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EXHIBIT 4

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

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the
Securities Exchange Act of 1934

Date of Report: December 13, 2012
(Date of earliest event reported)

MIDWAY GOLD CORP.

(Exact Name of Registrant as Specified in Charter)

British Columbia, Canada	**001-33894**	**98-0459178**
(State or Other Jurisdiction of Incorporation)	(Commission File Number)	(IRS Employer Identification No.)

8310 South Valley Highway, Suite 280
Englewood, Colorado
(Address of principal executive offices)

80112
(Zip Code)

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

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 1.01 Entry into Material Definitive Agreements

On December 13, 2012, Midway Gold Corp. ("***Midway***") closed the private placement of Series A Preferred Shares pursuant to the terms of the Share Purchase Agreements, Registration Rights Agreement and Side Letter, each dated November 21, 2012. The material terms of the agreements are described in Item 1.01 of Midway's Form 8-K filed on November 26, 2012 and are incorporated herein by reference.

Item 3.02 Unregistered Sales of Equity Securities

On December 13, 2012, Midway closed a US$70,000,000 private placement of Series A Preferred Shares (the "***Series A Preferred Shares***") to institutional accredited investors, including INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC (the "***Investors***").

Midway offered and sold 37,837,838 Series A Preferred Shares at a price of US$1.85 per share. The Series A Preferred Shares are convertible into common shares of Midway on a one-for-one share basis. An eight percent (8%) annual dividend, compounding monthly, payable quarterly, is payable on the Series A Preferred Shares, the first payment commencing on April 1, 2013 and each dividend payment payable thereafter on the first business day of each quarter commencing on July 2, 2013. The quarterly dividend is payable in cash or in-kind in common shares of Midway at the option of Midway, subject to certain conditions. The Series A Preferred Shares and common shares issuable upon conversion or for in-kind dividend payments are or will be "restricted securities" as defined in Rule 144(a)(3) of the U.S. Securities Act of 1933, as amended (the "***U.S. Securities Act***").

Neither the Series A Preferred Shares nor the common shares issuable upon conversion of or payable as dividends on the Series A Preferred Shares have been registered under the U.S. Securities Act or any state securities laws. The offer and sale of the Series A Preferred Shares was exempt from registration under Section 4(a)(2) and Regulation D Rule 506 of the U.S. Securities Act. The private placement was conducted with limitations on resale and no general solicitation. The Series A Preferred Shares were offered and sold to institutional "accredited investors" (as defined in Rule 501(a) of Regulation D) pursuant to exemptions from such registration requirements.

In connection with the private placement, Midway entered into a Registration Rights Agreement with the Investors, under which Midway will register the Midway common shares issued or issuable upon conversion of the Series A Preferred Shares and upon payment of an in-kind dividend for resale under the U.S. Securities Act. Under the Registration Rights Agreement, Midway has agreed, within 90 days after closing, to use all commercially reasonable efforts to prepare and file with the SEC a registration statement on Form S-3 (or such other form as available if Form S-3 is not available) and a Canadian prospectus covering the resale of all of the common shares issued or issuable upon conversion of the Series A Preferred Shares. Midway will maintain the effectiveness of the registration statement until all such common shares have been sold or may be sold without registration under Rule 144 of the U.S. Securities Act without any limitation as to volume or manner of sale requirements. The Registration Rights Agreement contains customary terms and conditions and does not provide for any specific cash settlement or liquidated damage payments.

Item 5.02 Departure/Election of Director

In connection with the provisions of the Side Letter, Nathaniel Klein, a member of Midway's Board of Directors (the "***Board***") and Vice President of Hale Capital Partners, L.P., resigned from the Board effective December 13, 2012.

Midway appointed Martin Hale, President of Hale Capital Partners, L.P., as a director to fill the vacancy on the Board resulting from Nathaniel Klein's resignation. Midway appointed Martin Hale to serve on the Corporate Governance and Nominating Committee, the Compensation Committee and the Budget/Work Plan Committee of Midway's Board.

In connection with the private placement of the Series A Preferred Shares, Midway entered into a Side Letter which provides for the following:

Nomination Right: Upon approval of a majority of the holders of common shares of Midway, the Preferred Governance Majority (initially HCP-MID, LLC until the Investors own less than 7,567,568 Series A Preferred Shares, then the holders of a majority of the Series A Preferred Shares) has the right to nominate one (1) director nominee (the "***Preferred Holder Director***") for election to Midway's Board to stand for election at each annual or special meeting of shareholders or action by written consent of shareholders at which directors will be elected. Nathaniel Klein will be nominated as the initial the Preferred Holder Director to stand for election to Midway's Board at the next annual shareholders meeting in 2013. Mr. Klein shall maintain observation rights to the Board until his election to the Board at the next annual general meeting of Midway.

Budget/Work Plan Committee: Midway formed a Budget/Work Plan Committee (the "***Budget Committee***"). The Budget Committee consists of three non-executive directors, one of whom is the Preferred Holder Director or appointed by the Preferred Governance Majority, and the Chief Executive Officer ("***CEO***") of Midway. CEO Kenneth Brunk, Martin Hale, Roger Newell and John Sheridan were appointed to the Budget Committee. The mandate of the Budget Committee is to review and approve the annual business and financing plans and capital and operating budgets (and any modifications of, or deviations from, such plans or budgets). The Budget Committee chair is the CEO. A majority of the members of the Budget Committee shall constitute a quorum for the transaction of business, and the unanimous vote of all members shall be required for all acts and approvals of the Budget Committee. In the event that unanimous approval of the Budget Committee is not obtained for any matter with which the Budget Committee is authorized under its charter, the Preferred Holder Director and the CEO shall cooperate and work together in good faith to resolve any issues that the Budget Committee has identified as an impediment to their unanimous approval. Budget Committee members shall serve until the successors shall be duly designated and qualified. Except with respect to the Preferred Holder Director, any member may be removed at any time, with or without cause, by a majority of the Board then in office. Any vacancy in the Budget Committee occurring for any cause may be filled by a majority of the Board then in office; provided however, that any vacancy created by the death, resignation, removal or disqualification of any Preferred Holder Director shall be filled by an eligible person designated by the Preferred Super Majority (initially, HCP-MID, LLC until the Investors own less than 3,783,784 Series A Preferred Shares, then the holders of a majority of the Series A Preferred Shares) as the Preferred Holder Director standing member of the Budget Committee.

Committee Appointments: Martin Hale was appointed to Midway's Corporate Governance and Nominating Committee, the Compensation Committee and the Budget Committee of Midway's Board.

Item 5.03 Amendments to Articles of Incorporation

Midway amended its Notice of Articles and Articles by filing a Notice of Alteration with the British Columbia Registry of Corporations on December 13, 2012.

The amended Articles authorize the Series A Preferred Shares in the capital of Midway with certain terms, conditions, and rights (the "***Series A Rights***"). (Terms not defined in this Item 5.03 have the meaning ascribed to them in the Series A Rights.) Material provisions of the Series A Rights are as follows:

Voting: Series A Preferred Shares will have the following voting rights:

Voting at Shareholder Meetings: Series A Preferred Shares will be entitled to vote, on an as converted basis, at all meetings of Midway's shareholders, except as otherwise required by law.

(a) Approval of Certain Corporate Actions: The consent or affirmative vote of the Preferred Super Majority (initially HCP-MID, LLC until the Investors own less than 3,783,784 Series A Preferred Shares, then the holders of a majority of the Series A Preferred Shares) is required for Midway to effect any of the following:

(i) create a new class or series of shares equal or superior to the shares of such class;

(ii) redeem or repurchase any shares of Midway except for purchases at cost upon termination of employment;

(iii) a voluntary or involuntary liquidation, dissolution or winding-up of the affairs of Midway;

(iv) change the special rights or restrictions attached to the Series A Preferred Shares;

(v) amend or repeal of any provision of Midway's Notice of Articles or Articles in a manner adverse to the holders of Series A Preferred Shares; or

(vi) issue any additional Midway common shares or common share equivalents for less than the Conversion Price (initially US$1.85) applicable to the Series A Preferred Shares; except for any of the following:

1. common shares pursuant to a Stock Split;

2. securities issued upon exercise, conversion or exchange of existing and outstanding securities equivalents on the date hereof;

3. options to acquire common shares (and common shares issuable upon exercise of such options) issued in accordance with any employee incentive stock option plan, or any amendment to a stock option plan, of Midway approved by the shareholders of Midway for Midway's management, directors and employees where the exercise price or conversion price of such options is below the Conversion Price, but is not less than the closing price of the common shares at the time of such grant or issuance; provided, further, that the aggregate of such grants, issuances or sales per calendar year shall not exceed five percent (5%) of the issued and outstanding shares of common shares as of December 31 of such calendar year;

4. common shares issued for the purpose of redeeming in full the Series A Preferred Shares in cash; or

5. up to a maximum of 756,757 common shares to be used exclusively for real property acquisitions, including by way of a joint venture.

Director Appointment: Upon approval of a majority of the holders of common shares of Midway, the Preferred Governance Majority (initially HCP-MID, LLC until the Investors own less than 7,567,568 Series A Preferred Shares, then the holders of a majority of the Series A Preferred Shares) have the right to nominate the Preferred Holder Director, to be elected by holders of the Series A Preferred Shares voting as a separate series at each annual or special meeting of shareholders of Midway or action by written consent of shareholders at which directors will be elected. If Midway's Board is increased beyond seven (7) members, increases shall occur in increments of two (2) and the Preferred Governance Majority will have the right to designate one (1) director nominee for election or appointment as director. The Preferred Governance Majority has the right to fill any vacancy of the Preferred Holder Director position. The director appointment rights terminate if there are less than 7,567,568 Series A Preferred Shares issued and outstanding. These rights are subject to approval of the holders of a majority of the common shares of Midway.

Dividend Rights: Series A Preferred Shares will be entitled to an annual 8% dividend, compounded monthly and payable quarterly in cash or, at the option of Midway and subject to certain conditions, in Midway common shares. Dividends are payable beginning on April 1, 2013, and thereafter be paid on the first business day of each following quarter, beginning July 2, 2013. Midway may elect to pay dividends in Midway common shares based on the closing price on NYSE MKT the day before the dividend is paid; provided that the issuance is an exempt purchase pursuant to Section 16(b) of the Securities Exchange Act of 1934, as amended. No dividend or other distribution greater than the Series A Preferred Dividend will be paid, declared or set apart for payment in respect of any common shares or shares of any other class ranking junior to the Series A Preferred Shares in respect of dividends (and the Series A Preferred Shares are deemed to rank senior to each class of shares that is created before it).

Liquidation Preference: Series A Preferred Shares shall have a liquidation preference equal to 125% of the initial issue price of the Series A Preferred Shares in connection with certain liquidation events, including:

(a) a voluntary or involuntary liquidation, dissolution or winding-up of Midway's affairs;

(b) any merger, amalgamation, reorganization, arrangement, acquisition or other similar transaction of Midway with another person or entity, pursuant to which the holders of voting securities of Midway immediately prior to the transaction hold (assuming an immediate and maximum exercise/conversion of all derivative securities issued in the transaction), immediately after such transaction, directly or indirectly, less than 50% of the voting power to elect directors of Midway resulting from the transaction (unless not deemed a liquidation event as provided in the Series A Rights);

(c) a sale, lease, conveyance or other disposition of all or substantially all of the property or business of Midway (directly or through a subsidiary) or the sale of substantially all of the properties, title, or rights related to the properties owned by Midway's U.S. subsidiary or U.S. affiliate in White Pine County, Nevada (unless not deemed a liquidation event as provided in the Series A Rights); or

(d) Midway common shares are no longer listed or traded on any of the Toronto Stock Exchange, the TSX Venture Exchange, the New York Stock Exchange, Inc., the NYSE MKT LLC, the NASDAQ Global Select Market, the NASDAQ Capital Market or the OTC Bulletin Board.

Conversion Rights: Series A Preferred Share have the following conversion terms:

Conversion: Each Series A Preferred Share is convertible into one Midway common share, subject to adjustment for stock splits and capital reorganizations, at any time by the holder of Series A Preferred Shares.

Mandatory Conversion: Midway has the right to force the conversion of the Series A Preferred Shares after 1 year, subject to certain conditions, including, but not limited to: (a) Midway common shares trade on the NYSE MKT or other eligible market above $3.70, as adjusted for stock splits and recapitalizations, for 20 consecutive trading days; (b) Midway common shares are registered for resale under the U.S. Securities Act or can be resold under Rule 144 without volume limitations; (c) no public announcement has been made of a pending or proposed liquidation event; (d) holders are not in possession of non-public material information; (e) no black-out period restricting the sale of Midway common shares; (f) the issuance is an exempt purchase pursuant to Section 16(b) of the Securities Exchange Act of 1934, as amended; (g) issuance of the common shares would not violate the rules of the NYSE MKT; and (h) the number of Series A Preferred Shares subject to the mandatory conversion will be calculated as of the date of the conversion based on the product of (i) the aggregate number of common shares issuable by Midway to all holders of Series A Preferred Shares upon such conversion multiplied by (ii) the average of the dollar volume-weighted average price for such common shares on NYSE MKT during the period beginning at 9:30:01 a.m., New York time and ending at 4:00 p.m., New York time, as reported by Bloomberg through its "Volume at Price" function for each of the twenty (20) consecutive days immediately prior to the conversion shall not exceed 30% of the average of the aggregate dollar trading volume of common stock traded on the Toronto Stock Exchange, the TSX Venture Exchange, the New York Stock Exchange, Inc., the NYSE MKT LLC, the NASDAQ Global Select Market, the NASDAQ Capital Market and the OTC Bulletin Board for the five (5) consecutive trading days for each of the twenty (20) consecutive trading days immediately preceding the applicable conversion.

Mandatory Redemption: Five (5) years after the date of issuance, Series A Preferred Shares are redeemable by either Midway or the holders of Series A Preferred Shares for cash at US$1.85 per share, as adjusted for stock splits and recapitalizations. The redemption payment is payable in legal available funds within 30 days after a redemption notice. If Midway is prohibited from redeeming Series A Preferred Shares, then Midway shall distribute all of the legal available funds to the holders of the Series A Preferred Shares and repay any amounts otherwise due in equal quarterly payments for the period of two (2) years from date on which redemption is demanded.

If the redemption is not completed during the two year period, the Preferred Super Majority may (i) voting as a single class (to the exclusion of the holders of all other securities and classes of capital stock of Midway),

vote to elect such number of additional directors which shall constitute a majority of Midway's Board of Directors, and the number of directors constituting Midway's Board shall automatically be increased as necessary, and (ii) in the event it is not permitted, the Preferred Super Majority may sell, as may be permitted by applicable law, on behalf of Midway the assets of Midway, in its discretion, that are sufficient to redeem the

Item 7.01 Regulation FD

On December 13, 2012, Midway issued a press release announcing the closing of the private placement. A copy of the press release is attached to this Current Report on Form 8-K as Exhibit 99.1. In accordance with General Instruction B.2 of Form 8-K, the information set forth herein and in the press release is deemed to be "furnished" and shall not be deemed to be "filed" for purposes of the Securities Exchange Act of 1934, as amended. In accordance with General Instruction B.6 of Form 8-K, the information set forth in herein and in the press release shall not be deemed an admission as to the materiality of any information in this Current Report on Form 8-K that is required to be disclosed solely to satisfy the requirements of Regulation FD.

Item 9.01. Exhibits

10.1	Share Purchase Agreement*
10.2	Registration Rights Agreement*
10.3	Side Letter*
3.1	Articles and Notice of Alteration for Series A Rights
99.1	Press Release

* Previously filed on Form 8-K dated November 26, 2012, and incorporated by reference.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

MIDWAY GOLD CORP.

DATE: December 13, 2012

By: /s/ Kenneth A. Brunk
Kenneth A. Brunk
Chairman, President and CEO

EXHIBIT INDEX

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EX-99.1 3 ex99_1.htm PRESS RELEASE

EXHIBIT 99.1

Midway Gold Closes US$70 Million Strategic Financing

December 13, 2012

Denver, Colorado – Midway Gold Corp. ("Midway" or the "Company") (TSX VENTURE: MDW) (NYSE MKT:MDW) is pleased to announce that it has closed its previously announced US$70 million private placement financing (the "Transaction") of five year 8% convertible Series A Preferred shares at a price of US$1.85 per share ("Preferred Shares"). Kenneth A. Brunk, Midway's Chairman, President and CEO commented, "Midway is pleased to have reached this significant funding milestone, which allows the Company to focus on finalizing our construction plans for the Pan project and to continue development of the Gold Rock project."

Concurrent with closing, Nathaniel E. Klein, Vice President of Hale Capital Partners, LP ("HCP") has resigned from the Company's board of directors and Martin M. Hale, Jr., CEO and Portfolio Manager of HCP, was appointed to fill the resulting vacancy. Mr. Hale was also appointed to the Company's Corporate Governance and Nominating Committee, Compensation Committee, and Budget/Work Plan Committee.

Prior to founding HCP in 2007, Martin was a founding member of Pequot Ventures (now known as FirstMark Capital) where he served as a member of the General Partner. From 2002 to 2007, Martin was a Managing Director and a Member of the Operating & Investment Committees helping to lead 7 funds with approximately US$2.2 billion under management. Prior to Pequot Ventures, Martin was an Associate at Geocapital Partners and an Analyst at Broadview International. He currently serves as Chairman of Telanetix, Inc. and is a board member of United Silver Corporation and Adept Technology. He received his B.A. cum laude from Yale University.

In connection with the Transaction, EREF-MID II, LLC ("EREF-MID II") and HCP-MID, LLC ("HCP-MID"), both funds managed by an affiliate of HCP, acquired 17,837,838 Preferred Shares pursuant to share purchase agreements entered into with Midway on November 21, 2012. Midway has been advised by HCP that after giving effect to the Transaction, EREF-MID II, HCP-MID and their respective affiliates, acquired control or direction over a total of 17,837,838 Preferred Shares of Midway, representing approximately 47% of the outstanding Preferred Shares of Midway and further, upon conversion of the Preferred Shares into common shares of Midway (the "Common Shares"), and together with common share purchase warrants currently held by HCP and its affiliates, HCP and its affiliates would hold 27,949,522 Common Shares, representing approximately 15.5% of the issued and outstanding Common Shares on a fully diluted basis (calculated as if all outstanding warrants and options to purchase Common Shares were exercised).

In connection with the Transaction, INV-MID,LLC ("INV-MID") acquired 20,000,000 Preferred Shares pursuant to a share purchase agreement entered into with Midway on November 21, 2012. Midway has been advised by INV-MID that after giving effect to the Transaction, INV-MID acquired control or direction over a total of 20,000,000 Preferred Shares of Midway, representing approximately 53% of the outstanding Preferred Shares of Midway, and further, upon conversion of the Preferred Shares into Common Shares, INV-MID would hold 20,000,000 Common Shares, representing approximately 11% of

the issued and outstanding Common Shares on a fully diluted basis (calculated as if all outstanding warrants and options to purchase Common Shares were exercised).

The primary use of proceeds from the private placement will be to advance the Pan heap leach gold project towards production, including the ordering of long-lead time capital equipment, as well as engineering studies to advance the Gold Rock project.

The Preferred Shares and Common Shares issuable upon conversion of the Preferred Shares are subject to a customary Canadian hold period until April 14, 2013 and are restricted securities under the U.S. Securities Act of 1933, as amended.

Neither the Preferred Shares nor the Common Shares issuable upon conversion of the Preferred Shares or in lieu of cash dividend payments have been registered under the United States Securities Act of 1933, as amended, or the securities laws of any state. Each Preferred Share is convertible into Common Shares of the Company on a 1 to 1 basis. Midway granted the investors registration rights in connection with the offering. The securities may be offered or sold only under exemptions from these registration requirements. This press release does not constitute an offer of securities.

ON BEHALF OF THE BOARD
"Kenneth A. Brunk"
Kenneth A. Brunk, Chairman, President and CEO

About Midway Gold Corp.

Midway Gold Corp. is a precious metals company with a vision to explore, design, build and operate gold mines in a manner accountable to all stakeholders while assuring return on shareholder investments. For more information about Midway, please visit our website at www.midwaygold.com or contact R.J. Smith, Vice President of Administration, at (877) 475-3642 (toll-free).

About Hale Capital Partners

Based in New York City, Hale Capital Partners has established itself as a leading private equity firm focused on strategic investments in public companies and their subsidiaries. Hale Capital Partners' team is comprised of seasoned private equity veterans and entrepreneurs, who bring not only deep domain expertise but also hands-on operating experience to help build highly successful companies. Hale Capital Partners' mining portfolio spans all stages of mine development from exploration to commercial production.

Neither the TSX Venture Exchange, its Regulation Services Provider (as that term is defined in the policies of the TSX Venture Exchange) nor the NYSE MKT accepts responsibility for the adequacy or accuracy of this release.

This press release contains forward-looking statements within the meaning of Canadian and United States securities laws about the Company and its business which may include, but is not limited to, the Company's intended use of proceeds, the ability to complete construction plans for the Pan Project, the plans for development of the Gold Rock Project and other statements that are not historical fact. Such forward-looking statements and forward-looking information reflect our current views with respect to future use of proceeds and are subject to certain risks, uncertainties and assumptions, including but not limited to risks related to delays in closing, the receipt of regulatory approvals and changes in market conditions. The forward-looking statements in this press release are subject to various risks, uncertainties and other factors that could cause the Company's actual results or achievements to differ materially from those expressed in or implied by forward looking statements. These risks, uncertainties and other factors include, without limitation, risks related to the timing and completion of the Company's intended work plans, risks related to fluctuations in gold prices; uncertainties related to raising sufficient financing to fund the planned work in a timely manner and on acceptable terms; changes in planned work resulting from weather, logistical, technical or other factors; the possibility that results of work will not fulfill expectations and realize the perceived potential of the Company's properties; uncertainties involved in the interpretation of

drilling results and other tests and the estimation of gold resources and reserves; the possibility that required permits may not be obtained on a timely manner or at all; the possibility that capital and operating costs may be higher than currently estimated and may preclude commercial development or render operations uneconomic; the possibility that the estimated recovery rates may not be achieved; risk of accidents, equipment breakdowns and labor disputes or other unanticipated difficulties or interruptions; the possibility of cost overruns or unanticipated expenses in the work program; and other factors identified in the Company's SEC filings and its filings with Canadian securities regulatory authorities. Forward-looking statements are based on the beliefs, opinions and expectations of the Company's management at the time they are made, and other than as required by applicable securities laws, the Company does not assume any obligation to update its forward-looking statements if those beliefs, opinions or expectations, or other circumstances, should change.

EXHIBIT 5

EX-99.1 2 newsrelease.htm PRESS RELEASE, DATED JULY 30, 2013

Midway Updates Progress at

Pan Project, Nevada

July 30, 2013

Denver, Colorado – Midway Gold Corp. (TSX and NYSE-MKT: MDW) (the "Company") reports that the Company's Pan heap leach gold project ("Pan") is on schedule for construction in Q4 2013 and production in 2014. Permitting, financing, and engineering optimization continue to advance on schedule. For the financing discussions, an updated feasibility study will incorporate optimization and detailed engineering conducted after the November 2011 Feasibility. The revised FS with updated costs is expected in Q3.

A Message from Ken Brunk – Chairman, President and CEO of Midway

Time flies when one is busy! It has been several months since we have updated our shareholders and other interested followers of Midway on our activities and progress. We have been extremely busy permitting, updating the Pan project technical and financial information, evaluating details within the heap leach operating parameters, conducting a trial blast to get rock breakage and powder factor confirmation, performing additional large scale, 25-ton leach tests, optimizing the mine plan and dig plans, re-evaluating the operating costs, re-visiting the capital costs, improving the construction plan and schedule, performing in-depth risk analyses of every aspect of the project and examining financing alternatives for the balance of funding needed to bring the project to production in August of 2014.

You might ask, "Why all this activity for a project with already impressive economics?" The answer is simple; it is our goal to optimize our cost parameters in order to deliver better returns to our shareholders, especially in the current environment.

The most significant event for Midway will be the creation of profitable cash flow from the Pan Mine. Planning for the creation of this cash flow stream began over three years ago with the design of a plan to develop the Pan project into a producing facility. We have been operating on that plan since April 2010. We are within three

weeks of that original schedule and production for Pan is within six weeks of the original target. That does not mean that every internal segment of the schedule has seen no variance; it does mean that the overall schedule has been managed such that we expect to pour gold in August of 2014. I believe that such performance speaks well for the team.

We will issue an updated feasibility study and an updated 43-101 Technical Report on the results of our work in the coming weeks. I am confident that the update will provide a level of comfort that Pan remains a good project. The attributes of nearby infrastructure, easy mining, simple metallurgy, solid engineering, a seasoned operating team and 60 plus million dollars in the bank all contribute toward the project's success. Let's discuss some of the aspects of the project in a bit more detail.

Permitting

We are still on our schedule for the achievement of a favorable record of decision in September of this year. That schedule allows construction to commence in October. The BLM's third party contractor is currently addressing comments and responses received from the Draft Environmental Impact Statement (EIS) public comment period. These comments will be included in the Final EIS. Major permits received to date include the *Water Pollution Control* permit and the *Class I Air Quality Operating Permit to Construct*. While Midway anticipates no Mercury emissions, a *Class I Operating Permit to Construct: Mercury* is required and is expected to be complete in the near future.

Metallurgical Test Work & First Blast at Pan

Post-feasibility metallurgical test work at Pan has focused on ways to reduce the number of stages of crushing needed thereby delaying the crusher capital expenditures. Large column tests on bulk samples showed excellent gold recoveries from coarse materials. The preliminary results indicate that gold recoveries are less sensitive to crush size than was outlined in the 2011 Feasibility Study. In June of this year, the Company conducted the first blast at Pan to obtain material for tests of Run of Mine potential. This also provided a test of the blast pattern, powder factor, and sampling procedures planned for use during initial mining. The Run of Mine metallurgical testing is still in progress.

Pan Project Financing Update

Midway is pursuing a combination of project and equipment financing alternatives, and has received proposals from several major commercial funding sources. The Company has been working with its financial advisors to assess the amount of financing needed and the various options available in the current market to secure the remaining capital necessary to fund Pan to cash flow. The current finance plan does not consider issuing additional equity that would dilute current shareholders. Accordingly, Midway terminated the September 23, 2011 "At-the-Market" share issuance program effective July 29, 2013.

Pan Updated Feasibility

The company is updating the 2011 Pan Feasibility Study for use in financing negotiations and in forward planning for internal purposes. The update will incorporate post-feasibility optimization changes to the mine plan and will bring feasibility costs up to date. The project timeline for Pan is still on track for Q4 construction and production in 2014.

This release has been reviewed and approved for Midway by William S. Neal (M.Sc., CPG), Vice President of Geological Services of Midway, a "qualified person" as that term is defined in NI 43-101.

ON BEHALF OF THE BOARD
"Kenneth A. Brunk"

Kenneth A. Brunk, Chairman, President and CEO

About Midway Gold Corp.

Midway Gold Corp. is a precious metals company with a vision to explore, design, build and operate gold mines in a manner accountable to all stakeholders while assuring return on shareholder investments. For more information about Midway, please visit our website at www.midwaygold.com or contact Jaime Wells, Investor Relations Analyst, at (877) 475-3642 (toll-free).

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This press release contains forward-looking statements about the Company and its business. Forward looking statements are statements that are not historical facts and include, but are not limited to, statements about the Company's intended work plans and resource estimates and potential offering of common shares of the Company from time to time. The forward-looking statements in this press release are subject to various risks, uncertainties and other factors that could cause the Company's actual results or achievements to differ materially from those expressed in or implied by forward looking statements. These risks, uncertainties and other factors include, without limitation, risks related to the timing and completion of the Company's intended work plans, risks related to fluctuations in gold prices; uncertainties related to raising sufficient financing to fund the planned work in a timely manner and on acceptable terms; changes in planned work resulting from weather, logistical, technical or other factors; the possibility that results of work will not fulfill expectations and realize the perceived potential of the Company's properties; uncertainties involved in the interpretation of drilling results and other tests and the estimation of gold resources and reserves; the possibility that required permits may not be obtained on a timely manner or at all; the possibility that capital and operating costs may be higher than currently estimated and may preclude commercial development or render operations uneconomic; the possibility that the estimated recovery rates may not be achieved; risk of accidents, equipment breakdowns and labor disputes or other unanticipated difficulties or interruptions; the possibility of cost overruns or unanticipated expenses in the work program; and other factors identified in the Company's SEC filings and its filings with Canadian securities regulatory authorities. Forward-looking statements are based on the beliefs, opinions and expectations of the Company's management at the time they are made, and other than as required by applicable securities laws, the Company does not assume any obligation to update its forward-looking statements if those beliefs, opinions or expectations, or other circumstances, should change.

Cautionary note to U.S. investors concerning estimates of reserves and resources: This press release and the documents referenced in this press release use the terms "reserve" and "mineral resource", which are terms defined under Canadian National Instrument 43-101 and the Canadian Institute of Mining and Metallurgy Classification system. Such definitions differ from the definitions in U.S. Securities and Exchange Commission ("SEC") Industry Guide 7. Under SEC Industry Guide 7 standards, a "final" or "bankable" feasibility study is required to report reserves, the three-year historical average price is used in any reserve or cash flow analysis to designate reserves and the primary environmental analysis or report must be filed with the appropriate governmental authority. Mineral resources are not mineral reserves and do not have demonstrated economic viability. The SEC normally only permits issuers to report mineralization that does not constitute SEC Industry Guide 7 compliant "reserves" as in-place tonnage and grade without reference to unit measures. The references to a "resource" in this press release and the documents referenced in this press release are not normally permitted under the rules of the SEC. It cannot be assumed that all or any part of mineral deposits in any of the above categories will ever be upgraded to Guide 7 compliant reserves. Accordingly, disclosure in this press release and in the technical reports referenced in this press release may not be comparable to information from U.S. companies subject to the reporting and disclosure requirements of the SEC.

EXHIBIT 6

EX-99.1 2 newsrelease.htm PRESS RELEASE, DATED SEPTEMBER 17, 2013

MIDWAY GOLD

IMPRESSIVE RUN-OF-MINE TEST RESULTS AT MIDWAY'S PAN PROJECT, NEVADA

September 17, 2013

Denver, Colorado – Midway Gold Corp. ("Midway" or the "Company") (MDW:TSX, MDW:NYSE-MKT) reports positive preliminary results from metallurgical test work on run-of mine (ROM) bulk samples at Pan. Observed gold recoveries of 92% after 58 days indicate gold recovery of the South Pan ore is not sensitive to crush size. These metallurgical results suggest the South Pan ore can be processed with ROM leaching and that a crusher installation and spend at Pan can be deferred for at least 18 to 24 months.

Ken Brunk, President and CEO of Midway states, "We are very excited by these new ROM test results. We saw indications in the 2010 pre-feasibility and 2011 feasibility column testing of South Pan ores that gold recovery seemed insensitive to crush size. However, due to permitting constraints we were unable to begin comprehensive ROM test work. Therefore, we elected to include crushers in the initial project, as we will need them for the North Pit ore regardless of South Pit design factors.

Since the November 2011 feasibility, we have continued to permit and test bulk samples of larger and larger particle size with favorable results. Our permitting team obtained permission from the BLM to conduct a trial blast in July at South Pan from which we could obtain true ROM ore for testing. Representative samples of the blasted ore were sent to Kappes-Cassidy & Associates (KCA) laboratories in Reno for leaching in large columns to simulate a ROM leaching operation. The duplicate 4 feet diameter columns are stacked with approximately 20,000 pounds of ROM ore each to a height of 15 feet and have already resulted in a gold recovery of 92% at 58 days. These excellent leaching results and leach kinetics are due to the fact that the rock is porous and permeable. In other words, the rock readily allows the leach solution to flow through the ore and to easily dissolve the gold.

The results of the large column tests lead the project team and management to conclude that ROM leaching is a viable option for South Pan. The excellent extraction of gold from the large-scale bulk sample also supports retaining the 85% recovery that is now confirmed by all the detailed test work to date. The size analysis of the large column test feed material is consistent with, and perhaps a bit coarser, than that from my experience with other ROM leaches on Carlin style formations. Midway will work with these large column results and use them to further refine our Pan project. Continued optimization of the mine plan will occur to ultimately dictate when the crushers will be needed."

Test Details

Figure 1 below is a graph showing the gold recoveries from feasibility study and pre-feasibility study metallurgical test work. It shows that the percent gold recovery is essentially the same for particle sizes from one-half inch in size to 7 inches in size. These results were obtained from column leaching of drill core and from bulk samples gathered from backhoe-dug trenches on site.

Figure 2 shows the current in-progress gold recovery from the ROM tests that are being run at KCA labs. These tests are still leaching and will remain for approximately another 60 days to allow for the collection of additional design information. The particle size of the ore in the test columns ranges from 24 inches to less than 0.1 inches. The P-80 is 7.3 inches. This means that 80% of the ore is 7.3 inches or less in size. Also, only 15% the rock in the test columns is less than 0.1 inches. Test results are preliminary and final results could vary once final tailings are assayed.

Other Project Updates
The Pan project is in the final stages of the NEPA process. A Record of Decision is expected before year-end, which will be followed 30 days later by construction. Midway is targeting startup of operations in the third quarter of 2014.

Midway has engaged Sierra Partners as a financial advisor to evaluate and guide the Company in putting in place the balance of the financing needed to construct the Pan project. At the end of the second quarter the Company had a cash position of $65.8M and expects to have the remaining financing in place by year-end.

Figure 1. Pan South Area Gold Recoveries vs. Crush Size

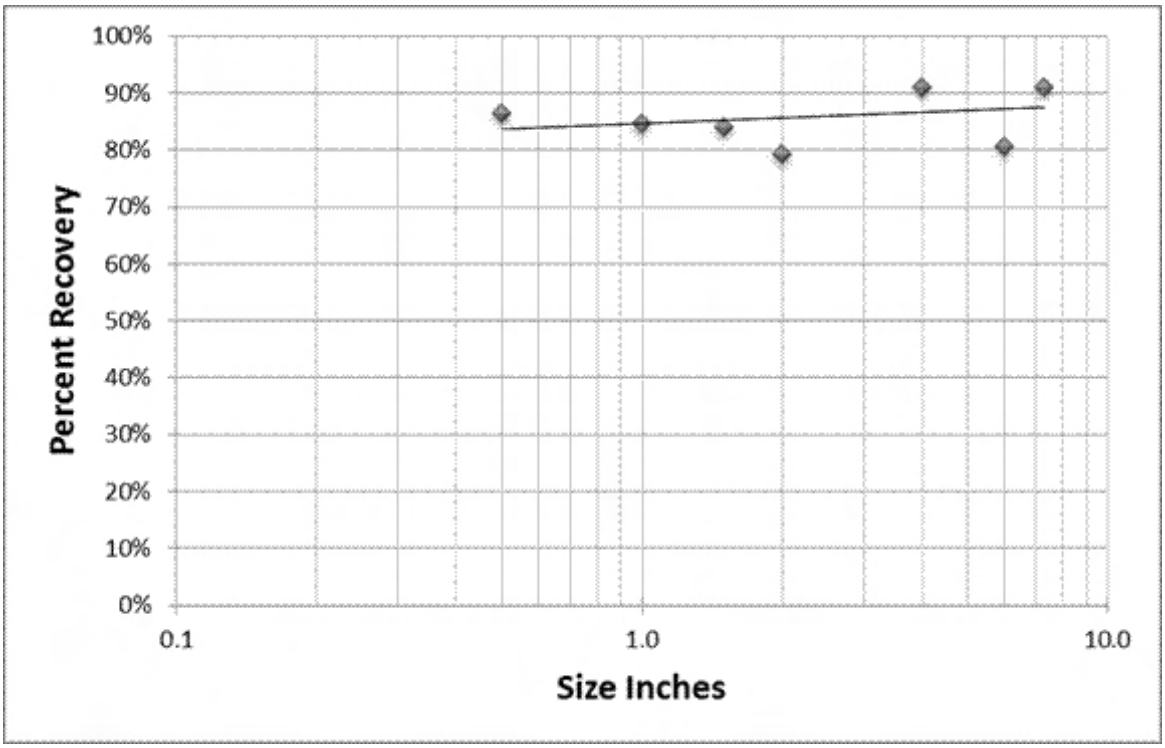
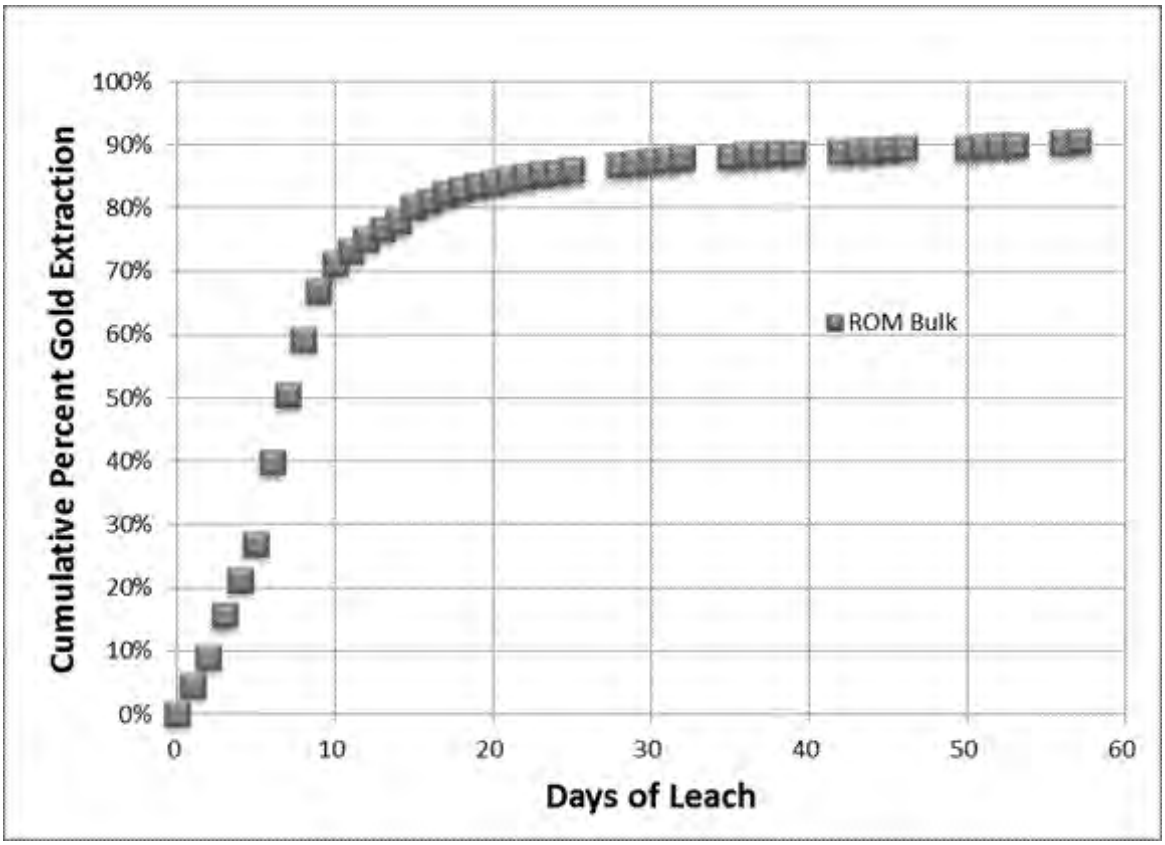


Figure 2. Recovery vs. Leach Cycle in Days



Pan Gold Project, Nevada

The Pan project is an oxidized, Carlin-style gold deposit mineable by shallow open pit methods and treatable by heap leaching. A Feasibility Study was completed in November 2011. It shows the NPV of the project is robust at a range of gold prices, ranging from $123 million at $1,200/oz gold to $344 million $1,900/oz gold. The IRR grows from 32% to 79% using the same gold price range. Both are after-tax figures (see press release dated November 15, 2011.)

This release has been reviewed and approved for Midway by Deepak Molhatra (PhD Mineral Economics, MS Metallurgical Engineering), President of Resource Development, Inc., and a "qualified person" as that term is defined in NI 43-101.

ON BEHALF OF THE BOARD
"Kenneth A. Brunk"
Kenneth A. Brunk, Chairman, President and CEO

About Midway Gold Corp.

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EXHIBIT 7

EX-99.1 2 newsrelease.htm PRESS RELEASE, DATED DECEMBER 20, 2013

MIDWAY GOLD COMPLETES PERMITTING – RECEIVES RECORD OF DECISION

PAN PROJECT, NEVADA

December 20, 2013

Denver, Colorado – Midway Gold Corp. ("Midway" or the "Company") (MDW:TSX, MDW:NYSE-MKT) announces receipt of a December 20, 2013 signed Record of Decision (ROD) on the Final Environmental Impact Statement (EIS) for the Pan gold project, White Pine County, Nevada. The ROD signifies full completion of the required NEPA and EIS process. The ROD represents the final step in the federal permitting process and allows construction to begin.

"We are permitted at Pan. This is truly a groundbreaking accomplishment for Midway Gold and a great Christmas present for all who have been a part of the Midway story over the past few years," said Ken Brunk, Midway's President & CEO. "We advanced from the Notice of Intent to the Record of Decision in a record 20 months. We would like to thank everyone here at Midway, especially our permitting team, for a job very well done. We respect the professionalism of the cooperating agencies and their effectiveness to complete the process in a timely manner. We would also like to thank the local communities and, of course, our shareholders for the endless support. We are very excited to have completed this permitting process and are ready to begin construction!"

What is the NEPA and the EIS Process?

The Environmental Impact Statement (EIS) for the Pan project is required under the National Environmental Policy Act (NEPA). The act sets up procedural requirements for all federal governmental agencies to prepare environmental assessments and environmental impact statements in response to proposed major activities on federal lands. The Pan project is on federal land administered by the Bureau of Land Management (BLM). Therefore, NEPA requires the BLM to prepare an EIS to analyze potential environmental consequences of the planned project and any reasonable alternatives. Midway has advanced through baseline studies, the Draft EIS,

the Final EIS, and has now completed the process with the **Record of Decision**. Numerous state permits are also required and have been obtained from various state agencies.

Pan Gold Project, Nevada

The Pan project is a low cost, oxidized, Carlin-style gold deposit mineable by shallow open pit methods and treatable by heap leaching. A Feasibility Study was completed in November 2011. It shows the NPV of the project is robust at a range of gold prices, ranging from $123 million at $1,200/oz gold to $344 million $1,900/oz gold. The IRR grows from 32% to 79% using the same gold price range. Both are after-tax figures (see press release dated November 15, 2011.)

ON BEHALF OF THE BOARD
"Kenneth A. Brunk"
Kenneth A. Brunk, Chairman, President and CEO

About Midway Gold Corp.

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EXHIBIT 8

EX-99.1 2 newsrelease.htm PRESS RELEASE, DATED JANUARY 15, 2014

MIDWAY BREAKS GROUND

AT PAN GOLD PROJECT, NEVADA

January 15, 2014

Denver, Colorado – Midway Gold Corp. ("Midway" or the "Company") (MDW:TSX, MDW:NYSE-MKT) holds a formal groundbreaking ceremony at the site of the Pan Project, White Pine County, Nevada. The project is fully permitted and construction is underway with completion estimated for Q3 2014. A Record of Decision from the BLM signed on December 20, 2013 completed the EIS process. Bonding for construction and mining is in place. Equipment has been mobilized to site and earth works are in progress. The power line to site has been permitted and construction has begun.

“This groundbreaking ceremony is the kick off for building the Pan mine,” said Ken Brunk, Midway’s President & CEO. “It is an opportunity for us to acknowledge those who drove the process from exploration through permitting and development. Many times, we have expressed our thanks to our permitting team and today is one more valuable opportunity to do so. Without their hard work and commitment to both excellent science and schedule we would not be where we are today. Additionally, we are proud to recognize Mr. Alan Branham, former president and CEO of Midway, for his leadership in acquiring the Pan project for Midway and for his vision that Pan would one day become a mine.”

Pan Gold Project, Nevada

The Pan project is a low cost, oxidized, Carlin-style gold deposit mineable by shallow open pit methods and treatable by heap leaching. A Feasibility Study was completed in November 2011. It shows the NPV of the project is robust at a range of gold prices, ranging from $123 million at $1,200/oz gold to $344 million at $1,900/oz gold. The IRR grows from 32% to 79% using the same gold price range. Both are after-tax figures (see press release dated November 15, 2011.)

ON BEHALF OF THE BOARD
"Kenneth A. Brunk"

Kenneth A. Brunk, Chairman, President and CEO

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EXHIBIT 9

MIDWAY GOLD

CORPORATE HEADQUARTERS
8310 S Valley Highway, Suite 280, Englewood, CO 80112
720.979.0900

MIDWAY FORECASTS CAPITAL REDUCTIONS
PAN PROJECT, NEVADA

April 24, 2014

Denver, Colorado – Midway Gold Corp. ("Midway" or the "Company") (MDW:TSX, MDW:NYSE-MKT) is pleased to provide an update on recent developments and scope changes at the Pan Project including potential reduction in pre-production capital requirements. Construction at Pan remains on-track for initial production in 2014.

"We are excited by our progress at Pan," said Ken Brunk CEO and President. "Our team has worked diligently during the last few months to advance our first project through construction while also finding ways to cut our costs. We believe we can significantly reduce our borrowing needs by employing two significant scope changes to the project—the utilization of a contract miner for early years of mining, and leaching the South Pan ore body by run-of-mine methods thereby deferring the purchase and installation of a crusher plant. We are also fortunate to have had our construction contracts that have been let to date come in at or very close to our feasibility estimates. With these recent reductions in initial capital requirements and our current strong cash balance, we look forward to completing project financing within the coming weeks. We are pleased that the third party engineers that have evaluated the project on behalf of potential lenders have found no "fatal flaws" in any of these approaches or with the project."

RECENT PROJECT SCOPE CHANGES

Transition to Contract Mining

Midway has elected to pursue contract mining in the initial years at Pan. Midway had planned to pursue owner mining (as referenced in the 2011 Feasibility Study). However, conditions in the mining industry have led to an increasingly attractive price environment for contract mining. A mining contractor will provide all mining-related services, manpower and equipment for the Pan Project. They will be directly responsible for drilling, blasting, loading, and hauling ore to the leach pad for processing by Midway. Contract mining reduces the initial capital requirements for Pan by deferring purchase of the planned mine fleet. It also minimizes initial start-up and operational risks.

Elimination of Crushing in Initial Mine Years

The Company has elected to defer purchase and installation of crushers for the first 2-3 years of the mine life at Pan. The November 2011 Feasibility Study included a 2-stage crushing circuit at South Pan. Detailed metallurgical tests confirm this ore responds favorably to run-of-mine leaching. Deferral of crushing circuit equipment and installation is expected to reduce initial capital expenditures. There is also potential to lower operating costs associated with the deferral of the crushers. Midway is currently evaluating the extent of such potential savings.

PROJECT FINANCING

Midway is currently well funded with $48M in cash as of December 31, 2013. Construction progress remains on track for 2014 gold production at Pan. Project financing is well advanced and expected to be complete in the second quarter of 2014. Financing is being designed to retain gold price upside for our shareholders. Midway is striving to maximize returns on capital invested and return on equity, and has evaluated a variety of debt financing alternatives, both traditional and non-

traditional. In depth, third party due diligence for the Pan project has resulted in a determination of no "fatal flaws" for prospective lenders.

Pan Gold Project, Nevada

The Pan project is a low cost, oxidized, Carlin-style gold deposit mineable by shallow open pit methods and treatable by heap leaching.

This release has been reviewed and approved for Midway by Rick Moritz a "qualified person" as that term is defined in NI 43-101.

ON BEHALF OF THE BOARD

"Kenneth A. Brunk"

Kenneth A. Brunk, Chairman, President and CEO

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EXHIBIT 10

EX-99.1 2 newsrelease.htm PRESS RELEASE, DATED MAY 22, 2014

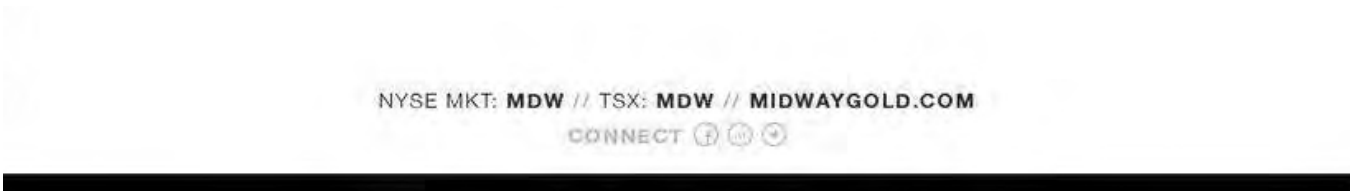
MIDWAY EXECUTES COMMITMENT LETTER FOR US$55 MILLION PROJECT FINANCE FACILITY WITH COMMONWEALTH BANK OF AUSTRALIA PAN PROJECT, NEVADA

May 22, 2014

Denver, Colorado – Midway Gold Corp. ("Midway" or the "Company") (MDW:TSX, MDW:NYSE-MKT) announces the signing of a binding commitment letter with Commonwealth Bank of Australia ("Commonwealth Bank") for a US$55 million 3-year senior secured project finance facility (the "Loan Facility") for the development of the Company's 100%-owned Pan Gold Mine in White Pine County, Nevada. Closing is expected to occur by the end of June 2014.

The Loan Facility is comprised of two tranches, a project finance facility of US$45 million plus a cost overrun facility of US$10 million. Advances under the project finance facility will bear interest at LIBOR plus 3.5% to 3.75%, and advances under the cost overrun facility will bear interest at the project finance facility rate plus 2%.

Ken Brunk, President and CEO of Midway, states, "We are pleased to be able to announce this major milestone for our Company and to have Commonwealth Bank as a new financial partner as we work toward gold production and positive cash flow. Our progress to date through permitting and financing speaks to the high quality of our first project and we look forward to achieving the highest return we can for our shareholders. We would like to thank our employees for their continued hard work and our shareholders and local community members for their support through this extensive process. We have committed approximately $21 million to project construction to date and the build out is about 20% complete."



May 19, 2014

Additional Loan Facility Information
The Loan Facility is subject to completion of loan and security documentation and customary conditions precedent to closing, and will be secured by substantially all of the assets of the borrower (MDW Pan LLP, which is comprised solely of the Pan Project) and its affiliates. Upon achieving economic completion and meeting certain other requirements, security will be limited to the assets of MDW Pan LLP and guarantees from the Company and an affiliate. Closing is expected to occur at the end of June 2014.

A condition precedent to draw on the loan is the establishment of an un-margined hedging program through Commonwealth Bank, which provides downside protection for the Company's debt. This program will cover a period of less than two years commencing approximately six months after the planned start of production and is expected to comprise an estimated 11% of the Project's anticipated life-of-mine production based on the current reserve base (See November 2011 Resource Estimate) assuming a spot gold price of approximately $1300/oz.

About Pan
The Pan project is a low cost, oxidized, Carlin-style gold deposit mineable by shallow open pit methods and treatable by heap leaching. A feasibility study was completed in November 2011. The project is fully permitted (December 2013) and is currently under construction.

This release has been reviewed and approved for Midway by Dave Mosch, Corporate Mining Engineering at Midway and a "qualified person" as that term is defined in NI 43-101.

May 19, 2014

ON BEHALF OF THE BOARD

"Kenneth A. Brunk"
Kenneth A. Brunk, Chairman, President and CEO

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EXHIBIT 11

TOLLING AGREEMENT

This Tolling Agreement (the "Agreement") is made and entered into as of June 2, 2016 (the "Effective Date"), by and between Daniel E. Wolfus and George Hawes, as well as the individuals and entities which have assigned their claims to Mr. Wolfus or Mr. Hawes, respectively (collectively referred to herein as "Plaintiffs") on the one hand, and Kenneth A. Brunk, Richard Moritz, Brad Blacketor, Timothy Haddon, Martin Hale, Trey Anderson, Richard Sawchak, Frank Yu, John Sheridan, Roger Newell, Rodney Knutson, and Nathaniel Klein (referred to jointly and/or severally as the "Midway Directors and Officers") on the other hand. The Plaintiffs and the Midway Directors and Officers are collectively referred to herein as the "Parties," or individually as a "Party."

WHEREAS, on March 29, 2016 counsel for the Plaintiffs sent a draft complaint to the Midway Directors and Officers setting forth a number of claims related to the public filings and management of Midway Gold (the "Draft Complaint"), and

WHEREAS, the Parties deem it to be in their mutual benefit that Plaintiffs' claims, including, but not limited to, those set forth in the Draft Complaint, and any counterclaims available against the Plaintiffs, not be asserted in litigation at the present time, and

WHEREAS, the Parties desire to encourage resolution and/or such further review or disposition of Plaintiffs' Claims and/or any Claims by the Midway Directors and Officers as may result in a confidential settlement and are willing to make the stipulations, covenants and agreements hereinafter set forth in order to defer and postpone the commencement of litigation, and

WHEREAS, the Parties desire that for the period of this Agreement, they should be able to consider issues relating to the possibility of settling disputes without regard to the time constraints that exist because of any future expiration of any applicable statute of limitations;

NOW, THEREFORE, in consideration of the mutual agreements hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby covenant and agree as follows:

1. As used in this Agreement, the following terms shall have the following meanings:

   a) "Claims" shall mean any and all claims and/or causes of action, if any, known or unknown, Plaintiffs may have against the Midway Directors and Officers in connection with their participation in the public filings by and the management and operation of Midway Gold and its affiliated entities including, but not limited to, those set forth in the Draft Complaint, and any claims and/or causes of action, if any, known or unknown, the Midway Directors and Officers may have against Plaintiffs in connection with Plaintiffs' conduct, management, operation, and/or purchases or sales or securities of Midway Gold and its affiliated entities.
   b) "Tolling Period" shall mean the period from and including the Effective Date of this Agreement until and including the Expiration Date (as defined below) of this Agreement.
   c) "Expiration Date" shall mean the earlier of **September 25, 2016**, or 30 days from the date that written notice of termination of this Agreement has been served by either of the Parties on the other in accordance with paragraph 10 of this Agreement.
   d) "Timing Defenses" shall mean and include, and shall be limited to, any affirmative defenses to any Party's Claims that another Party may have to the extent based upon (1) any statute of limitations, (2) laches, and/or (3) any failure by a Party to institute or commence litigation or other legal proceedings within some specified period, before a specified date, or before the happening of a specified event.

2. The Plaintiffs and the Midway Directors and Officers stipulate, covenant and agree that Timing Defenses applicable to the Claims shall be tolled during the Tolling Period.

3. The Plaintiffs and the Midway Directors and Officers stipulate, covenant, and agree that this Agreement shall have no effect on any Timing Defenses that may have lapsed prior to the Effective Date, and that all time periods prior to the Effective Date and after the Expiration Date

(and prior to the filing of any lawsuit or other legal proceeding by Plaintiffs subject to paragraph 5 of this Agreement) shall be included in the calculation of and running of any applicable Timing Defenses. Nothing contained herein shall preclude any Party from asserting any Timing Defenses to the extent that such defenses already exist as of the Effective Date, and nothing herein shall be deemed to revive any Claims barred as of the Effective Date.

4. The Parties stipulate, covenant, and agree that, by executing and entering into this Agreement, the Parties are not waiving or otherwise impairing by estoppel or any other means, right and ability to raise any Timing Defenses available to them for the periods prior to the Effective Date and after the Expiration Date (and prior to the filing of any lawsuit or other legal proceeding by Plaintiffs subject to paragraph 5 of this Agreement).

5. The provisions of this Agreement comprise all of the terms, conditions, agreements and representations of the Parties respecting the tolling of the Timing Defenses. This Agreement may not be altered or amended except by written agreement executed by both the Plaintiffs and the Midway Directors and Officers. The Parties hereby agree that terms of this Agreement have not been changed, modified, or expanded by any oral agreements or representations entered into or made prior to or at the execution of this Agreement.

6. The Parties hereto acknowledge that each of them has had the benefit of counsel of their choice and has been offered an opportunity to review this Agreement with chosen counsel. The Parties hereto further acknowledge that they have, individually or through their respective counsel, participated in the preparation of this Agreement, and it is understood that no provision hereof shall be construed against any party hereto by reason of either party having drafted or prepared this Agreement.

7. This Agreement may be executed in one or more original, scanned or facsimile counterparts, each of which shall be deemed an original, but also which together will constitute one and the same instrument.

8. This Agreement shall terminate on the Expiration Date as provided in paragraph 1(c) above, unless extended in writing by the parties to be bound.

9. This Agreement contains the entire agreement between the Parties with respect to its subject matter, and no statement, promise, or inducement made by any of the parties or agent of the parties that is not contained in this Agreement shall be valid or binding, and this Agreement shall not be enlarged, modified, or altered except in writing signed by the parties.

10. This Tolling Agreement shall be binding upon and inure to the benefit of the parties, their predecessors, successors, and assigns, if any.

11. This Agreement shall be construed in accordance with and be governed by the internal laws, other than choice of laws, of the State of Nevada.

12. Either the Plaintiffs or the Midway Directors and Officers may terminate this Agreement, effective 30 days after the date of serving a written notice of termination, by serving notice of termination by letter to the other party. Such notice letter shall be served by email transmission, followed by the delivery of an original of the notice letter by United States certified mail, return receipt requested, to the following persons at the following addresses:

If to the Plaintiffs:

Justin T. Toth
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, UT 84145-0385
Email: jtoth@rqn.com

If to the Midway Directors and Officers:

Holly Stein Sollod
Holland & Hart LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202-3979
Email: hsteinsollod@hollandhart.com

Eric B. Liebman
Moye White LLP
16 Market Square 6th Floor
1400 16th Street
Denver CO 80202
Email: eric.liebman@moyewhite.com

Mark Ferrario
Chris Miltenberger
Greenberg Traurig LLP
Suite 400 North
3773 Howard Hughes Parkway
Las Vegas NV 89134

13. On or after the Expiration Date of this Agreement, the Parties shall have the right to file and pursue any and all Claims and to seek any and all legal remedies against any other Party that may be available to them, if any, and any Party shall be entitled to assert any Timing Defenses or other defenses, if any, subject to the terms of this Agreement.

14. Nothing in this Agreement shall be construed as an admission or denial by any of the Parties as to the merits of any Party's Claims against any other Party or the merits of any Party's defenses to any Claims.

15. Neither the Parties nor any of their agents, witnesses, or attorneys will mention or allude to this Agreement, its terms, its execution, or the existence of any Tolling Period in any way, directly or indirectly, before a jury or any fact finder in any proceeding for any purpose. The terms of this paragraph will survive termination of this Agreement.

PLAINTIFFS:

Holly Stein Sollod
Holland & Hart LLP
555 Seventeenth Street, Suite 3200
Denver, CO 80202-3979
Email: hsteinsollod@hollandhart.com

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PLAINTIFFS:

DANIEL E. WOLFUS, individually and as assignee of The Wolfus Revocable Trust, Christine Wolfus and Daniel Wolfus, and Devoney Wolfus and Stephanie Wolfus

GEORGE HAWES, individually and as assignee of Christina Hawes-Mohr, Kathleen Hawes, Ian Hawes, and Brendan Hawes

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MIDWAY DIRECTORS AND OFFICERS:

KENNETH A. BRUNK	RICHARD SAWCHAK
RICHARD MORITZ	FRANK YU
BRAD BLACKETOR	JOHN SHERIDAN
TIMOTHY HADDON	ROGER NEWELL
MARTIN HALE	RODNEY KNUTSON
TREY ANDERSON	NATHANIEL KLEIN

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-B DEPT. NO.: XXVII **D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendants Richard D. Moritz ("Moritz"), Bradley J. Blacketor ("Blacketor"), Timothy Haddon ("Haddon"), Richard Sawchak ("Sawchak"), John W. Sheridan ("Sheridan"), Frank Yu ("Yu"), Roger A. Newell ("Newell") and Rodney D. Knutson ("Knutson") (collectively, the

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

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

DATED this 16th day of March, 2018.

By __/s/ David J. Freeman_____
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David J. Freeman, Esq.
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9555 Hillwood Drive, 2nd Floor
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Holly Stein Sollod, Esq. *(Admitted Pro Hac Vice)*
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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL:

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

DATED this __ day of March, 2018.

By __/s/ David J. Freeman_____
Robert J. Cassity, Esq.
David J. Freeman, Esq.
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9555 Hillwood Drive, 2nd Floor
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

I.

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

II.

FACTUAL BACKGROUND[2]

A. The Parties.

Non-party Midway Gold Corp. ("Midway") was a publicly traded Canadian Corporation incorporated under the Company Act of British Columbia[3] with its principal executive offices located in Englewood, Colorado.[4] SAC ¶ 23. Midway was engaged in the business of exploring and mining gold, primarily from mines located in Nevada and Washington. *Id.* ¶ 30. Midway filed for Chapter 11 bankruptcy on June 22, 2015. SAC ¶ 95.

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

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

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

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

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

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10, 2009, attached hereto as **Exhibits "I"** and **"J,"** respectively.[5] As of May 1, 2012, Plaintiff and his family owned over 1,629,117 shares of Midway common stock. SAC ¶ 29.[6]

B. The 2011 Pan Mine Feasibility Study.

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

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

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

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

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

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

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C. Midway's Alleged Misrepresentations and Omissions.

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

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

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

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

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

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

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

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

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

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

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

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

[11] *See supra* n.5.

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by purchasing 1,000,000 shares directly from Midway at a purchase price of $0.86/share for $860,000 Canadian Dollars ($783,778 USD). *Id.* ¶¶ 89, 107.[12]

E. The Midway Bankruptcy.

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

III.

LEGAL ARGUMENT

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

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

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

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

Rule 12(b)(1) allows a party to seek dismissal of a complaint for lack of subject matter jurisdiction. NRCP 12(b)(1); *Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d 982, 983 (2000). The burden of proving subject matter jurisdiction lies with the party asserting subject matter jurisdiction, the plaintiff or petitioner in an action. *Id.* A motion to dismiss for lack of subject matter jurisdiction is proper "when a lack of jurisdiction over the subject matter [] appears on the face of the pleading." *Girola v. Roussille,* 81 Nev. 661, 663 (1965); *see also Nevada v. United States*, 221 F. Supp. 2d 1241, 1248 (D. Nev. 2002).

2. Nevada Recognizes the Internal Affairs Doctrine

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Despite Plaintiff's attempt to replead his claims, the SAC still alleges diminution in value of Plaintiff's stock holdings as a result of the Defendants' purported concealment of corporate mismanagement, which diminution would have been suffered by every other Midway shareholder. It is undisputed that a diminution in stock value is an injury that does not give a stockholder standing to sue on his own behalf.[19] In such a case, the wrong is "entirely derivative, since [a]ny devaluation of stock is shared collectively by all the shareholders, rather than independently by the plaintiff or any other individual shareholder." *Lee v. Marsh & McLennan Companies, Inc.*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 24, 2007 WL 4303514 (N.Y. Sup. Ct. 2007);[20] *see also In re Amerco Derivative Litig.*, 127 Nev. 196, 226, 252 P.3d 681, 702 (2011) (shareholders in derivative action alleged that Board's actions prevented corporation from "realizing the amount of profit it would have obtained" causing the company ***and*** shareholders to suffer harm).

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

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

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

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

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

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

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

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

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

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

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

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

2. Plaintiff Fails to Allege Any Misrepresentation "In Connection with a Purchase or Sale of a Security."

a. No Purchase or Sale Occurred in 2014.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. (emphasis added).

a) Fraud.

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

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

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

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

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

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

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

b) Negligent Misrepresentation.

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

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

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

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

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

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

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

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

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

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

The SAC failed to remedy the personal jurisdiction deficiencies that plagued the prior complaint.[26] Significantly, Plaintiff is not a Nevada resident; Midway is not a Nevada corporation; Midway is not headquartered in Nevada; and the D&O Defendants[27] do not reside in Nevada, which prompts the question: ***Why was this matter filed in Nevada?***[28] The only new allegations in the SAC relating to personal jurisdiction are found in paragraphs 8-19, which assert self-serving conclusions of law that "while with Midway, [each of the defendants'] contacts with Nevada were so continuous and systematic as to render him at home in Nevada." SAC ¶¶ 8-19. However, these factually deficient, conclusory statements do not and cannot establish personal jurisdiction.

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

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

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

[28] When posed with the same question during the hearing on Defendants' Motions to Dismiss, Plaintiff's counsel countered, "Well, why not Nevada?" Hr'g Tr. at 22:22 (Nov. 1, 2017). Plaintiff's counsel argued he could bring the suit wherever he wanted. *See id.* at 23:5-7 ("And it's kind of our choice on where to bring the case. Even if California would be slightly better, but Colorado would be arguably slightly better, that doesn't mean we can't bring the claim in Nevada. And that's what we did.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV.

CONCLUSION

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

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

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

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

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

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

DATED this 16th day of March 2018.

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

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

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

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EXHIBIT A

EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-C DEPT. NO.: X **DECLARATION OF RODNEY D. KNUTSON IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

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

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

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

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

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

5. I do not have an office in Nevada.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED this 14th day of August 2017

Rodney D. Knutson

RODNEY KNUTSON

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EXHIBIT B

EXHIBIT B

DEC
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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-C DEPT. NO.: X **DECLARATION OF BRADLEY J. BLACKETOR IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED this 15th day of August 2017

BRADLEY J. BLACKETOR

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EXHIBIT C

EXHIBIT C

DEC
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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-C DEPT. NO.: X **DECLARATION OF RICHARD SAWCHAK IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

I, Richard Sawchak, hereby declare as follows:

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

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

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

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

5. I do not have an office in Nevada.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED this 14 day of August 2017

RICHARD SAWCHAK

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EXHIBIT D

EXHIBIT D

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-C DEPT. NO.: X **DECLARATION OF JOHN W. SHERIDAN IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

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

1. I am a citizen of Canada.

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

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

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

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

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

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

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

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

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

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

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

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL E. WOLFUS,

Appellant,

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,

Respondents,

Supreme Court No. 80613

District Court No. A-17-756971-B

DANIEL E. WOLFUS,

Appellant,

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,

Respondents,

Consolidated with:

Supreme Court No. 80949

Docket 80613 Document 2020-34595

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

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

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

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

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

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

DATED this 14th day of August 2017

JOHN W. SHERIDAN

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EXHIBIT E

EXHIBIT E

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25.	CASE NO.: A-17-756971-C DEPT. NO.: X **DECLARATION OF TIMOTHY HADDON IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

Defendants.

I, Timothy Haddon, hereby declare as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED this 9th day of August 2017

TIMOTHY HADDON

EXHIBIT F

EXHIBIT F

DEC
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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-C DEPT. NO.: X **DECLARATION OF ROGER A. NEWELL IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ROGER A. NEWELL

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EXHIBIT G

EXHIBIT G

DEC
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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-C DEPT. NO.: X **DECLARATION OF RICHARD D. MORITZ IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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EXHIBIT H

EXHIBIT H

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EIGHTH JUDICIAL DISTRICT COURT DISTRICT OF NEVADA

DANIEL E. WOLFUS, Plaintiff, ~~VS~~vs.	CASE NO.: A-17-756971-B DEPT NO.: 10 ~~CASE NO.: A-17-756971-C~~ ~~DEPT NO.: 1~~ SECOND AMENDED COMPLAINT FOR DAMAGES
KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	~~FIRST AMENDED COMPLAINT FOR DAMAGES~~

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

NATURE OF THE CASE

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

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

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

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

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

5. Wolfus alleges five causes of action.

A. The First Cause of Action is for violation of California's Corporate Securities Act of 1968, California Corporations Code §§ 25000 et seq, (the "Act"). Section 25401 makes it unlawful for Midway to sell its common stock in California "by means of any written or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading." Section 25501 states Wolfus may recover personally, "the price at which the security was bought plus interest at the legal rate from the date of purchase." Wolfus purchased shares from Midway on January 23, 2014 and again on September

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

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

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

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

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

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

PARTIES

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

~~2.~~8. Defendant Kenneth A. Brunk ("Brunk") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado. While with Midway, Brunk's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~3.~~9. Defendant Richard D. Moritz ("Moritz") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado. While with Midway, Moritz's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~4.~~10. Defendant Bradley J. Blacketor ("Blacketor") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado. While with Midway, Blacketor's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~5.~~11. Defendant Timothy J. Haddon ("Haddon") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Colorado. While with Midway, Haddon's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~6.~~12. Defendant Martin M. Hale, Jr., ("Hale") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of New York. While with Midway, Hale's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~7.~~13. Defendant Trey Anderson ("Anderson") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of New York. While with Midway, Anderson's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

~~8.~~14. Defendant Richard Sawchak ("Sawchak") is an individual who Wolfus is informed and believes and thereon alleges was and now is a resident of Virginia. While with

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

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

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

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

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

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

~~13.~~19. Defendant Nathaniel E. Klein ("Klein") is an individual who Wolfus is

informed and believes and thereon alleges was and now is a resident of New York. While with Midway, Klein's contacts with Nevada were so continuous and systematic as to render him at home in Nevada.

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

~~15.~~21. The true names, identities and capacities of defendants DOES 1 through 25, inclusive are presently unknown to Wolfus who is informed and believes and thereon alleges that such defendants are liable to Wolfus in some manner presently undetermined as a result of the matters complained of herein. Wolfus will seek leave of Court, if necessary, to amend this First Amended Complaint when the true names, identities and capacities of said fictitiously-named defendants are identified.

JURISDICTION AND VENUE

~~16.~~22. Among other reasons, jurisdiction and venue are proper in the District Court of Nevada, County of Clark in that Defendants, or at least one of them, at all relevant times resided in and still resides in Clark County, Nevada.

COMMON ALLEGATIONS

~~17.~~23. Midway ~~Gold Corp. ("Midway")~~ is a Canadian corporation incorporated under the Company Act of British Columbia on May 14, 1996 under a prior name which was changed to its current name on July 10, 2002. Midway became a reporting issuer in the Province of British Columbia on May 16, 1997 and shortly thereafter its common shares were listed on the Vancouver Stock Exchange, the predecessor of the TSX Venture Exchange. Midway subsequently became a reporting issue in the Province of Alberta and at all relevant times, Midway was a reporting company under the Securities Exchange Act of 1934 (the "Exchange Act"). Also during all relevant times, Midway's common shares were listed on both the NYSE Amex exchange and Tier 1 of the TSX.V under the symbol. As a reporting company under the Exchange, Midway has been required to file periodic reports with the Securities and Exchange Committee (the "SEC"). Those reports are public documents which may be accessed over the internet at

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

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

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

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

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

21.27. In 2009, Wolfus became the Chairman of the Board and the Chief Executive Officer of Midway, serving in both capacities until May 18, 2012 when he was replaced by Brunk. As an officer of Midway, Wolfus ceased to be a member of any of the Board's committees.

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

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

~~23.~~29. Wolfus began purchasing common stock of Midway in the open market in February 2008. As of May 1, 2012, Wolfus and his assignors owned 1,629,117 shares of Midway common stock. In January 2014, Wolfus and/or his assignors acquired an additional 200,000 shares of Midway common stock. In September 2014, Wolfus and/or his assignors acquired an additional 1,000,000 shares of common stock and as of December 23, 2014, and after the sale of some shares, the combined shareholdings of Wolfus and/or his assignors were 2,402,251 shares of Midway common stock. Certain of these share purchases were made directly from Midway after Wolfus ceased to be an officer or director of Midway and were made pursuant to the exercise of stock options previously granted to Wolfus.

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

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

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

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

mountain range in western White Pine County, Nevada, approximately 22 miles southeast of Eureka, Nevada, and 50 miles west of Ely, Nevada.

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

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

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

~~30.~~36. In May, 2010, Brunk was hired by Midway as its President and Chief Operating Officer with the primary assignment to bring the Pan project into production. In that capacity, Brunk was required to personally oversee both mining activities in Nevada and permitting activities in Nevada and frequently was in Nevada to perform these duties. Brunk served in that capacity until May of 2012, at which time he also became the Chairman of the Board and Chief Executive Officer of Midway, replacing Wolfus in those positions. Brunk continued as Chairman of the Board until August 2014 and as Chief Executive Officer and President until December 2014. At all times Brunk was a director of Midway, he was also a member of Midway's Disclosure Committee. Midway reported in public filings that Brunk holds a degree in Metallurgical Engineering from Michigan Technological University and throughout his career had conducted numerous feasibility studies and has been responsible for designing, constructing, staffing and operating multiple mining operations and improving process efficiencies around the

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

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

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

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

~~34.~~40. On April 4, 2011, Midway issued a press release filed with the SEC in which it reported that it had secured a "positive Prefeasibility Study" for the Pan ~~Project~~project. Midway also described in significant detail the method and manner by which Midway intended to mine the gold using conventional heap leaching methods prior to which the ore would be crushed by the primary in-pit mobile jaw crusher and secondary and tertiary cone crushers to a nominal 0.5 inches. Barren solution would then be distributed on the leach pad with drip tube emitters. The

entire Prefeasibility Study performed by ~~Gustayson~~Gustavson was filed with SEDAR and the SEC and was ~~publically~~publicly available on Edgar.

~~35.~~41. In a September 12, 2011 press release filed with the SEC, Midway reported its engineering team was in the process of completing a mine plan and a Feasibility Study for the Pan ~~Project~~project and that the environmental team was working to complete a plan of operations for the proposed mine that will be submitted to the Bureau of Land Management ("BLM") for evaluation and development of an Environmental Impact Statement.

~~36.~~42. On October 6, 2011, Midway reported in a Press Release that Midway was negotiating with potential lenders to secure necessary funds for the Pan project.

Several major lenders had expressed interest in providing the necessary funds required for the Pan project.

~~37.~~43. On November 1, 2011, Midway filed with the SEC a favorable Updated Mineral Resource Estimate for the Pan ~~Project~~project prepared by ~~Gustayson~~Gustavson.

~~38.~~44. On November 15, 2011, Midway reported by press release filed with the SEC the results of the Feasibility Study for the Pan project prepared by ~~Gustayson~~Gustavson ("Feasibility Study"). Midway stated that its mining plan would be to crush, agglomerate and place the ore on a heap leach pad with recoveries estimated to average 75%. Midway also reported that the capital costs to build the mine were estimated to be $99 million, including $8.2 million in working capital and $6.8 million contingency funds with total production costs projected to be $824/oz. of gold recovered. At that time, the price of gold was ~~—~~≈$1,700/oz.

~~39.~~45. On December 20, 2011, Midway filed the Feasibility Study with the SEC. Excerpts of that Feasibility Study are attached hereto as Exhibit 1 and incorporated herein by this reference. Among other items, this Study provides a detailed history of the mineral exploration of

the Pan project, estimated gold deposits, an extremely detailed mining plan, a budget of ~$100 million for the project along with an extremely detailed breakdown of the needed equipment, and a projection of anticipated revenues at different levels of gold prices. Midway participated in the creation of the Feasibility Study. The Feasibility Study was never publicallypublicly updated or amended and this study formed the basis on which all necessary permits were sought.

40.46. In order to bring the Pan project into production, two major events needed to occur.

A. First, Midway needed to secure necessary permits, primarily environmentally related. The most difficult of these permits was the "Record of Decision" on a Final Environmental Impact Statement processed through the BLM. Additional environmental permits were also required to be issued by the State of Nevada. No assurances could be made in 2011 that these permits would be issued but the issuance of the permits would add significant value to Midway even if Pan was not taken into production. By year-end 2011, Midway had begun the permitting process for both the BLM and the Nevada Department of Environmental Protection ("NDEP"). These permits would be issued approving a specific mining plan and material changes to the plan would require modification or amendment of the environmental permits received. At all times, Midway sought these permits based upon the detailed mining plan set forth in the Feasibility Study, which required the three-stage crushing and agglomeration of the ore before it is placed on the heap leaching pad to a height not to exceed 30'. Generally, the heap leaching process required allowing a cyanide solution to percolate through the ore allowing the gold to attach to the cyanide. The resulting gold enriched solution then would go through another process where the gold was then separated from the cyanide solution after which further processing would take place. Most of the permitting process occurred in Nevada.

B. The other event was that Midway would need to generate the necessary capital not only to fund the plan set forth in the Feasibility Study but also to fund Midway's other projects and general overhead. At the time, Midway believed that it would need —$120 million in capital to fund the foregoing up until the time that the Pan project was generating revenues. Midway was exploring raising this capital both by securing loans and through the sale of its common stock, which was the way Midway had historically raised capital.

41.47. On January 9, 2012, Midway issued a Press. Release in which it announced that it qualified as a Development Stage Entity under SEC guidelines and that it had submitted a mine plan of operations to the BLM and the NDEP. The mine plan followed the plan set forth in the Feasibility Study with capital costs of —$100 million.

42.48. Sheridan became a Director of Midway in February 2012 and continued in that capacity until June 2015. During a portion of his tenure as a director, Sheridan served as a member or Chairman of Midway's Disclosure Committee and Audit Committee.

43.49. Prior to May 2012, Midway was approached by Hale, who was the CEO and Portfolio Manager of Hale Capital Partners, LP who was seeking to negotiate what became a $70 million private placement of preferred stock with investors who Hale would secure. At the time these negotiations commenced, Wolfus was the CEO and Chairman of the Board of Midway and was the officer primarily involved in securing capital for Midway to fund its present and future operations. Moreover, Wolfus had been spending substantial time locating sources to fund the projected costs of both the Pan project and Midway's other on-going operations. Wolfus was opposed to the transaction proposed by Hale and Brunk was an ardent supporter of the transactions.

~~44.~~50. In May 2012, Midway's Board of Directors decided to terminate Wolfus as its Chairman of the Board and Chief Executive Officer and replace him with Brunk. This change of control was effective May 18, 2012, and ~~publically~~publicly reported by Brunk and Midway on May 21, 2012. Wolfus continued as a director of Midway until its next annual meeting of shareholders; and, while Wolfus also remained a member of the Disclosure Committee, he was effectively excluded from all management decisions, excluded from all negotiations involving the proposed Hale transaction, never provided with any anticipated public disclosures for review and excluded from information he would need to review to perform any Disclosure Committee duties. Wolfus did receive board packages consisting of information provided to all directors in anticipation of a quarterly Board of Directors meeting and did participate in Board of Director's meetings which occurred prior to June 2013. From and after May 18, 2012, Wolfus carefully read and considered all press releases by Midway and the public filings made by Wolfus usually within a day or two following their release. Wolfus relied on this material in making all investment decisions concerning Midway including purchasing additional shares of Midway and whether to continue holding his and his assignors' Midway shares even though he was no longer involved with the management of Midway. Wolfus' share holdings were a material part of his investment portfolio in equity securities. As part of Wolfus' transition out of the management of Midway, Wolfus and Midway entered into a consulting arrangement primarily for the purpose of allowing certain of his stock options to vest. Each of the Defendants then with Midway knew of this purpose and knew that Wolfus' services as a consultant would never be utilized by Midway.

~~45.~~51. On August 2, 2012, the Board of Directors of Midway voted to increase the size of the Board from 5 to 6 members and appoint Klein as a director. Klein at the time was a Vice President of Hale Capital Partners. At the time of this appointment, Hale and Hale Capital

Partners, LP were continuing to negotiate the terms of the proposed Hale transaction, which at the time had not been ~~publically~~publicly disclosed. Klein's directorship provided Hale and Hale Capital Partners, LP with access to Midway's books and records and staff.

~~46.~~52. By press release dated August 16, 2012, Midway and Brunk reported that engineering and permitting for the Pan project was advancing at a "rapid pace."

~~47.~~53. By press release dated September 10, 2012, Midway and Brunk reported that it was on schedule for "start-up of production in mid-2014" on the Pan project.

~~48.~~54. By 8-K filed with the SEC and by Press Release also filed with the SEC and both dated November 21, 2012, Midway announced that agreements had been signed for the private placement of $70 million in Series A Preferred Shares of Midway to the Hale Investors and generally described the terms and conditions of that sale. True and correct copies of that 8-K and Press Release are attached hereto as Exhibits 2 and 3, respectively, and incorporated ~~hereat~~herein by this reference. Wolfus is informed and believes and thereon alleges that at all relevant times the Hale Investors were controlled by Hale. Moreover, one of the terms of the forgoing transaction was the creation of a budget and work program committee, on which Hale or another director selected solely by the Hale Investors were required members. The purpose of this committee was to review and approve Midway's annual business and financing plans and capital and operating budgets or modifications thereto and its decisions had to be unanimous. Wolfus is informed and believes and thereon alleges that once this committee was formed, Hale and the Hale Investors acquired effective control of Midway and the Pan project.

~~49.~~55. On December 13, 2012, Midway filed an 8-K and Press Release with the SEC, a true and correct copy of which is attached hereto as Exhibit 4 and incorporated ~~hereat~~herein by this reference. Exhibit 4 reports that the Hale transaction had closed, that Hale had become a

director of Midway, and that Klein had resigned as a director, although he continued to attend Board meetings thereafter. In addition, Midway reported the formation of the "Budget Work Plan Committee as alleged above with Brunk, Hale, Newell and Sheridan as its members. At all relevant times thereafter, Hale remained a director and a member of the Budget Work Plan Committee of Midway.

~~50.~~56. On March 22, 2013, Midway announced that a draft environmental impact statement was available for public comment. Wolfus is informed and believes and thereon alleges that this statement was based on the mining plan set forth in the Feasibility Study.

~~51.~~57. On April 19, 2013, Midway issued its Definitive Proxy Statement which was filed with the SEC. This statement disclosed that the Board had not nominated Wolfus as a director but had nominated Knutson as a director and had nominated Klein as a director selected by the Hale Investors.

~~52.~~58. On June 20, 2013, Midway held its annual meeting of shareholders. Brunk, Hale, Newell, Sheridan, Yu, Knutson and Klein were each elected as directors. Wolfus ceased to be a director at this time, although Wolfus last participation with Midway's Board ceased some time before.

~~53.~~59. On July 30, 2013, Midway issued and filed with the SEC a Press Release dated July 30, 2013, a true and correct copy of which is attached hereto as Exhibit 5 and incorporated herein by this reference. In that release, Midway reported that it was exploring ways to reduce costs for the Pan project, expected to issue a revised Feasibility Study in the third quarter of 2013, had made significant progress in permitting, was pursuing a combination of project and equipment financing alternatives, had received proposals from several major commercial funding

sources to secure the necessary capital to fund the Pan project until a positive cash flow had been achieved, and expected to pour gold in August 2014.

~~54.~~60. On November 17, 2013, Midway issued and filed with the SEC a Press Release dated September 17, 2013, a true and correct copy of which is attached hereto as Exhibit 6 and incorporated ~~hereat~~herein by this reference. In this release, Midway reported that it had conducted tests of ore from South Pan and determined that it did not need to be crushed prior to leaching, and that a 92% recovery rate could be achieved after 58 days of leaching the ore at a height of 15'. This height is half of the 30' height which the Feasibility Study called for. Midway stated that leaching uncrushed ore, called Run of Mine, would avoid the need to secure crushing equipment until operations moved to other areas of the Pan project. Midway also reported that it had retained Sierra Partners to assist it in finding the necessary capital to fund operations.

~~55.~~61. At year-end 2013 and in addition to Pan, Midway was moving forward with its Gold Rock project, also in White Pine County Nevada, as its second operating gold mine. Midway's Spring Valley project was also progressing primarily funded by Barrick.

~~56.~~62. On December 5, 2013, Blacketor became the Chief Financial Officer and Senior Vice President of Midway. Blacketor was also a member of the Disclosure Committee.

~~57.~~63. On December 20, 2013, Midway issued and filed with the SEC a Press Release, a true and correct copy of which is attached hereto as Exhibit 7 and incorporated herein by this reference. In this release, Midway announced that it had received its Record of Decision for the Pan project which completes the BLM permitting process.

~~58.~~64. As of December 31, 2013, Brunk, Hale, Newell, Sheridan, Yu, Knutson and Klein were each directors of Midway; Brunk was the Chairman, President and Chief Executive officer of Midway; Blacketor was a Senior Vice President and Chief Financial Officer of Midway;

Moritz was the Senior Vice President of Operations of Midway; Brunk, Blacketor, Newell, Yu and Klein were each members of the Disclosure Committee of Midway; Sheridan, Yu and Knutson were each members of the Audit Committee of Midway; Brunk, Hale, Sheridan, Yu and Klein were each members of the Budget/Work Plan Committee; and Newell, Sheridan and Yu were each members of the Environment, Health and Safety Committee. In those capacities, each was responsible for insuring that Midway ~~publically~~publicly disclosed all material information concerning the Pan project and that all ~~publically~~publicly disclosed information concerning the Pan project was true and complete, was not misleading and did not omitted material facts. The foregoing defendants are collectively referred to as the "2013 Control Defendants."

~~59.~~65. As of December 13, 2013, the 2013 Control Defendants knew each of the following facts ("2013 Undisclosed Facts") to be true, knew that each of the following facts would be material to any reasonable investor in Midway including Wolfus, and knew that none of those facts had been disclosed to the public generally or to Wolfus:

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

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

C. The environmental and other permits secured by Midway for the Pan project were based upon and required Midway to conduct mining operations in accordance with the mining plan submitted which called for the crushing and agglomeration of ore before it was placed on

the leach pads and Midway had taken no steps to cause those permits to be modified to allow Midway to proceed using Run of Mine for the South Pit of the Pan project; and

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

~~60. On~~66. In late December and in early January 2014, Wolfus needed to decide whether to exercise some of his Midway stock options which would soon be expiring. In order to make this investment decision, Wolfus carefully reviewed and considered Midway's press releases and public filings, primarily those which were issued after he ceased to be Midway's Chief Executive Officer. At the time, Wolfus had no reason to believe that any of the factual statements contained therein were false or that Midway had failed to omit material facts. In reliance thereon and on January 7, 2014, Wolfus notified Midway of his intention to exercise some of his stock options. Wolfus is informed and believes and thereon alleges that ~~defendants~~Defendants, and each of them, were aware of this exercise. At the time Wolfus exercised these options he was not aware of any of the 2013 Undisclosed Facts, had no way of learning the 2013 undisclosed facts except from the 2013 Control Defendants, would not have exercised any of his options and would instead have sold his and his assignors' remaining Midway common shares~~-~~ when Midway's stock peaked in February 2014.

~~61.~~67. On January 15, 2014, Midway issued and filed with the SEC a Press Release, a true and correct copy of which is attached hereto as Exhibit 8 and incorporated ~~hereat~~herein by this reference. In that release, Midway reported that the Pan project was "fully permitted and construction is underway with completion estimated for Q3 2014."

~~62.~~68. Between January 7 and January 23, 2014, neither Midway nor any of the defendants provided Wolfus with any information not contained in Midway's then public filings, including the 2013 Undisclosed Facts.

~~63.~~69. On January 23, 2014, Wolfus consummated his stock option exercise purchasing 200,000 shares for $112,000 Canadian dollars which was then $100,636 US dollars.

70. Wolfus thereafter and on a daily basis checked on the market price of Midway's stock. When Midway's stock peaked on or about February 14, 2014, at $1.39[1], Wolfus decided to continue to hold his Midway shares and his assignors made the same decision based upon Wolfus advice. At the time Wolfus and his assignors made this decision to hold and not sell their Midway stock, Wolfus remained unaware of the 2013 Undisclosed Facts and also the fact that the Pan project was not fully permitted. Had Wolfus known any of the 2013 Undisclosed Facts or that the Pan project was not fully permitted, he and his assignors would have sold all of the Midway shares.

~~64.~~71. In its March 13, 2014, Annual Report on form 10-K, Midway reported that ore from the South Pan pit would be process Run of Mine and would not be crushed or agglomerated as provided in the Feasibility Study or the mining plan submitted to secure the necessary permits for the Pan project.

~~65.~~72. In a Press Release issued the same day, Midway again reported that the Pan project was fully permitted and that construction was underway.

~~66.~~73. On March 19, 2014, Midway announced in a Press Release that it has selected Ledcor CMI, Inc. as its mining contractor for the Pan project.

~~67.~~74. On April 24, 2014, Midway issued a Press Release. But for the hand interlineations, Exhibit 9 attached hereto and incorporated ~~hereat~~herein by this reference is a true

[1] The high at market closing per Bloomberg.

and correct copy of that release. In that release, Midway announced its intention to reduce the capital costs for the Pan project as set forth in the Feasibility Study by using contract miners to mine the ore and by proceeding Run of Mine on the South Pit of the Pan project. Midway stated that Moritz had approved the release and that Midway was "well -funded."

68.75. On May 16, 2014, Midway reported that Moritz had resigned.

69.76. Midway's intention to use contract mining and Run of Mine was repeated in its May 21, 2014, quarterly report filed on Form 10-Q with the SEC.

70.77. On May 22, 2014, Midway issued and filed with the SEC a Press Release, a true and correct copy of which is attached hereto as Exhibit 10 and incorporated herein by this reference. This release announced the execution of a $55 million credit facility with Commonwealth Bank of Australia for the Pan project.

71.78. On May 30, 2014, Midway filed with the SEC a prospectus for the sale of —~$25 million worth of common stock in a prearranged sale. The prospectus updated an earlier registration statement. The funds were to be used in substantial part for the Pan project. Under applicable securities laws, this prospectus was required to disclose all material facts related to the Pan project, among other disclosures. However, this prospectus failed to disclose any of the 2013 Undisclosed Facts or any of the 2014 Undisclosed Facts alleged below. In June 2014, Midway reported in a Press Release filed with the SEC that it completed this sale transaction.

72.79. On June 19, 2014, Sawchak became a director of Midway and Knutson ceased to be a director of Midway. During a portion of his tenure as a director, Sawchak served as Chairman of Midway's Audit Committee.

73.80. On July 21, 2014, Midway issued and filed with the SEC a Press Release announcing that it had closed on its Credit Facility from Commonwealth Bank of Australia.

Wolfus is informed and believes and thereon alleges that this Credit Facility was the largest loan Midway was able to secure.

~~74.~~81. In July 2014, there was a flood at the Pan project which delayed the project. The flood was not reported until Midway's September 15, 2014, press release filed with the SEC.

~~75.~~82. In its August 6, 2014, quarterly report filed on Form 10-Q with the SEC, Midway reported that it had made a 5-year contract mining deal with Ledcor and had paid a $500,000 mobilization fee. On September 15, 2014, Midway reported in a Press Release filed with the SEC that Ledcor had in fact mobilized on site on July 21, 2014. At no time did Midway disclose what control, if any, it had over the timing of Ledcor's mining operations or the control that it had over Ledcor's loading ore on the leach pads. Loading of the ore on the leach pads according to the applicable permits then effect had to be carefully monitored and supervised by qualified individuals and only after the ore had been crushed and agglomerated in the manner described in the Feasibility Study and the mining plan. Even if the ore was to be loaded on the leach pads Run of Mine, it still had to be carefully monitored and supervised by qualified individuals and only to a height not exceeding 15'. Additional ore could not be loaded on the leach pad until the approximately 2 month leaching process had occurred. Wolfus was not aware of these facts until after June 2015.

~~76.~~83. By Press Release dated August 6, 2014, and filed with the SEC, Midway announced that Brunk would be leaving Midway but he remained with Midway until December 2014.

~~77.~~84. By Press Release dated August 19, 2014 and filed with the SEC, Midway announced the "retirement" of Newell and the appointment of Haddon as Chairman of the Board,

replacing Brunk in that role. Haddon also became a member of the Environment, Health and Safety Committee of Midway.

~~78.~~85. As of August 31, 2013, Brunk, Hale, Sawchak, Sheridan, Yu, Haddon and Klein were each directors of Midway; Haddon was Chairman of the Board, Brunk was the President and Chief Executive officer of Midway; Blacketor was a Senior Vice President and Chief Financial Officer of Midway~~;~~; Brunk, Blacketor, Yu and Klein were each members of the Disclosure Committee of Midway; Sheridan, Yu and Sawchak were each members of the Audit Committee of Midway; Brunk, Hale, Sheridan, Yu and Klein were each members of the Budget/Work Plan Committee; and Haddon, Sheridan and Yu were each members of the Environment, Health and Safety Committee. In those capacities, each was responsible for insuring that Midway ~~publically~~publicly disclosed all material information concerning the Pan project and that all ~~publically~~publicly disclosed information concerning the Pan project was true and complete, was not misleading and did not omitted material facts. The foregoing defendants are collectively referred to as the "2014 Control Defendants."

~~79.~~86. As of August 31, 2014, the 2014 Control Defendants knew each of 2013 Undisclosed Facts and the following addition facts ("collectively the 2014 Undisclosed Facts") to be true, knew that each of those facts would be material to any reasonable investor in Midway including Wolfus, and knew that none of those facts had been disclosed to the public generally or to Wolfus:

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

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

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

~~80. On~~87. In late August and early September 2014, Wolfus needed to decide whether or not to exercise some of his Midway stock options which would soon be expiring. In order to make this investment decision, Wolfus carefully reviewed and considered Midway's press releases and public filings, primarily those which were issued after he purchase shares in January 2014. At the time, Wolfus had no reason to believe that any of the factual statements contained therein were false or that Midway had failed to omit material facts. In reliance thereon and on September 5, 2014, Wolfus notified Midway of his intention to exercise some of his stock options. Wolfus is informed and believes and thereon alleges that defendants and each of them were aware of this exercise. At the time Wolfus exercised these options he still was not aware of any of the 2013 Undisclosed Facts or the 2014 Undisclosed Facts, had no way of learning ~~the 2014 Undisclosed Facts~~those facts except from the 2014 Control Defendants, would not have exercised any of his options had he known those facts.

~~81.~~88. Between September 5 and 19, 2014, neither Midway nor any of the defendants provided Wolfus with any information not contained in Midway's then public filings, including the 2013 Undisclosed Facts and the 2014 Undisclosed Facts.

~~82.~~89. On September 19, 2014, Wolfus consummated his stock option exercise purchasing 1,000,000 shares for $860,000 Canadian dollars which was then $783,778 US dollars.

~~83.~~90. On September 15, 2014, Midway announced by Press Release filed with the SEC that Ledcor had commenced mining operations. The release further suggested that the facilities to process the mine would be ready by the end of September.

~~84.~~91. On October 14, 2014, Midway announced that William Zisch would become President and Chief Executive Officer of Midway on or about December 10, 2014 and that Brunk would depart Midway on Mr. Zisch's start date.

~~85.~~92. By Current Report filed on form 8-K with the SEC and dated November 4, 2014, Midway announced the resignation of Klein and the appointment of Anderson as a director by the Hale Investors. Anderson also became a member of the Budget/Work Plan Committee of Midway.

~~86.~~93. In its November 16, 2014, quarterly report on Form 10-Q filed with the SEC, Midway again provided only favorable information concerning the Pan project.

~~87.~~94. By Press Release dated December 1, 2014 and filed with the SEC, Midway reported that it had begun receiving funds on its Credit Facility.

~~88.~~95. On June 22, 2015, Midway announced that it ~~w3as~~was filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code and shortly thereafter filed for bankruptcy.

~~89.~~96. As a result of the Midway Bankruptcy, all or virtually all of Midway's assets have been sold and there ~~will be~~are no funds or recoveries by common shareholders of Midway.

~~90.~~97. Following the bankruptcy filing, Wolfus has learned or is otherwise informed and believed and thereon alleges that the following facts are true:

A. As of the end of 2013, Midway lacked sufficient resources in the form of capital or debt financing to bring the Pan project to a successful mining operation;

B. Hale and the Hale Investors blocked Midway from selling assets to create necessary capital;

C. In late 2013 or early 2014, material disagreements arose between Brunk and Hale, which resulted in Hale taking effective control of Midway and the Pan project even though Hale lacked the ability to manage the Pan project;

D. The ore in the entire Pan project was extremely clayey and would need to be crushed and agglomerated prior to leaching in order to profitable and timely extract gold; but rather than cut other costs so that the crushing and agglomeration equipment could be acquired, defendants, and each of them, decided not to purchase this necessary equipment;

E. Costly equipment was purchased by Midway which was not permitted to be used on the Pan project resulting in costly delays;

F. Midway never received the appropriate permits for Run of Mine operations;

G. Midway allowed Ledcor to overload the leach pads in a manner which violated its operating permits and resulted in an inability to successfully leach the gold from the ore;

H. Midway allowed Ledcor to begin loading the leach pads before it was capable of either performing the necessary heap leaching or capable of processing and refining for sale the resulting gold solution.

~~91.~~98. Effective June 2, 2016, Wolfus, Brunk, Moritz, Blacketor, Haddon, Hale, Anderson, Sawchak, Yu, Sheridan, Newell, Knutson and Klein entered into a tolling agreement, a true and correct copy of which is attached hereto as Exhibit 11 and incorporated herein by this reference. This agreement tolled the statute of limitations on all claims from June 2, 2016 through September 25, 2016.

FIRST CAUSE OF ACTION

(SECURITIES FRAUD AGAINST

THE 2013 AND 2014 CONTROL DEFENDANTS)

~~92.~~99. Wolfus realleges the allegations contained in Paragraphs 1 through ~~91~~98 as though fully set forth ~~hereat~~herein.

~~93.~~100. This is a claim for securities fraud based upon the California Corporate Securities Law of 1968, California Corporations Code § 25000, et seq. (the "Act")~~94. At all relevant times, Wolfus was and now is a resident of California. All purchases of Midway's common stock were made by Wolfus either for his own account or for his assignors. All purchases of Midway's common stock were made by Wolfus in California.~~. Section 25401 of the Act makes it unlawful for Midway to sell its common stock in California "by means of any written or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading." Section 25501 Act creates a private right of action for a purchaser and makes Midway, as the seller, liable to Wolfus, as the purchaser, for "the price at which the security was bought plus interest at the legal rate from the date of purchase." Wolfus purchased shares from Midway on January 23, 2014 and again on September 19, 2014 for $100,636 US dollars and $783,778, respectively and the legal rate of interest thereon is at 10% per annum. In addition to Midway, Defendants, and each of them, are liable for these damages pursuant to Sections 25403 and 25504. Only Wolfus is entitled to recover these damages for these two transactions. Defendants, and each of them, knew that at the time of purchase, Wolfus was a California resident entitled to pursue relief under the Act. All purchases of Midway's common stock were made by Wolfus in California.

~~95.~~101. Midway's common shares are securities as defined in California Corporations Code § 25019.

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

~~97.~~102. On January 23, 2014, Wolfus purchased in California 200,000 shares of Midway's common stock directly from Midway ~~through the exercise of stock options~~ at a purchase price of $.56 Canadian dollars per share or approximately $.50 US dollars per share. At that time, Midway's common stock was selling on the NYSE Amex exchange at $1.27 US dollars per share and its price was rising ~~reaching nearly $1.50 US dollars per share within the next 30 days~~.

~~98.~~103. Midway was the issuer of the 200,000 shares purchased by Wolfus and as such was liable for any written or oral communication contained in its public filings that included any untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in light of the circumstances under which the statements were made, not misleading.

~~99.~~104. Each of the 2013 Control Defendants are jointly and severally liable to Wolfus with Midway because of their positions as officers, directors and committee members of Midway and as such are deemed to be "controlling persons" under the Act. Moreover, each of the 2013 Control Defendants controlled Midway and had the ability and duty to ensure that its public filings were true, correct and complete, were not misleading and did not fail to disclose material facts.

~~100.~~105. In violation of California Corporations Code § 25401, the 2013 public filings by Midway which discussed the Pan project were materially false and misleading by

failing to timely disclose each of the 2013 Undisclosed Facts and the failure by the 2013 Control Defendants to disclose the 2013 Undisclosed Facts was intentional and was done to encourage investors to retain and purchase Midway's common stock.

~~101. In exercising his options~~106. In purchasing the 200,000 shares in January 2014, Wolfus had carefully read and reviewed and relied on the public filings of Midway and was unaware of the 2013 Undisclosed Facts. Had Wolfus known any of the 2013 Undisclosed Facts, Wolfus would not have ~~exercised~~purchased any ~~options~~shares in January 2014 or ~~thereafter and~~ would have sold both his and his assignors common stock when the stock reached its peak in February 2014.

~~102.~~107. On September 19, 2014, Wolfus purchased in California 1,000,000 shares of Midway's common stock directly from Midway ~~through the exercise of stock options~~ at a purchase price of $.86 Canadian dollars per share, which was approximately $.78 US dollars per share. ~~At that time, Midway's common stock was selling on the NYSE Amex exchange at $1.03 per share and its price was rising reaching nearly $1.20 per share within the next 30 days.~~

~~103.~~108. Midway was the issuer of the 1,000,000 shares purchased by Wolfus and as such was liable for any written or oral communication contained in its public filings that included any untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in light of the circumstances under which the statements were made, not misleading.

~~104.~~109. Each of the 2014 Control Defendants are jointly and severally liable to Wolfus with Midway because of their positions as officers, directors and committee members of Midway and as such are deemed to be "controlling persons" under the Act. Moreover, each of the 2014 Control Defendants controlled Midway and had the ability and duty to ensure that its public

filings were true, correct and complete, were not misleading and did not fail to disclose material facts.

~~105.~~110. In violation of California Corporations Code § 25401, the pre-September 2014 public filings by Midway which discussed the Pan project were materially false and misleading by failing to timely disclose each of the 2014 Undisclosed Facts and the failure by the 2014 Control Defendants to disclose the 2014 Undisclosed Facts was intentional and was done to encourage investors to retain and purchase Midway's common stock.

~~106. In exercising his options~~111. In purchasing shares in September 2014, Wolfus carefully reviewed and relied on the public filings of Midway and was unaware of the 2013 Undisclosed Facts or any of the 2014 Undisclosed Facts. Had Wolfus known any of the 2014 Undisclosed Facts or any of the 2013 Undisclosed Facts, Wolfus would not have ~~exercised~~purchased any ~~options~~shares in September ~~2014 and would have sold both his and his assignors remaining common stock when the stock reached its peak in October~~ 2014.

~~107. All of the common stock owned by Wolfus and his assignors has become valueless except to the extent sold after January 23, 2014.~~

~~108.~~112. As a result ~~of misrepresentations and omissions of material facts~~, Wolfus has been damaged in an amount ~~to be proven at trial, but no event less than $3,000,000. Wolfus is entitled to~~of $884,414.00 plus interest thereon at 10% per annum from date of purchase and reasonable attorney fees.

SECOND CAUSE OF ACTION

(BREACH OF FIDUCIARY DUTY

AGAINST THE 2013 AND 2014 CONTROL DEFENDANTS)

~~109.~~113. Wolfus realleges the allegations contained in Paragraphs 1 through ~~91, 94, 96, 97, 101,~~98, 102, ~~106 and~~103, 105 through 107 and 111, as though fully set forth ~~hereat~~herein.

~~110.~~114. This is a claim for breach of fiduciary duty against the 2013 Control Defendants arising out of their failure to disclose the 2013 Undisclosed Facts prior to Wolfus stock ~~option exercise~~purchase in January 2014 and against the 2014 Control Defendants for their failure to disclose the 2013 Undisclosed Facts and the 2014 Undisclosed Facts prior to Wolfus stock ~~option exercise in September 2014.~~purchase in September 2014. This claim is based on California common law arising out of breaches of fiduciary duty owed by Midway's officers and directors directly to Wolfus and Wolfus' assignors as so held in Meister v. Mensinger, 230 Cal.App.4th 381 (2014). This is a cause of action which belongs solely to Wolfus and Wolfus' assignors who are entitled to keep all recoveries thereon. While Midway also breached its fiduciary duties owed to Wolfus and Wolfus' assignors, Midway has not been joined as a culpable defendant because of the bankruptcy stay precluding Wolfus from doing so. California law, as set forth in Meister, provides that Wolfus is entitled to recover all damages proximately caused by the breach which is the market value of the stock then owned by Wolfus and Wolfus' assignors in February 2014 and the consideration paid by Wolfus for the shares purchased on September 19, 2014, together with interest thereon at 10% per annum.

~~111.~~115. Each of the 2013 Control Defendants and 2014 Control Defendants were fiduciaries and owed Wolfus the fiduciary duty of full disclosure of all material facts then existing prior to Wolfus' exercise of his stock options in 2014.

~~112.~~116. Each of the 2013 Control Defendants and 2014 Control Defendants breached their fiduciary duties to Wolfus by failing to disclose the 2013 Undisclosed Facts prior to January 1, 2014 and by failing to disclose the 2014 Undisclosed Facts prior to September 2014.

117. Had Wolfus known any of the 2013 Undisclosed Facts, Wolfus would have sold all of his shares of Midway and all of his assignors' shares of Midway in February 2014, when Midway's stock reached its peak and would not have purchased any additional shares in January or September 2014.

~~113.~~118. As a result of defendants' breach of their fiduciary duties to Wolfus, Wolfus has been damaged in an amount to be proven at trial, but no event less than $3,000,000. Wolfus is entitled to interest at 10% per annum.

~~114.~~119. Defendants conduct was fraudulent entitling Wolfus to an award of punitive damages in an amount to be proven at trial.

THIRD CAUSE OF ACTION

(AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY AGAINST ALL DEFENDANTS)

~~115.~~120. Wolfus realleges the allegations contained in Paragraphs 1 through ~~91, 94, 96, 97, 101, 102, 106, 107 and 114~~98, 102, 103, 105 through 107, 111, 115, 117 and 119, as though fully set forth ~~hereat~~herein.

~~116. This is a claim for aiding and abetting Midway in breaching its fiduciary duties of full disclosure of all material facts then existing related to the Pan project prior to Wolfus' exercise of his stock options in 2014.~~121. This is a claim for California common law aiding and abetting a breach of fiduciary duty owed by Midway directly to Wolfus and Wolfus' assignors for which Defendants, and each of them, aided and abetted as so held in American Master Lease LLC v. Idanta Partners, Ltd., 225 Cal.App.4th 1451 (2014). This is a cause of action which belongs solely to Wolfus and Wolfus' assignors who are entitled to keep all recoveries thereon. While Midway also breached its fiduciary duties owed to Wolfus and Wolfus' assignors, Midway has not been joined as a culpable defendant because of the

bankruptcy stay precluding Wolfus from doing so. California law, as set forth in American Master Lease, provides that Wolfus is entitled to recover all damages proximately caused by the breach which is the market value of the stock then owned by Wolfus and Wolfus' assignors in February 2014 and the consideration paid by Wolfus for the shares purchased on September 19, 2014, together with interest thereon at 10% per annum.

~~117.~~122. Wolfus is informed and believes and thereon alleges that Does 1 through ~~2~~20 are the underlying beneficial owners of the Hale Investors and as such indirectly through Hale controlled the Pan project and Midway at all times from and after June 2013.

~~118.~~123. Midway at all times after Wolfus ceased to be a member of Midway's Board of Directors owed Wolfus of full disclosure of all relevant facts related to the Pan project prior to selling 1.200,000 shares of Midway's common stock~~.~~ to Wolfus in 2014.

~~119.~~124. Midway breached its fiduciary duties to Wolfus in 2014 by failing to disclose the 2013 Undisclosed Facts prior to January 2014 and by failing to disclose the 2014 Undisclosed Facts prior to September 2014.

~~120.~~125. Defendants, and each of them, knew of Midway's fiduciary duties to Wolfus and materially aided and abetted Midway in breaching its fiduciary duties.

~~121.~~126. Wolfus has been damaged in an amount to be proven at trial, but no event less than $3,000,000. Wolfus is entitled to interest at 10% per annum.

FOURTH CAUSE OF ACTION

(FRAUD AGAINST THE 2013 AND 2014 CONTROL DEFENDANTS)

~~122. Wolfus realleges the allegations contained in Paragraphs 1 through 91, 94, 96, 97, 101, 102, 106, 107 and 114 as though fully set forth hereat.~~127. Wolfus realleges the allegations contained in Paragraphs 1 through 98, 102, 103, 105 through 107, 111 and 109, as though fully set forth herein.

~~123. This is a claim for common law fraud for failing to disclose the 2013 Undisclosed Facts and the 2014 Undisclosed Facts related to the Pan project prior to Wolfus' exercise of his stock options in 2014.~~

128. This is a claim for California common law and statutory fraud committed both by Midway and Defendants, and each of them, for inducing Wolfus to purchase shares in January and September 2014 and inducing Wolfus and Wolfus' assignors to hold and not sell their shares in February 2014. This claim is based on the holding in Small v. Fritz Companies, Inc., 30 Cal.4th 167 (2003). This is a cause of action which belongs solely to Wolfus and Wolfus' assignors who are entitled to keep all recoveries thereon. While Midway also defrauded Wolfus and Wolfus' assignors, Midway has not been joined as a culpable defendant because of the bankruptcy stay precluding Wolfus from doing so. California law, as set forth in Small, provides that Wolfus is entitled to recover all damages proximately caused by the fraud which is the market value of the stock then owned by Wolfus and Wolfus' assignors in February 2014 and the consideration paid by Wolfus for the shares purchased on September 19, 2014, together with interest thereon at 10% per annum.

129. In late December and in early January, Wolfus carefully reviewed all public filings and press releases of Midway issued after he ceased to be Midway's Chief Executive Officer in order to decide whether he should purchase additional shares of Midway or whether he should not make any further purchases and instead sell both his Midway shares and those of his assignors. Wolfus' assignors are immediate family members who totally relied on Wolfus' investment decisions. Wolfus was primarily concerned with the status of the Pan project and the likelihood that this project would begin profitably mining gold and be revenue positive. Wolfus determined from those public statements and the absence of the 2013 Undisclosed Facts that

profitable mining operations would result in a substantial increase in the value of their combined Midway shares.

130. Following Wolfus' share purchases in January 2014, Wolfus continued to review and rely upon Midway's public filings and press releases and closely monitored the market price of Midway's shares. When the market price of those shares peaked in February 2014, Wolfus was again called upon to decide whether to hold his shares and those of his assignors or whether to sell those shares. Wolfus determined from the publicly available information from Midway that he and his assignors should continue to hold their Midway shares. Had Wolfus learned of any of the 2013 Undisclosed Facts, he would have sold all of his Midway shares and his assignor's Midway shares in February 2014 when Midway's stock price began to fall from its peak.

131. In late August or early September, 2014, Wolfus again needed to make a decision as to whether to purchase additional Midway shares or refrain from making any further purchases and instead sell his shares and those of his assignors. Wolfus again carefully reviewed all public filings and press releases issued by Midway since December 2013. Had Wolfus learned of any of the 2013 Undisclosed Facts or any of the 2014 Undisclosed Facts at that time, he would have sold all of his Midway shares and his assignor's Midway shares in October 2014 when Midway's stock price began to fall from its peak.

132. Wolfus' reliance on the statements of fact contained in Midway's public filings and press releases and the absence of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts in those filings was reasonable.

~~124.~~133. The 2013 Control Defendants intentionally defrauded Wolfus by failing to disclose or causing Midway to disclose the 2013 Undisclosed Facts.

~~125.~~134. The 2014 Control Defendants intentionally defrauded Wolfus by failing to disclose or causing Midway to disclose the 2014 Undisclosed Facts.

~~126.~~135. Wolfus was ignorant of the 2013 Undisclosed Facts in January 2014, had no ability to learn the 2013 Undisclosed Facts prior to January 2014, and relied upon the absence of any disclosure of the 2013 Undisclosed Facts in exercising his stock options in January 2014 and in not selling all of his and his assignors' shares of Midway common stock prior to March, 2014.

~~127.~~136. Wolfus was ignorant of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts in September 2014, had no ability to learn any of those facts prior to September 2014, and relied upon the absence of any of any disclosure of those facts in exercising his stock options in September 2014 and in not selling all of his and his assignors' shares of Midway common stock prior to November, 2014.

~~128.~~137. Wolfus first learned of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts after June 2015.

~~129.~~138. Wolfus has been damaged in an amount to be proven at trial, but no event less than $3,000,000. Wolfus is entitled to interest at 10% per annum.

~~FOURTH~~FIFTH CAUSE OF ACTION

(NEGLIGENT MISREPRESENTATION

AGAINST THE 2013 AND 2014 CONTROL DEFENDANTS)

~~130.~~139. Wolfus realleges the allegations contained in Paragraphs 1 through ~~91, 94, 96, 97, 101, 102, 106, 107 and 114~~98, 102, 103, 105 through 107, 111, 109, 129 through 132 and 135 through 137, as though fully set forth ~~hereat~~herein.

~~131. This is a claim for common law negligent misrepresentation for negligently failing to disclose the 2013 Undisclosed Facts and the 2014 Undisclosed Facts related to the Pan project~~

prior to Wolfus' exercise of his stock options in 2014.140. This is a claim for California common law and statutory negligent misrepresentation committed both by Midway and Defendants, and each of them, for inducing Wolfus to purchase shares in January and September 2014 and inducing Wolfus and Wolfus' assignors to hold and not sell their shares in February 2014. This claim is brought pursuant to the holding in Small v. Fritz Companies, Inc., 30 Cal.4th 167 (2003). This is a cause of action which belongs solely to Wolfus and Wolfus' assignors who are entitled to keep all recoveries thereon. While Midway also made negligent misrepresentations and omissions to Wolfus and Wolfus' assignors, Midway has not been joined as a culpable defendant because of the bankruptcy stay precluding Wolfus from doing so. California law, as set forth in Small, provides that Wolfus is entitled to recover all damages proximately caused by the negligent misrepresentation which is the market value of the stock then owned by Wolfus and Wolfus' assignors in February 2014 and the consideration paid by Wolfus for the shares purchased on September 19, 2014, together with interest thereon at 10% per annum.

132.

141. The 2013 Control Defendants negligently failed to disclose or cause Midway to disclose the 2013 Undisclosed Facts to Wolfus prior to his exercise of stock options in January 2014.

133.

142. The 2014 Control Defendants negligently failed to disclose or cause Midway to disclose the 2014 Undisclosed Facts to Wolfus prior to his exercise of stock options in September 2014.

~~134.~~143. Because of their status, the 2013 Control Defendants and the 2014 Control Defendants owed Wolfus a duty of full disclosure of all relevant facts related to the Pan project prior to causing or allowing Midway to sell common stock to Wolfus.

~~135.~~144. Wolfus was ignorant of the 2013 Undisclosed Facts in January 2014, had no ability to learn the 2013 Undisclosed Facts prior to January 2014, and relied upon the absence of any disclosure of the 2013 Undisclosed Facts in exercising his stock options in January 2014 and in not selling all of his and his assignors' shares of Midway common stock prior to March, 2014.

~~136.~~145. Wolfus was ignorant of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts in September 2014, had no ability to learn any of those facts prior to September 2014, and relied upon the absence of any of any disclosure of those facts in exercising his stock options in September 2014 and in not selling all of his and his assignors' shares of Midway common stock prior to November, 2014.

~~137.~~146. Wolfus first learned of the 2013 Undisclosed Facts and the 2014 Undisclosed Facts after June 2015.

~~138.~~147. Wolfus has been damaged in an amount to be proven at trial, but no event less than $3,000,000. Wolfus is entitled to interest at 10% per annum.

PRAYER FOR RELIEF

WHEREFORE, Wolfus prays judgment against Defendants, as follows:

1. For damages in excess of $~~15,000.00,~~10,000.00, according to proof;

2. For exemplary or punitive damages, according to proof;

3. For interest thereon at 10% per annum;

~~3.~~4. For attorneys' fees;

~~4.~~5. For costs of suit; and

~~5.~~6. For such other and further relief as the Court deems just and proper.

Dated this ~~2 (~~ 5th day of ~~June, 2017.~~February, 2018.

_____

/s/ James IZ. Christensen
James R. ~~C istensen~~Christensen Esq.
Nevada Bar No. 3861
James R. Christensen PC
~~630 S. Third St.~~601 S. 6th Street
Las Vegas NV 89101
(702) 272-0406
(702) 272-0415 fax
jim@jchristensenlaw.com Attorney for Plaintiff

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Document 1 ID	file://C:\Users\CE_Lantz\Desktop\Holly Sollod\2017-06-30 First Amended Complaint Without Exs.docx
Description	2017-06-30 First Amended Complaint Without Exs
Document 2 ID	file://C:\Users\CE_Lantz\Desktop\Holly Sollod\2018-02-05 Second Amended Complaint for Damages Without Exs.docx
Description	2018-02-05 Second Amended Complaint for Damages Without Exs
Rendering set	Standard

Legend:	
Insertion	
~~Deletion~~	
~~Moved from~~	
Moved to	
Style change	
Format change	
~~Moved deletion~~	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	263
Deletions	216
Moved from	7
Moved to	7
Style change	0
Format changed	0

Total changes	493

EXHIBIT I

EXHIBIT I

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Sec Form 4

Form 4 Filings	Insider Buys	Significant Buys	Penny Stocks Insider Buying	Insider Sales
Insider Buy Sell Ratios	Stock Options	Insider Trading Stock Screener	Insider Trading Graph View	Insider Watch

Wolfus Daniel E - Midway Gold Corp - For 2009-01-07

1. About Form 4 Filing: Every director, officer or owner of more than ten percent of a class of equity securities registered under Section 12 of the '34 Act must file with the U.S. Securities and Exchange Commission (SEC) a statement of ownership regarding such security. The initial filing is on Form 3 and changes are reported on Form 4. The Annual Statement of beneficial ownership of securities is on Form 5. The forms contain information on the reporting person's relationship to the company and on purchases and sales of such equity securities.
2. Form 4 is stored in SEC's EDGAR database. EDGAR is Electronic Data Gathering, Analysis and Retrieval System. It is a registered trademark of the SEC.

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"Insiders might sell their shares for any number of reasons, but they buy them for only one: they think the price will rise"
- Peter Lynch ==>> What is insider trading>>

Email a friend >>...

The following is an SEC EDGAR document rendered as filed.
Here is the list of insider trading transaction codes.

FORM 4

Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. *See* Instruction 1(b).

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(h) of the Investment Company Act of 1940

OMB APPROVAL	
OMB Number:	3235-0287
Expires:	November 30, 2011
Estimated average burden hours per response...	0.5

1. Name and Address of Reporting Person * Wolfus Daniel E	2. Issuer Name **and** Ticker or Trading Symbol Midway Gold Corp [MDW]	5. Relationship of Reporting Person(s) to Issuer (Check all applicable) __ X __ Director _____ 10% Owner _____ Officer (give title below) _____ Other (specify below)
(Last) (First) (Middle) 10350 WILSHIRE BLVD, #1604	3. Date of Earliest Transaction (MM/DD/YY) 01/07/2009	
(Street) LOS ANGELES, CA90024	4. If Amendment, Date Original Filed(MM/DD/YY)	6. Individual or Joint/Group Filing(Check Applicable Line) __ X __ Form filed by One Reporting Person _____ Form filed by More than One Reporting Person
(City) (State) (Zip)		

Table I - Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

1.Title of Security (Instr. 3)	2. Transaction Date (MM/DD/YY)	2A. Deemed Execution Date, if any (MM/DD/YY)	3. Transaction Code (Instr. 8)		4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)			5. Amount of Securities Beneficially Owned Following Reported Transaction(s) (Instr. 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Indirect Beneficial Ownership (Instr. 4)
			Code	V	Amount	(A) or (D)	Price			

Table II - Derivative Securities Acquired, Disposed of, or Beneficially Owned

(*e.g.* , puts, calls, warrants, options, convertible securities)

1. Title of Derivative Security (Instr. 3)	2. Conversion or Exercise Price of Derivative Security	3. Transaction Date (MM/DD/YY)	3A. Deemed Execution Date, if any (MM/DD/YY)	4. Transaction Code (Instr. 8)		5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instr. 3, 4, and 5)		6. Date Exercisable and Expiration Date (MM/DD/YY)		7. Title and Amount of Underlying Securities (Instr. 3 and 4)		8. Price of Derivative Security (Instr. 5)	9. Number of Derivative Securities Beneficially Owned Following Reported Transaction(s) (Instr. 4)	10. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instr. 4)	11. Nature of Indirect Beneficial Ownership (Instr. 4)
				Code	V	(A)	(D)	Date Exercisable	Expiration Date	Title	Amount or Number of Shares				
Employee Stock Option (Right to Buy)	$ 0.56 (1)	01/07/2009		A		200,000		01/07/2009	01/06/2014	Common Stock	200,000	$ 0	200,000	D	

Reporting Owners

Reporting Owner Name / Address	Relationships			
	Director	10% Owner	Officer	Other
Wolfus Daniel E 10350 WILSHIRE BLVD #1604 LOS ANGELES, CA90024	X			

Signatures

/s/ Daniel E. Wolfus — ** Signature of Reporting Person

01/15/2009 — Date

Explanation of Responses:

(1)Dollar value expressed in Canadian dollars.

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

* If the form is filed by more than one reporting person, *see* Instruction 4(b)(v).

** Intentional misstatements or omissions of facts constitute Federal Criminal Violations. *See* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).

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Sec Form 4

Form 4 Filings | Insider Buys | Significant Buys | Penny Stocks Insider Buying | Insider Sales
Insider Buy Sell Ratios | Stock Options | Insider Trading Stock Screener | Insider Trading Graph View | Insider Watch

Wolfus Daniel E - Midway Gold Corp - For 2009-09-10

1. About Form 4 Filing: Every director, officer or owner of more than ten percent of a class of equity securities registered under Section 12 of the '34 Act must file with the U.S. Securities and Exchange Commission (SEC) a statement of ownership regarding such security. The initial filing is on Form 3 and changes are reported on Form 4. The Annual Statement of beneficial ownership of securities is on Form 5. The forms contain information on the reporting person's relationship to the company and on purchases and sales of such equity securities.
2. Form 4 is stored in SEC's EDGAR database. EDGAR is Electronic Data Gathering, Analysis and Retrieval System. It is a registered trademark of the SEC.

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"Insiders might sell their shares for any number of reasons, but they buy them for only one: they think the price will rise"
- Peter Lynch ==>> What is insider trading>>

Email a friend >>...

The following is an SEC EDGAR document rendered as filed.
Here is the list of insider trading transaction codes.

FORM 4

Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. *See* Instruction 1(b).

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(h) of the Investment Company Act of 1940

OMB APPROVAL	
OMB Number:	3235-0287
Expires:	November 30, 2011
Estimated average burden hours per response...	0.5

1. Name and Address of Reporting Person * Wolfus Daniel E (Last) (First) (Middle) 10350 WILSHIRE BLVD, #1604 (Street) LOS ANGELES, CA90024 (City) (State) (Zip)	2. Issuer Name **and** Ticker or Trading Symbol Midway Gold Corp [MDW]	5. Relationship of Reporting Person(s) to Issuer (Check all applicable) __ X __ Director _____ 10% Owner _____ Officer (give title below) _____ Other (specify below)
	3. Date of Earliest Transaction (MM/DD/YY) 09/10/2009	
	4. If Amendment, Date Original Filed(MM/DD/YY)	6. Individual or Joint/Group Filing(Check Applicable Line) __ X __ Form filed by One Reporting Person _____ Form filed by More than One Reporting Person

Table I - Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

1.Title of Security (Instr. 3)	2. Transaction Date (MM/DD/YY)	2A. Deemed Execution Date, if any (MM/DD/YY)	3. Transaction Code (Instr. 8)		4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)			5. Amount of Securities Beneficially Owned Following Reported Transaction(s) (Instr. 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Indirect Beneficial Ownership (Instr. 4)
			Code	V	Amount	(A) or (D)	Price			

Table II - Derivative Securities Acquired, Disposed of, or Beneficially Owned

(*e.g.* , puts, calls, warrants, options, convertible securities)

1. Title of Derivative Security (Instr. 3)	2. Conversion or Exercise Price of Derivative Security	3. Transaction Date (MM/DD/YY)	3A. Deemed Execution Date, if any (MM/DD/YY)	4. Transaction Code (Instr. 8)		5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instr. 3, 4, and 5)		6. Date Exercisable and Expiration Date (MM/DD/YY)		7. Title and Amount of Underlying Securities (Instr. 3 and 4)		8. Price of Derivative Security (Instr. 5)	9. Number of Derivative Securities Beneficially Owned Following Reported Transaction(s) (Instr. 4)	10. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instr. 4)	11. Nature of Indirect Beneficial Ownership (Instr. 4)
				Code	V	(A)	(D)	Date Exercisable	Expiration Date	Title	Amount or Number of Shares				
Stock Option (Right to Buy)	$ 0.86 (1)	09/10/2009		A		1,000,000		09/10/2009	09/09/2014	Common Stock	1,000,000	$ 0	1,000,000	D	

Reporting Owners

Reporting Owner Name / Address	Relationships			
	Director	10% Owner	Officer	Other
Wolfus Daniel E 10350 WILSHIRE BLVD #1604 LOS ANGELES, CA90024	X			

Signatures

/s/ Doris F. Meyer as attorney-in-fact for Daniel E. Wolfus — ** Signature of Reporting Person

09/14/2009 — Date

Explanation of Responses:

(1) Dollar value expressed in Canadian dollars.

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

* If the form is filed by more than one reporting person, *see* Instruction 4(b)(v).

** Intentional misstatements or omissions of facts constitute Federal Criminal Violations. *See* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25, Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII **KENNETH A. BRUNK'S MOTION TO DISMISS SECOND AMENDED COMPLAINT AND JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

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

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

DATED this 16th day of March, 2018.

SANTORO WHITMIRE

JASON D. SMITH, ESQ.
Nevada Bar No. 9691
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Las Vegas, Nevada 89135

ERIC B. LIEBMAN, ESQ.
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(702) 948-8771 - fax (702) 948-8773

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL:

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

DATED this 16th day of March, 2018.

SANTORO WHITMIRE

7357 for

JASON D. SMITH, ESQ.
Nevada Bar No. 9691
10100 W. Charleston Blvd., Suite 250
Las Vegas, Nevada 89135

ERIC B. LIEBMAN, ESQ.
REBECCA DECOOK, ESQ.
MOYE WHITE LLP
1400 16th Street, 6th Floor
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Attorneys for Defendant Kenneth A. Brunk

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10100 W. Charleston Blvd., Suite 250, Las Vegas, Nevada 89135
(702) 948-8771 - fax (702) 948-8773

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

INTRODUCTION

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

Brunk moves the Court to dismiss the claims asserted against him in the Complaint under Rule 12(b)(2) of the Nevada Rules of Civil Procedure ("NRCP") on the ground that this Court lacks personal jurisdiction over him. Brunk is not subject to general jurisdiction in Nevada because he does not reside, much less domicile, in Nevada, and his very limited contacts with Nevada do not render him at "home" in Nevada. Furthermore, Plaintiff's claims arise out of alleged material omissions contained in Midway's SEC filings and press releases, which were drafted in and issued from Colorado and communicated to the investing public in general. Because the claims asserted in this lawsuit do not arise from Brunk's purported contacts with the state of Nevada, this Court cannot exercise specific jurisdiction over Brunk.

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

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FACTUAL BACKGROUND

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

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

2. At all times relevant to this litigation, the headquarters of Midway was located in Englewood, Colorado. *See* Declaration of Kenneth A. Brunk, Exh. A ¶ 15.

3. From May 2010 to May 2012, Brunk served as the president and Chief Operating Officer ("COO") of Midway. Complaint ¶ 36. In May 2012, Brunk became the Chief Executive Officer ("CEO") and Chairman of the Board of Midway. *Id*. He served as Chairman of the Board until August 2014 and as CEO until December 2014. *Id*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

1. Legal Standard for Personal Jurisdiction.

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

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

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

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

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

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

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

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"a substantial connection with the forum state."[7]

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

2. This Court Lacks General Jurisdiction Over Brunk.

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

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

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

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

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

3. This Court Also Lacks Specific Jurisdiction Over Brunk.

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

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

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

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

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

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

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conduct" that would create a substantial connection between him and Nevada. *See generally,* Complaint. The only basis for jurisdiction asserted by Plaintiff is that at least one Defendant resided and still resides in Nevada. *See* Complaint ¶15. The claims asserted by Plaintiff all arise out of Plaintiff's reliance upon purported material omissions contained in Midway's SEC filings and press releases. *See* Complaint ¶¶ 106, 111, 129, 130, 131, 132, 135, 136, 144 and 145. Importantly, Plaintiff has not alleged, and cannot allege, that Brunk's allegedly tortious conduct (material omissions in public filings) took place in Nevada. *See generally,* Complaint. As stated in the Declaration, the SEC filings and press releases were entirely drafted in and issued from the state of ***Colorado*** where Midway's principal place of business and executive offices are located. Exh. A ¶ 20. These filings and press releases were also received and purportedly acted upon by Plaintiff in the state of ***California***. *See* Complaint ¶ 7. Absent evidence to the contrary, there is no connection between these claims and Nevada that would serve as a basis for the exercise of specific jurisdiction.[8] Plaintiff's Complaint must be dismissed.

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

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

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

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

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

CONCLUSION

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

DATED this 16th day of March, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 16th day of March, 2018, a true and correct copy of the **OF KENNETH A. BRUNK'S MOTION TO DISMISS SECOND AMENDED COMPLAINT AND JOINDER IN D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** was served electronically with the Clerk of the Court using the Eighth Judicial District Court's eFileNV system to the following:

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/s/ Rachel Jenkins
An employee of SANTORO WHITMIRE

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Exhibit A

DECL
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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25, Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII

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

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

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

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

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

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

4. I am a resident of Colorado.

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

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

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

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

9. I do not hold any Nevada licenses.

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

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

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

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

14. I do not have family in Nevada.

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

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

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17. During the time I served as the chief executive officer ("CEO") and Chairman of the Board of Midway, my business office was located in Colorado. I did not frequently visit Nevada to perform my duties as CEO and Chairman of the Board. In fact, during this time, I visited Nevada approximately three to five times per year. All such visits were made in furtherance of my duties as CEO and Chairman of the Board.

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

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

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

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

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

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

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

Dated this 16th day of March, 2018.

KENNETH A. BRUNK

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII **MOTION TO DISMISS AND JOINDER TO D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC (collectively, the "Hale Defendants"), by and through their counsel of record, Greenberg Traurig LLP, hereby move to dismiss Plaintiff Daniel E. Wolfus' ("Plaintiff") Second Amended Complaint pursuant to NRCP 12(b)(2) for lack of personal jurisdiction. Just like his misguided complaints before this one, Plaintiff fails to plead

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any facts demonstrating that this Court can properly exercise personal jurisdiction over any of the Hale Defendants. None of the claims at issues in Plaintiff's Second Amended Complaint arise in any way out of the Hale Defendants' purported contacts with the State of Nevada and the Hale Defendants have not otherwise purposefully vailed themselves of this Court's jurisdiction. This Court cannot properly exercise jurisdiction over any of the Hale Defendants as a result and the Second Amended Complaint must be dismissed as to each of them pursuant to NRCP 12(b)(2).

Further, pursuant to EDCR 2.20(d), the Hale Defendants also join in all of the arguments raised in the remaining D&O Defendants' Motion to Dismiss Second Amended Complaint (the "D&O Motion"). As set forth therein, this Court lacks subject matter jurisdiction over the claims and Plaintiff has otherwise failed to plead his claims in compliance with the law. As such, even if this Court could exercise jurisdiction over the Hale Defendants, which it cannot, dismissal of the Second Amended Complaint is proper under NRCP 12(b)(1) and 12(b)(5).

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

DATED this 16th day of March, 2018.

GREENBERG TRAURIG, LLP

/s/ Christopher R. Miltenberger

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NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned counsel will bring the following **MOTION TO DISMISS AND JOINDER TO D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** on for hearing before Department XXVII, District Court, Clark County, Nevada on the 2 day of May, 2018, at 10:30 a .m or as soon thereafter as counsel may be heard.

DATED this 16th day of March, 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Having now had three attempts to plead his claims against any of the Defendants, Plaintiff's Second Amended Complaint still falls woefully short. While all of Plaintiff's claims are deficient as a matter of law as set forth in the D&O Motion, Plaintiff's continued effort to assert claims against Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC[1] (the "Hale Defendants") in this jurisdiction is particularly egregious. None of the Hale Defendants reside in Nevada, transact business within this state, or otherwise demonstrate any indicia as to how exercise of jurisdiction over them could possibly be reasonable under the circumstances. Nor do any of the claims set forth in the

[1] INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC (the "Investment Entities") are sole-purpose entities serving as investment vehicles that were organized under the laws of the State of Delaware. *See* Hale Decl.,

Second Amended Complaint arise out of any of the Hale Defendants' minimal, Nevada-related activity. In light of the incontrovertible facts, this Court should, at a minimum, dismiss the Second Amended Complaint as against each of the Hale Defendants for lack of personal jurisdiction.

II. SUMMARY OF ALLEGATIONS RELEVANT TO THE HALE DEFENDANTS[2,3]

Midway is a Canadian corporation incorporated under the Company Act of British Columbia. Second Amended Complaint ("SAC"), ¶ 23. Historically, Midway was engaged in the acquisition, exploration and potential development of gold mineral properties throughout North America, but primarily from mines located in Nevada and Washington. *See, e.g., id.* at ¶¶ 24, 30.

Plaintiff is and at all relevant times was a resident of the State of California. *Id.* at ¶ 7. Plaintiff served as a member of Midway's Board of Directors from November 2008 through June 2013, including serving as the company's Chairman of the Board of Directors and Chief Executive Officer from sometime in 2009 through May 18, 2012. *Id.* at ¶¶ 26-27, 49. Both prior to, during, and after serving as a member of Midway's Board of Directors and its CEO, Plaintiff either purchased Midway's common stock on the open market or by exercising certain stock option grants issued during his tenure with the company. *See id.* at ¶ 29. Plaintiff does not allege that he purchased any common stock or was granted any stock option grants directly from any of the Hale Defendants or was solicited by any of the Hale Defendants in connection with any of his purchases or exercises of his grants. *See id.* at ¶¶ 29, 69-70, 87, 89.

In 2012, while Plaintiff was still Chairman of Midway's Board of Directors and the Company's CEO, Hale Capital Partners, LP ("HCP") began investigating making a substantial

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[2] The Hale Defendants incorporate by reference the Factual Background set forth in Section II of the D&O Motion as if fully set forth herein.

[3] While the Hale Defendants dispute many of Plaintiff's factual allegations, the summary set forth herein accepts such allegations as true simply for the purpose of this motion to the extent required by NRCP 12(b)(5). *See Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997).

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investment in Midway. Am. Compl., ¶ 49. In August 2012, Nathaniel Klein ("Klein"), then a Vice President at HCP, was appointed to Midway's Board of Directors. *Id.* at ¶ 51.

On November 21, 2012, Midway announced via a press release and a Schedule 8-K filed with the SEC, that the Company had reached an agreement whereby the Investor Entities (INV-MID, LLC, as lead investor, and EREF-MID II, LLC and HCP-MID, LLC, as investors) would acquire $70 million in Series A Preferred Shares of Midway for $70 million, pursuant to certain stipulations and agreements. *Id.* at ¶ 54. This transaction closed on December 13, 2012. *Id.* at ¶ 55. That day, Martin M. Hale, Jr. ("Hale"), HCP's CEO and portfolio manager, was appointed to Midway's Board of Directors, and Klein resigned his directorship. *Id.* at ¶ 49, 55. Klein was reelected to Midway's Board of Directors on June 20, 2013, *id.*. ¶ 58, but later resigned from the Board on November 4, 2014. *Id.* at ¶ 92. Trey Anderson ("Anderson") was appointed to serve as a director, filling the spot vacated by Klein. *Id.* Plaintiff does not allege that he acquired any stock in Midway or otherwise exercised stock option grants at any time after Anderson's appointment to the Board. *See id.* at ¶¶ 92-95.[4]

It bears repeating that Plaintiff does not allege that any statements made in any of the press releases or Schedule 8-Ks issued by Midway relating to the HCP transaction, or, in fact, relating to Midway at all, ever originated from Nevada as opposed to Midway's executive offices in Colorado. *See generally* SAC. He also concedes that he received any such statements in California, not Nevada. *See id.* at ¶ 7. Although it is his burden to establish jurisdiction over each of the Defendants, Plaintiff makes no attempt to demonstrate by alleging facts, as opposed to hollow legal conclusions, as to how the Hale Defendants have subjected themselves to jurisdiction within this State. *See id* at ¶¶ 12-13, 19 (asserting the legal conclusion that Hale, Anderson and Klein's "contacts with Nevada were so continuous and systematic as to render him

[4] Notably, Plaintiff admits that Anderson was not responsible for any of the alleged misleading statements or omissions for which he basis any of his misguided claims. *See* SAC, ¶¶ 64, 85 (defining the 2013 and 2014 "Control Defendants" as alleged by Plaintiff). Nevertheless, Plaintiff includes Anderson as a defendant in this action without asserting any conduct whatsoever on his behalf related in any way to his claims.

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at home in Nevada."); *see, e.g., id.* at ¶ 20 (making ***no*** allegations with respect to ***any*** contacts of the Investment Entities with the State of Nevada).

III. ANALYSIS

A. Plaintiff Bears the Burden of Establishing Jurisdiction over Each Defendant.

The party seeking to invoke the Court's jurisdiction bears the burden of presenting the Court with competent evidence sufficient to establish a *prima facie* showing of jurisdiction as to each defendant. *Trump v. District Court*, 109 Nev. 687, 693, 857 P.2d 740, 744 (1993) ("The plaintiff must produce some evidence in support of all facts necessary for a finding of personal jurisdiction, and the burden of proof never shifts to the party challenging jurisdiction."). A plaintiff cannot establish jurisdiction by simply resting on its allegations, particularly when those allegations are mere statements of legal conclusions. *See Trump*, 109 Nev. at 692, 857 P.2d at 743. Plaintiff has not and cannot present sufficient facts to demonstrate that the exercise of personal jurisdiction over any of the Hale Defendants is proper in this case.

The Nevada Supreme Court has long held that in order for a court within this state to exercise personal jurisdiction over a nonresident defendant, the plaintiff must demonstrate: (1) that the requirements of the state's long-arm statute have been satisfied, and (2) that due process is not offended by the exercise of jurisdiction. *Trump*, 109 Nev. at 698, 857 P.2d at 747. However, for all practical purposes, "since Nevada's long-arm statute has been construed to extend to the outer reaches of due process, the two inquiries…may be collapsed into one." *See id*. and *Baker v. District Court*, 116 Nev. 527, 532, 999 P.2d 1020, 1023 (2000) (Nevada's long-arm statute, NRS 14.065, reaches the limits of due process set by the United States Constitution). Accordingly, under Nevada law, the essential inquiry is whether the exercise of personal jurisdiction satisfies due process.

The due process requirement protects a nonresident from binding judgments in forums with which it has established no meaningful contacts, ties, or relations. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). In order for a Nevada court to exercise personal jurisdiction over a nonresident defendant, the Due Process Clause of the Fourteenth Amendment

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requires that the defendant have "minimum contacts" with the forum state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Baker*, 116 Nev. at 532, 999 P.2d at 1023 (citing *Mizner v. Mizner*, 84 Nev. 268, 270, 439 P.2d 679, 680 (1968) (citing *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945))). Importantly, the forum state's exercise of jurisdiction over a defendant must be reasonable. *Id.*

1. This Court Cannot Exercise General Jurisdiction Over the Hale Defendants.

Plaintiff's Amended Complaint failed to allege facts to support the exercise of jurisdiction over any of the Hale Defendants and Plaintiff's perfunctory revisions to his Second Amended Complaint do nothing to remedy that fatal flaw. For the Court to exercise general jurisdiction, Plaintiff must establish facts demonstrating that each of the Hale Defendants' contacts with the State of Nevada are "substantial" or "continuous and systematic" such that hailing them into this court is reasonable as they may, in effect, be deemed to be present in the forum. *Budget Rent-A-Car v. Eighth Judicial Dist. Court*, 108 Nev. 483, 485, 835 P.2d 17, 19 (1992) citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). As the United States Supreme Court recently explained, general jurisdiction should only be exercised when the defendant's contacts with the forum state "are so constant and pervasive as to render it essentially at home in the forum State." *Daimler AG v. Bauman*, -- U.S. --, --, 134 S.Ct. 746, 751 (2014).

As the Nevada Supreme Court has recognized, "[t]he level of contact with the forum state necessary to establish general jurisdiction is high." *Budget Rent-A-Car*, 108 Nev. at 485, 835 P.2d at 19; *see also Trump*, 109 Nev. at 699. In determining if exercising jurisdiction is proper, the Court should look to factors such as whether the defendant is incorporated or licensed to do business in the forum state, has offices, property, employees or bank accounts there, pays taxes in the state or whether the defendant advertises, solicits business, or makes sales in the state. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1083 (C.D. Cal. 2003) (citing cases), *aff'd,* 380 F.3d 1154 (9th Cir. 2004), *cert. granted,* 73 U.S.L.W. 3247 (U.S.

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Dec. 10, 2004). The Hale Defendants have no such contacts and the Court cannot properly exercise general jurisdiction over any of them.

With respect to Hale, Klein and Anderson, Plaintiff alleges that each of them has contacts with Nevada that were "so continuous and systematic as to render him at home in Nevada." *See* SAC at ¶¶12-13, 19. Stating such a legal conclusion does not make it so. Contrary to Plaintiff's baseless allegations, Hale, Klein and Anderson have little if any contacts with the State of Nevada. None of them reside in the State of Nevada, nor have they ever been a resident of this state. Ex. A, Hale Decl., ¶ 5; Ex. B, Klein Decl., ¶ 5; Ex. C, Anderson Decl., ¶ 5. Nor do they own any real or personal property within the state, or hold any personal assets within the state. Ex. A, Hale Decl., ¶ 6; Ex. B, Klein Decl., ¶ 6; Ex. C, Anderson Decl., ¶ 6. Neither Hale, Klein, nor Anderson maintain any offices, bank accounts, telephone or fax numbers, or registered agents within the State of Nevada. Ex. A, Hale Decl., ¶¶ 7, 10, 11 and 12; Ex. B, Klein Decl., ¶¶ 7, 10, 11 and 12; Ex. C, Anderson Decl., ¶¶ 7, 10, 11 and 12. In fact, Hale, Klein and Anderson do not hold any licenses issued by any regulatory or administrative body in the State of Nevada, any interests in any companies organized under the laws of Nevada, or any managerial or employment positions with any such companies. Ex. A, Hale Decl., ¶¶ 8 and 9; Ex. B, Klein Decl., ¶¶ 8 and 9; Ex. C, Anderson Decl., ¶¶ 8 and 9. In short, Hale, Klein and Anderson's minimal interactions with the State of Nevada relate to the rare vacation with friends and family, occasional attendance at a trade show or seminar, and perhaps a few visits to Midway's Nevada operations for a board meeting, a groundbreaking, or general observations. Ex. A, Hale Decl., ¶¶ 14 and 15; Ex. B, Klein Decl., ¶¶ 14 and 15; Ex. C, Anderson Decl., ¶¶ 14 and 15. Such infrequent and inconsequential contacts do not satisfy the due process requirements to enable this Court to exercise general jurisdiction over them or for the Court to consider any of them to be "at home" in this state. *Bauman*, 134 S.Ct. at 751; *Viega GmbH v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 40, 328 P.3d 1152, 1157 (2014).

Notably, Plaintiff makes ***no*** effort to plead ***any*** facts claiming that any of the Investment Entities has any contacts with the State of Nevada, let alone continuous and systematic ones as

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would be required to exercise general jurisdiction. *See* SAC at ¶ 20. Instead, and as Plaintiff concedes in his Second Amended Complaint, each of the Investment Entities is a limited liability company organized under the laws of the State of Delaware. SAC at ¶ 20; Ex. A, Hale Decl., ¶ 16. Each of the Investment Entities is a sole-purpose entity formed for the purpose of making investments in Midway. Ex. A, Hale Decl., ¶ 17. None of the individual members or managers of any of the Investment Entities are residents of the State of Nevada or entities organized under the laws of the State of Nevada. *Id.* at ¶18. In light of the nature of those entities, none of the Investment Entities owns property in Nevada, maintains offices, telephone numbers, or registered agents in Nevada, holds any licenses in Nevada, or otherwise conducts business in the State of Nevada. *Id.* at ¶¶ 20 - 24. Again, none of the Investment Entities could be considered to be "at home" in this state, and this Court cannot exercise general jurisdiction over any of them. *Bauman*, 134 S.Ct. at 751; *Viega GmbH*, 328 P.3d at 1157.

2. This Court Cannot Exercise Specific Jurisdiction over any of the Hale Defendants.

Plaintiff's Second Amended Complaint fails to allege any facts with respect to the Hale Defendants that would permit this Court to exercise personal jurisdiction over any of them. This Court may only invoke specific jurisdiction over a defendant when the plaintiff establishes through facts each of the following: (1) that the defendant purposefully availed itself of the privilege of serving the market in the forum or of enjoying the protection of the laws of the forum; (2) that plaintiff's claim asserted in the complaint arises from the defendant's purposeful contact with the forum state; and, (3) that the exercise of jurisdiction as a result is reasonable under the circumstances. *Budget Rent-A-Car,* 108 Nev. at 487, 835 P.2d at 20; *see also Viega GmbH*, 328 P.3d at 1157. Plaintiff's Second Amended Complaint does not contain facts to meet its burden with respect to any of these elements.

No Purposeful Availment. To survive a motion to dismiss, Plaintiff must demonstrate that the Hale Defendants purposefully availed themselves of Nevada's laws or markets by intentionally directing their conduct toward Nevada. *Trump*, 109 Nev. at 702, 857 P.2d 750.

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Plaintiff's Second Amended Complaint does not contain any allegations that any of the Hale Defendants directed any of their actions towards Nevada, as opposed to the operations of a Canadian company Importantly, having a relationship with a company that may conduct some business operations in Nevada is not enough to establish specific jurisdiction over a nonresident defendant. *See Southport Lane Equity II, LLC v. Downey*, 177 F.Supp.3d 1286 (D. Nev. 2016). Further, any of the other Defendants' purported contacts with the State of Nevada cannot be attributed to any of the Hale Defendants or a basis to find them subject to this Court's specific jurisdiction. *See Downey*, 177 F.Supp.3d at 1296 ("[W]hat matters most in this analysis is not the corporations own contacts with Nevada but the individual Defendants' contacts with the state.") Plaintiff cannot satisfy the threshold element of identify any conduct that purports to represent the Hale Defendants purposefully availing themselves to the jurisdiction of this state.

No Claim Arising from Forum Related Activity. A plain reading of the Second Amended Complaint demonstrates that none of the claims asserted therein arise out of the Hale Defendants' purported limited contacts with the State of Nevada. Instead, all of Plaintiff's claims are based on his allegations that Midway, in its public filings and press releases, either misrepresented statements or omitted statements from those statements. *See e.g., id.* at ¶¶ 59, 90. Even if those statements could somehow be attributed to any of the Hale Defendants, which they cannot, all such filings and press releases were disseminated from Midway at its Englewood/Denver, Colorado executive headquarters. In fact, the Second Amended Complaint allege that any of the Hale Defendants made any representations at all, let alone directly to Plaintiff in the State of Nevada. Rather, Plaintiff alleges that he received any representations upon which he bases his claims from the company in his home in California. *See* SAC at ¶7. In short, Plaintiff cannot articulate how his claims purportedly arise out of the Hale Defendant's transient contacts with the state and jurisdiction over any of the Hale Defendants is improper as a result.

Exercise of jurisdiction is unreasonable. Even if Plaintiff could somehow demonstrate that the Hale Defendants had purposefully availed themselves of the privilege of doing business

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in Nevada, or that his claims arose out of the Hale Defendant's incidental contacts with the State, this Court should still not exercise jurisdiction over them as it would be unreasonable to do so under the circumstances. As the United States Supreme Court noted in long ago in *International Shoe Co.*, exercise of personal jurisdiction over a defendant is only appropriate if there are sufficient "minimum contacts" between the nonresident defendant and the forum state so that the maintenance of the suit does not "offend traditional notions of fair play and substantial justice." *International Shoe Co.*, 326 U.S. at 316. As expressed above at length, none of the Hale Defendants have any sufficient "minimum contacts" with the State of Nevada that would render exercise of jurisdiction reasonable in any situation. *See also* Ex. A, Hale Decl.; Ex. B, Klein Decl.; Ex. C, Anderson Decl.

Nevertheless, even if there were "minimum contacts" for this Court to consider, exercise of specific jurisdiction over any of the Hale Defendants would still be unreasonable. The Nevada Supreme Court has held that the Court should consider the following factors in determining if exercise of jurisdiction would be reasonable: (1) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; and (4) the interest of several states in furthering substantive social policies. *Trump,* 109 Nev. at 701, 857 P.2d at 749 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). None of these factors weigh in favor of exercising jurisdiction and dragging the Hale Defendants into Court in Nevada. Nevada has no interest, let alone a compelling interest, in adjudicating a dispute between a non-resident Plaintiff and non-resident defendants. This is particularly the case where none of the alleged conduct at the heart of the Second Amended Complaint took place in Nevada and where the harm was not suffered in Nevada. Nor does this Court have any interest in adjudicating claims Plaintiff pleads under the laws of the State of California.

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As the Hale Defendants lack contacts with the State of Nevada, and after weighing the relevant factors, exercise jurisdiction in this situation would offend "traditional notions of fair play and substantial justice" such that dismissal is proper.

B. <u>The Arguments in the D&O Motion Apply Equally to the Hale Defendants.</u>

Although Plaintiff was granted leniency by the Court and permitted to amend his complaint for a third time, he failed to remedy the same fatal flaws that the Court found in the Amended Complaint and as otherwise previously addressed by the parties' in their prior motions to dismiss. Plaintiff's failure to cure these defects in his latest pleading demonstrates why his Second Amended Complaint should be dismissed with prejudice.

In the interests of judicial economy and efficiency, the Hale Defendants hereby joint in the D&O Motion in its entirety. In doing so, the Hale Defendants hereby adopt and incorporate the arguments set forth therein by reference in this Motion in their entirety. The Hale Defendants reserve the right to argue the legal arguments and positions set forth in the D&O Motion at the time of the consolidated hearing on this Motion and Joinder and the D&O Motion.

IV. CONCLUSION

Plaintiff's latest effort to replead his claims against the Defendants fails on both the law and facts. As set forth in the D&O Motion, Plaintiff lacks standing to pursue his claims as they are derivative in nature and his claims are otherwise insufficiently pled. Regardless, even if his claims were adequately pled, this Court should still dismiss all of the Hale Defendants from this case as this Court has no jurisdiction over any of them. Either way, Plaintiff's Second Amended

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Complaint fails and it should be dismissed in its entirety.

DATED this 16th day of March, 2018.

GREENBERG TRAURIG, LLP

/s/ Christopher R. Miltenberger
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Nevada Bar No. 1625
CHRISTOPHER R. MILTENBERGER, ESQ.
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Counsel for Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this 16th day of March, 2018, I caused a true and correct copy of the foregoing ***Motion to Dismiss and Joinder to D&O Defendants Motion to Dismiss Second Amended Complaint*** to be filed and e-served via the Court's E-Filing System on all parties with an email address on record this action. The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

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

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EXHIBIT A

DECL
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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII **DECLARATION OF MARTIN M. HALE, JR. IN SUPPORT OF MOTION TO DISMISS AND JOINDER TO D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

I, Martin M. Hale, Jr., declare under penalty of perjury of the laws of the United States and the State of Nevada as follows:

1. I am a Defendant in the above-captioned matter. This Declaration is made and based upon my own personal knowledge. If called upon to testify to the contents of this Declaration, I am legally competent to testify to its contents in a court of law.

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2. I make this Declaration in support of the Hale Defendants' Motion to Dismiss and Joinder to D&O Defendants' Motion to Dismiss Second Amended Complaint filed contemporaneously herewith.

3. I have served as a member of Midway Gold Corporation's ("Midway") Board of Directors since December 13, 2012.

4. Plaintiff's allegation in the Second Amended Complaint that while with Midway my contacts with the State of Nevada were "so continuous and systematic as to render [me] at home in Nevada" is patently false and without any basis in fact as demonstrated herein.

5. I am not now, nor have I ever been, a resident of the State of Nevada.

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

7. I do not own or maintain any business or personal offices in the State of Nevada.

8. I do not hold any licenses from any agency, governing body, or regulatory agency within the State of Nevada for any purpose.

9. I do not own any interest in any companies organized under the laws of the State of Nevada or having its principal place of business in the State of Nevada. Nor do I hold any managerial or employment positions with any such companies or organizations.

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

11. I do not have or maintain any telephone or facsimile numbers in the State of Nevada.

12. I have never been required to maintain, nor have I maintained, a registered agent for service in the State of Nevada.

13. I have never been a party to any lawsuits in the State of Nevada, except for the instant case.

14. My interactions with Nevada are very limited. Between December 2012 and the present, I traveled to Nevada on approximately four occasions in connection with my position as a member of Midway's Board of Directors or in connection with the investments made in

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Midway by INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC (the "Investment Entities"). These visits included attending one board meeting in the State of Nevada, visiting Midway's Nevada operations for a groundbreaking ceremony, and perhaps on one or two other occasions to generally observe Midway's Nevada operations.

15. Outside of the rare visit to Nevada in connection with observation of Midway's Nevada operations, my interactions with the State of Nevada are even more limited. Over the last decade, I have traveled to Nevada, and in particular Las Vegas, on a few occasions for personal vacations with friends and family and attended an hour of one personal development seminar that included two colleagues from work in addition to a few friends and approximately 100 other attendees.

16. Each of the Investment Entities named as Defendants in the above-captioned action is a limited liability company organized under the laws of the State of Delaware.

17. Each of the Investment Entities is a sole-purpose entity formed for the purpose of making an equity investment in Midway, a publicly traded Canadian corporation incorporated under the laws of British Columbia with its principal executive offices located in Englewood, Colorado.

18. None of the individual members of any of the Investment Entities are residents of the State of Nevada. INV-MID, LLC is managed by Hale Fund Management, LLC, a Delaware limited liability company, and its other member is neither a resident of Nevada or entities organized under the laws of Nevada. EREF-MID, LLC is managed by Hale Fund Management, LLC, a Delaware limited liability company, and its other members are neither residents of Nevada or entities organized under the laws of Nevada. HCP-MID, LLC is solely owned by Hale Capital Partners, LP, is a Delaware limited partnership with its principal place of business in New York, New York.

19. None of the Investment Entities conducts any business in the State of Nevada.

20. None of the Investment Entities owns any personal or real property in the State of Nevada.

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21. None of the Investment Entities owns or maintains any offices in the State of Nevada.

22. None of the Investment Entities hold any licenses from any agency, governing body, or regulatory agency within the State of Nevada for any purpose.

23. None of the Investment Entities hold any telephone or facsimile numbers in the State of Nevada.

24. None of the Investment Entities have ever been required to maintain, nor have they maintained, a registered agent for service in the State of Nevada.

25. None of the Investment Entities have ever been a party to any lawsuits in the State of Nevada, except for the instant case.

26. I declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct and that I signed this declaration on this 16th day of March, 2018.

/s/ Martin M. Hale, Jr.
MARTIN M. HALE, JR.

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EXHIBIT B

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII **DECLARATION OF NATHANIEL KLEIN IN SUPPORT OF MOTION TO DISMISS AND JOINDER TO D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

I, Nathaniel Klein, hereby declare as follows:

1. I am a Defendant in the above-captioned matter. This Declaration is made and based upon my own personal knowledge. If called upon to testify to the contents of this Declaration, I am legally competent to testify to its contents in a court of law.

2. I make this Declaration in support of the Hale Defendants' Motion to Dismiss and

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Joinder to D&O Defendants' Motion to Dismiss Second Amended Complaint filed contemporaneously herewith.

3. I served as a member of Midway Gold Corporation's ("Midway") Board of Directors from August 8, 2012 until December 13, 2012, and again from June 20, 2013 until approximately November 4, 2014.

4. Plaintiff's allegation in the Second Amended Complaint that while with Midway my contacts with the State of Nevada were "so continuous and systematic as to render [me] at home in Nevada" is patently false and without any basis in fact as demonstrated herein.

5. I am not now, nor have I ever been, a resident of the State of Nevada.

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

7. I do not own or maintain any business or personal offices in the State of Nevada.

8. I do not hold any licenses from any agency, governing body, or regulatory agency within the State of Nevada for any purpose.

9. I do not own any interest in any companies organized under the laws of the State of Nevada or having its principal place of business in the State of Nevada. Nor do I hold any managerial or employment positions with any such companies or organizations.

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

11. I do not have or maintain any telephone or facsimile numbers in the State of Nevada.

12. I have never been required to maintain, nor have I maintained, a registered agent for service in the State of Nevada.

13. I have never been a party to any lawsuits in the State of Nevada, except for the instant case.

14. My interactions with Nevada are very limited. Between 2012 and 2014, I traveled to Nevada on approximately four occasions in connection with my position as a member of Midway's Board of Directors or in connection with the investments made in Midway by INV-

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MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC (the "Investment Entities"). These visits included conducting due diligence relating to the potential investment by the Investment Entities, attending one board meeting in the State of Nevada, visiting Midway's Nevada operations for a groundbreaking ceremony, and perhaps on one or two other occasions to generally observe Midway's Nevada operations.

15. Outside of the rare visit to Nevada in connection with observation of Midway's Nevada operations, my interactions with the State of Nevada are even more limited. Over the last decade, I have traveled to Nevada, and in particular Las Vegas, on a few occasions for personal vacations with friends and family. While I have attended a few industry trade shows and conventions in Las Vegas, Nevada over the past decade, I have not conducted any business in the State of Nevada other than attending such conventions.

16. I declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct and that I signed this declaration on this 16th day of March, 2018.

/s/ Nathaniel Klein
NATHANIEL KLEIN

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EXHIBIT C

DECL
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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII **DECLARATION OF TREY ANDERSON IN SUPPORT OF MOTION TO DISMISS AND JOINDER TO D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

I, Trey Anderson, declare under penalty of perjury of the laws of the United States and the State of Nevada as follows:

1. I am a Defendant in the above-captioned matter. This Declaration is made and based upon my own personal knowledge. If called upon to testify as to the contents of this Declaration, I am legally competent to testify to its contents in a court of law.

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2. I make this Declaration in support of the Hale Defendants' Motion to Dismiss and Joinder to D&O Defendants' Motion to Dismiss Second Amended Complaint filed contemporaneously herewith.

3. I have served as a member of Midway Gold Corporation's ("Midway") Board of Directors since November 4, 2014.

4. Plaintiff's allegation in the Second Amended Complaint that while with Midway my contacts with the State of Nevada were "so continuous and systematic as to render [me] at home in Nevada" is patently false and without any basis in fact as demonstrated herein.

5. I am not now, nor have I ever been, a resident of the State of Nevada.

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

7. I do not own or maintain any business or personal offices in the State of Nevada.

8. I do not hold any licenses from any agency, governing body, or regulatory agency within the State of Nevada for any purpose.

9. I do not own any interest in any companies organized under the laws of the State of Nevada or having its principal place of business in the State of Nevada. Nor do I hold any managerial or employment positions with any such companies or organizations.

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

11. I do not have or maintain any telephone or facsimile numbers in the State of Nevada.

12. I have never been required to maintain, nor have I maintained, a registered agent for service in the State of Nevada for any purpose.

13. I have never been a party to any lawsuits in the State of Nevada, except for the instant case.

14. My interactions with Nevada are very limited. As a member of Midway's Board of Directors, I attended one board meeting and a few site visits in the State of Nevada.

15. My interactions with the State of Nevada other than in connection with my

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membership on Midway's Board of Directors are even more limited. Over the last decade, I have traveled to Nevada on a few occasions for personal vacations with friends and family and attended a personal development seminar that included two colleagues from work in addition to a few friends and approximately 100 other attendees. While I have attended a few industry trade shows and conventions in Las Vegas, Nevada, and one or two site visits for an unrelated project outside of Reno, Nevada over the past decade, I have not personally conducted any business in the State of Nevada.

16. I declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct and that I signed this declaration on this 16th day of March, 2018.

/s/ Trey Anderson
TREY ANDERSON

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EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

DANIEL E. WOLFUS, Plaintiff, vs. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-B DEPT NO.: 27 **CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT** Date of hearing: 5.9.18 Time of hearing: 10:30 a.m.

I. INTRODUCTION

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

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

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

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

II. FACTS

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

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

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

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

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

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

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

In November 2008, Wolfus became an outside director of Midway. (SAC ¶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. (SAC ¶27.)

In 2009, Midway was active in gold exploration at its Nevada properties of Pan, Gold Rock (formerly the Monte), Spring Valley, Thunder Mountain, Roberts Creek, Creek and Burnt Canyon. (SAC ¶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. (SAC ¶35.) Pan is located about 22 miles southeast of Eureka, Nevada. (SAC ¶32.)

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

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

On July 20, 2010, Midway publicly announced the results of a favorable preliminary economic assessment ("PEA") for the Pan project. The PEA included an independent audit of an updated Midway mineral resource estimate. (SAC ¶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 the Pan project. The same day, Midway reported in the Annual Report filed on Form 10-K 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." (SAC ¶39.)

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

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

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

On December 20, 2011, Midway filed the 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 Feasibility Study was never publicly updated or amended, and it was the basis on which all permits were sought. (SAC ¶45; and, excerpts of study attached to the SAC at Exhibit 1.)

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, with capital costs of ~$100 million. (SAC ¶47.)

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

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

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

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

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

On September 10, 2012, Midway and Brunk reported by press release that the Pan project was on schedule for "start-up of production in mid-2014". (SAC ¶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 Series A Preferred Shares to the Hale Investors; and, creation of a Budget Work Plan Committee, which allowed Hale to control Midway and the Pan project. (SAC ¶54; and, SAC Exhibits 2 & 3.)

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

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

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

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

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

On November 17, 2013, a Midway press release issued and filed with the SEC reported that tests of ore from South Pan determined 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 the Pan project. Midway also reported hiring Sierra Partners to help find capital to fund operations. (SAC ¶60; and, SAC exhibit 6.)

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

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 Defendant was responsible for insuring that Midway publicly disclosed all material information about the Pan project and that all the Pan project publicly disclosed information was true and complete, was not misleading and did not omit material facts; and, are collectively referred to as the 2013 Control Defendants. (SAC ¶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 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 on-going operations until the Pan project produced sufficient revenues to cover those expenses;
>
> B. Hale and the Hale Investors had blocked any consideration of the sale of either Midway's interest in the Spring Valley project or the Gold Rock project or any other material assets to generate additional revenues;
>
> C. The environmental and other permits secured by Midway for the Pan project were based upon and required Midway to conduct mining operations in accordance with the mining plan submitted which called for the crushing and agglomeration of ore before it was placed on the leach pads and Midway had taken no steps to cause those permits to be modified to allow Midway to proceed using Run of Mine for the South Pit of the Pan project; and,
>
> D. Modifying the permits to permit Run of Mine would have been time consuming delaying the time when Midway could start the leaching process.

In late December and in early January 2014, Wolfus decided to exercise some of his 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 he ceased to be Midway's Chief Executive Officer. At the time, Wolfus accepted Midway public statements and filings as true and complete, and relied upon them in making the decision to buy stock. (SAC ¶66.)

On January 7, 2014, Wolfus notified Midway of his intention to exercise some of his stock options. The 2013 Control Defendants were aware of this 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. (SAC ¶66.)

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

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

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 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. (SAC ¶70.)

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

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

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

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

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

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

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

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

In its August 6, 2014, quarterly report filed on Form 10-Q with the SEC, Midway reported that it had made a 5-year contract mining deal with Ledcor and had paid a $500,000 mobilization fee. (SAC ¶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 the Pan project and that all publicly disclosed information concerning the Pan project was true and complete, was not misleading, and did not omit material facts; and, are collectively referred to as the "2014 Control Defendants." (SAC ¶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 at SAC ¶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 of the ore on the leach pads;

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

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

In late August and early September 2014, Wolfus decided to exercise some of his 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. (SAC ¶87.)

On September 5, 2014, Wolfus notified Midway of his decision to exercise some of his 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. (SAC ¶87.)

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

On September 15, 2014, Midway filed a press release with the SEC 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. (SAC ¶82.)

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

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

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

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

III. THE SECOND AMENDED COMPLAINT IS CORRECTLY PLED

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 picture of the status of its Nevada gold mining operations, especially the Pan project.

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

The press releases and disclosures were false and misleading, the reality on the ground at the Nevada Pan mine was not accurately described. In 2015, the reality on the ground at Pan 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 untrue progress at the Pan mine. Wolfus also held

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

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

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

1. The fraudulent and misleading statements are identified.

Fraudulent and misleading press releases and/or SEC disclosure/filings are identified in the SAC. *See, e.g.*, SAC at ¶47, 52, 53, 59, & 63, and SAC exhibits 5 & 7. Each statement is identified by date, its nature (SEC disclosure, press release) and its relevant content. After identifying and describing the relevant content of each press release and/or SEC disclosure/filing, the specific information which was omitted, false or misleading is listed. *See, e.g.*, SAC 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 the Pan project. The undisclosed material facts are listed in the SAC. *See, e.g.*, SAC at ¶ 65 & 86.

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

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

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

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

4. Those responsible are identified.

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

5. Scienter is alleged.

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

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

On their own, the allegations in ¶105 & 110 are sufficient. However, the paragraphs are supported and must be read in context with the other factual assertions. For example, on the non-disclosure of the Pan Run of Mine operations permit issue:

- ¶ 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 (SAC at exhibit 1), and the permitting process.
- ¶47, 52, 53, 59, & 63, list the disclosures which relate to permitting the Pan project, 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. SAC at exhibit 7.
- ¶65 describes the misleading nature of the permitting disclosures (especially exhibit 7), 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.

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

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

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

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

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

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

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

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

B. The First Cause of Action for Securities Fraud.

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

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

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

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

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

Code §25019.[4] Wolfus paid money for the shares (SAC ¶69 & 89), which is a sale of a security for value. Cal. Corp. Code §25017(a). Accordingly, Wolfus may pursue a private right of action, pursuant to Cal. Corp. Code §25501 & 25504, for securities fraud under Cal. Corp. Code §25401. Cal. Corp. Code §25401 states:

> 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.

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

> Every person who directly or indirectly controls a person liable under Section 25501 or 25503, … , every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, … , are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.

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

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

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

[4] Midway stock traded as "MDW".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The Third Cause of Action for Aiding and Abetting a Breach of Fiduciary Duty.

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

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

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

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

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

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

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

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

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

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

F. The Fifth Cause of Action for Negligent Misrepresentation.

The elements for 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 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. *Fox v. Pollack*, 181 Cal.App.3d 954, 962, 226 Cal.Rptr. 532 (1986).

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

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

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

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

G. Leave to Amend.

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

IV. NEVADA HAS JURISDICTION OVER DEFENDANTS

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

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

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

When challenged, the party seeking jurisdiction must introduce "some evidence" to establish a prima facie showing of jurisdiction. *Trump,* 857 P.2d at 743-45 (1993). Once competent evidence of jurisdiction is presented, the court must accept the proffered evidence as true; and, any remaining dispute over jurisdiction is resolved at trial. *Ibid.*

A. The Court has General Jurisdiction over Defendant Yu.

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Jurisdictional Discovery and Evidentiary Hearing.

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

Dated this 18th day of April 2018.

/S/ James R. Christensen

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CERTIFICATE OF SERVICE

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

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

EXHIBIT 1

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EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

DANIEL E. WOLFUS, Plaintiff, vs. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-~~C~~ B DEPT NO.: ~~10~~ 27 **DECLARATION OF DANIEL E. WOLFUS IN OPPOSITION TO RENEWED MOTIONS TO DISMISS**

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

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

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

Midway Gold US Inc. And Other Nevada Subsidiaries.

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

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

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

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

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

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

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

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

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

The Disclosure Committee

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

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

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

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

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

Midway Board Meetings

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

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

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

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

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

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

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

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

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

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

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

The Budget/Work Plan and Audit Committees

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

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

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

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

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

The Defendants' Declarations.

Yu

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

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

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

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

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

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

Brunk

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

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

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

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

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

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

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

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

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

Moritz

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

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

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

Blacketor

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

Hale

44. I have known Martin M. Hale, Jr., ("Hale") since prior to May 2012. Hale became a director of Midway in December 2012. Hale also was the agent of INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company (collectively the "Hale Investors"), who became investors of Midway. Hale's job as an agent was to protect these investors' investment. At all times since becoming a director, Hale was actively involved in managing Midway's mining operations in Nevada as a mandated member of the Budget/Work Plan Committee and indeed took effective control over those operations because he could veto any expenditure of capital by Midway. Hale was the person who precluded Midway from selling other Nevada projects to finance the Pan project properly. Klein was aligned with Hale and appointed by the Hale Investors. To the extent that necessary crushing equipment was not purchased for the Pan project, that was Hale's and Klein's decision primarily. To the extent Hale tries to minimize his involvement in all of Midway's Nevada activities, his declaration is false.

Klein

45. I have known Nathaniel E. Klein ("Klein") prior to the time he became a director of Midway in August 2012. Klein has substantial mining experience. Klein became a director at the instance of Hale and the Hale Investors in order to conduct their due diligence for the investment being sought by the Hale Investors and because as a director, Klein would have complete and unfettered access to all of Midway's operations, books and records.

46. As part of his due diligence in the period of August through November 2012, Klein spent substantial time in Nevada visiting all of the projects and meeting with Nevada based employees and others.

47. Like Hale and Anderson, Klein was appointed a director by the Hale Investors and was their agent charged with protecting their investors.

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

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

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

Newell

51. I have known Roger A. Newell ("Newell") since prior to December 2009 when he became a director of Midway. Newell was asked to be a director because of his extensive mining knowledge. Newell was also a member of the Disclosure Committee with the same duties as Yu referenced above and involved in drafting all press releases principally directed to the Nevada news outlets and the Nevada mining groups. Newell was involved in Midway related meeting in Eureka, Nevada, in June 2014. Newell was actively involve involved in managing Midway's mining operations in Nevada and issuing false and misleading press releases directed to Nevada news organizations until his departure in August 2014.

Sheridan

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

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

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

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

Sawchek

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

Knutson

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

Anderson

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

Haddon

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

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

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

Daniel E. Wolfus

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-B DEPT. NO.: XXVII **REPLY IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT**

Defendants Richard D. Moritz ("Moritz"), Bradley J. Blacketor ("Blacketor"), Timothy Haddon ("Haddon"), Richard Sawchak ("Sawchak"), John W. Sheridan ("Sheridan"), Frank Yu ("Yu"), Roger A. Newell ("Newell") and Rodney D. Knutson ("Knutson") (collectively, the

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

DATED this 2nd day of May 2018.

By __/s/ David J. Freeman_____
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REPLY MEMORANDUM IN SUPPORT OF D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

I.

INTRODUCTION

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

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

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

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II.

LEGAL ARGUMENT

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

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

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

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

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

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

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

[3] Plaintiff's holder claims fail independently for the reasons set forth in the Motion and Section II.C, *infra*.

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

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

> 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 and sale of the warrant or right or convertible security and ***neither the exercise of the right to purchase or subscribe or to convert nor the issuance of securities pursuant thereto is an offer or sale***.

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

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

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

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

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

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

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public disclosures. Accordingly, Plaintiff has failed to allege facts sufficient to state a claim against any of the D&O Defendants.[6]

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

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

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

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

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

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

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

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

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

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

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

2. Plaintiff's Holder Claims Fail to Sufficiently Allege Reliance and Causation[10]

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

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

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

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

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

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

3. Plaintiff's Fraud Claim Fails For Lack of Scienter.

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

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

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

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

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

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

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

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

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

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

P.3d 1152, 1156-57 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, --- U.S. ----, 131 S. Ct. 2846, 2851 (2011)) (emphasis added); *see also Daimler AG v. Bauman*, --- U.S. ----, 134 S. Ct. 746, 761 (2014). Because Plaintiff failed to respond entirely with respect to this issue (*see generally* Opp. Sec. IV.A.-B.), Plaintiff concedes this Court cannot exercise general jurisdiction over the remaining D&O Defendants. *See* EDCR 2.20(e) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same."). Accordingly, the Motion should be granted and the SAC dismissed pursuant to NRCP 12(b)(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV.

CONCLUSION

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

DATED this 2nd day of May 2018.

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

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that on the 2nd day of May, 2018, I served a true and correct copy of the foregoing **D&O DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** by the following method(s):

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25, Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII **KENNETH A. BRUNK'S 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**

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

DATED this 2nd day of May, 2018.

SANTORO WHITMIRE

s/ Jason D. Smith
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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

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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.

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

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

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

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

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

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

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

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

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

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

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

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

[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).

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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

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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

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

CONCLUSION

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

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

DATED this 2nd day of May, 2018.

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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 system to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	Case No.: A-17-756971-B Dept. No.: XXVII **REPLY IN SUPPORT OF MOTION TO DISMISS AND JOINDER TO D&O DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT** Date of Hearing: May 9, 2018 Time of Hearing: 10:30 a.m.

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

II. ANALYSIS

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

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

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

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

It is a bedrock principle that the exercise of personal jurisdiction over any defendant must be reasonable. *Fulbright & Jaworski v. Eighth Judicial Dist. Ct.*, 131 Nev. Adv. Op. 5, 342 P.3d 997, 1001 (2015); *Baker v. District* Court, 116 Nev. 527, 532, 999 P.2d 1020, 1023 (2000). Plaintiff bears the burden of demonstrating the reasonable exercise of jurisdiction, "and the burden of proof never shifts to the party challenging jurisdiction." *Trump v. District Court*, 109 Nev. 687, 693, 857 P.2d 740, 744 (1993). While Plaintiff is correct in noting it is his burden to present "some evidence" to support jurisdiction, merely producing a conclusory, vague declaration is not enough to satisfy this standard. Rather, Plaintiff was required to produce "some evidence ***in support of all facts necessary for a finding of personal jurisdiction***" and such presentation must be done through the introduction of "competent evidence of ***essential facts which establish a prima facie showing that personal jurisdiction exists***." *Id.*, 109 Nev. at 693, 857 P.2d at 743-44 (emphasis added; internal quotation and citation omitted). Plaintiff failed on all accounts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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III. CONCLUSION

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

DATED this 2nd day of May, 2018.

GREENBERG TRAURIG, LLP

/s/ Christopher R. Miltenberger

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this 2nd day of May, 2018, I caused a true and correct copy of the foregoing ***Reply in Support of Motion to Dismiss and Joinder to D&O Defendants' Reply in Support of Motion to Dismiss Second Amended Complaint*** to be filed and e-served via the Court's E-Filing System on all parties with an email address on record this action. The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL 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

Las Vegas, Nevada, Wednesday, May 09, 2018

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

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

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

THE COURT: Thank you.

MR. CHRISTENSEN: Jim Christensen on behalf of Plaintiff.

THE COURT: Thank you.

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

THE COURT: Thank you.

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

THE COURT: Thank you.

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

THE COURT: Thank you.

MR. LIEBMAN: Eric Liebman, Your Honor, appearing pro hoc vice from the Moye White law firm in Chicago -- Chicago? Denver, excuse me. I'm from Chicago. And my Las Vegas Counsel, Jason 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

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

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

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

Just to quote briefly from the actual language of the statute, it says: Neither the exercise of the right to purchase, nor the issuance of 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 fors
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

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

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

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

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

Mr. Miltenberger.

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

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

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

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

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

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

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

THE COURT: Thank you.

And Mr. Liebman.

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

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

As I stated earlier, I represent Kenneth A. Brunk, one of the Directors and Officers. We join in all the arguments that have been made by my distinguished Counsel, Mr. Cassity and Mr. Miltenberger, with respect to the claims. And I also am just going to touch on the 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

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

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

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

But the point is, as Mr. Cassity correctly pointed out, that -- and I'll just -- I know it's a three element test but the Court of course is very familiar with the jurisdictional -- the specific jurisdiction requirement and I'll distill it down from their three points. The conduct has to have to 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.

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

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

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

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

So what does Mr. Wolfus lay out? He lays out, beginning in his Declaration at page 2, kind of the Midway setup here in Nevada. He had Midway out of Canada offices and Colorado with all of its major operations here in Nevada. But then you also had at least ten subsidiaries, all Nevada-based, all which related to the gold mine 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

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

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

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

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

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

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

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

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

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

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

meetings held at the Pan Mine in March and April.

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

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

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

And it's interesting, Brunk, in Footnote Number 1 of his Reply, 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

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

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

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

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

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

THE COURT: It was two, but --

MR. CHRISTENSEN: Or two meetings, right.

THE COURT: -- not that it matters.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. REES: Absolutely. Because I am --

THE COURT: Thank you.

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

THE COURT: That's fine.

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

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

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

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

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

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

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

The Defendant's action forewarns. I respectfully submit that 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

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

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

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

THE COURT: Thank you.

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

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

contacts with Nevada and the meetings in Nevada.

THE COURT: Well, at least part, right.

MR. CASSITY: Yeah. And then with respect to the California Securities Law claim, Counsel referred to the *People v. Bowles* decision. Again, I remind the Court that that decision was 30 years before the California statute was even enacted.

We talked about the *Star Media* case. That case didn't even refer to the subsection at issue. Again, the plain language of subsection E of 25017 does apply to the exercise of stock options to say that that is not a purchaser of sale under Securities Law. On that I'll submit, Your Honor.

THE COURT: Thank you.

MR. CASSITY: We ask the Court to dismiss with prejudice and alternatively ask for dismissal for the other D&O Defendant's, other than Mr. Yu for lack of personal jurisdiction.

THE COURT: Thank you. I'm -- like I did last time I'm going to take it under advisement. My initial thoughts on reading the brief, I have a few issues I have to reconsider and reread your briefs. I'm going to set it down for a status, chambers only, on May 22nd, with the hope that I can have something to you by then. I realize that's a delay, but it's only two weeks.

So, thank you all for your appearance today. Any time you have a hearing in this case, assuming it goes forward, at least in some part, please schedule a time where I can give you all the time you need because every time I have to compact your arguments, I am concerned

that you won't get justice you require.

So, please, on scheduling issues -- really, in all business court cases -- because first of all, we want to give you the time you need, but I also don't want your clients to send you here and pay for you to come here and not get the time you need. So thank you all.

MR. LIEBMAN: Thank you, Your Honor.

MR. CHRISTENSEN: Thank you.

MR. CASSITY: Thank you, Your Honor.

MR. REES: Thank you, Your Honor.

MR. MILTENBERGER: Thank you, Your Honor.

[Proceeding concluded at 12:50 p.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Brittany Mangelson
Independent Transcriber

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-B DEPT. NO.: XXVII **ORDER 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

W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson (collectively, the "D&O Defendants") *D&O Defendants' Motion to Dismiss Second Amended Complaint* (the "Motion"), Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC (collectively, the "Hale Defendants") *Motion to Dismiss and Joinder* thereto (the "Hale Joinder") and Defendant Kenneth A. Brunk ("Brunk") *Motion to Dismiss and Joinder* thereto (the "Brunk Joinder"), wherein the D&O Defendants, Hale Defendants and Brunk (collectively, the "Defendants") moved this Court to dismiss the *Second Amended Complaint for Damages* filed by Plaintiff Daniel E. Wolfus ("Wolfus" or "Plaintiff") on February 5, 2018 (the "Second Amended Complaint" or "SAC").

Robert J. Cassity, Esq. and David J. Freeman, Esq., of the law firm HOLLAND & HART LLP, appeared on behalf of the D&O Defendants. Mark E. Ferrario, Esq. and Christopher R. Miltenberger, Esq., of the law firm GREENBERG TRAURIG, LLP, appeared on behalf of the Hale Defendants. Eric B. Liebman, Esq., of the law firm MOYE WHITE LLP, and Jason D. Smith, Esq., of the law firm SANTORO WHITMIRE, appeared on behalf of Brunk. James R. Christensen, Esq., of the law firm JAMES R. CHRISTENSEN PC, and Samuel T. Rees, Esq. appeared on behalf of Plaintiff.

Having carefully considered the D&O Defendants' Motion, Hale Joinder, Brunk Joinder, Plaintiff's *Consolidated Memorandum of Points and Authorities in Opposition to Motions to Dismiss*, the Defendants' respective reply briefs filed in support of the Motion, together with all declarations filed in support of and opposition to the Motion and Joinders, including the exhibits to the declarations, the oral argument of counsel presented at the hearing on this matter, and good cause appearing, the Court decides the submitted issues as follows:

FACTUAL ALLEGATIONS

1. Midway Gold Corp. ("Midway") was a publicly traded Canadian Corporation incorporated under the Company Act of British Columbia, with its principal executive offices located in Englewood, Colorado. SAC ¶ 23.

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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.

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10. Midway disclosed the study to the public in December 2011 (*see id.* ¶ 45), and stated it was converting to a production company to bring the Pan Mine online as a profitable revenue stream.

11. Plaintiff alleges that, by either mid or late 2013, Midway's management and its board (including the D&O Defendants) knew the Pan Mine was being built and operated in ways that were materially different from those assumed in the 2011 Pan Mine Study, but the Defendants did not inform investors of the material impact on cash flows as a result of those differences. *Id.* ¶ 65.

12. Specifically, Plaintiff alleges the Defendants failed to disclose that Midway (a) was unable to raise sufficient cash to complete the Pan Mine project in the manner set forth in the 2011 Pan Mine Study, as well as fund on-going operations until the Pan Mine project produced sufficient revenues to cover these expenses, and (b) did not seek the proper permits and did not have the necessary facilities to process the gold solution once leaching was completed, and there would be a considerable delay before the facilities were constructed and permitted for operations. *Id.* ¶¶ 65, 86.

13. On January 23, 2014, Plaintiff exercised stock options by purchasing 200,000 shares at $0.56/share for $112,000 Canadian Dollars ($100,636 USD). *Id.* ¶ 69.

14. On September 19, 2014, Plaintiff exercised his stock option by purchasing 1,000,000 shares at $0.86/share for $860,000 Canadian Dollars ($783,778 USD). Plaintiff's purchase was also as a result of his exercising certain of his qualified employee stock options. *Id.* ¶¶ 87, 88, 89.

15. Plaintiff has asserted claims against Defendants arising out of the Defendants' alleged failure to disclose certain facts regarding the progress (or lack thereof) of the Pan Mine project prior to Plaintiff's stock option exercises in 2014.

16. Plaintiff alleges that had he known these undisclosed facts, he would not have exercised his stock options in either January 2014 or September 2014. Plaintiff also alleges that he and his family were induced to hold their stock when, had they known the material facts, they

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would have sold their stock when Midway's stock price reached its peak on February 28, 2014. *See* Compl. ¶¶ 106, 111, 114, 117, 124, 130, 131, 144-145.

CONCLUSIONS OF LAW

17. When a plaintiff fails to "state a claim upon which relief can be granted," the Court must dismiss the claim upon motion under NRCP 12(b)(5). "In considering a motion to dismiss pursuant to NRCP 12(b)(5) the court accepts a plaintiff's factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claims asserted." *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (citation omitted). "To survive dismissal, a complaint must contain some 'set of facts, which, if true, would entitle the plaintiff to relief.'" *In re Amerco Derivative Litig.,* 127 Nev. 196, 211, 252 P.3d 681, 692 (2011) (citation omitted). "Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief." *Stockmeier v. Nevada Dep't of Corr.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (citations omitted).

18. Plaintiff's first cause of action is for Securities Fraud under the California Corporate Securities Act. Cal. Corp. 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."

19. 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."

20. 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

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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."

21. After review of the plain language of Cal. Corp. Code § 25017(e), the Court concludes that 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.

22. Although 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.

23. 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, the application of Cal. Corp. Code § 25017(e) indicates that the sale occurred in 2009 when the stock options were issued, and there are no allegations that the sale in 2009 was based upon any untrue statement of a material fact or an omission of the same. Accordingly, the California Securities Fraud cause of action fails as a matter of law and is subject to dismissal with prejudice as to all Defendants.

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.

25. Defendants, with the exception of Frank Yu, have also moved for dismissal on the basis of lack of personal jurisdiction pursuant to NRCP 12(b)(2).

26. Rule 12(b)(2) of the Nevada Rules of Civil Procedure ("NRCP") allows a party to seek dismissal of a complaint for lack of personal jurisdiction. NRCP 12(b)(2); *Trump v. District Court*, 109 Nev. 687, 693, 857 P.2d 740, 744 (1993).

27. The Court may exercise general personal jurisdiction over a defendant when the defendant's contacts with the State of Nevada are so "substantial" or "continuous and systematic"

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such that hailing them into court would be reasonable as they may be deemed to be present within this state. *Budget Rent-A-Car v. Eighth Judicial Dist. Court*, 108 Nev. 483, 485, 835 P.2d 17, 19 (1992).

28. Alternatively, the Court may exercise specific personal jurisdiction over a defendant where: (1) purposefully availed itself of the privilege of acting within the state or of causing important consequences in the state; (2) the cause of action arises from defendant's purposeful contacts with the forum state; and (3) those contacts with the forum state were substantial enough to make the exercise of jurisdiction over the defendant reasonable. *Consipio Holding, BV v. Carlberg*, 128 Nev. Adv. Op. 43, 282 P.3d 751, 755 (2012).

29. The Court determined that Plaintiff does not oppose Defendants' contention that the Court lacks personal jurisdiction over INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC. These Defendants are each Delaware LLCs with principal places of business in New York. SAC ¶ 20.

30. This Court cannot exercise general personal jurisdiction over Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC, as Plaintiff has not alleged such jurisdiction nor has he made any such showing supporting the exercise of such jurisdiction.

31. Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC have not purposefully availed themselves of the privilege of acting within this State or causing any important consequences within this State.

32. Plaintiff's causes of action do not arise from any of Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC's purposeful contacts with this State.

33. It would be unreasonable to exercise specific personal jurisdiction over Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC under these circumstances.

34. 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.

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35. The Court concludes that the parties may conduct jurisdictional discovery related to Defendants Richard D. Moritz, Bradley J. Blacketor, 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.

ORDER

Based on the foregoing, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion is GRANTED as to Plaintiff's Claim for Violation of California Securities Act, which is hereby DISMISSED with prejudice as to all Defendants.

IT IS FURTHER ORDERED that Defendants' Motion is DENIED as to Plaintiff's claims for Breach of Fiduciary Duty, Aiding and Abetting a Breach of Fiduciary Duty, Fraud, and Negligent Misrepresentation.

IT IS HEREBY FURTHER ORDERED that the Hale Defendants' *Motion to Dismiss and Joinder to D&O Defendants' Motion to Dismiss Second Amended Complaint* is GRANTED, in part, with respect to Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC.

IT IS HEREBY FURTHER ORDERED that the Second Amended Complaint is DISMISSED with prejudice as to Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC.

IT IS FURTHER ORDERED that Plaintiff is permitted jurisdictional discovery regarding Defendants Richard D. Moritz, Bradley J. Blacketor, 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, which jurisdictional discovery shall be limited to these Defendants' contacts with Nevada related to the planning, preparation, and issuance of the SEC

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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, as follows:

1. Plaintiff is limited to four sets of ten interrogatories (i.e., Plaintiff may serve four separate defendants with a set of ten interrogatories), and answers must be served within ten days of service of the interrogatories.

2. Plaintiff is limited to four depositions lasting two hours each (i.e., Plaintiff may take depositions of four defendants, each lasting up to two hours), which depositions may occur upon not less than ten days' notice.

3. These discovery mechanisms are independent of the Nevada Rules of Civil Procedure allowances for general discovery, yet shall be limited to the jurisdictional issues enumerated herein.

4. The parties will initially have 90 days to complete jurisdictional discovery, with jurisdictional discovery closing on August 19, 2018.

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IT IS FURTHER ORDERED that a Status Check is hereby set for July 26, 2018 at 11:00 a.m. to determine the status of jurisdictional discovery.

IT IS SO ORDERED.

DATED this 6 day of June 2018.

Nancy L. Allf

DISTRICT COURT JUDGE

Respectfully submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO. : A-17-756971-B DEPT. NO.: XXVII **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT** Electronic Filing Case

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Please be advised that the Order Regarding Defendants' Motions to Dismiss Second Amended Complaint was on June 6, 2018, a copy of which is attached hereto.

DATED this 7th day of June, 2018.

By /s/ David Freeman

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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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☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-B DEPT. NO.: XXVII **ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT** Electronic Filing Case

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W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson (collectively, the "D&O Defendants") *D&O Defendants' Motion to Dismiss Second Amended Complaint* (the "Motion"), Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC (collectively, the "Hale Defendants") *Motion to Dismiss and Joinder* thereto (the "Hale Joinder") and Defendant Kenneth A. Brunk ("Brunk") *Motion to Dismiss and Joinder* thereto (the "Brunk Joinder"), wherein the D&O Defendants, Hale Defendants and Brunk (collectively, the "Defendants") moved this Court to dismiss the *Second Amended Complaint for Damages* filed by Plaintiff Daniel E. Wolfus ("Wolfus" or "Plaintiff") on February 5, 2018 (the "Second Amended Complaint" or "SAC").

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Having carefully considered the D&O Defendants' Motion, Hale Joinder, Brunk Joinder, Plaintiff's *Consolidated Memorandum of Points and Authorities in Opposition to Motions to Dismiss*, the Defendants' respective reply briefs filed in support of the Motion, together with all declarations filed in support of and opposition to the Motion and Joinders, including the exhibits to the declarations, the oral argument of counsel presented at the hearing on this matter, and good cause appearing, the Court decides the submitted issues as follows:

FACTUAL ALLEGATIONS

1. Midway Gold Corp. ("Midway") was a publicly traded Canadian Corporation incorporated under the Company Act of British Columbia, with its principal executive offices located in Englewood, Colorado. SAC ¶ 23.

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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.

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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.

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10. Midway disclosed the study to the public in December 2011 (*see id.* ¶ 45), and stated it was converting to a production company to bring the Pan Mine online as a profitable revenue stream.

11. Plaintiff alleges that, by either mid or late 2013, Midway's management and its board (including the D&O Defendants) knew the Pan Mine was being built and operated in ways that were materially different from those assumed in the 2011 Pan Mine Study, but the Defendants did not inform investors of the material impact on cash flows as a result of those differences. *Id.* ¶ 65.

12. Specifically, Plaintiff alleges the Defendants failed to disclose that Midway (a) was unable to raise sufficient cash to complete the Pan Mine project in the manner set forth in the 2011 Pan Mine Study, as well as fund on-going operations until the Pan Mine project produced sufficient revenues to cover these expenses, and (b) did not seek the proper permits and did not have the necessary facilities to process the gold solution once leaching was completed, and there would be a considerable delay before the facilities were constructed and permitted for operations. *Id.* ¶¶ 65, 86.

13. On January 23, 2014, Plaintiff exercised stock options by purchasing 200,000 shares at $0.56/share for $112,000 Canadian Dollars ($100,636 USD). *Id.* ¶ 69.

14. On September 19, 2014, Plaintiff exercised his stock option by purchasing 1,000,000 shares at $0.86/share for $860,000 Canadian Dollars ($783,778 USD). Plaintiff's purchase was also as a result of his exercising certain of his qualified employee stock options. *Id.* ¶¶ 87, 88, 89.

15. Plaintiff has asserted claims against Defendants arising out of the Defendants' alleged failure to disclose certain facts regarding the progress (or lack thereof) of the Pan Mine project prior to Plaintiff's stock option exercises in 2014.

16. Plaintiff alleges that had he known these undisclosed facts, he would not have exercised his stock options in either January 2014 or September 2014. Plaintiff also alleges that he and his family were induced to hold their stock when, had they known the material facts, they

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL E. WOLFUS,

Appellant,

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,

Respondents,

Supreme Court No. 80613

District Court No. A-17-756971-B

DANIEL E. WOLFUS,

Appellant,

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,

Respondents,

Consolidated with:

Supreme Court No. 80949

Docket 80613 Document 2020-34595

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would have sold their stock when Midway's stock price reached its peak on February 28, 2014. *See* Compl. ¶¶ 106, 111, 114, 117, 124, 130, 131, 144-145.

CONCLUSIONS OF LAW

17. When a plaintiff fails to "state a claim upon which relief can be granted," the Court must dismiss the claim upon motion under NRCP 12(b)(5). "In considering a motion to dismiss pursuant to NRCP 12(b)(5) the court accepts a plaintiff's factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claims asserted." *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (citation omitted). "To survive dismissal, a complaint must contain some 'set of facts, which, if true, would entitle the plaintiff to relief.'" *In re Amerco Derivative Litig.,* 127 Nev. 196, 211, 252 P.3d 681, 692 (2011) (citation omitted). "Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief." *Stockmeier v. Nevada Dep't of Corr.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (citations omitted).

18. Plaintiff's first cause of action is for Securities Fraud under the California Corporate Securities Act. Cal. Corp. 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."

19. 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."

20. 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

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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."

21. After review of the plain language of Cal. Corp. Code § 25017(e), the Court concludes that 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.

22. Although 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.

23. 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, the application of Cal. Corp. Code § 25017(e) indicates that the sale occurred in 2009 when the stock options were issued, and there are no allegations that the sale in 2009 was based upon any untrue statement of a material fact or an omission of the same. Accordingly, the California Securities Fraud cause of action fails as a matter of law and is subject to dismissal with prejudice as to all Defendants.

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.

25. Defendants, with the exception of Frank Yu, have also moved for dismissal on the basis of lack of personal jurisdiction pursuant to NRCP 12(b)(2).

26. Rule 12(b)(2) of the Nevada Rules of Civil Procedure ("NRCP") allows a party to seek dismissal of a complaint for lack of personal jurisdiction. NRCP 12(b)(2); *Trump v. District Court*, 109 Nev. 687, 693, 857 P.2d 740, 744 (1993).

27. The Court may exercise general personal jurisdiction over a defendant when the defendant's contacts with the State of Nevada are so "substantial" or "continuous and systematic"

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such that hailing them into court would be reasonable as they may be deemed to be present within this state. *Budget Rent-A-Car v. Eighth Judicial Dist. Court*, 108 Nev. 483, 485, 835 P.2d 17, 19 (1992).

28. Alternatively, the Court may exercise specific personal jurisdiction over a defendant where: (1) purposefully availed itself of the privilege of acting within the state or of causing important consequences in the state; (2) the cause of action arises from defendant's purposeful contacts with the forum state; and (3) those contacts with the forum state were substantial enough to make the exercise of jurisdiction over the defendant reasonable. *Consipio Holding, BV v. Carlberg*, 128 Nev. Adv. Op. 43, 282 P.3d 751, 755 (2012).

29. The Court determined that Plaintiff does not oppose Defendants' contention that the Court lacks personal jurisdiction over INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC. These Defendants are each Delaware LLCs with principal places of business in New York. SAC ¶ 20.

30. This Court cannot exercise general personal jurisdiction over Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC, as Plaintiff has not alleged such jurisdiction nor has he made any such showing supporting the exercise of such jurisdiction.

31. Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC have not purposefully availed themselves of the privilege of acting within this State or causing any important consequences within this State.

32. Plaintiff's causes of action do not arise from any of Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC's purposeful contacts with this State.

33. It would be unreasonable to exercise specific personal jurisdiction over Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC under these circumstances.

34. 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.

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35. The Court concludes that the parties may conduct jurisdictional discovery related to Defendants Richard D. Moritz, Bradley J. Blacketor, 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.

ORDER

Based on the foregoing, and good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion is GRANTED as to Plaintiff's Claim for Violation of California Securities Act, which is hereby DISMISSED with prejudice as to all Defendants.

IT IS FURTHER ORDERED that Defendants' Motion is DENIED as to Plaintiff's claims for Breach of Fiduciary Duty, Aiding and Abetting a Breach of Fiduciary Duty, Fraud, and Negligent Misrepresentation.

IT IS HEREBY FURTHER ORDERED that the Hale Defendants' *Motion to Dismiss and Joinder to D&O Defendants' Motion to Dismiss Second Amended Complaint* is GRANTED, in part, with respect to Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC.

IT IS HEREBY FURTHER ORDERED that the Second Amended Complaint is DISMISSED with prejudice as to Defendants INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC.

IT IS FURTHER ORDERED that Plaintiff is permitted jurisdictional discovery regarding Defendants Richard D. Moritz, Bradley J. Blacketor, 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, which jurisdictional discovery shall be limited to these Defendants' contacts with Nevada related to the planning, preparation, and issuance of the SEC

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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, as follows:

1. Plaintiff is limited to four sets of ten interrogatories (i.e., Plaintiff may serve four separate defendants with a set of ten interrogatories), and answers must be served within ten days of service of the interrogatories.

2. Plaintiff is limited to four depositions lasting two hours each (i.e., Plaintiff may take depositions of four defendants, each lasting up to two hours), which depositions may occur upon not less than ten days' notice.

3. These discovery mechanisms are independent of the Nevada Rules of Civil Procedure allowances for general discovery, yet shall be limited to the jurisdictional issues enumerated herein.

4. The parties will initially have 90 days to complete jurisdictional discovery, with jurisdictional discovery closing on August 19, 2018.

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IT IS FURTHER ORDERED that a Status Check is hereby set for July 26, 2018 at 11:00 a.m. to determine the status of jurisdictional discovery.

IT IS SO ORDERED.

DATED this 6 day of June 2018.

Nancy L. Allf

DISTRICT COURT JUDGE

Respectfully submitted by:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; AND NATHANIEL KLEIN,
Petitioners,
vs.
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,
Respondents,
and
DANIEL E. WOLFUS,
Real Party in Interest.

No. 76052

FILED

OCT 11 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

This is an original petition for a writ of prohibition or mandamus challenging a district court denial of a motion to dismiss a corporations action.

Petitioners Kenneth Brunk, et al., (Directors) are former directors and officers of Midway Gold Corporation (Midway), a publicly traded Canadian company incorporated in British Columbia with principal offices in Colorado. Midway engaged in gold mining and mineral exploration operations in Nevada and elsewhere, and commissioned a feasibility study for a gold mine project to be located in White Pine County (the Pan project). Real party in interest Daniel Wolfus served as Midway's

Chairman and CEO at the time Midway commissioned the study. After his replacement as Midway's Chairman and CEO, Wolfus exercised various stock options to purchase shares of Midway stock, allegedly relying on favorable public statements and press releases concerning the Pan project. The Pan project was unsuccessful, however, and Midway ultimately went bankrupt. Thereafter, Wolfus filed suit in Nevada against the Directors, asserting claims based on California law. Wolfus alleged the Directors mismanaged the company, and the Pan project in particular, and despite knowing the Pan project was not going to succeed, breached a fiduciary duty of disclosure by issuing misleading press releases and public statements promoting the project's success. He alleged that he relied on these misleading statements in exercising his stock options, which were subsequently rendered worthless by Midway's bankruptcy.

The Directors moved to dismiss Wolfus's complaint, based in part on a lack of subject matter jurisdiction. The Directors argued that because Midway was incorporated in British Columbia, Wolfus's claims are subject to the law of that jurisdiction, including various pre-suit requirements for shareholder derivative suits which Wolfus failed to satisfy. After initially agreeing with the Directors and dismissing Wolfus's complaint for lack of subject matter jurisdiction, the district court permitted Wolfus to amend his complaint. Wolfus's second amended complaint included new citations to California and Delaware caselaw in support of his fiduciary duty and common law fraud claims, authorities he did not include in his original complaint or first amended complaint. The Directors moved once more to dismiss Wolfus's complaint, whereupon the district court reversed course, denying the Directors' motion to dismiss for lack of subject matter jurisdiction and ordering discovery on the issue of personal

jurisdiction as to certain of the Directors. The Directors now challenge the district court's denial of their motion to dismiss.

Having considered the petition, the record, and the points raised during oral argument, we conclude Wolfus's claims are derivative in nature, as they are necessarily dependent on injury directly inflicted upon Midway, injury from which harm indirectly affected Wolfus and other shareholders. Because Wolfus lacked standing to assert a derivative action on behalf of a bankrupt corporation incorporated under British Columbia law, we grant the Directors' writ petition and conclude the district court erred in exercising subject matter jurisdiction over Wolfus's complaint.

DISCUSSION

A writ of prohibition is an extraordinary remedy, and "[t]he decision to entertain a petition for [writ relief] lies within this court's discretion." *Gen. Motors Corp. v. Eighth Judicial Dist. Court*, 122 Nev. 466, 469, 134 P.3d 111, 113-14 (2006). We exercise our discretion to entertain a writ petition only where there is "no plain, speedy and adequate remedy in the ordinary course of law or there are . . . important legal issues that need clarification." *Id.* at 469, 134 P.3d at 114 (internal quotation marks omitted). Choice-of-law questions, such as the one presented here, may justify writ relief, particularly where the question implicates "an important issue of law recognizing the distinction between direct and derivative corporate shareholder claims." *Parametric Sound Corp. v. Eighth Judicial Dist. Court,* 133 Nev. 417, 421, 401 P.3d 1100, 1104 (2017); *Gen. Motors Corp.*, 122 Nev. at 469, 134 P.3d at 114. Because the instant petition raises important questions of law pertaining to choice-of-law issues and the distinction between direct and derivative shareholder claims, we exercise our discretion to entertain the writ petition.

The distinction between derivative and direct shareholder claims

The critical distinction between derivative and direct shareholder claims is dispositive here. If Wolfus's claims against the Directors are derivative in nature, they trigger the internal affairs doctrine and are controlled by the law of British Columbia, which requires a shareholder to obtain leave of court and make a demand on the board of directors before filing a derivative action. *See Batchelder v. Kawamoto*, 147 F.3d 915, 920 (9th Cir. 1998) ("Under the 'internal affairs' doctrine, the rights of shareholders in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated."); *see also Rogers v. Bank of Montreal*, 1985 CarswellBC 176, para. 62 (Can. B.C.S.C.) (WL) ("[L]eave of court [is] a prerequisite to the commencement, conduct, discontinuance, settlement, or dismissal of any derivative action even if the shareholder meets the common law's stringent conditions.").

Additionally, if Wolfus's claims are derivative, he lacks standing as a result of Midway's bankruptcy, which rendered any such claims a part of the corporation's bankruptcy estate, over which the estate's trustee has exclusive standing to litigate. 11 U.S.C. §§ 323, 541; *Estate of Spirtos v. One San Bernardino Cty. Superior Court Case No. SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006) ("The bankruptcy code endows the bankruptcy trustee with the exclusive right to sue on behalf of the estate."); *Delgado Oil Co. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986) (explaining that the bankruptcy estate of a corporate debtor includes any derivative right of action the corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director).

If, on the other hand, Wolfus has properly asserted a direct claim, that is, a claim personal to him, then he alleges an individual cause

of action on his own behalf for which he would have standing to sue. *Parametric Sound*, 133 Nev. at 423, 401 P.3d at 1105 (2017) ("[S]hareholders have standing to bring suit for direct injuries they have suffered and that are separate from any injury the corporation may have suffered without making a demand on the board of directors.").

Wolfus, unsurprisingly, argues his claims are direct, rather than derivative, in that they are personal to him as a shareholder and arise from a breach of duty Midway's Directors owed to him personally, rather than a duty owed to the corporation. As discussed herein, we conclude the gravamen of Wolfus's claims allege mismanagement by the Directors, causing Midway's ultimate demise, stemming from the failed Pan project, which incidentally harmed Wolfus and other shareholders in the form of diminution in the value of their corporate shares. Wolfus has thus failed to allege an injury that is independent of the harm Midway suffered as a corporation allegedly mismanaged by the Directors. As such, Wolfus's claims are derivative in nature.

Controlling standard for distinguishing direct and derivative claims

"The question whether a suit is derivative by nature or may be brought by a shareholder in his own right is governed by the law of the state of incorporation . . . ." *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 589-90 (7th Cir. 2003); *see also Kepley v. Lanz*, 715 F.3d 969, 972-73 (6th Cir. 2013). The test British Columbian courts apply when evaluating whether a claim is direct or derivative is whether "the gravamen of the cause of action alleged [arises] as a result of wrongs done to the company . . . . If the damage that flows is a direct result of the wrongs done to the company, then those damages can only be claimed by the company." *Robak Indus. Ltd. v. Gardner*, 2006 CarswellBC 2533, para. 5 (Can. B.C.S.C.) (WL). In making this determination, the courts in that jurisdiction examine "the nature of

the damages suffered as alleged in the pleadings." *Id.* at para. 13; *see also Luft v. Ball*, 2013 CarswellBC 820, para. 34 (Can. B.C.S.C.) (WL) ("In order for a complaining shareholder to maintain a personal action for breach of duties owed to the company, that shareholder must show that he or she has suffered damage or loss in a manner distinct from other shareholders.").

The test in British Columbia closely resembles that which California courts have adopted, as articulated in *Jones v. H.F. Ahmanson & Co.*: "[T]he action is derivative . . . if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders . . .". 460 P.2d 464, 470 (Cal. 1969) (internal quotation marks omitted). British Columbia's approach is also similar to the approach the Supreme Court of Delaware follows: "[T]o bring a direct action, the stockholder must allege something other than an injury resulting from a wrong to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1038 (Del. 2004). "[A] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation." *Id.* at 1039. We have adopted Delaware's approach for determining whether a claim is direct or derivative. *Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 417, 427, 401 P.3d 1100, 1108 (2017).

The tests controlling the direct/derivative distinction in California, British Columbia, and Nevada are essentially the same, and require us to evaluate the nature of the injury Wolfus alleges in his second amended complaint. We apply this analysis to the entirety of Wolfus's complaint, dealing first with the nature of his fiduciary duty claims.

Wolfus's claims for breach of fiduciary duty

Wolfus alleges the Directors breached a duty of disclosure by failing to communicate material information about Midway and the Pan project in public filings and press releases. In particular, he alleges that the Directors' non-disclosure of facts pertaining to Midway's mismanagement constituted a breach of fiduciary duty to disclose, and that the duty was owed to him personally. Any duty to disclose the alleged mismanagement, however, stems from duties which the Directors owed to Midway, not to Wolfus. As the Supreme Court of Delaware has explained: "The duty of directors to observe proper disclosure requirements derives from the combination of the fiduciary duties of care, loyalty, and good faith." *Malone v. Brincat*, 722 A.2d 5, 11 (Del. 1998). Thus, Wolfus's allegation of a breach of a duty to disclose does not automatically implicate an individual cause of action. Rather, "[the] violation may result in a derivative claim on behalf of the corporation or a cause of action for damages," depending on the "classic 'direct v. derivative'" analysis. *Id.* at 14 & n.45.

We recently adopted Delaware's "direct harm" test for distinguishing between derivative and direct shareholder claims in *Parametric Sound*, 133 Nev. at 427, 401 P.3d at 1108. In order to determine whether a shareholder claim is direct or derivative, the court must consider: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* (quoting *Tooley*, 845 A.2d at 1033). The purpose of *Tooley*'s two-part "direct harm" test is to serve as a means for "determining whether stockholders can bring a claim for breach of fiduciary duty directly, or whether a particular fiduciary duty claim must be brought derivatively

on the corporation's behalf." *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1139 (Del. 2016).

Pursuant to the direct harm test, the relevant inquiry in addressing who suffered the alleged harm is: "Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?" *Parametric Sound*, 133 Nev. at 426, 401 P.3d at 1107-08 (quoting *Tooley*, 845 A.2d at 1036). Applying the direct harm test as set forth in *Parametric Sound*, we conclude Wolfus's fiduciary duty claims are derivative because he has not demonstrated a harm that is independent of the injury to Midway as a corporation.

Reviewing the entirety of Wolfus's complaint, it is clear the nature of Wolfus's claims are wholly dependent on alleged injuries primarily inflicted upon Midway, which resulted indirectly in harm to Wolfus and to other Midway stockholders in the form of a diminution in stock value. The gravamen of his complaint is the Directors' mismanagement of Midway, specifically, mismanagement in the form of failing to secure sufficient capital for the Pan project, deciding not to sell assets to create necessary capital, and allowing a Director (Martin Hale) to "tak[e] effective control of Midway and the Pan project even though Hale *lacked the ability to manage the Pan project*." (Emphasis added.) Wolfus also alleges the Directors failed to appropriately employ supervisory staff for the Pan project, which delayed production. Further, Wolfus alleges the Pan project failed because the Directors, rather than cut costs to purchase necessary equipment, "decided not to purchase this necessary equipment" and instead purchased equipment for which the company had not secured the appropriate permits. These alleged acts of mismanagement and

imprudent investment decisions impaired or prevented what Wolfus describes in his complaint as the "two major events" required for the Pan project to succeed: Midway securing necessary permits and securing necessary financing for the project.

Wolfus's breach of fiduciary duty claims depend on alleged misrepresentations involving the purported mismanagement of the company by the Directors, mismanagement which caused the failure of the Pan project and presumably the failure and bankruptcy of the company. He contends the Directors breached a fiduciary duty to disclose material information about their mismanagement of the company by omitting the information from public filings and public press releases in order to encourage investors to retain and purchase Midway's stock. Thus, Wolfus's allegations explicitly set forth, first and foremost, a direct harm to the company caused by the Director's purported mismanagement, and implicate primarily a breach of duty the Directors owed to the corporation.

We are persuaded, based on the body of his complaint and the nature of his claims, that Wolfus's breach of fiduciary duty claims describe a derivative action based on the Directors' alleged mismanagement of Midway. His complaint merely reflects an unavailing attempt to characterize the derivative claim as a direct claim personal to him. Such an effort does not alter the nature of his claims. *See Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 352-53 (Del. 1988) (holding that where the gravamen of a stockholder's complaint is director mismanagement, the cause of action is derivative in nature). Notwithstanding his attempt to characterize his claims as direct, the essence of Wolfus's claims allege direct harm to Midway from which injury resulted indirectly to Midway's shareholders. Wolfus cannot sidestep the gravamen of his allegations,

which is harm to Midway, simply by framing his fiduciary duty claims in terms of misrepresentation about the alleged mismanagement. Accordingly, in this instance, Wolfus's fiduciary duty claims are derivative. *See In re Sunrise Sec. Litig.*, 916 F.2d 874, 882-83 (3rd Cir. 1990) (concluding shareholders' purported direct claim was derivative where they alleged corporate "advertisements, press releases, periodic reports and other publicly disseminated materials," were misleading as to the company's financial condition and omitted information about the company's mismanagement, because the shareholders' "asserted injury emanated from mismanagement, not fraud" (internal quotation marks omitted)); *see also Rivers v. Wachovia Corp.*, 665 F.3d 610, 614-18 (4th Cir. 2011) (concluding a shareholder asserted a derivative claim after alleging that directors misrepresented the company's financial health, causing the shareholder to retain company stock until they lost nearly all value, and that the attempt to "differentiate between mismanagement which injured the corporation and misrepresentations which injured [the shareholder] individually . . . is a distinction without a difference").

Wolfus invokes *Citigroup Inc. v. AHW Investment Partnership*, 140 A.3d 1125, 1126-27 (Del. 2016) to assert that his claims are direct claims because they belong to him personally. For several reasons, however, *Citigroup* is distinguishable from the instant case and does not support Wolfus's argument that his claims against the Directors are direct and personal to him. First, the shareholders in *Citigroup* were not pursuing claims for breach of fiduciary duty, as Wolfus is here, and the court in *Citigroup* did not apply the direct harm test as set forth in *Tooley* and adopted by this court in *Parametric Sound*. *See Citigroup*, 140 A.3d at 1126-27, 1134 ("Because the holder claims at issue here belong to the holding

stockholders under the state laws that govern the claims, *and are not fiduciary duty claims* or claims otherwise belonging to the corporation, *Tooley* does not affect our answer to this certified question.")). Wolfus's explicit allegations of claims for breach of fiduciary distinguish his claims from those which the *Citigroup* court considered.

Second, the *Citigroup* court explicitly noted that if the shareholders there had asserted the type of claims Wolfus asserts here—claims arising from a failure to make timely and accurate public disclosures—the *Citigroup* shareholders' cause of action would implicate the internal affairs doctrine and would be subject to the laws of the state in which the company (Citigroup) was incorporated. *Id.* at 1134-36. The court articulated several concerns related to this point, explaining that:

> When a public corporation . . . has shares in the market, it will have investors . . . in virtually every state in our nation. For investors to be able to sue not only under federal law, but purport to sue under their own state's bespoke laws, subjects corporations to potential inconsistencies, inefficiencies, and unfairness.

Id. at 1136. We identify the same concerns with Wolfus's attempt to subject Midway, a British Columbian corporation headquartered in Colorado, to claims brought under California law in a Nevada court.

Finally, *Citigroup* is unavailing for Wolfus because, unlike the parties in *Citigroup*, the parties here disagree as to the law that should govern Wolfus's claims. The *Citigroup* court was asked to interpret New York and Florida state law in response to a certified question from the United States Court of Appeals for the Second Circuit, and the parties agreed the law of either New York or Florida controlled the claims at issue. *Id.* at 1132-34. The *Citigroup* court explained that because both New York and Florida would recognize so-called "holder" claims as belonging to the

individual shareholder, and because the parties agreed that either Florida or New York law applied, the court's answer was based on the law of those states:

> For the purpose of answering this certified question what matters is that the [shareholders'] [h]older [c]laims are governed by either New York or Florida law–a fact about which the parties, and as important, our referring courts, agree–and . . . courts in those states have suggested that their highest courts would recognize holder claims and would conclude, consistent with their very name, that . . . they belong to the holder . . . .

Id. at 1137 (footnotes omitted).

While *Citigroup* does not assist Wolfus in his effort to color his derivative claims as direct claims, our conclusion here does align with the *Citigroup* court's rationale insofar as Wolfus asserts breach-of-fiduciary duty claims involving the Directors' alleged failure to make timely and accurate public disclosures. To the extent the *Citigroup* court concluded that such claims implicate the internal affairs doctrine and are subject to the law of the state of incorporation, *id.* at 1134-35, we agree and conclude Wolfus's claims are subject to British Columbia law.

We are also guided by the *Citigroup* court's explanation that non-fiduciary duty claims are not subject to the *Tooley* "direct harm" test which we adopted in *Parametric Sound.* Determining whether non-fiduciary duty claims are direct or derivative requires, as discussed in *Citigroup, id.* at 1138-40, an analysis of the nature of the harm the shareholder alleges. Having applied the direct harm test to Wolfus's fiduciary duty claims, we next analyze the nature of Wolfus's common law claims for fraud and negligent misrepresentation, and conclude that they, too, are derivative in nature.

Wolfus's claims for fraud and negligent misrepresentation

Wolfus argues that California common law, as set forth in *Small v. Fritz Cos.*, 65 P.3d 1255 (Cal. 2003), permits him to assert claims for fraud and negligent misrepresentation directly. Regardless of how Wolfus purports to characterize these claims, however, he has simply repackaged his fiduciary duty claims under different labels. "[T]he duty of the court," however, "is to look at the nature of the wrong alleged, not merely at the form of the words used in the complaint." *Schuster v. Gardner*, 25 Cal. Rptr.3d 468, 476 (Ct. App. 2005) (quoting *In re Syncor Int'l Corp. Shareholders Litig.*, 857 A.2d 994, 997 (Del. Ch. 2004)); *see also Arent v. Distribution Scis., Inc.*, 975 F.2d 1370, 1373 (8th Cir. 1992) ("[T]he fact that plaintiffs framed the harm as a direct fraud [does] not permit them to go forward on a claim that [i]s, at its core, derivative."). Here, Wolfus attempts to frame his cause of action as one for fraud and negligent misrepresentation, but the claims are based on what the Directors purportedly should have disclosed about their mismanagement of Midway. The underlying nature of Wolfus's fraud and negligent misrepresentation claims are derivative insofar as they are dependent on alleged injuries to Midway.

To be sure, Wolfus attempts to circumvent the fact that his claims arise from corporate mismanagement by carefully alleging that the Directors owed a duty directly to him, and breached that duty when, in their capacity as Directors, they failed to make true and complete public statements regarding the Pan project. Wolfus's second amended complaint explicitly states he does not assert any claim belonging to Midway and does not assert any claim for mismanagement of Midway, while alleging the Directors are liable for withholding facts they knew would be material to any reasonable investor in Midway, including Wolfus, and knew that none

of those facts had been disclosed. But generally alleging that a duty is owed individually to a shareholder, without more, is unavailing. *See Parametric Sound*, 133 Nev. at 422 n.10, 401 P.3d at 1105 n.10 ("Without more, general language concerning fiduciary duty owed to shareholders by directors does not support a direct action." (internal quotation marks omitted)).

No matter how he characterizes them, the nature of Wolfus's fraud and misrepresentation claims, as the *Citigroup* court explained, are claims for breach of fiduciary duty that would be governed by the law of the state of incorporation:

> [A]ny argument . . . that an issuer of stock owes special duties to the holder of its stock is just another way of arguing that the investors of a corporation are owed fiduciary duties by those who manage it. In other words, it is a way of saying that because of the relationship between the governed and the governors of a corporation, a special cause of action ought to exist. That kind of claim is governed by the laws of the state of incorporation exclusively under the internal affairs doctrine.

Citigroup, 140 A.3d at 1134-35. Like his fiduciary duty claims, the basis of Wolfus's fraud claim is that Midway's Directors mismanaged the Pan project, failed to disclose various aspects of their mismanagement, and as a result of the non-disclosure, Wolfus exercised stock options he otherwise would not have. Wolfus's fraud claim is slightly distinct from his fiduciary duty claims to the extent it emphasizes that his cause of action stems from the diminution in Midway's share value. His second amended complaint alleges that, had he known of the purportedly undisclosed facts the Directors withheld, Wolfus "would have sold all of his Midway shares . . . in February 2014 *when Midway's stock price began to fall* from its peak." (Emphasis added.) The nature of the harm alleged here cannot be understood apart from the decline in Midway's stock value which ostensibly

resulted from the Directors' mismanagement. The decline in Midway's stock value did not result from any misrepresentation or omission, but from the Directors' alleged failure to successfully manage the Pan project. Generally, such an allegation will sustain a derivative action, not an action for direct injury to the shareholder. "The reasoning behind this rule is said to be that a diminution in the value of corporate stock resulting from some depreciation or injury to corporate assets is a direct injury only to the corporation; it is merely an indirect or incidental injury to an individual shareholder." 12B *Fletcher Cyclopedia of the Law of Corporations* § 5913 (Sept. 2018 Update). In other words, a shareholder's allegation of harm in the form of diminished value in stock is derivative when it results from alleged injury to the corporation, as Wolfus has alleged here. The overwhelming weight of authority clearly supports the proposition that shareholder suits alleging harm based on diminution in stock value are derivative when the decline results from harm directly inflicted on the corporation. *See, e.g., Rivers v. Wachovia Corp.*, 665 F.3d 610, 614-15 (4th Cir. 2011) ("The well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." (internal quotation marks omitted); *Smith v. Waste Mgmt., Inc.*, 407 F.3d 381, 384-85 (5th Cir. 2005) (concluding a shareholder's claims for fraud and negligent misrepresentation were derivative because alleged corporate misrepresentations that "caus[e] a decline in the company's share price when the truth is revealed," injure the corporation directly and the shareholders only indirectly.); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (concluding a shareholder's allegations of breach of fiduciary duty and corporate mismanagement "describe[d] a direct

injury to the bank, not the individual stockholders," and allegations of "depreciation of stock value [were] an indirect result of the injury to [the bank] which resulted in its closure"); *NBD Bank, N.A. v. Fulner*, 109 F.3d 299, 301 (6th Cir. 1997) ("A shareholder's rights are merely derivative unless he can show a violation of a duty owed directly to him. Depreciation in value of a shareholder's corporate stock is generally not the type of direct personal injury necessary to sustain a direct cause of action.").

Even if we were to entertain Wolfus's argument that his claims for fraud and misrepresentation allege direct harm personal to him, his pleading would be inadequate pursuant to the very authority upon which he relies, specifically, the decision in *Small v. Fritz Cos.*, 65 P.3d 1255, 1265 (Cal. 2003). There, the California Supreme Court explained:

> "[I]n view of the danger of nonmeritorious suits . . . conclusory language does not satisfy the specificity requirement. In a holder's action a plaintiff must allege specific reliance on the defendants' representations: for example, that if the plaintiff had read a truthful account of the corporation's financial status the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place. The plaintiff must allege actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied on the misrepresentations."

Id.

Wolfus's allegations regarding his reliance on the Directors' alleged misrepresentations are far from specific. He broadly asserts that he would have sold "all" of his Midway shares when they "peaked" in February 2014, while failing to explain how he could have known the stock price had reached a peak at that time. In effect, he has resorted to little more than

alleging the type of "unspoken and unrecorded thoughts and decisions" which the California Supreme Court rejected in *Small*. *Id.* For example, according to his second amended complaint, "Wolfus was primarily concerned with the status of the Pan project and the *likelihood* that this project would begin profitably mining gold and be revenue positive. *Wolfus determined* from those public statements and the absence of the 2013 [u]ndisclosed [f]acts that profitable mining operations would result in a *substantial increase in the value* of their combined Midway shares." (Emphasis added.) Wolfus's generic assertions that he subjectively "determined" through speculation based on public statements that Midway shares would "likely" be profitable, and that had he learned of the alleged omissions about the Directors' mismanagement, he would have sold all his Midway shares when the stock price "peaked" in February 2014, are merely conclusory and lack the level of specificity the California Supreme Court held is required under California law.[1] Thus, even if we were to apply California law to Wolfus's fraud and negligent misrepresentation claims, they would fail.

---

[1]Wolfus's generic and speculative allegations also stand in stark contrast to the shareholders' allegations in *Citigroup*, upon which Wolfus relies for support. The shareholders there apparently had developed a specific plan for selling their Citigroup shares at a specific price, at a specific time, in collaboration with their financial advisors, *before* the Citigroup stock price declined. *Citigroup*, 140 A.3d at 1128. They evidently supported their allegation by showing that they partly carried out their plan to sell their Citigroup shares, but delayed selling the remainder of their shares for twenty-two months in reliance on misrepresentations made to them about the corporation's financial health. *Id.* Wolfus, here, fails to identify anything remotely similar, beyond generic references to what he would have done with the benefit of hindsight.

In short, the gravamen of Wolfus's complaint is the Directors' mismanagement of Midway, and the Pan project in particular, which harmed the corporation and contributed to its demise. Wolfus attempts to isolate the injury to him at the point at which he exercised stock options, and essentially seeks to obtain a refund of the purchase price he paid for his Midway shares, as well as the market value of the shares he purportedly would have sold, had the Directors' alleged mismanagement been disclosed to him and to the public. To recognize such a claim as a direct claim would be to ignore the entirety of Wolfus's complaint in disregard of the primary harm inflicted directly on the now-bankrupt corporation, an injury from which harm to Wolfus and other Midway shareholders necessarily derived.

Wolfus's claims are governed by the law of the state of incorporation

Having determined that Wolfus's claims against the Directors are derivative in nature, as allegations of mismanagement which harmed Midway directly, we conclude the law of British Columbia, where Midway was incorporated, controls Wolfus's claims. *Vaughn v. LJ Int'l, Inc.*, 94 Cal. Rptr. 3d 166, 175 (Ct. App. 2009) ("Under the internal affairs doctrine, the rights of shareholders in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated." (internal quotation marks omitted)). British Columbia law requires a corporate shareholder to apply for leave of the court of that jurisdiction before filing a derivative action, and requires the shareholder to provide notice of such application to the company and demand that the directors take remedial action prior to commencement of the suit. Business Corporations Act, R.S.B.C. 2002, c. 57 §§ 232(2)(a) & 233(1)(a)-(b). The failure to obtain leave of court is fatal under British Columbia common law.

Bruneau v. Irwin Indus. (1978) Ltd., 2002 CarswellBC 1107, para. 19 (Can. B.C.S.C.) (WL) ("[W]here an action [is] in fact a derivative action but commenced without leave, the appropriate remedy [is] to strike it as disclosing no reasonable claim.").

For his part, Wolfus concedes that if his claims are derivative, they are also subject to an effective pre-suit demand requirement which he failed to satisfy. Failure to comply with such a requirement is equally fatal to his complaint. *Vaughn*, 94 Cal. Rptr. 3d at 171-72 (holding a pre-suit demand requirement imposed by the British Virgin Islands Business Companies Act of 2004 imposed a substantive requirement determining whether a shareholder had standing to sue). Wolfus also appears to acknowledge that he is barred from asserting a derivative claim as a result of Midway's bankruptcy.

Having rejected Wolfus's main contention that his claims are direct, rather than derivative, we agree with the district court's initial determination that it lacked subject matter jurisdiction to adjudicate Wolfus's claims, because Wolfus lacked standing to assert them. Accordingly, we conclude that the district court was correct to initially dismiss Wolfus's claims against the Directors on a jurisdictional basis, and the court's subsequent reversal in permitting Wolfus's claims to move forward was error. In light of the foregoing, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF PROHIBITION instructing the

district court to vacate its order denying petitioners' motion to dismiss and to enter an order granting petitioners' motion to dismiss.[2]

_____, C.J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

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[2]Because we conclude that petitioners are entitled to a writ of prohibition in light of the district court's erroneous exercise of jurisdiction, NRS 34.320; *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court*, 131 Nev. 30, 35, 342 P.3d 997, 1001 (2015), we need not address petitioners' alternate request for mandamus relief.

cc: Hon. Linda Marie Bell, Chief Judge
Hon. Nancy L. Allf, District Judge
Greenberg Traurig, LLP/Las Vegas
Holland & Hart LLP/Las Vegas
Holland & Hart, LLP/Denver
Moye White LLP
Santoro Whitmire
James R. Christensen
BleauFox
Eighth District Court Clerk

SILVER, J., with whom PICKERING, J. joins, concurring in part and dissenting in part:

I agree with the majority that the district court should have dismissed the first three causes of action in California-resident Wolfus's second amended complaint, since those claims are derivative in nature and are for the corporation to assert or decline, not Wolfus. However, the same cannot be said for Wolfus's fourth and fifth causes of action, which are grounded in common law fraud and misrepresentation. Further, as pleaded, these are direct, *not derivative*, claims under California law as espoused by *Small v. Fritz Companies*, 65 P.3d 1255 (Cal. 2003). Therefore, I respectfully concur in part and dissent in part.

Midway's Pan Gold Project (Pan) involved the company's intent to mine for gold at the northern end of the Pancake Mountains located in White Pine County, Nevada. In order to complete the project, Midway needed to secure permits from both the Bureau of Land Management and the Nevada Department of Environmental Protection. In May of 2010, Midway hired petitioner Brunk as its President and Chief Operating Officer, and by May of 2012, he ascended to become Chairman of the Board and Chief Executive Officer—ousting Wolfus. Wolfus alleged in his second amended complaint that Brunk, along with other named defendants (petitioners here), through the company, issued various press releases and SEC filings over the next two years that described in significant detail the method and manner by which Midway intended to mine gold in the Pancake Mountains. According to Wolfus, these releases and filings misrepresented that Midway had made significant progress in permitting and financing the project moving forward.

In fact, Wolfus distinctly pleaded that in a January 15, 2014, SEC press release, Midway reported that the Pan project was "*fully permitted and construction is underway with completion estimated for Q3 2014.*" (Emphasis added). As a result, Wolfus exercised his stock option—purchasing 200,000 shares for $112,000 Canadian dollars, which was the equivalent of $100,636 U.S. dollars. Again, in March 12, 2014, Midway issued another press release stating that the Pan project was *fully permitted and that construction was underway.* Additionally, days later Midway issued another press release naming its mining contractor for the Pan project.

Wolfus alleged that on September 19, 2014, he again relied upon petitioners' continued misrepresentations through press releases and SEC filings and purchased another 1,000,000 shares of Midway stock—exercising his stock options for $860,000 Canadian dollars, which was then equivalent to $783,778 U.S. dollars. Finally, only six months later, by June of 2015, Midway announced that it had begun Chapter 11 bankruptcy proceedings. Soon after, the bankruptcy was converted from Chapter 11 reorganization to Chapter 7 liquidation.

Wolfus alleged fraud and negligent misrepresentation by petitioners in his second amended complaint, highlighting that but for petitioners' fraud and or negligent misrepresentations regarding the Pan project's permits and financing (neither of which actually occurred), Wolfus would not have held onto his stock and would have sold it, and, moreover, he would not have exercised stock options in *purchasing* stock. Specifically, Wolfus alleged that he would have sold his existing stock around February 14, 2014, when Midway shares peaked at $1.39.

This court disfavors granting writ petitions that challenge the denial of a motion to dismiss. *Buckwalter v. Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010); *State v. Thompson*, 99 Nev. 358, 361-62, 662 P.2d 1338, 1340 (1983). We review de novo the decision to dismiss a complaint under NRCP 12(b)(1), resolving factual disputes in favor of the plaintiff where the plaintiff makes a prima facie showing of jurisdiction, supported by competent evidence. *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. 368, 374, 328 P.3d 1152, 1156 (2014).

Midway and its representatives (petitioners) were responsible for Midway's press releases and SEC filings. The releases and filings publically claimed that Midway was fully permitted to mine for gold and that the company successfully obtained financing in moving forward with the Pan project. Midway cannot sue itself for its own fraud and misrepresentation. Fraud and misrepresentation as pleaded by Wolfus reflect a direct claim pursuant to common law.

In *Small*, the California Supreme Court held that California law authorizes a direct, as opposed to derivative, claim to a shareholder who alleges that they were wrongfully induced to hold stock instead of selling it. 65 P.3d at 1260, 1266. Therefore, a shareholder may properly bring a common law action for fraud or misrepresentation if that shareholder makes a bona fide showing of actual reliance upon the misrepresentations. *See id.* at 1266.

My review of the 47 pages of the second amended complaint in this case reveals that Wolfus sufficiently alleged a personal holder claim, which is a direct claim under California law. More importantly, Wolfus additionally alleged that because of petitioners' fraud or negligent misrepresentations in claiming the Pan project was "fully permitted" and

financed, he *purchased* almost a $1,000,000 US stock—when in actuality, Midway was never fully permitted, nor was it financed, which ultimately resulted in Midway's bankruptcy. Most certainly, Wolfus's "purchaser claims" are direct claims that are personal to him. In my view, the majority broadly and in a conclusory fashion opines that the "gravamen" of Wolfus's second amended complaint is derivative in nature. Not only does the majority fail to properly analyze the specifically pleaded holder claims involving *affirmative* acts of alleged fraud and misrepresentation, but it completely ignores specifically pleaded purchaser claims. These purchaser claims are clearly personal to Wolfus, not to all shareholders. How can the allegation that Wolfus purchased 1,000,000 shares of Midway Stock for $860,000 Canadian dollars, equivalent to $783,778 U.S. dollars, on September 19, 2014, based on fraud and misrepresentations by the petitioners regarding the project being fully permitted, be derivative in nature—as opposed to personal to Wolfus? This is *not*, as the majority claims, a cause of action for general mismanagement leading to the demise of the corporation for which all shareholders seek redress.

I do not disagree with those critical of "holder" claims who underscore that Wolfus has a long row to hoe to prove fraud and negligent misrepresentation, as "holder" claims may be quite speculative in nature and involve very complex questions of proof and damages. But that is not our concern. Here, this court is tasked with entertaining a writ petition involving a district court's denial of a motion to dismiss pursuant to NRCP 12(b)(5). In *Citigroup Inc. v. AHW Investment Partnership,* 140 A.3d 1125 (Del. 2016), the Delaware Supreme Court emphasized that difficulties proving a holder claim do not affect its status as a direct claim, and further noted that purchaser claims are direct as well:

> Finally, whatever analytical problems are involved in recognizing the Holder Claims as a species of common law fraud claim or negligent misrepresentation claim do not turn those Holder Claims into claims belonging to the issuer who is the primary defendant, or into claims governed by the internal affairs doctrine. As discussed above, *holder claims are analytically indistinct from seller and purchaser claims, which are direct claims that are personal to the holder.* Purchaser, seller, and holder claims all involve very difficult questions of proof and damages, and holder claims just entail proving the additional requirement of inducement. This admittedly can be said to compound, not just marginally add to, those complex questions of proof and damages. That is, a holder claim plaintiff must prove that she would have sold her securities in some particular time period had she had certain information at that time. Because securities holders may decide whether to hold or sell stock for various reasons, proving inducement is difficult. *The speculation arguably inherent in this added element has led states to be rightly cautious about creating broad causes of action for securities holders, as opposed to sellers or purchasers, a caution our state law has shared. That issue, however, does not transmogrify a common law fraud or negligent misrepresentation claim belonging to the security holder under state law into one belonging to the issuer.*

Id. at 1140-41 (footnotes and citations omitted) (emphasis added).

Based on the foregoing, I would deny petitioners' writ. In my view, the district court properly denied petitioners' motion to dismiss Wolfus's second amended complaint regarding counts 4 and 5, alleging

fraud and negligent misrepresentation. Both causes of action are direct claims, personal to Wolfus, and he pleaded them with enough specificity to survive a motion to dismiss.

_____, J.
Silver

I concur:

_____, J.
Pickering

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; AND NATHANIEL KLEIN,
Petitioners,
vs.
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,
Respondents,
and
DANIEL E. WOLFUS,
Real Party in Interest.

Supreme Court No. 76052
District Court Case No. A756971

NOTICE IN LIEU OF REMITTITUR

TO THE ABOVE-NAMED PARTIES:

The decision and Order of the court in this matter having been entered on October 11th, 2019, and the period for the filing of a petition for rehearing having expired and no petition having been filed, notice is hereby given that the Order and decision entered herein has, pursuant to the rules of this court, become effective.

DATE: November 05, 2019

Elizabeth A. Brown, Clerk of Court

By: Rory Wunsch
Deputy Clerk

cc: Hon. Nancy L. Allf, District Judge
Eighth Judicial District Court, Chief Judge
Santoro Whitmire
Moye White LLP
Holland & Hart LLP/Las Vegas
Greenberg Traurig, LLP/Las Vegas
James R. Christensen
BleauFox
Steven D. Grierson, Eighth District Court Clerk

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; AND NATHANIEL KLEIN,
Petitioners,
vs.
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,
Respondents,
and
DANIEL E. WOLFUS,
Real Party in Interest.

No. 76052

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

WRIT OF PROHIBITION

TO: The Honorable Nancy L. Allf, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of prohibition issue,

NOW, THEREFORE, you are instructed to vacate your order denying petitioners' motion to dismiss and to enter an order granting petitioners' motion to dismiss, in the case entitled Daniel E. Wolfus, 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 Deleware Limited Liability Company; EREF-MID II, LLC, a

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Deleware Limited Liability Company; and HCP-MID, LLC, a Delaware Limited Liability Company, case no. A756971.

WITNESS The Honorables Mark Gibbons, Chief Justice, James W. Hardesty, Ron Parraguirre, Lidia Stiglich, and Elissa Cadish, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 11th day of October, 2019.

Harriet Cummings

Chief Assistant Clerk

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.

Supreme Court No. 76052

District Court Case No. A-17-756971-B

CERTIFICATE OF SERVICE

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CLERK OF
DEPUTY

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b), I hereby certify that I am an employee of Holland & Hart; that on this date I caused to be hand delivered the following documents: **ORDER GRANTING PETITION FOR WRIT OF PROHIBITION and WRIT OF PROHIBITION** as follows:

Honorable Judge Nancy L. Allf
Department 27
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, 89155

November 5, 2019

/s/ Julie Linton
An Employee of HOLLAND & HART LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO. : A-17-756971-B DEPT. NO.: XXVII **ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT** Electronic Filing Case

On March 16, 2018, Defendants Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson (collectively, the "D&O Defendants") filed D&O Defendants' Motion to Dismiss Second Amended Complaint (the "Motion"), Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC (collectively, the "Hale Defendants") Motion to Dismiss and Joinder thereto (the "Hale Joinder") and Defendant Kenneth A. Brunk ("Brunk") Motion to Dismiss and Joinder thereto (the "Brunk Joinder") (collectively, the Motion, Brunk Joinder, and Hale Joinder will be referred to as "Defendants' Motions"), wherein the D&O Defendants, Hale Defendants and Brunk (collectively, the "Defendants") moved the Court to dismiss the Second Amended Complaint for Damages filed by Plaintiff Daniel E. Wolfus ("Wolfus" or "Plaintiff") on February 5, 2018 (the "Second Amended Complaint" or "SAC").

The Defendants' Motions came before this Court for hearing on May 9, 2018 at 10:30 a.m. Robert J. Cassity, Esq. and David J. Freeman, Esq., of the law firm HOLLAND & HART LLP, appeared on behalf of the D&O Defendants. Mark E. Ferrario, Esq. and Christopher R. Miltenberger, Esq., of the law firm GREENBERG TRAURIG, LLP, appeared on behalf of the Hale Defendants. Eric B. Liebman, Esq., of the law firm MOYE WHITE LLP, and Jason D. Smith, Esq., of the law firm SANTORO WHITMIRE, appeared on behalf of Brunk. James R. Christensen, Esq., of the law firm JAMES R. CHRISTENSEN PC, and Samuel T. Rees, Esq. appeared on behalf of Plaintiff.

On June 6, 2018, the Court entered an Order Regarding Defendants' Motions to Dismiss. On June 12, 2018, Defendants filed a Petition for Writ of Prohibition or, Alternatively, Mandamus (the "Writ Petition") with the Nevada Supreme Court, which was assigned Case No. 76052. In the Writ Petition, Defendants challenged the Court's Order Regarding Defendants' Motions to Dismiss. On July 26, 2018, the Nevada Supreme Court issued an Order Directing an Answer to the Writ Petition. On September 26, 2018, Plaintiff filed an Answer to the Writ Petition. On October 29, 2018, Defendants filed a Reply in Support of the Writ Petition. On April 2, 2019, the Nevada Supreme Court, sitting *en banc*, held oral argument on Defendants'

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Writ Petition. On October 11, 2019, the Nevada Supreme Court issued an Order Granting Petition for Writ of Prohibition, and the Supreme Court issued a Writ of Prohibition, instructing this Court to vacate its Order Regarding Defendants' Motions to Dismiss and to enter an order granting Defendants' Motion to Dismiss. A Notice of Lieu of Remittitur was issued on November 5, 2019.

The Court having carefully considered the D&O Defendants' Motion, Hale Joinder, Brunk Joinder, Plaintiff's Consolidated Memorandum of Points and Authorities in Opposition to Motions to Dismiss, the Defendants' respective reply briefs filed in support of the Motion, together with all declarations filed in support of and opposition to the Motion and Joinders, including the exhibits to the declarations, the oral argument of counsel presented at the hearing on this matter, and having reviewed the Nevada Supreme Court's Order Granting Petition for Writ of Prohibition, having been served with the Writ of Prohibition, and in accordance with the requirements of the Writ of Prohibition, issues the following Order Granting Defendants' Motions to Dismiss:

FACTUAL ALLEGATIONS

1. Midway Gold Corp. ("Midway") was a publicly traded Canadian Corporation incorporated under the Company Act of British Columbia, with its principal executive offices located in Englewood, Colorado. *See* Pl.'s Second Am. Compl. ("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.

4. 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.

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5. 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.

6. In 2009, Plaintiff became Chairman of the Board and the Chief Executive Officer of Midway, serving in both capacities until May 18, 2012 when he was replaced by Brunk. *Id.* ¶ 27.

7. 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.

8. 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* SAC ¶ 30), including the Pan Mine (*see id.* ¶ 32).

9. 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.

10. 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.

11. Midway disclosed the study to the public in December 2011 (*see id.* ¶ 45), and stated it was converting to a production company to bring the Pan Mine online as a profitable revenue stream.

12. Plaintiff alleges that, by either mid or late 2013, Midway's management and its board (including the D&O Defendants) knew the Pan Mine was being built and operated in ways that were materially different from those assumed in the 2011 Pan Mine Study, but the Defendants did not inform investors of the material impact on cash flows as a result of those differences. *Id.* ¶ 65.

13. Specifically, Plaintiff alleges the Defendants failed to disclose that Midway (a) was unable to raise sufficient cash to complete the Pan Mine project in the manner set forth in the

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2011 Pan Mine Study, as well as fund on-going operations until the Pan Mine project produced sufficient revenues to cover these expenses, and (b) did not seek the proper permits and did not have the necessary facilities to process the gold solution once leaching was completed, and there would be a considerable delay before the facilities were constructed and permitted for operations. *Id.* ¶¶ 65, 86.

14. On January 23, 2014, Plaintiff exercised stock options to acquire 200,000 shares at $0.56/share for $112,000 Canadian Dollars ($100,636 USD). *Id.* ¶ 69.

15. On September 19, 2014, Plaintiff exercised his stock option to acquire 1,000,000 shares at $0.86/share for $860,000 Canadian Dollars ($783,778 USD). Plaintiff's acquisition of shares was also a result of his exercising certain of his qualified employee stock options. *Id.* ¶¶ 87, 88, 89.

16. Plaintiff has asserted claims against Defendants arising out of the Defendants' alleged failure to disclose certain facts regarding the progress (or lack thereof) of the Pan Mine project prior to Plaintiff's stock option exercises in 2014.

17. Plaintiff alleges that had he known these undisclosed facts, he would not have exercised his stock options in either January 2014 or September 2014. Plaintiff also alleges that he and his family were induced to hold their stock when, had they known the material facts, they would have sold their stock when Midway's stock price reached its peak on February 28, 2014. *See* SAC ¶¶ 106, 111, 114, 117, 124, 130, 131, 144-145.

18. Plaintiff alleged that he relied on these allegedly misleading statements in exercising his stock options, which were subsequently rendered worthless by Midway's bankruptcy. *See* SAC ¶¶ 95-96.

CONCLUSIONS OF LAW

19. When a plaintiff fails to "state a claim upon which relief can be granted," the Court must dismiss the claim upon motion under NRCP 12(b)(5). "In considering a motion to dismiss pursuant to NRCP 12(b)(5) the court accepts a plaintiff's factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claims asserted." *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (citation

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omitted). "To survive dismissal, a complaint must contain some 'set of facts, which, if true, would entitle the plaintiff to relief.'" *In re Amerco Derivative Litig.*, 127 Nev. 196, 211, 252 P.3d 681, 692 (2011) (citation omitted). "Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief." *Stockmeier v. Nevada Dep't of Corr.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (citations omitted).

20. Plaintiff's first cause of action is for Securities Fraud under the California Corporate Securities Act. Cal. Corp. 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."

21. 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."

22. 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."

23. After review of the plain language of Cal. Corp. Code § 25017(e), the Court concludes that 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.

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24. Although 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.

25. 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, the application of Cal. Corp. Code § 25017(e) indicates that the sale occurred in 2009 when the stock options were issued, and there are no allegations that the sale in 2009 was based upon any untrue statement of a material fact or an omission of the same. Accordingly, the California Securities Fraud cause of action fails as a matter of law and is subject to dismissal with prejudice as to all Defendants.

26. With regard to Plaintiffs' claims, "[t]he question whether a suit is derivative by nature or may be brought by a shareholder in his own right is governed by the law of the state of incorporation . . . ." *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 589-90 (7th Cir. 2003); *see also Kepley v. Lanz*, 715 F.3d 969, 972-73 (6th Cir. 2013).

27. As Midway Gold is a British Columbian corporation, the test British Columbian courts apply when evaluating whether a claim is direct or derivative is whether "the gravamen of the cause of action alleged [arises] as a result of wrongs done to the company. . . . . If the damage that flows is a direct result of the wrongs done to the company, then those damages can only be claimed by the company." *Robak Indus. Ltd. v. Gardner*, 2006 CarswellBC 2533, para. 5 (Can. B.C.S.C.) (WL).

28. In making this determination, the courts in that jurisdiction examine "the nature of the damages suffered as alleged in the pleadings." *Id.* at para. 13; *see also Luft v. Ball*, 2013 CarswellBC 820, para. 34 (Can. B.C.S.C.) (WL) ("In order for a complaining shareholder to maintain a personal action for breach of duties owed to the company, that shareholder must show that he or she has suffered damage or loss in a manner distinct from other shareholders.").

29. The Nevada Supreme Court recently adopted Delaware's "direct harm" test for distinguishing between derivative and direct shareholder claims in *Parametric Sound*, 133 Nev. at 427, 401 P.3d at 1108. In order to determine whether a shareholder claim is direct or derivative,

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the court must consider: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* (quoting *Tooley*, 845 A.2d at 1033).

30. Pursuant to the direct harm test, the relevant inquiry in addressing who suffered the alleged harm is: "Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation. *Parametric Sound*, 133 Nev. at 426, 401 P.3d at 1107-08 (quoting *Tooley*, 845 A.2d at 1036). Applying the direct harm test as set forth in *Parametric Sound*, Wolfus's fiduciary duty claims are derivative because he has not demonstrated a harm that is independent of the injury to Midway as a corporation.

31. The gravamen of Wolfus's Second Amended Complaint is the Directors' alleged mismanagement of Midway, specifically, mismanagement in the form of failing to secure sufficient capital for the Pan project, deciding not to sell assets to create necessary capital, and purportedly allowing a certain Director to "tak[e] effective control of Midway and the Pan project even though" Wolfus contends that Director "lacked the ability to manage the Pan project." Wolfus also alleges the Directors failed to appropriately employ supervisory staff for the Pan project, which delayed production. Further, Wolfus alleges the Pan project failed because the Directors, rather than cut costs to purchase necessary equipment, "decided not to purchase this necessary equipment" and instead purchased equipment for which the company had not secured the appropriate permits. These alleged acts of mismanagement and imprudent investment decisions impaired or prevented what Wolfus describes in his Second Amended Complaint as the "two major events" required for the Pan project to succeed: Midway securing necessary permits and securing necessary financing for the project. SAC ¶ 46.

32. The Court concludes, based on the body of his Second Amended Complaint and the nature of his claims, that Wolfus's breach of fiduciary duty claims describe a derivative action based on the Directors' alleged mismanagement of Midway. His Second Amended Complaint merely reflects an unavailing attempt to characterize the derivative claim as a direct claim

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personal to him. Such an effort does not alter the nature of his claims. *See Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 352-53 (Del. 1988) (holding that where the gravamen of a stockholder's complaint is director mismanagement, the cause of action is derivative in nature). Notwithstanding his attempt to characterize his claims as direct, the essence of Wolfus's claims allege harm to Midway from which injury resulted indirectly to each of Midway's shareholders. Accordingly, Wolfus's breach of fiduciary duty claims are derivative and he lacks standing to pursue them.

33. Wolfus argues that California common law, as set forth in *Small v. Fritz Cos.*, 65 P.3d 1255 (Cal. 2003), permits him to assert claims for fraud and negligent misrepresentation directly. Regardless of how Wolfus purports to characterize these claims, however, he has simply repackaged his fiduciary duty claims under different labels. Here, Wolfus attempts to frame his cause of action as one for fraud and negligent misrepresentation, but the claims are based on what the Directors purportedly should have disclosed about their management of Midway. The underlying nature of Wolfus's fraud and negligent misrepresentation claims are derivative as they are dependent on alleged injuries to Midway.

34. Wolfus's Second Amended Complaint alleges that, had he known of the purportedly undisclosed facts the Directors withheld, Wolfus "would have sold all of his Midway shares . . . in February 2014 when Midway's stock price began to fall from its peak." The nature of the harm alleged here cannot be understood apart from the decline in Midway's stock value which ostensibly resulted from the Directors' purported mismanagement. The decline in Midway's stock value did not result from any misrepresentation or omission, but from the Directors' alleged failure to successfully manage the Pan project. Generally, such an allegation will sustain a derivative action, not an action for direct injury to the shareholder. *See, e.g., Rivers v. Wachovia Corp.*, 665 F.3d 610, 614-15 (4th Cir. 2011) ("The well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." (internal quotation marks omitted); *Smith v. Waste Mgmt., Inc.*, 407 F.3d 381, 384-85 (5th Cir. 2005) (concluding a shareholder's claims for fraud and negligent misrepresentation were

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derivative because alleged corporate misrepresentations that "caus[e] a decline in the company's share price when the truth is revealed," injure the corporation directly and the shareholders only indirectly.); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (concluding a shareholder's allegations of breach of fiduciary duty and corporate mismanagement "describe[d] a direct injury to the bank, not the individual stockholders," and allegations of "depreciation of stock value [were] an indirect result of the injury to [the bank] which resulted in its closure").

35. Even if the Court were to entertain Wolfus's argument that his claims for fraud and misrepresentation allege direct harm personal to him, his pleading would be inadequate pursuant to the very authority upon which he relies, specifically, the decision in *Small v. Fritz Cos.*, 65 P.3d 1255, 1265 (Cal. 2003).

36. Having determined that Wolfus's claims against the Directors are derivative in nature, as allegations of mismanagement which harmed Midway directly, the Court concludes the law of British Columbia, where Midway was incorporated, controls Wolfus's claims. *Vaughn v. Le nnt'l, Inc.*, 94 Cal. Rptr. 3d 166, 175 (Ct. App. 2009) ("Under the internal affairs doctrine, the rights of shareholders in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated." (internal quotation marks omitted)).

37. British Columbia law requires a corporate shareholder to apply for leave of the court of that jurisdiction before filing a derivative action, and requires the shareholder to provide notice of such application to the company and demand that the directors take remedial action prior to commencement of the suit. Business Corporations Act, R.S.B.C. 2002, c. 57 §§ 232(2)(a) & 233(1)(a)-(b). The failure to obtain leave of court is fatal under British Columbia common law. *Bruneau v. Irwin Indus. (1978) Ltd.*, 2002 CarswellBC 1107, para. 19 (Can. B.C.S.C.) (WL) ("[W]here an action [is] in fact a derivative action but commenced without leave, the appropriate remedy [is] to strike it as disclosing no reasonable claim.").

38. Wolfus concedes that if his claims are derivative, they are also subject to an effective pre-suit demand requirement which he failed to satisfy. Failure to comply with such a requirement is equally fatal to his complaint. *Vaughn*, 94 Cal. Rptr. 3d at 171-72 (holding a pre-

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suit demand requirement imposed by the British Virgin Islands Business Companies Act of 2004 imposed a substantive requirement determining whether a shareholder had standing to sue).

39. Wolfus also lacks standing to pursue derivative claims on behalf of Midway as a result of Midway's bankruptcy, over which the estate's trustee has exclusive standing to litigate. 11 U.S.C. §§ 323, 541; *Estate of Spirtos v. One San Bernardino Cty. Superior Court Case No. SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006) ("The bankruptcy code endows the bankruptcy trustee with the exclusive right to sue on behalf of the estate."); *Delgado Oil Co. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986) (explaining that the bankruptcy estate of a corporate debtor includes any derivative right of action the corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director).

ORDER

Based on the foregoing, and good cause appearing,

IT IS HEREBY ORDERED that the Court's Order Regarding Defendants' Motion to Dismiss dated June 6, 2018 is VACATED;

IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Securities Fraud, which is hereby DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Breach of Fiduciary Duty, which is hereby DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Aiding and Abetting Breach of Fiduciary Duty, which is hereby DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Fraud, which is hereby DISMISSED with prejudice.

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IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Negligent Misrepresentation, which is hereby DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 9 day of ~~December 2019~~ Jan 2020.

Nancy L Allf
DISTRICT COURT JUDGE

Respectfully submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO. : A-17-756971-B DEPT. NO.: XXVII **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT**

PLEASE TAKE NOTICE that an Order Granting Defendants' Motions to Dismiss Second Amended Complaint was entered on the 10th day of January 2020. A copy is attached.

DATED this 13th day of January 2020.

By /s/ Robert J. Cassity

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January 2020, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING 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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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO. : A-17-756971-B DEPT. NO.: XXVII **ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT** Electronic Filing Case

On March 16, 2018, Defendants Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson (collectively, the "D&O Defendants") filed D&O Defendants' Motion to Dismiss Second Amended Complaint (the "Motion"), Defendants Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein, INV-MID, LLC, EREF-MID II, LLC and HCP-MID, LLC (collectively, the "Hale Defendants") Motion to Dismiss and Joinder thereto (the "Hale Joinder") and Defendant Kenneth A. Brunk ("Brunk") Motion to Dismiss and Joinder thereto (the "Brunk Joinder") (collectively, the Motion, Brunk Joinder, and Hale Joinder will be referred to as "Defendants' Motions"), wherein the D&O Defendants, Hale Defendants and Brunk (collectively, the "Defendants") moved the Court to dismiss the Second Amended Complaint for Damages filed by Plaintiff Daniel E. Wolfus ("Wolfus" or "Plaintiff") on February 5, 2018 (the "Second Amended Complaint" or "SAC").

The Defendants' Motions came before this Court for hearing on May 9, 2018 at 10:30 a.m. Robert J. Cassity, Esq. and David J. Freeman, Esq., of the law firm HOLLAND & HART LLP, appeared on behalf of the D&O Defendants. Mark E. Ferrario, Esq. and Christopher R. Miltenberger, Esq., of the law firm GREENBERG TRAURIG, LLP, appeared on behalf of the Hale Defendants. Eric B. Liebman, Esq., of the law firm MOYE WHITE LLP, and Jason D. Smith, Esq., of the law firm SANTORO WHITMIRE, appeared on behalf of Brunk. James R. Christensen, Esq., of the law firm JAMES R. CHRISTENSEN PC, and Samuel T. Rees, Esq. appeared on behalf of Plaintiff.

On June 6, 2018, the Court entered an Order Regarding Defendants' Motions to Dismiss. On June 12, 2018, Defendants filed a Petition for Writ of Prohibition or, Alternatively, Mandamus (the "Writ Petition") with the Nevada Supreme Court, which was assigned Case No. 76052. In the Writ Petition, Defendants challenged the Court's Order Regarding Defendants' Motions to Dismiss. On July 26, 2018, the Nevada Supreme Court issued an Order Directing an Answer to the Writ Petition. On September 26, 2018, Plaintiff filed an Answer to the Writ Petition. On October 29, 2018, Defendants filed a Reply in Support of the Writ Petition. On April 2, 2019, the Nevada Supreme Court, sitting *en banc*, held oral argument on Defendants'

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Writ Petition. On October 11, 2019, the Nevada Supreme Court issued an Order Granting Petition for Writ of Prohibition, and the Supreme Court issued a Writ of Prohibition, instructing this Court to vacate its Order Regarding Defendants' Motions to Dismiss and to enter an order granting Defendants' Motion to Dismiss. A Notice of Lieu of Remittitur was issued on November 5, 2019.

The Court having carefully considered the D&O Defendants' Motion, Hale Joinder, Brunk Joinder, Plaintiff's Consolidated Memorandum of Points and Authorities in Opposition to Motions to Dismiss, the Defendants' respective reply briefs filed in support of the Motion, together with all declarations filed in support of and opposition to the Motion and Joinders, including the exhibits to the declarations, the oral argument of counsel presented at the hearing on this matter, and having reviewed the Nevada Supreme Court's Order Granting Petition for Writ of Prohibition, having been served with the Writ of Prohibition, and in accordance with the requirements of the Writ of Prohibition, issues the following Order Granting Defendants' Motions to Dismiss:

FACTUAL ALLEGATIONS

1. Midway Gold Corp. ("Midway") was a publicly traded Canadian Corporation incorporated under the Company Act of British Columbia, with its principal executive offices located in Englewood, Colorado. *See* Pl.'s Second Am. Compl. ("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.

4. 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.

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5. 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.

6. In 2009, Plaintiff became Chairman of the Board and the Chief Executive Officer of Midway, serving in both capacities until May 18, 2012 when he was replaced by Brunk. *Id.* ¶ 27.

7. 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.

8. 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* SAC ¶ 30), including the Pan Mine (*see id.* ¶ 32).

9. 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.

10. 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.

11. Midway disclosed the study to the public in December 2011 (*see id.* ¶ 45), and stated it was converting to a production company to bring the Pan Mine online as a profitable revenue stream.

12. Plaintiff alleges that, by either mid or late 2013, Midway's management and its board (including the D&O Defendants) knew the Pan Mine was being built and operated in ways that were materially different from those assumed in the 2011 Pan Mine Study, but the Defendants did not inform investors of the material impact on cash flows as a result of those differences. *Id.* ¶ 65.

13. Specifically, Plaintiff alleges the Defendants failed to disclose that Midway (a) was unable to raise sufficient cash to complete the Pan Mine project in the manner set forth in the

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2011 Pan Mine Study, as well as fund on-going operations until the Pan Mine project produced sufficient revenues to cover these expenses, and (b) did not seek the proper permits and did not have the necessary facilities to process the gold solution once leaching was completed, and there would be a considerable delay before the facilities were constructed and permitted for operations. *Id.* ¶¶ 65, 86.

14. On January 23, 2014, Plaintiff exercised stock options to acquire 200,000 shares at $0.56/share for $112,000 Canadian Dollars ($100,636 USD). *Id.* ¶ 69.

15. On September 19, 2014, Plaintiff exercised his stock option to acquire 1,000,000 shares at $0.86/share for $860,000 Canadian Dollars ($783,778 USD). Plaintiff's acquisition of shares was also a result of his exercising certain of his qualified employee stock options. *Id.* ¶¶ 87, 88, 89.

16. Plaintiff has asserted claims against Defendants arising out of the Defendants' alleged failure to disclose certain facts regarding the progress (or lack thereof) of the Pan Mine project prior to Plaintiff's stock option exercises in 2014.

17. Plaintiff alleges that had he known these undisclosed facts, he would not have exercised his stock options in either January 2014 or September 2014. Plaintiff also alleges that he and his family were induced to hold their stock when, had they known the material facts, they would have sold their stock when Midway's stock price reached its peak on February 28, 2014. *See* SAC ¶¶ 106, 111, 114, 117, 124, 130, 131, 144-145.

18. Plaintiff alleged that he relied on these allegedly misleading statements in exercising his stock options, which were subsequently rendered worthless by Midway's bankruptcy. *See* SAC ¶¶ 95-96.

CONCLUSIONS OF LAW

19. When a plaintiff fails to "state a claim upon which relief can be granted," the Court must dismiss the claim upon motion under NRCP 12(b)(5). "In considering a motion to dismiss pursuant to NRCP 12(b)(5) the court accepts a plaintiff's factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claims asserted." *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009) (citation

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omitted). "To survive dismissal, a complaint must contain some 'set of facts, which, if true, would entitle the plaintiff to relief.'" *In re Amerco Derivative Litig.*, 127 Nev. 196, 211, 252 P.3d 681, 692 (2011) (citation omitted). "Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief." *Stockmeier v. Nevada Dep't of Corr.*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008) (citations omitted).

20. Plaintiff's first cause of action is for Securities Fraud under the California Corporate Securities Act. Cal. Corp. 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."

21. 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."

22. 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."

23. After review of the plain language of Cal. Corp. Code § 25017(e), the Court concludes that 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.

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24. Although 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.

25. 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, the application of Cal. Corp. Code § 25017(e) indicates that the sale occurred in 2009 when the stock options were issued, and there are no allegations that the sale in 2009 was based upon any untrue statement of a material fact or an omission of the same. Accordingly, the California Securities Fraud cause of action fails as a matter of law and is subject to dismissal with prejudice as to all Defendants.

26. With regard to Plaintiffs' claims, "[t]he question whether a suit is derivative by nature or may be brought by a shareholder in his own right is governed by the law of the state of incorporation . . . ." *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 589-90 (7th Cir. 2003); *see also Kepley v. Lanz*, 715 F.3d 969, 972-73 (6th Cir. 2013).

27. As Midway Gold is a British Columbian corporation, the test British Columbian courts apply when evaluating whether a claim is direct or derivative is whether "the gravamen of the cause of action alleged [arises] as a result of wrongs done to the company. . . . . If the damage that flows is a direct result of the wrongs done to the company, then those damages can only be claimed by the company." *Robak Indus. Ltd. v. Gardner*, 2006 CarswellBC 2533, para. 5 (Can. B.C.S.C.) (WL).

28. In making this determination, the courts in that jurisdiction examine "the nature of the damages suffered as alleged in the pleadings." *Id.* at para. 13; *see also Luft v. Ball*, 2013 CarswellBC 820, para. 34 (Can. B.C.S.C.) (WL) ("In order for a complaining shareholder to maintain a personal action for breach of duties owed to the company, that shareholder must show that he or she has suffered damage or loss in a manner distinct from other shareholders.").

29. The Nevada Supreme Court recently adopted Delaware's "direct harm" test for distinguishing between derivative and direct shareholder claims in *Parametric Sound*, 133 Nev. at 427, 401 P.3d at 1108. In order to determine whether a shareholder claim is direct or derivative,

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the court must consider: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* (quoting *Tooley*, 845 A.2d at 1033).

30. Pursuant to the direct harm test, the relevant inquiry in addressing who suffered the alleged harm is: "Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation. *Parametric Sound*, 133 Nev. at 426, 401 P.3d at 1107-08 (quoting *Tooley*, 845 A.2d at 1036). Applying the direct harm test as set forth in *Parametric Sound*, Wolfus's fiduciary duty claims are derivative because he has not demonstrated a harm that is independent of the injury to Midway as a corporation.

31. The gravamen of Wolfus's Second Amended Complaint is the Directors' alleged mismanagement of Midway, specifically, mismanagement in the form of failing to secure sufficient capital for the Pan project, deciding not to sell assets to create necessary capital, and purportedly allowing a certain Director to "tak[e] effective control of Midway and the Pan project even though" Wolfus contends that Director "lacked the ability to manage the Pan project." Wolfus also alleges the Directors failed to appropriately employ supervisory staff for the Pan project, which delayed production. Further, Wolfus alleges the Pan project failed because the Directors, rather than cut costs to purchase necessary equipment, "decided not to purchase this necessary equipment" and instead purchased equipment for which the company had not secured the appropriate permits. These alleged acts of mismanagement and imprudent investment decisions impaired or prevented what Wolfus describes in his Second Amended Complaint as the "two major events" required for the Pan project to succeed: Midway securing necessary permits and securing necessary financing for the project. SAC ¶ 46.

32. The Court concludes, based on the body of his Second Amended Complaint and the nature of his claims, that Wolfus's breach of fiduciary duty claims describe a derivative action based on the Directors' alleged mismanagement of Midway. His Second Amended Complaint merely reflects an unavailing attempt to characterize the derivative claim as a direct claim

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personal to him. Such an effort does not alter the nature of his claims. *See Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 352-53 (Del. 1988) (holding that where the gravamen of a stockholder's complaint is director mismanagement, the cause of action is derivative in nature). Notwithstanding his attempt to characterize his claims as direct, the essence of Wolfus's claims allege harm to Midway from which injury resulted indirectly to each of Midway's shareholders. Accordingly, Wolfus's breach of fiduciary duty claims are derivative and he lacks standing to pursue them.

33. Wolfus argues that California common law, as set forth in *Small v. Fritz Cos.*, 65 P.3d 1255 (Cal. 2003), permits him to assert claims for fraud and negligent misrepresentation directly. Regardless of how Wolfus purports to characterize these claims, however, he has simply repackaged his fiduciary duty claims under different labels. Here, Wolfus attempts to frame his cause of action as one for fraud and negligent misrepresentation, but the claims are based on what the Directors purportedly should have disclosed about their management of Midway. The underlying nature of Wolfus's fraud and negligent misrepresentation claims are derivative as they are dependent on alleged injuries to Midway.

34. Wolfus's Second Amended Complaint alleges that, had he known of the purportedly undisclosed facts the Directors withheld, Wolfus "would have sold all of his Midway shares . . . in February 2014 when Midway's stock price began to fall from its peak." The nature of the harm alleged here cannot be understood apart from the decline in Midway's stock value which ostensibly resulted from the Directors' purported mismanagement. The decline in Midway's stock value did not result from any misrepresentation or omission, but from the Directors' alleged failure to successfully manage the Pan project. Generally, such an allegation will sustain a derivative action, not an action for direct injury to the shareholder. *See, e.g., Rivers v. Wachovia Corp.*, 665 F.3d 610, 614-15 (4th Cir. 2011) ("The well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." (internal quotation marks omitted); *Smith v. Waste Mgmt., Inc.*, 407 F.3d 381, 384-85 (5th Cir. 2005) (concluding a shareholder's claims for fraud and negligent misrepresentation were

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derivative because alleged corporate misrepresentations that "caus[e] a decline in the company's share price when the truth is revealed," injure the corporation directly and the shareholders only indirectly.); *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (concluding a shareholder's allegations of breach of fiduciary duty and corporate mismanagement "describe[d] a direct injury to the bank, not the individual stockholders," and allegations of "depreciation of stock value [were] an indirect result of the injury to [the bank] which resulted in its closure").

35. Even if the Court were to entertain Wolfus's argument that his claims for fraud and misrepresentation allege direct harm personal to him, his pleading would be inadequate pursuant to the very authority upon which he relies, specifically, the decision in *Small v. Fritz Cos.*, 65 P.3d 1255, 1265 (Cal. 2003).

36. Having determined that Wolfus's claims against the Directors are derivative in nature, as allegations of mismanagement which harmed Midway directly, the Court concludes the law of British Columbia, where Midway was incorporated, controls Wolfus's claims. *Vaughn v. Le nnt'l, Inc.*, 94 Cal. Rptr. 3d 166, 175 (Ct. App. 2009) ("Under the internal affairs doctrine, the rights of shareholders in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated." (internal quotation marks omitted)).

37. British Columbia law requires a corporate shareholder to apply for leave of the court of that jurisdiction before filing a derivative action, and requires the shareholder to provide notice of such application to the company and demand that the directors take remedial action prior to commencement of the suit. Business Corporations Act, R.S.B.C. 2002, c. 57 §§ 232(2)(a) & 233(1)(a)-(b). The failure to obtain leave of court is fatal under British Columbia common law. *Bruneau v. Irwin Indus. (1978) Ltd.*, 2002 CarswelIBC 1107, para. 19 (Can. B.C.S.C.) (WL) ("[W]here an action [is] in fact a derivative action but commenced without leave, the appropriate remedy [is] to strike it as disclosing no reasonable claim.").

38. Wolfus concedes that if his claims are derivative, they are also subject to an effective pre-suit demand requirement which he failed to satisfy. Failure to comply with such a requirement is equally fatal to his complaint. *Vaughn*, 94 Cal. Rptr. 3d at 171-72 (holding a pre-

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suit demand requirement imposed by the British Virgin Islands Business Companies Act of 2004 imposed a substantive requirement determining whether a shareholder had standing to sue).

39. Wolfus also lacks standing to pursue derivative claims on behalf of Midway as a result of Midway's bankruptcy, over which the estate's trustee has exclusive standing to litigate. 11 U.S.C. §§ 323, 541; *Estate of Spirtos v. One San Bernardino Cty. Superior Court Case No. SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006) ("The bankruptcy code endows the bankruptcy trustee with the exclusive right to sue on behalf of the estate."); *Delgado Oil Co. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986) (explaining that the bankruptcy estate of a corporate debtor includes any derivative right of action the corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director).

ORDER

Based on the foregoing, and good cause appearing,

IT IS HEREBY ORDERED that the Court's Order Regarding Defendants' Motion to Dismiss dated June 6, 2018 is VACATED;

IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Securities Fraud, which is hereby DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Breach of Fiduciary Duty, which is hereby DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Aiding and Abetting Breach of Fiduciary Duty, which is hereby DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Fraud, which is hereby DISMISSED with prejudice.

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IT IS FURTHER ORDERED that Defendants' Motions are GRANTED as to Plaintiff's Claim for Negligent Misrepresentation, which is hereby DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 9 day of ~~December 2019~~ Jan 2020.

Nancy L Allf
DISTRICT COURT JUDGE
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Respectfully submitted by:

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EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

DANIEL E. WOLFUS, Plaintiff, vs. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-B DEPT NO.: 27 **NOTICE OF APPEAL**

NOTICE HIS HEREBY GIVEN that Plaintiff DANIEL E. WOLFUS hereby appeals to the Supreme Court of Nevada from (i) the Order Granting Defendants' Motions to Dismiss Second Amended Complaint electronically filed and entered on January 10, 2020, notice of entry of which was electronically filed on January 13, 2020; (ii) the Order Regarding Defendants' Motions to Dismiss Second Amended Complaint, electronically filed and entered on June 6, 2018, notice of entry of which was electronically filed on June 7, 2018; and (iii) the Court Minutes dated May 18, 2018.

Dated this 12th day of February, 2020.

/s/ *Samuel T. Rees*

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CERTIFICATE OF SERVICE

I CERTIFY SERVICE of **NOTICE OF APPEAL** was made this date by electronic service (via Odyssey) to all parties currently shown on the Court's e-serve list of recipients this 12th day of February 2020.

/s/ Dawn Christensen
An employee of James R. Christensen

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO. : A-17-756971-B DEPT. NO.: XXVII **JUDGMENT** Electronic Filing Case

The Court, having issued a *Notice of Entry of Order Granting Defendants' Motions to Dismiss Second Amended Complaint* on January 13, 2020, Defendants Richard D. Moritz,

Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson having filed a *Verified Memorandum of Costs* pursuant to NRS 18.005 and 18.110 on January 15, 2020, and Plaintiff Daniel E. Wolfus having filed no motion to retax or settle the costs, and good cause appearing,

IT IS ORDERED, ADJUDGED, AND DECREED that Judgment is entered in favor of Defendants Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson and against Plaintiff Daniel E. Wolfus in the amount of $5,119.30. Prejudgment interest and post-judgment interest shall accrue as prescribed under Nevada law.

DATED this 3 day of March 2020.

Nancy L Allf
DISTRICT COURT JUDGE

Submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO. : A-17-756971-B DEPT. NO.: XXVII **NOTICE OF ENTRY OF JUDGMENT**

PLEASE TAKE NOTICE that a Judgment was entered on the 4th day of March 2020. A copy is attached.

DATED this 5th day of March 2020.

By /s/ David Freeman

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March 2020, a true and correct copy of the foregoing **NOTICE OF ENRTY OF JUDGMENT** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's Odyssey eFileNV Electronic Filing system and serving all parties with an email address on record, as indicated below, pursuant to Administrative Order 14-2 and Rule 9 of the .N.E.F.C.R. That date and time of the electronic proof of service in place of the date and place of deposit in the U.S. Mail.

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☒ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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/s/ Julie Linton
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DISTRICT COURT

CLARK COUNTY, NEVADA

DANIEL E. WOLFUS, , Plaintiff, v. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC; a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO. : A-17-756971-B DEPT. NO.: XXVII **JUDGMENT** Electronic Filing Case

The Court, having issued a *Notice of Entry of Order Granting Defendants' Motions to Dismiss Second Amended Complaint* on January 13, 2020, Defendants Richard D. Moritz,

Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson having filed a *Verified Memorandum of Costs* pursuant to NRS 18.005 and 18.110 on January 15, 2020, and Plaintiff Daniel E. Wolfus having filed no motion to retax or settle the costs, and good cause appearing,

IT IS ORDERED, ADJUDGED, AND DECREED that Judgment is entered in favor of Defendants Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson and against Plaintiff Daniel E. Wolfus in the amount of $5,119.30. Prejudgment interest and post-judgment interest shall accrue as prescribed under Nevada law.

DATED this 3 day of March 2020.

Nancy L Allf
DISTRICT COURT JUDGE

Submitted by:

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EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

DANIEL E. WOLFUS, Plaintiff, vs. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-B DEPT NO.: 27 **AMENDED NOTICE OF APPEAL**

NOTICE HIS HEREBY GIVEN that Plaintiff DANIEL E. WOLFUS hereby appeals to the Supreme Court of Nevada from (i) the Order Granting Defendants' Motions to Dismiss Second Amended Complaint electronically filed and entered on January 10, 2020, notice of entry of which was electronically filed on January 13, 2020; and, (ii) the Order Regarding Defendants' Motions to Dismiss Second Amended Complaint, electronically filed and entered on June 6, 2018, notice of entry of which was electronically filed on June 7, 2018. (The reference to Court Minutes dated May 18, 2018, has been removed.)

Dated this 30th day of March, 2020.

/s/ Samuel T. Rees

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CERTIFICATE OF SERVICE

I CERTIFY SERVICE of **AMENDED NOTICE OF APPEAL** was made this date by electronic service (via Odyssey) to all parties currently shown on the Court's e-serve list of recipients this 30th day of March 2020.

/s/ Dawn Christensen
An employee of James R. Christensen

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EIGHTH JUDICIAL DISTRICT COURT

DISTRICT OF NEVADA

DANIEL E. WOLFUS, Plaintiff, vs. KENNETH A. BRUNK; RICHARD D. MORITZ; BRADLEY J. BLACKETOR; TIMOTHY HADDON; MARTIN M. HALE, JR.; TREY ANDERSON; RICHARD SAWCHAK; FRANK YU; JOHN W. SHERIDAN; ROGER A. NEWELL; RODNEY D. KNUTSON; NATHANIEL KLEIN; INV-MID, LLC, a Delaware Limited Liability Company; EREF-MID II, LLC, a Delaware Limited Liability Company; HCP-MID, LLC, a Delaware Limited Liability Company; and DOES 1 through 25. Defendants.	CASE NO.: A-17-756971-B DEPT NO.: 27 **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that Plaintiff DANIEL E. WOLFUS appeals to the Supreme Court of Nevada from the Judgment electronically filed and entered on March 4, 2020, notice of entry of which was electronically filed on March 5, 2020. Plaintiff previously filed notice of appeal from (i) the Order Granting Defendants' Motions to Dismiss Second Amended Complaint electronically filed and entered on January 10, 2020, notice of entry of which was electronically filed on January 13, 2020; (ii) the Order Regarding Defendants' Motions to Dismiss Second Amended Complaint, electronically filed and entered on June 6, 2018, notice of entry of which was electronically filed on June 7, 2018; and (iii) the Court Minutes dated May 18, 2018, and notice of entry which was electronically served May 18, 2018. An Amended

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Notice of Appeal was filed removing (iii) the Court Minutes dated May 18, 2018.

Dated this 30th of March 2020.

/s/ *Samuel T. Rees*

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I CERTIFY SERVICE of **NOTICE OF APPEAL** was made this date by electronic service (via Odyssey) to all parties currently shown on the Court's e-serve list of recipients this 30th day of March 2020.

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An employee of James R. Christensen

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