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,

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

Consolidated with:

Supreme Court No. 80949

APPELLANT'S OPENING BRIEF

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

SAMUEL T. REES, ESQ.
Admitted Pro Hac vice
26 Muirfield Place
New Orleans, LA 70131
(213) 220-9988
streesesq@earthlink.net

Attorneys for Appellant, DANIEL E. WOLFUS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

Other Authorities

ROUTING STATEMENT

The Nevada Supreme Court should retain this appeal under NRAP 17(a) because it raises an issue of of important substantive rights to pursue a remedy and for purposes of consistency, as the Nevada Supreme Court issued Writ relief in this case in *Brunk v. Eighth Judicial Dist. Court of Nev.*, 449 P.3rd 1270 (Nev. 2019) (unpublished). The appeal does not fall into one of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

RULE 26.1 DISCLOSURE

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

No such corporations are involved. Daniel E. Wolfus is an individual and is represented by James R. Christensen of James R. Christensen, PC, and Samuel T. Rees.

Dated this 24th day of September, 2020.

/s/ James R. Christensen

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

SAMUEL T. REES, ESQ.
(Admitted Pro Hac Vice)
26 Muirfield Place
New Orleans, LA 70131
(213) 220-9988
STReesEsq@earthlink.net

Attorneys for Appellant DANIEL E. WOLFUS

I. Introduction.

This appeal involves the only cause of action of Plaintiff and Appellant Daniel E. Wolfus ("Wolfus") which was not before the Court in *Brunk v. Eighth Judicial Dist. Court of Nev*., 449 P3d 1270 (Nev. 2019) (unpublished).

That securities fraud First Cause of Action was Wolfus' claim that Midway Gold Corp. ("Midway") violated California's Corporate Securities Law of 1968, California *Corporations Code* §§ 25000 *et seq.* (the "Act") when it sold 1,200,000 shares of its common stock to Wolfus in 2014 using false and misleading facts and omissions in its public filings to induce Wolfus to purchase those shares and on which Wolfus detrimentally relied. California securities law applies when a purchase of stock originates in California. California's *Corporations Code* § 25008; and *Hall v. Superior Court*, 150 Cal App. 3d 411 (2003).[1]

Defendants below and Respondents herein (hereinafter collectively "D&Os") are alleged to be secondarily liable for the securities fraud by virtue of their status, among other grounds, because they were officers and/or directors of Midway who were responsible for the publication of the false and misleading facts and omissions with knowledge of their falsity.

[1] References herein to *Corporations Code* are references to California's *Corporations Code.*

In *Brunk*, this Court resolved Wolfus four other tort claims contained in Wolfus Second Amended Complaint ("SAC") finding that those tort claims were derivative and not direct. The Court did not decide Wolfus' statutory securities fraud cause of action because the District Court had already dismissed the securities fraud claim and the D&Os only sought to overturn the District Court's failure to dismiss the other tort causes of action for breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, fraud and negligent misrepresentation.

By this appeal, Wolfus seeks review of the District Court's granting of the D&Os motions to dismiss Wolfus' securities fraud claim. As will be shown below, Wolfus contends that the District Court failed to properly interpret and apply *Corporations Code* § 25017 based upon an apparent misunderstanding of Qualified Employee Incentive Stock Options, warrants and convertible securities.

As will be shown below and just like the federal and other state securities laws including Nevada's, the Act provides a private right of action to a purchaser of a security if the seller either misstates material facts or omits to disclose material facts in order to induce the purchase. The remedy provided in the Act is essentially the return of the purchaser's consideration plus interest.

On two occasions in 2014, Wolfus purchased shares of common stock, which is a qualifying security, directly from Midway and paid Midway nearly $885,000 US. In order to induce this purchase, Midway in its public filings made

materially false and misleading statements and omitted material facts on which Wolfus relied in making his two purchases. This was the basis for Wolfus' securities fraud claim.

However, the District Court determined that neither of the 2014 purchases was a "sale" under *Corporations Code* § 25017 of the Act. Instead, the District Court concluded that the "sale" actually occurred when Wolfus was "granted" certain stock options in 2009 under Midway's qualified employee incentive stock option plan even though (i) Wolfus had paid no consideration for those stock option grant, (ii) Wolfus suffered no damages from this gratuitous grant and (iii) the options were priced at the then fair market value of Midway's stock which is a requirement of US stock option plans so there could be no damages. Thus, at the time of this gratuitous grant, Wolfus had no securities fraud claim. No such claim could accrue until Wolfus purchased shares and parted with consideration for those shares in 2014.

Finding that the "sale" occurred in 2009 when the options were granted, the District Court concluded that Wolfus had failed to state a securities fraud claim because he had not alleged that this gratuitous grant at Midway's sole discretion was made based upon material misstatements of facts or omissions.

Wolfus contends that the District Court's conclusion is erroneous based upon a misinterpretation of *Corporations Code* § 25017 of the Act with defines what constitutes a "sale."

The whole purpose of the securities laws is to insure that purchases and sales of securities are not accomplished by market manipulation, fraud or insider trading. The District Court's interpretation means that a corporation after stock options are granted is free to defraud a purchaser to induce the purchaser to exercise options and pay consideration and that the defrauded purchaser has no securities fraud claim. This is exactly contrary to and defeats the purposes of the securities laws.

II. Statement of Issues.

This appeal involves two issues. Both of these issues involve the interpretation of *Corporations Code* § 25017 of the Act.

A. Did the District Court err when it concluded that Wolfus' two purchases of Midway common stock in 2014 did not constitute a "sales" within the meaning of *Corporations Code* § 25017 of the Act.

B. Did the District Court err when it concluded that Wolfus' "purchases" were made in 2009 when Midway granted Wolfus certain stock options under its qualified employee incentive stock option plan even though the grant was without consideration paid by Wolfus.

III. Statement of Facts.

A. Procedural Facts.

On June 15, 2017, Wolfus commenced this action by filing his Complaint for Damages. [AA 1-135][2] This complaint was immediately amended prior to service by Wolfus First Amended Complaint for Damages filed on June 30, 2017. [AA 136-269]

All of the D&Os accepted service of the summons and First Amended Complaint in July 2017. [AA 270-271, 272-273 & 274]

No answers were filed to the First Amended Complaint. Instead, each of the D&Os filed motions to dismiss and joinders. [AA 276]

On January 5, 2018, the District Court filed its Order Granting Defendants' Motion to Dismiss Amended Complaint Without Prejudice. [AA 275-288] Notice of entry of that order was filed and served on January 8, 2018. [AA 289-305] The order specifically granted Wolfus 30 days from January 8, 2018 to file his Second Amended Complaint. [AA 288]

On February 5, 2018, Wolfus filed and served his Second Amended Complaint for Damages ("SAC"). [AA 306-451] The SAC is the operative complaint. No answers have been filed to the SAC.

---

[2] References to "AA" are to Appellant's Appending filed herewith.

The SAC alleged five causes of action. The First Cause of Action was for securities fraud based upon the Act. The Second Cause of Action was for breach of fiduciary duty. The Third Cause of Action was for aiding and abetting a breach of fiduciary duty. The Fourth Cause of Action was for common law fraud. The Fifth Cause of Action was for negligent misrepresentation.

On March 16, 2018, certain of the D&Os filed and served their D&O Defendants' Motion to Dismiss Second Amended Complaint. [AA 452-559] This motion contains the D&Os argument to dismiss Wolfus securities fraud claim, among other grounds.

Also on March 16, 2018, the other D&Os filed and served their two motions to dismiss the SAC both of which joined in the prior motion without substantive argument regarding the securities fraud claim. [AA 560-577 and 578-604]

On April 18, 2018, Wolfus filed and served his combined opposition entitled Consolidated Memorandum of Points and Authorities in Opposition to Motions to Dismiss Plaintiff's Second Amended Complaint. [AA 605-651]

On May 2, 2018, certain of the D&Os filed and served their reply entitled Reply in Support of D&O Defendants' Motion to Dismiss Second Amended Complaint. [AA 652-671] This reply contains the D&Os further argument to dismiss Wolfus securities fraud claim, among other grounds.

Also on May 2, 2018, the other D&Os filed and served their reply memoranda and joined the other reply without further substantive argument regarding the securities fraud claim. [AA 672-681 & 682-691]

The hearing on the motions to dismiss was conducted on May 9, 2018. The District Court offered no substantive comments concerning Wolfus' securities fraud claim. A copy of the transcript was filed on May 14, 2018. [AA 692-733]

On June 6, 2018, the District Court filed its Order Regarding Defendants' Motions to Dismiss Second Amended Complaint. [AA 734-743] Notice of Entry of that order was filed and served on June 7, 2018. [744-756] This Order dismissed, with prejudice as to all of the D&Os, Wolfus' First Cause of Action for securities fraud. However, this Order denied the D&Os' motions to dismiss the other four causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud and negligent misrepresentation. [AA 741]

On October 11, 2019, this Court filed its unpublished Order Granting Petition for Writ of Prohibition in *Brunk, supra.* [AA 757-783] This followed the D&Os "original petition for a writ of prohibition or mandamus challenging a district court denial of a motion to dismiss." [AA 757] As a result, Wolfus securities fraud claim, dismissed by the District Court, was not before this Court in *Brunk, supra*. This Court directed the District Court to "vacate its order denying

petitioners' motion to dismiss and to enter an order granting petitioners' motion to dismiss." [AA 776]

On November 5, 2019, this Court issued its Notice in Lieu of Remittitur. [AA 784] On November 8, 2019, this Court filed its Writ of Prohibition. [AA 785-789]

In compliance with this Court's direction, the District Court on January 10, 2020, filed its Order Granting Defendants' Motions to Dismiss Second Amended Complaint. [AA 790-801] Notice of entry of this order was filed and served on January 13, 2020. [AA 802-816]

When it did not appear that a judgment would be filed and served, Wolfus filed his Notice of Appeal on February 1, 2020. [AA 817-819] This Notice of Appeal commenced Supreme Court No. 80613. Because this Notice of Appeal incorrectly purported to appeal from the District Court's Minute Order dated May 18, 2018, in addition to appealing from the January 10, 2020 order and the June 6, 2018, order, Wolfus filed his Amended Notice of Appeal on March 30, 2020, eliminating the erroneous appeal from the Minute Order. [AA 827-829]

On March 4, 2020, the District Court filed its Judgment in favor of the D&Os. [AA 820-821] Notice of entry was filed and served on March 5, 2020. [AA 822-826]

On March 30, 2020, Wolfus filed and served his Notice of Appeal from the Judgment. [AA 830-832] This Notice of Appeal commenced Supreme Court No. 80949. This Notice of Appeal also referenced the prior Notice of Appeal and Amended Notice of Appeal.

B. Facts Alleged in the SAC.

The following facts are alleged in the SAC. Since this appeal arises out of the granting of motions to dismiss, Wolfus' factual allegations are treated by this Court and the District Court as true. *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823; 221 P.3rd 1276, 1280 (2009). References are to the Paragraph numbers of the SAC. [AA 306-352]

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.)

Prior to 2008, Midway was an exploration company which acquired and explored gold and silver mineral properties located primarily in Nevada. (SAC ¶24.)

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 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, Spring Valley, Thunder Mountain, Roberts Creek, Gold Rock (formerly the Monte) 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.)

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. (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. (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 Midway's only 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 the only 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 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. (SAC ¶65.)

In late December and in early January 2014, Wolfus decided to exercise some of his Midway qualified employee incentive 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. (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 USD. (SAC ¶69.)

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.) This was contrary to Midway's permits, but on March 13, 2014, Midway again 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 of the D&Os 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 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. (SAC ¶86.)

In late August and early September 2014, Wolfus decided to exercise some of his Midway remaining 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 June 22, 2015, Midway announced its bankruptcy. (SAC ¶95.)

IV. Standard of Review.

This appeal concerns the proper interpretation of Section 25017 of the Act. Questions of statutory interpretation are reviewed *de novo.* *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.* 134 Nev. Adv. Opp. 31, 416 P.3rd 249, 253 (2018), *D.R. Horton, Inc. v. Eighth Judicial Dist. Court,* 125 Nev. 449, 459; 215 P.3rd 697, 702 (2009).

This appeal is also from the granting of motions to dismiss. As stated by this Court in *Buzz Stew, LLC v. City of N. Las Vegas*, 181 P.3rd 670, 673; 124 Nev. 224 (2008):

> The City's motion to dismiss Buzz Stew's complaint under NRCP 12(b)(5) "is subject to a rigorous standard of review on appeal." Accordingly, this court will recognize all factual allegations in Buzz Stew's complaint as true and draw all inferences in its favor. Buzz Stew's complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief. We review the district court's legal conclusions de novo. (Footnotes with Citations Omitted)

As a result, the standard of review in this Court is *de novo.*

V. Summary of Argument.

The claims involved in this appeal were not decided by this Court in *Brunk, supra*. The issues in that earlier writ proceeding involved only the Second through Fifth Causes of Action of the SAC which attempted assert claims for breach of fiduciary duty, both direct and by aiding and abetting, for fraud and for negligent

misrepresentation. This Court concluded that those claims were derivative and not direct claims which could be pursued by Wolfus.

The D&Os did not seek review of the grant of their motion to dismiss Wolfus' First Cause of Action for securities fraud in *Brunk* and Wolfus was unable to raise that dismissal because no final judgment had yet been entered.

Moreover, there is no question that Wolfus' securities fraud claim is a direct and personal claim to him. Such a claim may only be brought by a purchaser or seller. Rescission or damages, the remedy for a securities fraud claim, is based upon the purchase price paid by the purchaser.

In dismissing Wolfus' securities fraud claim, the District Court erroneously concluded that the "sale" occurred in 2009 when Midway gratuitously granted Wolfus stock options even though no shares were issued and no consideration was paid. In reaching this conclusion, the District Court applied *Corporations Code* § 25017(e) and not 25017(a), which Wolfus contends is the applicable subsection.

The Act provides in *Corporations Code* §§ 25401 and 25501 a private right of action by a purchaser against a seller of securities when the sale is accomplished by the seller's false or misleading facts or omissions. Directors and officers of the seller are joint and severally liable to the purchaser by reason of their status as such.

Wolfus alleged all of the necessary elements for a securities fraud claim. Wolfus has specifically and with great detail alleged (1) a material misrepresentations or omissions, (2) scienter by Midway, (3) the nexus of the fraud with the purchase or sale of a security, (4) reliance by Wolfus, (5) economic loss, and (6) loss causation.

Corporations Code § 25017(a) provides that a sale occurs when shares are issued and sold and consideration is paid.

Corporations Code § 25017(e) does not deal with qualified employee incentive stock options grants. Instead, this subsection deals with the issuance and sale of warrants and convertible securities. The former is gratuitously granted by the employer. The latter are issued and sold and tradable at that time. Understanding the difference between qualified employee incentive stock options, warrants and convertible securities shows that *Corporations Code* § 25017(e) makes perfect sense when applied to warrants and convertible securities and not if applied to qualified employee incentive stock option grants.

There is no reported decision in California supporting the District Court's erroneous conclusion. There is, however, one reported case discussing very similar language and holding that this language does not apply to stock options.

As a result, the District Court's Conclusion of Law is erroneous and requires reversal.

VI. Argument.

A. The Issues on This Appeal Were Not Resolved by *Brunk.*

On June 6, 2018, the District Court filed its Order Regarding Defendants' Motions to Dismiss Second Amended Complaint. [AA 734-743] The D&Os had moved to dismiss all five causes of action in the SAC. The District Court's Order, however, only dismissed Wolfus' First Cause of Action for securities fraud. The District Court denied the D&Os motions to dismiss the other four causes of action of the SAC, leaving undismissed Wolfus' Second Cause of Action for breach of fiduciary duty, his Third Cause of Action for aiding and abetting a breach of fiduciary duty, his Fourth Cause of Action for common law fraud and his Fifth Cause of Action for negligent misrepresentation. [AA 741]

Thereafter, the D&Os petitioned this Court to order the District Court to vacate the June 6, 2018, Order and instead order the District Court to grant the D&O's motions to dismiss as to the above tort claims, which had been denied, and dismiss those tort claims. As a result, the First Cause of Action for securities fraud, which is the subject of this appeal, was not before this Court in *Brunk.*

Clearly, Wolfus could not have raised the granting of the motion to dismiss the First Cause of Action in the writ proceedings as no final judgment on that cause of action had been entered. Instead, it was merely an interlocutory order of the District Court.

In its Order Granting Petition for Writ of Prohibition [AA 757-783], this Court determined that the tort claims asserted in the Second through Fifth Causes of Action were derivative claims and not direct claims. This Court held that those claims concerned actions which damaged all shareholders and not simply Wolfus.

This cannot be said of Wolfus First Cause of Action for securities fraud brought pursuant to the California's Corporate Securities Law of 1968, California *Corporations Code* §§ 25000 *et seq.* (the "Act"). The Act specifically provides for a private right of action in *Corporations Code* § 25501. See *California Amplifier, Inc. v. RLI Ins. Co.*, 94 Cal.App.4th 102, 108-109 (2001) and *Apollo Capital Fund LLC v. Roth Capital Partners, LLC*, 158 Cal.App.4th 226, 249 (2007). The Act applies to Wolfus claim because he purchased his shares in California. *Corporations Code* § 25008; and *Hall v. Superior Court*, *supra*, although Nevada's securities law would provide the same claim and remedy as the Act.

In order to assert a securities fraud claim under the Act, a plaintiff must be either a purchaser or seller of a "security." The remedy to a purchaser whose security becomes valueless is the return of the consideration he paid for the security plus interest from the date the consideration was paid, less the value of the security. *Apollo, supra* at 249. Because of this statutory purchaser/seller requirement for standing under the Act, the claim cannot be made by all of Midway's shareholders.

Because Wolfus' securities fraud claim is a direct claim and not a derivative claim, this Court's Order did not address or resolve this claim.

B. The District Court Erred When It Concluded That Wolfus' Securities Fraud Claim Did Not Accrue When He Purchased Midway's Common Stock in 2014.

In Conclusion of Law 23 of the District Court's January 10, 2020 Order [AA 795], the District Court concluded as a matter of law "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." In reaching this conclusion, the District Court ignored the plan meaning of the Act and misinterpreted Section 25017(e) thereof. This conclusion, together with Conclusions of Law 24 and 25 are the basis for this appeal.

Wolfus contends that the actual purchases giving rise to his securities fraud claim occurred in 2014 when a contract of sale was created and consummated and when Wolfus paid Midway nearly $885,000 and received his share certificates. See Findings of Fact 14 and 15. [AA 794]

1. Wolfus Has Alleged a Securities Fraud Claim Under the California Act and Under Nevada Law.

Like Nevada, the California Act creates a private right of action in favor of the purchaser of a security against the seller of that security if the seller does so "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." *Corporations Code* § 25401.

Once a claim is established against a corporate seller of securities, *Corporations Code* § 25504 also creates joint and several liability against (i) every principal executive officer, (ii) every director, (iii) every person or entity who directly or indirectly controls the seller, and (iv) every employee of a person so liable who materially aids in the act or transaction constituting the violation, among others. It is this section which imposes liability on each of the D&Os even though none of them are either the seller of the security, are in privity with Wolfus, personally made any misleading statement or omission directly to the purchaser or had the requisite "scienter" required of the seller, although in those capacities their "scienter" is imputed to their corporate principal.

Claims under the Act were summarized in *California Amplifier, Inc. v. RLI Ins. Co.*, 94 Cal.App.4th 102, 108-109 (2001), as follows:

> The Act includes three sections that create fraudulent and prohibited practices in the purchase and sale of securities. (§§ 25400-25402.) *Section 25400* prohibits false and misleading statements designed to manipulate the securities markets. (*Diamond Multimedia Systems, Inc. v. Superior Court (1999) 19 Cal. 4th 1036, 1049 [80 Cal. Rptr. 2d 828, 968 P.2d 539]* (*Diamond Multimedia*).) "Market manipulation," essentially a term of art, covers fraudulent practices such as wash sales, matched orders, and rigged prices, that are intended to mislead investors by artificially creating market activity in a security. (*Id. at p. 1040, fn. 2*.) ***Section 25401* is a broader statute that prohibits misrepresentations in connection with the purchase or sale of securities in general.** *Section 25402* prohibits insider trading. These three sections are penal in nature. A violation could result in imprisonment for five years and a fine of up to $ 10 million. (*§ 25540, subd. (b)*.)
>
> Each of these three fraudulent practices sections has a corresponding section which establishes a **private remedy for damages**. (§§ 25500-25502.) The purpose of the Act in this regard is to create statutory liability that eliminates some of the elements of common law fraud, but balances this expansion of liability by placing other restrictions on recovery. (*Boam v. Trident Financial Corp. (1992) 6 Cal. App. 4th 738, 743-744 [8 Cal. Rptr. 2d 177]*; *Bowden v. Robinson (1977) 67 Cal. App. 3d 705, 711-712 [136 Cal. Rptr. 871]*.) *Section 25500* creates the private remedy for violations of *section 25400* and extends liability to all persons affected by market manipulation without requiring reliance or privity. But, *section 25500* is limited to intentional misrepresentations. (See *Bowden, supra, at pp. 714-715*.) *Sections 25501* and *25502* extend liability to some negligent conduct, but retain the privity requirement from common law fraud. [Emp Added and Footnotes Omitted]

See also *Apollo Capital Fund LLC v. Roth Capital Partners, LLC*, California DCA 2007 158 Cal.App.4th 226, 249 (2007) , as follows:

> The private right of action is specifically codified in Section 25501 of the Act, as follows:
>
> Any person who violates Section 25401 shall be liable to the person who purchases a security from him or sells a security to him, who may sue either for rescission or for damages (if the plaintiff or the defendant, as the case may be, no longer owns the security), unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know (or if he had exercised reasonable care would not have known) of the untruth or omission. * * * Damages recoverable under this section by a purchaser shall be an amount equal to the difference between (a) the price at which the security was bought plus interest at the legal rate from the date of purchase and (b) the value of the security at the time it was disposed of by the plaintiff plus the amount of any income received on the security by the plaintiff. * * *

By his securities fraud cause of action, Wolfus asserts claims on only two of his share purchases. The first was a purchase directly from Midway of 200,000 shares of Midway's common stock paying $100,636 for those shares. This purchase closed and the consideration paid on January 23, 2014. The shares were purchased by Wolfus, a California resident, in California and the shares were delivered to Wolfus in California. See SAC ¶s 5.A., 66, 100 and 102. Wolfus other purchase, again directly from Midway, was for 1,000,000 shares of Midway's common stock paying $783,778 for those shares. This purchase closed and the consideration paid on September 19, 2014. Like the first purchase, this second

purchase was made by a California resident from California for shares delivered to him in California. See SAC ¶s 5.A., 89, 100 and 107.

Midway's common stock, which was listed on national securities exchanges, is a "security" as defined in *Corporations Code* § 25019. In relevant part, that Section states "“Security” means . . . stock . . . ."

Because Midway was the "seller" in the two transactions, it is the "person" liable if the other elements of *Corporations Code* §§ 25401 and 25501 are alleged and proven. While the Act requires "privity" for a violation of sections 25401 and 25501 to exist, privity is only required between Wolfus and Midway and not the D&Os whose liability is created by Section 25504. See *California Amplifier* at 109. Wolfus has alleged the required privity between himself as the purchaser and Midway as the seller.

Having alleged that these two transactions are covered by the Act, Wolfus must also allege the other required elements of 25401 and 25501 in order to establish Midway's liability but if Wolfus makes those allegations then each of the D&Os is jointly and severally liable under *Corporations Code* § 25504 by virtue of their corporate status with Midway. Nothing other than status must be shown against the D&Os for liability to attach.

Corporations Code § 25401 requires that Wolfus allege that his two purchases were made 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. As stated in *Mueller v. San Diego Entm't Partners, LLC*, 260 F.Supp.3rd 1283, 1291, 1298 (SD Cal. 2017), a section 25401 claim, which is patterned on Rule 10b-5, requires that "a plaintiff must show (1) a material misrepresentation or omission, (2) scienter, (3) in connection with the purchase or sale of a security, (4) reliance, (5) economic loss, and (6) loss causation."

Wolfus has specifically identified numerous misleading public filings and incorporated press releases by Midway predating his first purchase in January 2014 and has summarized the relevant contents therein. See SEC ¶s 37, 39-45, 47, 52-57, 59, 60, 63 and 67. Each of these constitutes "written communications" on which a *Corporations Code* § 25401 violation may be based.

In Paragraph 65 of the SAC, Wolfus has specifically alleged facts which were omitted in the prior written representations.

The foregoing fully satisfies the specificity in pleading requirement for Wolfus' first purchase.

In Paragraphs 65 and 105 of the SAC, among other allegations, Wolfus has specifically alleged that that these public filings were both materially false and

misleading including their omission of the specific facts alleged in SAC Paragraph 65.

Also in Paragraph 105 of the SAC among other allegations, Wolfus has specifically alleged "scienter" in that the materially false and misleading written communications were issued "intentionally and was done to encourage investors to retain and purchase Midway's common stock." This is more than sufficient to allege the required element of scienter. See *Mueller, supra,* at 1291-1292.

Reasonable reliance by Wolfus as well as the lack of knowledge of the falsity of at least one of the representation concerning permitting and of the undisclosed facts are specifically alleged in SAC Paragraphs 50, 66, 70, 86, 87, 88, and 106.

With regard to Wolfus' second purchase in September 2014, Wolfus has specifically identified additional public misleading filings and incorporated press releases by Midway. See SAC ¶s 71-78 and 80-84. Each of these constitutes additional "written communications" on which a *Corporations Code* § 25401 violation may be based.

In Paragraph 86 of the SAC, Wolfus has specifically alleged facts which were still omitted.

The foregoing fully satisfies the specificity in pleading requirement for Wolfus' second purchase.

In Paragraphs 86 and 110 of the SAC among other allegations, Wolfus has specifically alleged that that these public filings were both materially false and misleading including their omission of the specific facts alleged in SAC Paragraph 86.

Also in SAC Paragraph 110 of the SAC among other allegations, Wolfus has specifically alleged "scienter" in that the materially false and misleading written communications were issued "intentionally and was done to encourage investors to retain and purchase Midway's common stock." This is more than sufficient to allege the required element of scienter. *Mueller, supra,* at 1291-1292.

Reasonable reliance by Wolfus as well as the lack of knowledge of the falsity of at least one of the representation concerning permitting and of the undisclosed facts are specifically alleged in SAC Paragraphs 50, 66, 70, 86, 87, 88, and 111.

While not required to state a prima facie case, Wolfus has also specifically alleged when he acquired knowledge of the falsity and of the omissions in Paragraph 97 of the SAC, making this action clearly timely. See *Corporations Code* § 25506(b).

Having established that Wolfus has made with specificity all of the required elements to establish a *Corporations Code* § 25401/25501 claim against Midway, it is now necessary to demonstrate that Wolfus has made the additional allegations

necessary to establish the Defendants' joint and several liability for Midway's violation. The required allegations are found in *Corporations Code* § 25504 which states, as follows:

> Every person who directly or indirectly controls a person liable under Section 25501 or 25503, every partner in a firm so liable, 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, and every broker–dealer or agent 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.

Under that statute, any defendant who is either a principal executive officer or a director or a controlling person is jointly and severally liable with Midway merely by occupying those positions. There is no privity requirement. There is no scienter requirement. There is no "materially aid" requirement. All that is required is specified corporate status.

In SAC Paragraph 64 and elsewhere, Wolfus has alleged that as of December 31, 2013, Brunk, Hale, Newell, Sheridan, Yu, Knutson and Klein were each directors of Midway. That is all that is required to be alleged to make these Defendants jointly and severally liable with Midway on the first purchase. As of the same date, Blacketor, as Chief Financial Officer, and Moritz, as Senior Vice President in charge of the Pan project, are alleged to be principal executive officers

of Midway along with Brunk already liable as a director. That is all that is required to make Blacketor and Moritz jointly and severally liable with Midway on the first purchase. Together these Defendants are called the 2013 Control Defendants.

In SAC Paragraph 85 and elsewhere, Wolfus has alleged that as of August 31, 2014,[3] Brunk, Hale, Sawchak, Sheridan, Yu, Haddon, and Klein were each directors of Midway. That is all that is required to be alleged to make these Defendants jointly and severally liable with Midway on the second purchase. As of the same date, Blacketor was still Midway's Chief Financial Officer and as such is alleged to still be a principal executive officer of Midway. That is all that is required to make Blacketor jointly and severally liable with Midway on the second purchase. Together these Defendants are called the 2014 Control Defendants and their status makes them jointly and severally liable.

It should be noted that Nevada's Securities (Uniform Act) NRS Chapter 90 provides the same private right of action as does the California Act. See *NRS* 90.570, 90.660 and 90.670. Applying Nevada's law results in the same conclusion sought by Wolfus herein.

[3] Paragraph 85 typographically states August 31, 2013 when the date actually is August 31, 2014 as the context amply demonstrates.

2. The District Court Misinterpreted *Corporations Code* § 25017 and Did Not Understand the Essential Differences Between a Qualified Employee Incentive Stock Option Grant, a Warrant and a Convertible Security.

Corporations Code § 25017, in relevant part, defines "Sale; sell; offer or offer to sell" as follows:

> (a) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. "Sale" or "sell" includes any exchange of securities and any change in the rights, preferences, privileges, or restrictions of or on outstanding securities.
>
> (b) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.
>
> (c) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing constitutes a part of the subject of the purchase and is considered to have been offered and sold for value.
>
> * * *
>
> (e) Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, includes an offer and sale of the other security only at the time of the offer or sale of the warrant or right or convertible security; but neither the exercise of the right to purchase or subscribe or to convert nor the issuance of securities pursuant thereto is an offer or sale.
>
> * * *

Wolfus contends that the applicable subsection of this rule governing this appeal is subsection (a). The District Court concluded that the applicable subsection is (e).

As noted above and among the other required elements for a securities fraud claim is that (i) there must be sale of a security and (ii) there must have been money paid as consideration for the purchase. If there is no sale, then no consideration changes hands and no securities fraud claim can be made as there are no damages.

The applicable section on this appeal creating the private right of action is *Corporations Code* § 25501. That section requires that there be a purchase and sale. That section provides a remedy only to a defrauded purchaser or seller. That section basically provides two remedies – rescission (i.e. return of consideration) or damages based upon the consideration paid plus interest less the value of the security at the time the complaint was filed. NRS 90.660(1) provides the same remedy plus attorneys' fees.

The District Court concluded that the "sale" in Wolfus' claim occurred in 2009 when he was "granted" qualified employee incentive stock options. See Finding of Fact 7 and Conclusion of Law 23. [AA 793 & 795] But no "sale" occurred in 2009. Wolfus did not receive any securities in 2009. Wolfus did not pay the $885,000, or any money, in 2009. Wolfus securities fraud claim cannot

accrue, if at all, until he parts with the $885,000 and receives the securities, neither of which occurred until 2014.

Unlike warrants or convertible securities discussed below, qualified employee incentive stock options are "granted" and not purchased or sold. See Finding of Fact 7 at AA 793 referencing D&Os' Exhibits H & I at AA 575-577.

No consideration changes hands when employee stock options are "granted." A grant under a qualified employee incentive stock option plan is merely an open ended "offer to sell" given gratuitously and at a corporation's sole discretion only to qualifying corporate employees. This open-ended offer cannot be "exercised" until it vests and must be exercised before it terminates according to its terms. Moreover, the price per share contained in the grant must be at least the fair market value of the security on the date of the grant. Thus, there can be no "damages" at the time of the grant because even if exercised at that moment, the price is at least the market price.

Additionally, it is the "exercise" of the stock option grant which creates the contract of sale. Upon exercise, the employee becomes obligated to pay the purchase price and the corporate employer becomes obligated to deliver the shares. These events all occurred in 2014 and not in 2009.

For an excellent discussion of employee stock options see Thomson Reuters *Practical Law*, "Employee share plans in the United States: regulatory overview"

by Michael Yang, Justin JT Ho, Keith Tidwell and Katherine Hogan, *Orrick, Herrington & Sutcliffe LLP* published on May 1, 2020, a copy of which copy of which can be found at https://ca.practicallaw.thomsonreuters.com/4-503-3871?transitionType=Default&contextData=(sc.Default)&firstPage=true.

Corporations Code § 25017(e) by its very language concerns two different types of securities and not grants of qualified employee incentive stock options.

First, this section deals with "warrants." Warrants are a security. As defined in an excellent article entitled *Warrant* by James Chen and published on February 4, 2020 in *Investopedia*, a warrant is "a derivative that gives the right, but not the obligation, to buy or sell a security – most commonly an equity - at a certain price before expiration."[4] As such, a warrant is "a right to purchase or subscribe to another security of the same or another issuer."

Warrants are not "granted." They are issued and sold generally by the company and frequently as additional consideration for the purchase of another of the company's securities such as a corporate bonds or preferred stock. Unlike employee stock options, warrants are transferable and tradable on exchanges. Since the sale occurs and the corporation receives the consideration at the time the warrants are issued, a securities fraud claim arises, if at all, at the time the warrants

[4] A copy of this article may be found at https://www.investopedia.com/terms/w/warrant.asp

are issued. Additionally, since warrants are normally "additional consideration" given for the purchase of an interest bearing obligation such as a bond or preferred stock, they are usually bought and resold on the same date resulting in an additional return on the debt obligation and are only bought and resold if a profit results to the purchaser who then has no actionable damages to the purchaser.

The other security referenced in *Corporations Code* § 25017(e) is "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." This is the definition of a convertible security. As defined in an excellent article entitled *Convertible Security* by Will Kenton and also published on September 11, 2019 in *Investopedia,* a convertible security is "an investment that can be changed into another form. The most common convertible securities are convertible bonds and convertible preferred stock, which can be converted into common stock. A convertible security specifies the price at which it can be converted and pays a periodic fixed amount—a coupon payment for convertible bonds and preferred dividend for convertible preferred shares."[5]

---

[5] A copy of this article may be found at https://www.investopedia.com/terms/c/convertible-security.asp

Just like warrants, convertible securities are not "granted" but, instead, are issued and sold generally by the company into whose shares the convertible security may be converted. Again and unlike employee stock options, convertible securities such as corporate bonds or preferred stock are transferable and tradable on exchanges. Since the sale occurs and the corporation receives the consideration at the time the convertible securities are issued and sold by the company, a securities fraud claim arises, if at all, at the time the convertible security is issued and sold. Moreover, there is generally no additional consideration paid by the purchaser of a convertible security at the time of conversion and, thus, no damages arise simply by conversion.

Read with this understanding of warrants and convertible securities, *Corporations Code* § 25017(e) makes perfect sense. The securities fraud claims arises, if at all, at the time the initial security (i.e. warrant or convertible security) is issued and sold and the purchase price changes hands from the purchaser to the seller.

There are no reported cases in California holding that the exercise of either qualified employee incentive stock options or even regular option contracts does not give rise to a securities fraud claim at the time of exercise or holding that a "sale" occurs when options are granted rather than when they are exercised, shares are issued and consideration is paid.

There is only one published case discussing similar language to *Corporations Code* § 25017(e), which is *People v. Boles,* 35 Cal. App. 2d 461, 95 P.2d 949 (1939). This case arose out of a criminal prosecution for violation of the then California Corporate Securities Act [6] for issuing a stock option security without a permit from the California Department of Corporations. The defendants were two officers of the issuing corporation. These defendants caused the corporate issuer to issue a stock option contract to a lender who was also making a loan to the corporation.

Following their conviction, the defendants appealed claiming that the issuance of the stock option was not a "sale" because of an exception set forth in paragraph 8, subdivision (a), section 2 of the Corporate Securities Act.[7] As stated by the Court, the exception provided in relevant part, as follows:

> . . . provided, that a privilege pertaining to a security giving the holder the privilege to convert such security into another security of the same company shall not be deemed a sale of such other security within the meaning of this definition; and provided further, that the issue or transfer of a right pertaining to a security and entitling the holder of such right to subscribe to another security of the same company shall not be deemed a sale of such security within the meaning of this definition; . . .
> *Boles* at 453.

---

6 Cal. Gen. Laws. Ann. act. 3814, § 2(a)(8)

7 Act 3814, vol. 2, Deering's General Laws (1931), p. 1926.

The defendants' argument was that because a stock option is a security and because it could be exercised for the purchase the corporation's stock which was a different security, then the exception applied and no sale occurred at the time the option was issued.

In affirming the conviction, the Court interpreted the exception and dismissed the defendants' argument as "untenable" based upon the clear reading of the exception. The Court's holding is, as follows:

> In the instant case the option given by defendants is clear on its face and does not provide for the exchange of one security of the corporation for another security of the same corporation. Therefore, the transaction here involved did not fall within the purview of the exception above noted.
> *Boles* at 453.

Thus, the Court held that when there is an exercise of an option, there is neither a "conversion" nor an "exchange of one security for another" which is the requirement for section 25017(e) to apply.

In this appeal, the District Court concluded that there was a "sale" when Wolfus was gratuitously granted stock options in 2009. Applying 25017(e) the District Court impliedly concluded that when Wolfus purchased the common stock and paid the consideration in 2014, he was actually converting one security for another. This is the same argument that the defendants made in *Boles* and was found to be "untenable."

For the foregoing reasons, it is clear that the applicable "sale" occurred in 2014 when Wolfus received his shares and paid Midway $885,000. The applicable subsection of *Corporations Code* § 25017 is (a) and not (e). A grant qualified employee incentive stock options is not a sale and they are neither warrants nor convertible securities. The District Court's Conclusion of Law to the contrary is erroneous and justifies reversal of the judgment and order from which this consolidated appeal is taken.

VII. Conclusion.

The issues raised in this appeal were not resolved by this Court in *Brunk, supra*. This cause of action was not before this Court in *Brunk.* Wolfus' securities fraud claim is personal to him as a purchaser and is not a derivative claim as a matter of law.

Wolfus alleged all of the necessary elements for his securities law claim to establish both the primary violation by Midway and the secondary liability by reasons of their status of each of the D&Os.

Wolfus securities fraud claim accrued when he paid $885,000 in 2014 and received 1,200,000 shares of common stock directly from Midway. The fact that the purchase and sale, a required element of a securities fraud claim, occurred in 2014 is found in *Corporations Code* § 25017(a).

Corporations Code § 25017(e) is not applicable to Wolfus' purchase. Qualified employee incentive stock options are gratuitously "granted" by the employer and are not purchased or sold. Qualified employee incentive stock options are not warrants and they are not convertible securities.

The District Court's Conclusion of Law to the contrary was in error and its judgment and order adverse to Wolfus should be reversed.

DATED this 24th day of September 2020.

/s/ James R. Christensen

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

SAMUEL T. REES, ESQ.
(Admitted Pro Hac Vice)
26 Muirfield Place
New Orleans, LA 70131
(213) 220-9988
STReesEsq@earthlink.net

Attorneys for DANIEL E. WOLFUS

VERIFICATION

I, James R. Christensen, am an attorney for Appellant herein. I hereby certify that I have read the foregoing Appellant's Opening Brief, have personal knowledge concerning the matters raised therein, and to the best of my knowledge, information, and belief, the factual matters set forth are as documented in the record of the case and Appendix, and that the arguments herein are not frivolous nor interposed for any improper purpose or delay.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

DATED this 24th day of September, 2020.

/s/ James R. Christensen

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

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either: [x] Proportionately spaced, has a typeface of 14 points or more and contains about 10,129 words.

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

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24th day of September, 2020.

/s/ James R. Christensen

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

SAMUEL T. REES, ESQ.
(Admitted Pro Hac Vice)
26 Muirfield Place
New Orleans, LA 70131
(213) 220-9988
STReesEsq@earthlink.net

Attorneys for DANIEL E. WOLFUS

CERTIFICATE OF SERVICE

I certify that on the 21st day of September, 2020, a true and correct copy of the foregoing Appellant's Opening Brief was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court E-Filing System.

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

Mark E. Ferrario, Esq.
Christopher Miltenberger, Esq.
Greenberg Traurig, LLP
Attorneys for Martin M. Hale, Jr.
Trey Anderson, Nathaniel Klein

Jason D. Smith, Esq.
Santoro Whitmire
Eric B. Liebman, Esq.
(Admitted Pro Hac Vice)
Rebecca DeCook, Esq.
(Admitted Pro Hac Vice)
Moye White, LLP
Attorneys for Kenneth A. Brunk

Robert J. Cassity, Esq.
David J. Freeman, Esq.
Holly Stein Sollod, Esq.
(Admitted Pro Hac Vice)
Holland & Hart, LLP
Attorneys for Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson

/s/ Dawn Christnesen
An employee of James R. Christensen, PC