's exercise of discretion to employ an extraordinary remedy.[1]

1. No substantive issue of general importance is presented; or, of judicial economy.[2] This case will not have statewide impact. Wolfus is pursing *direct* tort claims for being induced into the purchase and holding of stock, which are already generally accepted claims.[3] Aggressive issue framing by the Petitioners does not change the nature of the case, or of its limited reach.

2. No issue of first or novel impression is presented, particularly one that is dispositive of the entire case.[4] The District Court necessarily found that Wolfus pled a holder claim under California law. For sure, Wolfus did not ask the court to recognize a new Nevada holder cause of action! Rather, Wolfus pled California claims in the SAC (IV PA0603–0748); including the holder claim, which California already recognizes in *Small*, 65 P.3d 1255. Plus, the holder issue will

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[1] *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224–225, 88 P.3d 840, 841 (2004) (an eventual appeal is generally an adequate remedy and precludes a writ).
[2] *Nevada Yellow Cab v. Eighth Jud. Dist. Ct.*, 383 P.3d 246 (Nev. 2016) (writ found appropriate on an issue that has statewide impact on employees, and on which there are at five other cases pending).
[3] *Citigroup v. AHW Investment Partnership*, 140 A.3d 1125, 1140 (Del. 2016) ("holder claims are analytically indistinct from seller and purchaser claims, which are direct claims that are personal to the holder.")
[4] *Humboldt Gen. Hosp., v. Sixth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 53, 376 P.3d 167 169–170 (2016) (the court may consider a writ on a dispositive issue of first impression).

not resolve the entire case and is not a good candidate for extraordinary relief, because the Writ does not address the fraud and negligent misrepresentation actions based on buying Midway stock.[5]

3. The defense jumped the gun on the conflict of laws argument, as it pertains to a *direct* claim, because it was not decided below. Petitioners argued, "[t]he District Court completely ignored the choice of law in its order". Pet., at p.32. Without going into the why, Wolfus agrees that choice of law was not mentioned in the order. If Petitioners want an explicit decision, then the remedy is motion practice in the District Court, not a Writ.

4. Petitioners challenge the denial of their motion to dismiss the holder portions of the fraud and negligent misrepresentation causes of action. Writ relief for denial of a motion to dismiss is a rare animal,[6] rarer still is extraordinary relief for denial of a motion to dismiss only a portion of a cause of action which was correctly pled in the SAC.

[5] *Moore v. Eighth Jud. Dist. Ct.*, 96 Nev. 415, 610 P.2d 188 (1980).
[6] *Buckwalter v. Eighth Jud. Dist. Ct.*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) ("Normally this court will not entertain a writ petition challenging the denial of a motion to dismiss.").

II. Statement of the Case

A. Nature of the case

Wolfus is a California resident who, while in California, bought and held stock issued by Midway, a Canadian mining company, headquartered in Colorado, with almost all its active operations in Nevada. Wolfus brought 5 causes of action based on California law against the control persons of Midway, generally for misrepresentations and omissions of material fact in public statements upon which Wolfus relied when he bought and held Midway stock.

B. Course of proceedings

On June 15, 2017, Wolfus filed a complaint. On June 30, 2017, Wolfus filed a first amended complaint (FAC). Defendants moved to dismiss the FAC. On January 8, 2018, the FAC was dismissed with leave to amend. On February 5, 2018, the SAC was filed, which Defendants moved to dismiss.

The case is assigned to business court. No answers have been filed. No discovery has taken place. No trial date has been assigned.

C. Disposition below

On June 6, 2018, the court dismissed the first cause of action of the SAC, denied the remainder of the motions to dismiss, and ordered that limited jurisdictional discovery take place. On June 21, 2018, the court stayed the entire case pending the resolution of the subject petition.

III. Facts

Wolfus is the collective name for all Plaintiffs. Wolfus lives in California. IV PA 603–649 at ¶7.

In 1996, Midway was chartered in Canada. Midway was listed on the New York Stock Exchange, was subject to the Securities Exchange Act of 1934, and was obligated to file periodic reports with the SEC. IV PA 603–649 at ¶23.

Prior to 2008, Midway acquired and explored gold and silver mineral properties mainly located in Nevada. IV PA 603–649 at ¶24.

Prior to November 2008, Midway created a Disclosure Committee to ensure that Midway complied with its disclosure obligations under United States securities laws. IV PA 603–649 at ¶25.

In November 2008, Wolfus became an outside director of Midway. IV PA 603–649 at ¶26. In 2009, Wolfus became the Chairman of the Board and the CEO of Midway; until May 18, 2012, when he was replaced by Brunk. IV PA 603–649 at ¶27.

In 2009, Midway was active in gold exploration at six Nevada properties, including Pan. IV PA 603–649 at ¶30.

Prior to May 2010, Midway decided to change from an exploration company to a gold mining production company using the Pan project as its first production mine. IV PA 603–649 at ¶35.

In May 2010, Brunk was hired as Midway's President and COO with the primary job of bringing Pan into production. Brunk was required to personally oversee mining and permitting in Nevada and was frequently in Nevada to perform his job duties. IV PA 603–649 at ¶36.

On July 20, 2010, Midway publicly announced a favorable preliminary economic assessment ("PEA") for Pan. IV PA 603–649 at ¶37.

On February 3, 2011, Midway filed an 8-K and Press Release with the SEC which reported the Pan project was moving forward with "possible production as early as 2013" and that Midway was working on a Prefeasibility Study for Pan. The same day, Midway reported in the Annual Report filed with the SEC, it was "currently transitioning itself from an exploration company to a gold production company with plans to advance the Pan gold deposit located in White Pine County, Nevada through to production by as early as 2013." IV PA 603–649 at ¶39.

On April 4, 2011, Midway issued a press release filed with the SEC which reported it had secured a "positive Prefeasibility Study" for Pan. The same day, the PEA was filed with SEC and SEDAR. IV PA 603–649 at ¶40.

On December 20, 2011, Midway filed a Feasibility Study with the SEC. The study detailed the mineral exploration of the Pan project, estimated gold deposits, a mining plan, a project budget of ~$100 million, with a detailed breakdown of the needed equipment, and a projection of anticipated revenue. The

study was never publicly updated or amended, and it was the basis on which all permits were sought. IV PA 603–649 at ¶45; and, 651–683.

On January 9, 2012, Midway announced by press release that it qualified as a Development Stage Entity under SEC guideline and that it had submitted a mine plan of operations to the BLM and the NDEP. The mine plan followed the Feasibility Study. IV PA 603–649 at ¶47.

In May of 2012, Brunk replaced Wolfus as CEO and Chairman of the Board. IV PA 603–649 at ¶36 & 50. Wolfus was effectively excluded from management after his replacement, even though Wolfus was officially still working under a consulting agreement. IV PA 603–649 at ¶50.

On August 16, 2012, Midway reported that Pan engineering and permitting was advancing at a "rapid pace." IV PA 603–649 at ¶52.

On September 10, 2012, Midway reported by press release that Pan was on schedule for "start-up of production in mid-2014". IV PA 603–649 at ¶53.

On November 12, 2012, Midway announced by an 8-K and press release filed with the SEC that a deal had been reached for private placement of $70 million in Midway preferred stock. IV PA 603–649 at ¶54; and, 684–695.

On March 22, 2013, Midway opened for public comment a draft environmental impact statement for Pan, based on the Feasibility Study. IV PA 603–649 at ¶56.

On July 30, 2013, Midway issued and filed with the SEC a press release that reported that it was exploring ways to reduce costs for Pan, expected to issue a revised Feasibility Study in the third quarter of 2013, had made significant progress in permitting, was pursuing a combination of project and equipment financing alternatives, had received proposals from several major funding sources to secure the necessary capital to fund Pan and expected to pour gold in August 2014. IV PA 603–649 at ¶59; and, 707–712.

On November 17, 2013, Midway reported by a press release that tests of ore from South Pan showed that leaching uncrushed ore could be used, called Run of Mine, and would avoid the cost of crushing equipment until operations moved to other areas of Pan; and, reported hiring Sierra Partners to help find capital for operations. IV PA 603–649 at ¶60; and, 713–717.

On December 20, 2013, Midway reported by press release receipt of the Record of Decision for Pan which completed the BLM permitting process. IV PA 603–649 at ¶63; and, 718–721.

As of December 31, 2013, Brunk, Hale, Newell, Sheridan, Yu, Knutson and Klein were directors of Midway; Brunk was the Chairman, President, and CEO; Blacketor was a Senior Vice President and CFO; Moritz was the Senior Vice President of Operations; Brunk, Blacketor, Newell, Yu and Klein were on the Disclosure Committee; Sheridan, Yu and Knutson were on the Audit Committee;

Brunk, Hale, Sheridan, Yu and Klein were on the Budget/Work Plan Committee; and, Newell, Sheridan and Yu were on the Environment, Health and Safety Committee. Each was responsible for insuring that Midway publicly disclosed all material information about the Pan project, that all the publicly disclosed information was true and complete, was not misleading, and did not omit material facts; and, are referred to as the 2013 Control Defendants. IV PA 603–649 at ¶64.

As of December 13, 2013, the 2013 Control Defendants knew each of the following 2013 Undisclosed Facts to be true, knew that each of the following facts would be material to any reasonable investor in Midway including Wolfus, and knew that none of those facts had been disclosed to the public or to Wolfus. The 2013 Undisclosed Facts at SAC ¶65 (IV PA 603–649 at ¶65) are:

> A. Midway had been unable to raise sufficient cash either in the form of equity or debt to allow it to complete the Pan project in the manner set forth in the Feasibility Study as well as fund ongoing operations until Pan produced sufficient revenues to cover those expenses;
>
> B. Hale and the Hale Investors had blocked any consideration of the sale of either Midway's interest in the Spring Valley project or the Gold Rock project or any other material assets to generate additional revenues;
>
> C. The environmental and other permits secured by Midway for the Pan project were based upon and required Midway to conduct mining operations in accordance with the mining plan submitted which called for the crushing and agglomeration of ore before it was placed on the leach pads and Midway had taken no steps to cause those permits to be modified to allow Midway to proceed using Run of Mine for the Pan South Pit; and,
>
> D. Modifying the permits to permit Run of Mine would have been time consuming delaying the time when Midway could start the leaching process.

In late December and in early January 2014, Wolfus decided to exercise some Midway stock options. The decision was based on careful review and consideration of Midway's press releases and public filings, primarily those which were issued after Wolfus was excluded from management. Wolfus accepted Midway public statements and filings as true and complete, and relied upon them in making the decision to buy stock. IV PA 603–649 at ¶66.

On January 7, 2014, Wolfus notified Midway of his intention to exercise some stock options. The 2013 Control Defendants were aware of the exercise. At the time Wolfus was not aware of the 2013 Undisclosed Facts and would not have bought stock had he been aware. Instead, Wolfus would have sold his position when Midway's stock peaked in February 2014. IV PA 603–649 at ¶66.

On January 15, 2014, Midway issued and filed with the SEC a press release which reported that Pan was "fully permitted and construction is underway with completion estimated for Q3 2014." IV PA 603–649 at ¶67; and, 722–725.

On January 23, 2014, Wolfus closed the stock option and bought 200,000 shares for $100,636.00 USD. IV PA 603–649 at ¶69. Wolfus bought the stock directly from Midway while in California. IV PA 60–649 at ¶100, 102 & 107

Following the January purchase, Wolfus closely followed Midway stock price. When Midway's stock peaked on or about February 14, 2014, at $1.39, Wolfus decided to continue to hold his shares. Wolfus made the decision to hold

based on the public statements of Midway, including the statements that the Pan project was fully permitted. Had Wolfus known any of the 2013 Undisclosed Facts or that the Pan project was not fully permitted, he would have sold his shares. IV PA 603–649 at ¶70.

On March 13, 2014, the Midway Annual Report stated that ore from the South Pan Pit would be processed Run of Mine. IV PA 603–649 at ¶71.

On March 13, 2014, Midway issued a press release reporting that Pan was fully permitted, and that construction was underway. IV PA 603–649 at ¶72.

On March 19, 2014, Midway announced in a press release that it had selected Ledcor CMI as a mining contractor for Pan. IV PA 603–649 at ¶73.

On April 24, 2014, Midway announced in a press release a plan to reduce capital costs by using contract miners and by using Run of Mine on the South Pan Pit. Midway stated that Moritz had approved the release and that Midway was "well-funded." IV PA 603–649 at ¶74; and, 726–729.

On May 21, 2014, Midway's SEC Form 10-Q quarterly report confirmed the use of contract miners and Run of Mine. IV PA 603–649 at ¶76.

On May 30, 2014, Midway filed with the SEC a prospectus for a prearranged sale of ~$25 million of common stock. A large part of the funds raised were for Pan. The prospectus did not disclose any of the 2013 or 2014

Undisclosed Facts. In June 2014, Midway filed a press release with the SEC announcing completion of the sale. IV PA 603–649 at ¶78.

In its August 6, 2014, quarterly report filed on SEC Form 10-Q, Midway stated that it had made a 5-year contract mining deal with Ledcor and had paid a $500,000 mobilization fee. IV PA 603–649 at ¶82.

As of August 31, 2014, Brunk, Hale, Sawchak, Sheridan, Yu, Haddon and Klein were each directors of Midway; Haddon was Chairman of the Board, Brunk was the President and CEO; Blacketor was a Senior Vice President and CFO; Brunk, Blacketor, Yu and Klein were each members of the Disclosure Committee; Sheridan, Yu and Sawchak were each members of the Audit Committee; Brunk, Hale, Sheridan, Yu and Klein were each members of the Budget/Work Plan Committee; and, Haddon, Sheridan and Yu were each members of the Environment, Health and Safety Committee. In those capacities, each Defendant was responsible for insuring that Midway publicly disclosed all material information concerning Pan and that all publicly disclosed information was true and complete, was not misleading, and did not omit material facts; and, are collectively referred to as the "2014 Control Defendants." IV PA 603–649 at ¶85.

As of August 31, 2014, the 2014 Control Defendants knew each of 2013 Undisclosed Facts and the following 2014 Undisclosed Facts to be true, knew that each of those facts would be material to any reasonable investor in Midway

including Wolfus, and knew that none of those facts had been disclosed to the public generally or to Wolfus. The 2014 Undisclosed Facts (IV PA 603–649 at ¶86) are:

> A. Ledcor was poised to commence mining operations at Pan loading ore directly on the leach pads, but Midway did not have either a "qualified" person or a knowledgeable employee on site to supervise the loading;
>
> B. Midway had not sought or received modified permits to allow it to deviate from the mining plan submitted for the permits and as contained in the Feasibility Study; and,
>
> C. Midway did not have the necessary facilities to process the gold solution once the leaching had been completed and it would be a considerable period before those facilities were constructed and permitted for operation.

In late August and early September 2014, Wolfus decided to exercise some Midway stock options. Wolfus made his decision based on careful review, consideration and reliance upon Midway's press releases and public filings, primarily those which were issued after he purchased shares in January 2014. At the time, Wolfus believed all Midway statements were true and that no material information had been omitted. IV PA 603–649 at ¶87.

On September 5, 2014, Wolfus notified Midway of his decision to exercise stock options. Wolfus made his decision in reliance upon Midway disclosures. At the time Wolfus decided to buy stock, he did not know any of the 2013 or 2014 Undisclosed Facts, had no way of learning the Undisclosed Facts except from the

2014 Control Defendants, and would not have bought stock had he known the Undisclosed Facts. IV PA 603–649 at ¶87.

On September 15, 2014, Midway filed a press release announcing a flood had occurred at Pan in July of 2014. IV PA 603–649 at ¶81. The same day, Midway made a press release that reported Ledcor mobilized on July 21, 2014. Midway did not disclose the lack of a qualified employee to supervise the loading of ore onto leach pads. IV PA 603–649 at ¶82.

On September 15, 2014, Midway filed a press release with the SEC that announced that Ledcor had begun mining operations and suggested that processing facilities would be ready by the end of the month. IV PA 603–649 at ¶90.

On September 19, 2014, Wolfus closed a purchase of 1,000,000 shares for $783,778 USD. IV PA 603–649 at ¶89. Wolfus bought the stock directly from Midway while in California. IV PA 603–649 at ¶100, 102 & 107.

On June 22, 2015, Midway announced bankruptcy. IV PA 603–649 at ¶95.

IV. Summary of the Argument

Wolfus claims are direct, because he holds the claims for being fraudulently induced into buying and holding Midway stock. The fact stock price went down is not germane to the direct harm test's primary question: Whose action is it?

Wolfus stated a holder claim under California law. The argument that a new Nevada holder cause of action was recognized, was first raised in the Petition.

Petitioner did not make below, and has not made now, a properly supported argument that the internal affairs doctrine would somehow apply to the choice of law for a direct tort holder claim; perhaps, because it clearly does not.

The SAC is correctly pled. The SAC lays out the who, what, when, why & how of the claims, including the California common law holder claim.

V. Standard of Review

Petitioners motion to dismiss under NRCP 12(b)(5) for failure to state a claim was denied by the District Court. Writ review of an order denying a motion to dismiss is disfavored.[7]

The standard of review for an order granting a motion to dismiss for failure to state a claim is *de novo*.[8] On review, the pleadings are construed liberally, and all inferences are drawn in favor of the nonmoving party.[9]

The standard of review when a case is dismissed based on subject matter jurisdiction is *de novo*.[10]

[7] *State v. Thompson*, 99 Nev. 258, 662 P.2d 1338 (1983).
[8] *Pack v. LaTourette,* 128 Nev. 264, 267–68, 277 P.3d 1246, 1248 (2012).
[9] *Buzz Stew, LLC v. City of N. Las Vegas,* 124 Nev. 224, 227–228, 181 P.3d 670, 672 (Nev. 2008).
[10] *Castillo v. United Federal Credit Union*, 409 P.3d 54 (Nev. 2018).

VI. Argument

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

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

When the disclosure obligation is broken, an investor can be harmed. The law provides a remedy to an investor harmed by a breach of the disclosure obligation. The existence of a legal remedy promotes the overriding public policy goal of an efficient market by encouraging disclosure.[11]

Wolfus twice bought stock from Midway, and held stock on another date, in reliance on bad information provided by Midway. Wolfus is a California citizen and bought and held Midway stock in California. Wolfus sued the control persons of Midway, who are liable under California law. Wolfus brought five claims: (1) Securities Fraud; (2) Breach of Fiduciary Duty; (3) Aiding and Abetting a Breach of Fiduciary Duty; (4) Fraud; and, (5) Negligent Misrepresentation.

[11] *See, e.g., Small*, 65 P.3d at 1264–65.

A. Wolfus brought direct claims.

Petitioners did not correctly frame the issue. The District Court did not face a question of subject matter jurisdiction over derivative claims.[12] Instead, Wolfus brought direct claims for purchasing and holding stock, which belong solely to Wolfus.

The District Court made the right decision when it implicitly found that Wolfus brought direct claims. Wolfus sued as a fraudulently induced purchaser and holder of stock.[13] As such, Wolfus brought claims which only Wolfus could assert; and, "not claims that could plausibly belong to the issuer corporation [Midway]."[14] Put another way:

> Under the direct harm approach … if a manager fraudulently induces a person to become an owner (or to increase or decrease the person's ownership interest), the resulting claim is direct. The injury is to the owner; if anything, the entity will have benefited from the fraud. (Footnotes omitted.)

Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L. Rev. 63, 89 (2006).

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[12] Wolfus does not contest that a claim held by Midway, a derivative claim, is subject to an effective demand under the internal affairs doctrine. But that is not this case.

[13] *Apollo Capital Fund v. Roth Capital Partners*, 158 Cal.App.4th 226, 249 (2007) (a properly alleged fiduciary relationship can serve as the basis for an action for breach of a fiduciary duty in a securities case).

[14] *Citigroup v. AHW Investment Partnership,* 140 A.3d 1125, 1138 (Del. 2016)

The distinction between a direct and a derivative claim can be challenging when a stockholder seeks to enforce a right based on a breach of a fiduciary duty claim which is held by the company. *Tooley* provides a two-part test to assist in unraveling the direct vs derivate knot in the context of a breach of fiduciary duty cause of action brought by a stockholder, on behalf of an entity.[15]

However, the primary test if a claim is direct is simple. A stockholder claim is direct, if the claim (or right) belongs to the stockholder.[16]

If the claim belongs to the stockholder, then the claim is direct; without the need to delve into the *Tooley* factors or to consider stock price.[17] As a purchaser and holder of stock, Wolfus holds the breach of fiduciary duty claims,[18] and will receive the entire benefit if successful.

In *NAF Holdings*[19], the Delaware Supreme Court explained, on a certified question, that when a holder of a right sues to enforce the right, the claim is direct. In *NAF* a company sought to sue on a commercial contract in the context of a

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[15] *See, e.g., NAF Holdings v. Li & Fung (Trading) Limited*, 118 A.3d 175, 176, 179–180 (Del. 2015); and, *Tooley v. Lufkin & Jenrette*, 845 A2d 1031, 1039 (Del. 2004).
[16] *Citigroup*, 140 A.3d at 1126–1127.
[17] *See, e.g., Citigroup*, 140 A.3d at 1138*; NAF Holdings*, 118 A.3d at 176, 179–180.
[18] See, e.g., *Apollo*, 158 Cal.App.4th 226; *Meister v. Mensinger*, 230 Cal. App. 4th 381 (2014); *American Master Lease v. Idanta Partners*, 225 Cal.App.4th 1451, 1475–76 (2014) (an aiding and abetting Defendant does not have to owe an independent duty to the Plaintiff).
[19] *NAF Holdings*, 118 A.3d at 180.

repudiated merger between a subsidiary and another company. *NAF claimed a diminution in the value of stock as resulting damages from the failed merger.* Thus, the argument was made that the NAF claim was derivative and was subject to the effective demand requirement.[20] The Delaware Supreme Court disagreed.

NAF Holdings explained that the *Tooley* two-part test had limited application to determine if a stockholder could pursue a breach of a fiduciary duty claim when the claim was held by the company. In *NAF Holdings*, the court first looked to who held the claim. NAF signed the contract in question, so NAF held the claim, thus it was found to be a direct claim—irrespective of the nature of claimed damages—holding devalued stock.[21]

In *Citigroup*[22], on another certified question, the Delaware Supreme Court reaffirmed the first question is: Who holds the right? In *Citigroup*, stockholders sued Citigroup and its officers alleging that the stockholders held stock because of misrepresentations when they otherwise would have sold stock, and then the stock price went down—a classic holder claim.[23]

[20] *Id*., at 177.
[21] *Id*., at 179–181.
[22] *Citigroup*, 140 A.3d 1125.
[23] *Ibid*.

The Second Circuit certified the following question of law to the Delaware Supreme Court:

> Are the claims of a plaintiff against a corporate defendant alleging damages based on the plaintiff's continuing to hold the corporation's stock in reliance on the defendant's misstatements as the stock diminished in value properly brought as direct or derivative claims?[24]

And, the answer is, "the holder claims in this action are direct."[25]

Citigroup also found the internal affairs doctrine did not impact a direct claim. In finding that a holder claim existed under either New York or Florida law, *Citigroup* panned the idea that Delaware law could be applied via the internal affairs doctrine to preclude the holder claim:

> Delaware law cannot convert a direct claim that another state's law has granted to securities holders by deciding that it actually belongs to the corporation that the securities holder is suing. Thus, because the Holder Claims here could not possibly belong to the corporation, Delaware law has nothing to do with what type of claims the Williamses are asserting. Their Holder Claims are direct, but a court need not engage in a *Tooley* analysis to arrive at that result. (Footnotes omitted.)[26]

Nevada adopted the direct harm test in *Parametric Sound Corp., v. Eighth Jud. Dist. Ct*., 401 P.3d 1100 (2017). In *Parametric*, stockholders sued over diminution of value of their stock resulting from a reverse triangular merger. The stockholders brought breach of fiduciary duty claims. Because the company held

[24] *Id*., at 1126.
[25] *Ibid*.
[26] *Id*., at 1140

the claims, and the harm appeared to hit all stockholders equally, the claims were held to be derivative. However, even in the merger setting—which is accepted as an internal corporate affair—*Parametric* held the door open for a direct claim if a subset of stockholders could plead an equity expropriation claim.[27]

Petitioners seize on the fact that stock value went down in *Parametric* and propose that the only factor of importance is that Midway stock went down too. But that approach reaches back in time to the discredited special injury test, and beyond; and was repudiated in *NAF Holdings*.[28]

Petitioners issue framing is not factually accurate either. Wolfus alone suffered damages when, in justifiable reliance on misrepresentations, Wolfus bought stock on January 23 and September 19, 2017, and held stock on February 14, 2014; and, Wolfus will enjoy the entire benefit from a successful outcome, not Midway. Thus, even if the court below improperly used the *Tooley* two-part test, the claims brought by Wolfus are still direct.

With the direct harm test, the very first question to ask is: Who does the claim belong to? Because the answer is, Wolfus; the claims are direct, and the District Court made the right call in accord with *Tooley, NAF, Citigroup* and *Parametric*.

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[27] *Parametric*, 401 P.3d at 1109.
[28] *NAF Holdings*, 118 A.3d at 179–180.

B. California Recognizes a Holder Claim.

The District Court did not break new ground and recognize a new Nevada holder cause of action, nor is this a case of first impression.

Petitioners argued, in part, the SAC did not satisfy the holder claim elements under California law. V PA 769–774. Wolfus opposed the motion to dismiss on the basis that the SAC was properly pled under California law. V PA 925–927. In denying the motion to dismiss, the court implicitly ruled that the SAC presented a properly pled holder claim under California law, pursuant to *Small*, 65 P.3d 1255. In the Order prepared by the Petitioners the court found:

> 24. The Court further finds that 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. VI PA 1039.

There is nothing in the record to suggest that a Nevada holder cause of action was found. Certainly, Wolfus did not make that argument. V PA 0902–948. Rather, the SAC pleads a California holder claim, even citing *Small v. Fritz* (IV PA 0606–07); and, the Court found that Wolfus' fraud and misrepresentation claims in the FAC were brought under California common law. III PA 0597.

Of course, had the question been raised, Wolfus would support Nevada's recognition of a holder cause of action. For it has long been held that,

> And it has long been established in the ordinary case of deceit that a misrepresentation which leads to a refusal to purchase or to sell is actionable in just the same way as a misrepresentation which leads to the consummation of a purchase or sale. *Butler v. Watkins*, 13 Wall. 456, 20 L.Ed. 629 (1872).[29]

While *Blue Chip Stamps* found that Congress did not intend to allow a holder claim under SEC Rule 10b-5, a holder claim was acknowledged to exist.[30]

It is a mistake to characterize the order denying dismissal as recognizing a novel new Nevada holder cause of action. That characterization is not supported by the record.

C. Choice of law

Petitioner may not obtain extraordinary relief from an implied choice of law decision which was not explicitly decided in the court below.

In the motion to dismiss the SAC, the defense argued that the law of British Columbia would apply, under the internal affairs doctrine, to a derivative claim brought by a shareholder on behalf of Midway. V PA 0749–856. Wolfus never opposed that argument, because Wolfus brought direct tort claims under California law to which the internal affairs doctrine does not apply.[31]

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[29] *Blue Chip Stamps v. Manor Drug Stores*, 95 S.Ct. 1917, 1929 (1975).
[30] *Ibid*.
[31] *Citigroup,* 140 A.3d at 1138–39.

Application of California law is the proper choice. California law applies when a purchase of stock originates, or when stock is held, in California.[32]

Nevada generally follows the Restatement (Second) Conflict of Laws.[33] Section 148 specifically addresses fraud and misrepresentation. If given the chance below, Wolfus might argue that §148 (1) calls for the application of California law.[34] Also, Wolfus might argue that *Citigroup* rejected an attempt to apply the internal affairs doctrine to a direct tort claim[35]; and, that the rejection is supported by the plain wording of §301.[36] Lastly, that §302, comment a, agrees that the internal affairs doctrine does not impact the choice of law for a tort.

Finally, the Petitioner's argument that the internal affairs doctrine would apply to a direct claim is not properly supported.[37] Petitioners' brief at page 32

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[32] *See, e.g., Hall v. Superior Ct.,* 150 Cal. App. 3d 411 (2003).
[33] *Gen. Motors, v. Eighth Jud. Dist. Ct*., 172 Nev. 842, 264 P.3d 1161 (2011).
[34] Restatement (Second) §148(1) states: When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.
[35] *Citigroup,* 140 A.3d at 1138–40.
[36] Restatement (Second) §301 states: "The rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to noncorporate parties."
[37] *SIIS v. Buckley*, 100 Nev. 376, 381, 682 P.2d 1387, 1390 (1984) (arguments "lacking substantive citation to relevant authority" need not be considered.)

cites to *NAF Holdings*, 118 A.3d at 181, for the proposition that the internal affairs doctrine controls the choice of law for a direct tort claim. This is the same argument advanced below at V PA 769. However, *NAF Holdings* does not mention or address the internal affairs doctrine.

The District Court correctly decided Wolfus stated a holder claim under California law; and, did not comment on the unsupported and incorrect argument regarding the internal affairs doctrine. To the extent the Petitioner wants relief on this issue, the proper place to start is in the court below.

D. The Holder Claim in the SAC is Well Pled.

The defense seeks extraordinary relief from denial of a motion to dismiss for failure to state a claim. Extraordinary relief from denial of a motion to dismiss is rarely granted.[38]

The District Court denial was proper. The SAC describes the who, what, where, when and why of each cause of action, including the holder claim.

Midway ran gold mining operations in Nevada. Midway had a large Nevada footprint, including 11 wholly owned Nevada subsidiaries. In 2013 & 2014 Midway issued press releases and filed SEC disclosures which painted a rosy

[38] *Thompson*, 99 Nev. 258, 662 P.2d 1338.

picture of the Nevada gold mining operations, especially Pan. Midway focused on making Pan its first production gold mine and was the key to success.

Midway press releases and disclosures were false and misleading, the reality on the ground at Pan was not accurately described. In 2015, reality overcame the false picture of success, and Midway failed.

Wolfus bought stock in reliance on the false and misleading press releases and SEC disclosures that described false progress at Pan. Wolfus also held stock in reliance on the false and misleading disclosures that described false progress at Pan. Wolfus suffered a loss caused by his reasonable reliance on the false and misleading statements about Pan.

The SAC fourth cause of action is for California common law fraud. A purchaser and a holder claim are alleged. The elements for California common law fraud are: (1) a misrepresentation, concealment or nondisclosure; (2) knowledge of falsity or scienter; (3) intent to defraud—that is, to induce reliance; (4) justifiable reliance; and, (5) damage.[39]

The SAC fifth cause of action is for negligent misrepresentation. A purchaser and a holder claim are alleged. The elements for California common law negligent misrepresentation are: (1) a misrepresentation of a past or existing material fact; (2) without reasonable grounds for believing it to be true; (3) with

[39] *Lazar v. Superior Court*, 909 P.2d 377, 380–81 (Cal. 1996).

intent to induce another's reliance on the fact misrepresented; (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages.[40]

The SAC describes all the elements for fraud and negligent misrepresentation, including affirmative misrepresentations of past events, and satisfies the requirements for a holder claim.

1. The fraudulent and misleading statements are identified.

Fraudulent and misleading press releases and/or SEC disclosure/filings are identified in the SAC. IV PA 603–649 at ¶47, 52, 53, 59, & 63, IV PA at 707–712 & 718–721. Each statement is identified by date, its nature and its relevant content, then the specific information which was omitted, false or misleading is listed. *E.g*., IV PA 603–649 at ¶65 & 86.

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

The identified statements were fraudulent and misleading mainly because they did not disclose material facts/bad information about Pan. The undisclosed material facts are listed. IV PA 603–649 at ¶ 65 & 86. Affirmative false statements about current events were also made. For example, SAC ¶63 and exhibit 7 describe the false statement that permitting was completed at Pan in December of

[40] *Fox v. Pollack*, 181 Cal.App.3d 954, 962, 226 Cal.Rptr. 532 (1986).

2013, when the Run of Mine method of operation had not been permitted. IV PA 603–649 at ¶63 and IV PA 718–721.

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

Each fraudulent or misleading statement is identified by date and how the statement was made. *E.g.*, IV PA 603–649 at ¶47, 52, 53, 59, & 63.

4. Those responsible are identified.

Midway is the primary violator for each fraudulent and misleading statement under Cal. Corp. Code 24401. Each defendant is identified as a control person for joint and several secondary violator liability under Cal. Corp. Code 25504. IV PA 603–649 ¶64, 85, 104 & 109. The collaborative role[41] of each Defendant in drafting and/or approving each fraudulent and misleading statement, by their membership in Midway committees, is described. IV PA 603–649 at ¶64 & 85.

5. Scienter is alleged.

Scienter is alleged. *E.g.*, IV PA 603–649 at ¶105 & 110. On their own, the allegations in ¶105 & 110 are sufficient. However, the paragraphs are supported and must be read in context. For example, on the nondisclosure of the Pan Run of Mine operations permit issue:

[41] Collaboration creates liability. *Apollo Capital Fund v. Roth Capital*, 158 Cal.App.4th 226, 242 (2007).

- ¶ 25, 64 & 85 explain the purpose of the Disclosure Committee is to ensure accurate information is disclosed.
- ¶64 & 85 list Disclosure Committee members. More detail is provided elsewhere. For example, ¶ 36 & 38 describe the role of Brunk and Moritz in personally overseeing the Pan mine.
- ¶44, 45 & 46, detail the workings of the Pan mine as set forth in the Feasibility Study (IV PA 651–683), and the permitting process.
- ¶47, 52, 53, 59, & 63, list the disclosures which relate to permitting Pan, which was based upon the Feasibility Study method of operation.
- ¶ 60 described the change in operation at Pan to Run of Mine—which required different permits from the Feasibility Study method of operation.
- ¶ 63 describes the December of 2013 press release which stated permitting for Pan was complete.
- ¶65 describes the misleading nature of the permitting disclosures because permits were not obtained for a Run of Mine operation at Pan, which would delay gold extraction from mined ore.
- ¶64 alleges how defendants knew the truth of the permitting issue at Pan by their membership in the governance committees, and that they knew the public was not told the truth.

IV PA 603–649 at ¶25, 36, 38, 42, 44–47, 52, 53, 59, 60, 63–65 & 85.

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

Reliance by Wolfus on Midway public disclosures when deciding to buy and hold stock are described. IV PA 603–649 at ¶50, 66, 70 (holding), 87, 106 & 111. Wolfus had been excluded from Midway. Wolfus relied upon public disclosures when making the decision to buy or hold stock, and Wolfus acted reasonably upon the disclosures. There is no confusion over which public disclosures Wolfus relied upon all the disclosures are identified. IV PA 603–649 at ¶106 & ¶111.

The who, what, when, where and how, number of shares and price are described for the holding claim in ¶70. Wolfus satisfies causation by explaining had he known the truth, he would not have purchased additional stock, and would instead, have sold his entire position. IV PA 603–649 at ¶64, 65, 70, 85 & 86. Resulting damages are alleged. IV PA 603–649 at ¶70, 112, 117–119, 126, 138 & 147. The holding claim is well pled.

VII. Conclusion

Wolfus respectfully requests that the petitioners request for extraordinary writ relief be denied. The court below did not make an egregious error or act arbitrarily or capriciously; and, there are no issues presented worthy of advisory mandamus pursuant to *Archon Corp., v. Eighth Jud. Dist. Ct*., 407 P.3d 702 (Nev. 2017).

DATED this 26th day of September 2018.

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VERIFICATION

I, JAMES R. CHRISTENSEN, declare as follows:

1. I am an attorney at James R. Christensen, PC and represent Real Party in Interest, Daniel Wolfus, in this matter.

2. I verify that I have read this Answer of Real Party in Interest To Petition For Writ of Prohibition or Alternatively, Mandamus and that it is true to the best of my own knowledge, except for those matters therein stated on information and belief, and, as to those matters, I believe them to be true.

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

Dated this 26th day of September, 2018.

/s/ James R. Christensen
James R. Christensen

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365ProPlus in Times New Roman, 14 pt.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is does not exceed 30 pages.

Finally, I hereby certify that I have read this Answer, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix

where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26th day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that on the 26th day of September, 2018, a true and correct copy of the foregoing Answer of Real Party in Interest To Petition For Writ of Prohibition or Alternatively, Mandamus, was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court E-Filing System.

I further certify that the following participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service of the Answer has been accomplished to the following individuals via electronic service:

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I further certify that the following party was served with a copy of the foregoing Answer by U.S. Mail with postage fully prepaid:

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/s/ Dawn Christensen
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