IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL E. WOLFUS,

Appellant,

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,

Respondents.

Supreme Court No. 80613

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

DANIEL E. WOLFUS,

Appellant,

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,

Respondents.

Consolidated with:

Supreme Court No. 80949

Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Nancy Allf, District Judge, District Judge

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RULE 26.1 DISCLOSURE

The undersigned associated counsel of record certifies the following are persons or entities as described in Rule 26.1(a) of the Nevada Rules of Appellate Procedure and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Richard D. Moritz, Bradley J. Blacketor, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson are individuals and currently represented by the law firm of HOLLAND & HART LLP before the District Court and this Court.

2. Kenneth A. Brunk is an individual and currently represented by the law firms of MOYE WHITE LLP and SANTORO WHITMIRE before the District Court and this Court.

3. Martin M. Hale, Jr., Trey Anderson, Nathaniel Klein are individuals and are currently represented by the law firm of GREENBERG TRAURIG, LLP before the District Court and this Court.

Dated this 25th day of November 2020.

/s/ Robert J. Cassity

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ROUTING STATEMENT

The Nevada Supreme Court should retain this appeal under NRAP 17(a)(9) because it should hear and decide cases originating in business court. The appeal petition does not fall into one of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b).

COUNTERSTATEMENT OF ISSUES

1. Did the District Court correctly conclude that under Cal. Corp. Code § 25017(e), Wolfus' exercise of stock options in 2014 did not constitute a "purchase or sale of a security," but rather that any "purchase or sale" occurred at the time the options were granted in 2009, when the statute explicitly states that "neither the exercise of the right to purchase . . . nor the issuance of securities pursuant thereto is an offer or sale"?

2. Did the District Court correctly conclude that Wolfus failed to state a claim for violation of the California Corporate Securities Law of 1968 when Wolfus lacked privity with any of the Respondents and identified no material misrepresentation made to him by any Respondent?

I. STATEMENT OF THE CASE

Wolfus, a California resident and former CEO and Chairman of the Board of Midway Gold, Inc. ("Midway"), a now-bankrupt Canadian corporation whose principal place of business was in Colorado, brought the underlying action against the Respondents. Wolfus alleges, among other things, that Respondents—who are former officers and directors of Midway—violated the California Corporate Securities Law of 1968, Cal. Corp. Code §§ 25000, *et seq.* (the "California Securities Act" or the "Act") when Midway failed to disclose certain purported material facts in its press releases and public filings regarding the operations of Midway's Pan Mine project, which Wolfus contends induced him to exercise certain previously granted stock options.

Specifically, Wolfus claims he relied on alleged omissions from Midway's public disclosures when, on two occasions in 2014, he exercised stock options granted to him in 2009, pursuant to an employee stock option plan, at below market prices. Wolfus 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 Midway common stock when it reached its peak market price in February 2014. The District Court issued an order granting the Respondents' motions to dismiss Wolfus' California Securities Act claim on the

ground that Wolfus' exercise of the stock options in 2014 did not constitute a "purchase" as defined under the Act.[1]

This Court should affirm the District Court's dismissal of Wolfus' claim under the California Securities Act. First, Section 25017(e) of the Act specifically states that, with respect to stock options, a "purchase or sale" is deemed to occur at the time the option is granted, and *not* when the option is exercised. Accordingly, Wolfus' exercise of the stock options in 2014 did not constitute a "purchase or sale" under the California Securities Act; rather, the "purchase" occurred in 2009 when he was granted the options. Second, the California Securities Act requires privity of contract as a predicate to imposing liability. Because Wolfus purchased shares directly from Midway, and not from Respondents, the claim fails for lack of privity. Finally, Wolfus failed to allege that any Respondent made a statement directly to Wolfus, let alone a false statement at the time he exercised his options. Accordingly, Wolfus failed to state a claim under the California Securities Act and the claim was properly dismissed by the District Court.

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[1] In *Brunk v. Eighth Judicial Dist. Court*, 449 P.3d 1270, 2019 WL 5110141, at *8 (Nev. Oct. 11, 2019), this Court previously directed the District Court to dismiss all of Wolfus' other claims on the ground that they were derivative under British Columbia law and Wolfus therefore lacked standing to assert them. Because Wolfus' California Securities Act claim had been dismissed by the District Court (and the writ petition challenged the denial of Respondents' Motions to Dismiss), it was not addressed in this Court's prior ruling.

II. STATEMENT OF THE FACTS

A. Facts as Alleged in the Operative Complaint[2]

1. Midway.

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] AA314 ¶ 23.[5] Midway was engaged in the business of exploring and mining gold, primarily from mines located in Nevada and Washington. AA316 ¶ 30. Midway filed for Chapter 11 bankruptcy on June 22, 2015. AA337 ¶ 95.

Wolfus, a California resident, became an outside director of Midway in November 2008. AA310 ¶ 7; AA315 ¶ 26. In 2009, Wolfus became Chairman of the Board and the Chief Executive Officer of Midway, serving in both capacities

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[2] For the purposes of the Appeal only, the factual allegations are taken as true as they are stated in the Second Amended Complaint. Respondents do not admit to any of the allegations and reserve the right to challenge any of the allegations in the unlikely event the District Court's dismissal is not affirmed.

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

[4] Wolfus has not brought any claims or lawsuits arising out of the same set of facts against Midway or its Board of Directors in the provincial courts of British Columbia, the place of Midway's incorporation.

[5] All citations to Appellant's Appendix will refer to "AA" and the page number(s) referenced (*e.g.*, "AA301"); citations to Respondents' Appendix will refer to "RA" and the pages number(s) referenced (e.g., "RA001").

until May 18, 2012 when he was replaced by Respondent Kenneth Brunk ("Brunk"). AA315 ¶ 27.

Wolfus began purchasing common stock of Midway in the open market in February 2008. AA316 ¶ 29. Wolfus also acquired Midway stock option grants pursuant to an employee stock option plan on January 7 and September 10, 2009. *See* AA557; AA559.[6] As of May 1, 2012, Wolfus and his family owned over 1,629,117 shares of Midway common stock. AA316 ¶ 29.[7]

2. The 2011 Pan Mine Feasibility Study.

At the time Wolfus became Chairman of the Board and CEO, Midway had properties in the exploratory stage where gold mineralization had been identified. AA316 ¶ 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. AA312 ¶ 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. AA317 ¶ 35.

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[6] The District Court was authorized to 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).

[7] 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. AA316 ¶ 29.

In November 2011, when Wolfus 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"). AA320 ¶ 44. On December 20, 2011, Midway filed the 2011 Pan Mine Feasibility Study with the SEC. AA320 ¶ 45. The 2011 Pan Mine Feasibility Study is attached as Exhibit 1 to the SAC. AA354 – AA386 Ex. 1.

3. The Hale Transaction.

Wolfus claims that, as CEO and Chairman of the Board of Midway, he was primarily involved in securing capital for Midway to fund its operations. AA322 – AA323 ¶ 49. In 2012, while Wolfus was still Midway's Chairman and CEO, Hale Capital Partners, LP ("HCP") offered to secure a $70 million private placement of preferred stock. *Id.* Wolfus purportedly opposed the proposed HCP transaction, while Brunk was an ardent supporter. *Id.*

On May 18, 2012, Midway's Board of Directors voted to terminate Wolfus as its Chairman and CEO and replaced him with Brunk. AA323 – AA324 ¶ 50. Wolfus, 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.*

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 certain 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. AA325 ¶ 54. This transaction closed on December 13, 2012. AA325 – AA 326 ¶ 55. That day, Martin M. Hale, Jr. ("Hale"), HCP's CEO and portfolio manager, was appointed to Midway's Board of Directors, and Nathanial Klein ("Klein") resigned his directorship.[8] AA322 – AA323 ¶ 49; AA325 – AA326 ¶ 55. Klein was reelected to Midway's Board of Directors on June 20, 2013, AA326 ¶ 58, but later resigned from the Board on November 4, 2014. AA337 ¶ 92. Trey Anderson ("Anderson") was appointed to serve as a director, filling the spot vacated by Klein.[9] *Id.*

4. Midway's Alleged Misrepresentations and Omissions.

Wolfus claims Midway's management and its Board knew the Pan Mine was being built and operated in ways that were materially different from those assumed

[8] Klein, a Vice President at HCP, was previously appointed to Midway's Board of Directors in August 2012. AA324 ¶ 51.

[9] Respondents Hale, Klein, and Anderson are collectively referred to as the "Hale Respondents." The District Court dismissed INV-MID, LLC, EREF-MID II, LLC, and HCP-MID, LLC from the underlying action with prejudice, and they are not parties to this appeal.

in the 2011 Pan Mine Feasibility Study as of December 13, 2013[10] and as of August 31, 2014[11], but that Midway's directors and officers failed to inform investors of the material impact on cash flows as a result of those differences. AA328 – AA329 ¶ 65; AA335 ¶ 86. Wolfus 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. AA323 – AA324 ¶ 50; AA329 – AA330 ¶ 66; AA335 – AA336 ¶ 87; AA347 – AA349 ¶¶ 129 – 131. Wolfus alleges he was primarily concerned with the status of the Pan Mine project and the likelihood the project would profitably mine gold and be revenue positive. *Id.* Wolfus claims he determined from those public statements and the absence of

[10] Wolfus alleges that, as of December 31, 2013, Midway's management and Board consisted of Respondents Kenneth A. Brunk ("Brunk"), Martin M. Hale, Jr. ("Hale"), Richard D. Moritz ("Moritz"), Bradley J. Blacketor ("Blacketor"), John W. Sheridan ("Sheridan"), Frank Yu ("Yu"), Roger A. Newell ("Newell"), Rodney D. Knutson ("Knutson") and Nathaniel Klein ("Klein"). AA328 ¶ 64.

[11] Wolfus alleges that as of August 31, 2014, Midway's management and Board consisted of Respondents Brunk, Hale, Blacketor, Sheridan, Yu, Klein, Timothy Haddon ("Haddon") and Richard Sawchak ("Sawchak"). AA334 – AA335 ¶ 85.

the 2013 Undisclosed Facts[12] and 2014 Undisclosed Facts[13] that profitable mining operations would result in a substantial increase in the value of his Midway shares. AA347 – AA349 ¶¶ 129-136. The SAC does not contain any allegations about any public statements by Midway from December 1, 2014 until the announcement that it was filing for bankruptcy on June 22, 2015.

5. Wolfus Exercises His Stock Options in January and September 2014.

In late December 2013 and in early January 2014, Wolfus alleges that he "needed to decide whether to exercise some of his Midway stock options which would soon be expiring." AA329 – AA330 ¶ 66. Wolfus alleges, "in order to make this investment decision, Wolfus carefully reviewed and considered Midway's press

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[12] Wolfus alleges that Brunk, Moritz, Blacketor, Newell, Sheridan, Yu, Knutson, Hale and Klein 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 Respondents 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. AA328 – AA329 ¶ 65.

[13] Appellant alleges Brunk, Blacketor, Sawchak, Sheridan, Yu, Haddon, Hale and Klein 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. AA335 ¶ 86.

releases and public filings, primarily those that were issued after he ceased to be Midway's Chief Executive Officer."[14] *Id.*

The only stock purchase alleged to have been made by Wolfus in 2014 was the ***exercise of stock options*** granted to Wolfus pursuant to an employee stock option plan on January 7 and September 10, 2009. AA316 ¶ 29, AA329 – AA330 ¶ 66, AA331 ¶ 69, AA335 – AA336 ¶ 87; AA557; AA559. On January 23, 2014, Wolfus exercised stock options by purchasing 200,000 shares at $0.56/share for $112,000 Canadian Dollars ($100,636 USD). AA340 ¶ 102. At that time, Midway's common stock was selling at $1.27 US dollars per share and its price was rising. *Id.*

Wolfus 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." AA331 ¶ 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, Wolfus 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

[14] Notably, the SAC does not specify which press releases or SEC filings Appellant reviewed at that time other than "all". Nor does Appellant point to any specific misrepresentation by any Respondent contained in the filings upon which he purportedly relied.

family members would have sold all of the Midway shares at that time. AA331 ¶ 70; AA341 – AA342 ¶ 106; AA343 ¶ 111; AA344 ¶ 117.

In late August and early September 2014, Wolfus alleges that he again "needed to decide whether or not to exercise some of his options which would soon be expiring." AA335 – AA336 ¶ 87. Wolfus claims to have reviewed the press releases and SEC filings "primarily those that were issued after he purchased shares in January 2014."[15] *Id*.

On September 5, 2014, Wolfus 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. AA335 – AA336 ¶ 87; AA557; AA559.[16] On September 19, 2014, Wolfus consummated his stock option exercise 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). AA336 ¶ 89; AA342 ¶ 107.[17]

6. The Midway Bankruptcy.

Wolfus generally alleges that from mid-September 2014 until the announcement of the voluntary petition for bankruptcy on June 22, 2015, Midway's

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

[16] *See supra* n.6.

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

press releases and SEC filings provided only favorable information concerning the Pan Mine project. AA336 – AA337 ¶¶ 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. AA337 ¶ 96.

B. Procedural Posture

1. The First Amended Complaint.

On June 30, 2017, Wolfus filed the *First Amended Complaint for Damages* ("FAC")[18] against Midway's former officers, directors, and certain of Midway's investors, claiming Respondents violated the California state securities statute, breached fiduciary duties, aided and abetted Midway's breach of fiduciary duty, committed common law fraud and made negligent misrepresentations to the investing public when Midway purportedly failed to disclose certain material facts regarding the operations of its Pan Mine project in certain press releases and SEC filings. *See, generally,* AA001 – AA135; AA136 – AA250. Wolfus claimed he relied on Midway's public disclosures when, on two occasions in 2014, he exercised stock options granted to him years earlier at below market prices. AA154 – AA155

[18] On June 15, 2017, Appellant initiated the underlying action by filing a *Complaint for Damages*; however, the Complaint was amended before a responsive pleading was filed pursuant to NRCP 15(a). *See, generally,* AA001 – AA135.

¶¶ 60-63; AA159 – AA160 ¶¶ 80-82; AA557; AA559. Wolfus then alleged that had he known certain allegedly undisclosed facts, he would not have exercised the stock options in 2014; rather, he would have omnisciently sold his common stock when Midway's stock reached its peak. AA164 ¶ 101, and AA165 – AA166 ¶ 106.

2. The District Court Dismisses the FAC For Lack of Subject Matter Jurisdiction.

On January 5, 2018, the District Court entered an order granting Respondents' 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 Dismissing the FAC"). *See, generally*, AA275 – AA288. The District Court concluded that Wolfus' 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. v. Eighth Judicial Dist. Court*, 133 Nev. 417, 401 P.3d 1100 (2017). AA284 – AA285 ¶¶ 33-38. The District Court further concluded it lacked subject matter jurisdiction because, under the internal affairs doctrine, British Columbian law vests exclusive jurisdiction in the Supreme Court of British Columbia to adjudicate Wolfus' derivative claims. AA285 – AA286 ¶¶ 39-42. Nevertheless, the District Court granted Wolfus leave to file a second amended complaint. AA275 – AA288.

3. The Second Amended Complaint.

On February 5, 2018, Wolfus filed the *Second Amended Complaint for Damages* ("SAC") alleging the same five causes of action against Respondents. *See, generally,* AA306 – AA451. In the SAC, Wolfus' third iteration of the complaint, Wolfus reasserted his California State statute securities claim against Respondents for purportedly violating Section 25401 of the Act but revised the claim to include a control person theory of liability against Respondents. AA339 – AA343 ¶ 99-112.

To avoid dismissal once again on the grounds that his claims were derivative in nature, Wolfus alleged his claims were direct, not derivative, under a "holder" theory of liability and that non-party Midway and each of the Respondents was liable for inducing Wolfus to exercise his stock options in January 2014 and September 2014 and inducing Wolfus to hold and not sell all their shares in February 2014. AA309 – AA310 ¶ 5D-5E. Respondents moved to dismiss the SAC, arguing again that the claims were derivative, that Wolfus lacked standing to bring them, and that the holder claims were not cognizable under British Columbia law. AA452 – AA559. With respect to Wolfus' claim under the California Securities Act, Respondents argued that Wolfus' claim failed because his exercise of stock options in 2014 did not constitute a "purchase or sale" under the plain language of the Act. AA452 – AA559.

4. The District Court Enters An Order Granting In Part and Denying In Part The Motion to Dismiss the Second Amended Complaint.

On May 18, 2018, the District Court issued a *Minute Order* dismissing Wolfus' California Securities Act claim with prejudice and dismissing certain defendants with prejudice for lack of personal jurisdiction and ordering jurisdictional discovery. *See, generally,* RA001 – RA003. Without providing any oral or written findings or reasoning whatsoever, the District Court reversed its position from the Order Dismissing the FAC and found that Wolfus' claims for (1) breach of fiduciary duty, (2) aiding and abetting a breach of fiduciary duty, (3) fraud and (4) negligent misrepresentation were "sufficiently pled" in the SAC. RA001 – RA003.

On June 6, 2018, the District Court memorialized its ruling in an Order granting in part and denying in part Respondents' Motions to Dismiss and joinders (the "Order Regarding the SAC"). AA744 – AA756. In the Order Regarding SAC, the District Court correctly dismissed with prejudice Wolfus' claim based upon the California Securities Act, finding as a matter of law under the plain language of CAL. CORP. CODE § 25017(e) that Wolfus' exercise of stock options in 2014 was not a "purchase." AA752. Rather, Wolfus' "purchase" of securities occurred in 2009 when he was issued stock options, not when they were exercised in 2014. Because Wolfus did not allege that the purchase in 2009 was based upon any false statement of a material fact or an omission of the same, the District Court concluded Wolfus'

claim under the California Securities Act failed as a matter of law and dismissed the same with prejudice as to all Respondents. AA752 ¶ 23; 8:9-12.

However, the District Court reversed its position from the Order Dismissing the FAC and concluded it had subject matter jurisdiction over Wolfus' claims for breach of fiduciary duty and aiding and abetting and allowed Wolfus to proceed with its fraud and negligent misrepresentation claims under a "holder" theory of liability. *See, generally*, RA001 – RA003; AA744 – AA756.

5. Respondents Obtain Writ Relief.

On June 12, 2018, Respondents filed a *Petition for Writ of Prohibition or, Alternatively, Mandamus* (the "Petition") before this Court in Case No. 76052 wherein they sought writ relief from this Court for the District Court's denial of their motion to dismiss Wolfus' claims. RA004 – RA064. The Petition argued, among other things, that Wolfus' claims were derivative—not direct—and that Wolfus lacked standing to assert them, that the District Court failed to consider whether British Columbia law recognized Wolfus' claims. RA004 – RA064. The Petition did not address Wolfus' claim under the California Securities Act because the District Court had properly dismissed it.

The District Court entered an order staying all proceedings in the underlying case, including jurisdictional discovery, pending the resolution of the Petition. RA065 – RA071. On October 11, 2019, this Court issued its Order Granting Petition

for Writ of Prohibition, wherein it concluded that Wolfus' claims were derivative, agreeing with the District Court's initial determination that it lacked subject matter to adjudicate Wolfus' claims because he lacked standing to assert them. AA757 – AA783. This Court concluded that the District Court was correct to initially dismiss Wolfus' claims against Respondents on subject matter jurisdiction, and the District Court's subsequent reversal in permitting Wolfus' claims to move forward was in error. *Id.* Accordingly, this Court issued a Writ of Prohibition instructing the District Court to vacate its order denying Respondents' motion to dismiss and to enter an order granting the same. AA757 – AA783.

6. District Court Enters an Order Dismissing Wolfus' Second Amended Complaint in its Entirety.

On January 10, 2020, in response to this Court's Writ of Prohibition, the District Court issued an *Order Granting Defendants' Motions to Dismiss Second Amended Complaint* as directed by this Court. AA802 – AA816. The District Court once again ordered dismissal with prejudice of Wolfus' claim under the California Securities Act finding, as a matter of law, neither the exercise of the right to purchase shares nor the issuance of securities pursuant thereto is an offer or sale. AA810 ¶ 23. Because Cal. Corp. Code § 25017(e) provides the sale of Wolfus' securities occurred in 2009 when the stock options were issued, and there are no allegations the sale in 2009 was based upon any untrue statement of a material fact or an omission of the same, the District Court correctly concluded again that the California

Securities Act cause of action failed as a matter of law and dismissed the same with prejudice as to all Respondents. AA811 ¶ 25; 11:15-16. On February 12, 2020, Wolfus initiated the subject appeal by filing a Notice of Appeal. AA817 – AA819. Wolfus only appealed the District Court's dismissal of his claim under the California Securities Act; he did not appeal the dismissal of any of the other claims that this Court ordered to be dismissed pursuant to the Writ of Prohibition. *Id.*

On March 4, 2020, the District Court entered a Judgment against Wolfus and in favor of certain of the Respondents[19] awarding costs in the amount of $5,119.30. AA820 – AA821. On March 30, 2020, Wolfus initiated a second appeal by filing a Notice of Appeal.[20] AA830 – AA832. This Court consolidated the appeals on April 24, 2020 pursuant to a stipulation of the parties.

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[19] Judgment was entered in favor of Respondents Richard D. Moritz, Bradley J. Blacketer, Timothy Haddon, Richard Sawchak, John W. Sheridan, Frank Yu, Roger A. Newell and Rodney D. Knutson in response to having filed a Verified Memorandum of Costs pursuant to NRS 18.005 and 18.110 on January 15, 2020 without Appellant filing any motion to retax or settle the costs. RA072 – RA078; AA820 – AA821.

[20] Wolfus originally filed a Notice of Appeal on February 12, 2020 in Case No. 80613 from (i) the *Order Granting Defendants' Motions to Dismiss Second Amended Complaint* dated January 10, 2020 (AA802 – AA816); (ii) the *Order Regarding Defendants' Motions to Dismiss Second Amended Complaint* dated June 6, 2018 (AA744 – AA756); and (iii) the Minute Order dated May 18, 2018 (RA001 – RA003). AA830 – AA832. Wolfus then filed an Amended Notice of Appeal removing the May 18, 2018 Minute Order. AA827 – AA829. On May 12, 2020, this Court entered an *Order Consolidating Appeals* wherein it consolidated Supreme Court Case Nos. 80613 with 80949 for all appellate purposes because the appeals

III. SUMMARY OF ARGUMENT

The District Court correctly dismissed Wolfus' claim under the Corporate Securities Law of 1968 ("California Securities Act") based on the plain reading of Section 25017(e). The sole basis for this appeal is Wolfus' claim that the District Court erred when it concluded that the "sale" in Wolfus' claim occurred in 2009 when he was "granted" qualified employee incentive stock options. Wolfus, the former CEO and Chairman of the Board of Midway Gold, argues on appeal that no "sale" occurred in 2009 because he did not receive any securities in 2009. Rather, only when he exercised his stock options in 2014, paid for them, and received the stock did his securities fraud claim accrue. The District Court held otherwise.

In his Opening Brief, Wolfus misrepresents to the Court that he relied on Midway's misleading public disclosures when, on two occasions in 2014, he "purchased" Midway stock. This case is not about Wolfus' purchase of Midway stock on the open market or pursuant to a private placement. This case is solely about Wolfus' exercise of employee stock options on two occasions granted to him as a Director by Midway in 2009. Under the plain language of the California Securities Act, a "purchase or sale" of stock options is deemed to occur at the time

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arose from the same district court litigation, involved the same parties and doing so was in the interest of judicial efficiency. RA079 – RA080.

the stock options are *granted*—not at the time the options are later *exercised*. CAL. CORP. CODE § 25017(e). Because Wolfus was granted the subject Midway stock options in 2009, and there is no allegation of any misrepresentation in connection with his acquisition of the options in 2009, Wolfus failed to state a claim upon which relief can be granted, and the District Court correctly dismissed the California Securities Act claim.

In his Opening Brief, Wolfus argues for the first time that because Wolfus' acquired the stock options under a qualified employee stock option plan, the transaction is not governed by Section 25017(e). This argument should be rejected because it was not raised below. Moreover, the argument is refuted by the express language of the statute and the multitude of secondary sources commenting on California's securities statute. In sum, Wolfus provides no meaningful analysis explaining how his acquisition of the Midway stock options does not constitute a "purchase or sale" or fall squarely within the "right to purchase" language of Section 25017(e).

Wolfus' allegations fail to state a claim against the Respondents under the California Securities Act for two additional reasons. First, Wolfus fails to allege privity of contract between Wolfus and Respondents, which is required under Section 25501 to support a claim under the Act. Second, Wolfus does not allege any material misstatement or omission by Respondents in connection with the sale

of securities under Section 25401 or allege any facts that the Respondents materially assisted in violations of other sections of the Act. Therefore, Wolfus failed to state a claim under Sections 25401 and 25501, and the District Court correctly dismissed the claim.

IV. ARGUMENT

A. Standard of Review.

On appeal, this Court reviews *de novo* the District Court's dismissal of Wolfus' *First Cause of Action (Securities Fraud Against the 2013 and 2014 Control Defendants)* as alleged in the SAC for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(5) of the Nevada Rules of Civil Procedure. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). In its application of *de novo* review, this Court may review the entire record on appeal in order to ascertain whether the District Court properly concluded dismissal was appropriate. *See id.* Further, "this court may affirm the district court on any ground supported by the record, even if not relied upon by the district court." *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010); *see also Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (observing that this Court "will affirm the order of the district court if it reached the correct result, albeit for different reasons") (citation omitted).

B. The District Court Properly Concluded Wolfus Failed to State a Claim for Relief Under the California Securities Act.

Wolfus contends the District Court erroneously dismissed his Section 25401 and 25501 claim under the California Securities Act for failure to state a claim when it concluded the SAC failed to allege any misrepresentation or omission of fact made by Respondents in connection with the purchase or sale of Wolfus' security. *See* Opening Brief ("OB"), 26. In doing so, Wolfus argues the District Court ignored the plain meaning of the Act and misinterpreted Section 25017(e). *Id.* at 26.

1. The District Court Properly Concluded Wolfus Failed to Allege Any Misrepresentation "In Connection with a Purchase or Sale of a Security."

The California Securities Act governs the offer or sale of any "security" within California. *See* CAL. CORP. CODE §§ 25000-25707. "This California law was designed to protect the public from fraud and deception in securities matters, by providing statutory remedies for violations of the California Corporations Code." *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 14, 108 Cal. Rptr. 2d 699 (Ct. App. 1st Dist. 2001), as modified, (July 10, 2001). Specifically, the Act creates a private right of action for inter alia, buyers and sellers of securities who are injured by persons who violate section 25401, which prohibits the use of "untrue statement[s] of a material fact" or omissions of material facts to buy or sell securities.

CAL. CORP CODE § 25501. Wolfus alleges Respondents violated Sections 25401 and 25501[21]. AA339 – AA340 ¶ 100.

Under Section 25401, it is unlawful for any person, to offer or sell a security in California, or to buy or offer to buy a security 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. CAL. CORP. CODE § 25401 (as amended in 2013, 2014, and 2015); *see also Mohebbi v. Khazen*, 50 F. Supp. 3d 1234, *11 (N.D. Cal. 2014).

In order to establish a cause of action under Section 25401, Wolfus must plead and prove that "there was a sale or purchase of stock in California by fraudulent untrue statements or by omitting material facts that would by omission make the statements misleading." CAL. CORP. CODE §§ 25401, 25501; *Mueller v. San Diego*

[21] The Act comprises three statutory schemes which impose liability for the following securities violations: market manipulation (Sections 25400 and 25500); false and misleading statements (Sections 25401 and 25501); and insider trading (Sections 25402 and 25502). Within each of these schemes, the 25400 provisions establish the violation while the 25500 provisions establish the remedy. 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. Sections 25501 and 25502 extend liability to some negligent conduct but retain the privity requirement from common law fraud. *California Amplifier, Inc. v. RLI Ins. Co.*, 94 Cal. App. 4th 102, 109, 113 Cal. Rptr. 2d 915, 921 (Ct. App. 2d Dist. 2001).

Entm't Partners, LLC, No. 16CV2997-GPC(NLS), 2017 WL 2230161, at *8–9 (S.D. Cal. May 22, 2017).

Section 25501 provides a private right of action for violations of Section 25401: "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 . . . ." CAL. CORP. CODE § 25501; *see also California Amplifier, Inc. v. RLI Ins. Co.,* 94 Cal. App. 4th 102, 109, 113 Cal. Rptr. 2d 915 (2001). Section 25501 provides, in pertinent part:

> Any person who violates Section 25401 shall be liable to the person who purchases a security from him or sells a security to him ... 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 ... of the untruth or omission.

CAL. CORP. CODE § 25501.

"Offers" and "offers to sell" are defined in Section 25017(b) of the Cal. Corp. Code to include "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or an interest in a security for value." CAL. CORP. CODE § 25017(b). Significantly, the California Securities Act differs from federal law in its treatment of warrants, options and conversion privileges. Under Section 25017(e), "neither the exercise of the right to purchase or subscribe to or to convert, nor the issuance of the securities under the exercise of such right is an offer or sale." Rather, the grant of an option includes an offer or sale of the issuer's security "only at the time of the

offer or sale of the warrant or right or convertible security." CAL. CORP. CODE § 25017(e); *see also* MARIA A. AUDERO & BRENT A. OLSON, CAL. BUS. LAW DESKBOOK § 41:3 (2019 – 2020 ed. 2019). "The exercise of the option is not an offer or sale within the coverage of the Corporate Securities Law." CAL. CORP. CODE § 25017(e). Specifically, Section 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 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).

Thus, under the specific statutory language of the Act, shares issuable by exercise of stock options or warrants or conversion rights in other securities, are deemed "offered" or "sold" *when the options, warrants or convertible securities are offered or sale* … rather than later when they are later exercised. *Id.*; *see also* C. HUGH FRIEDMAN ET AL., CAL. PRACTICE. GUIDE CORPS. CH. 5-C (James F. Fotenos et al. eds., 2020) (*citing* CAL. CORP. CODE § 25017(e)).

Consequently, under Section 25017(e), Wolfus' California Securities Act claim fails as a matter of law because he did not "purchase or sell a security" in 2014 when he exercised his stock options purportedly in reliance on the 2013 and 2014

Undisclosed Facts. Rather, because Wolfus acquired his stock options in 2009 when he was on the Board of Directors of Midway (AA316 ¶ 29, AA329 – AA330 ¶ 66, AA331 ¶ 69, AA335 – AA336 ¶ 87; AA557; AA559[22]), and there are no allegations of any misrepresentations made by Respondents in 2009 "in connection with the purchase or sale" of the options, the SAC cannot state a claim for violating the Act upon which relief can be granted.

2. Section 25017(e) Applies to Wolfus' Exercise of His Employee Stock Options.

On appeal, Wolfus argues for the first time that the District Court failed to properly interpret and apply Section 25017 "based upon an apparent misunderstanding of Qualified Employee Incentive Stock Options, warrants and convertible securities" and further argues that Section 25017(e) "does not deal with qualified employee incentive stock options grants." *See* OB 2, 23, 36-44. This is a non-existent distinction based solely upon the unsupported arguments of counsel, and it should be rejected.

a) Wolfus Failed to Raise His Argument in the Opening Brief Before the District Court and Should Be Precluded from Raising the Issue for the First Time on Appeal.

Wolfus' argument on appeal regarding the District Court's purported "misunderstanding of Qualified Employee Incentive Stock Options, warrants and

[22] *See supra* n.6.

convertible securities" (OB 2) should not be entertained by this Court because it was never raised before the District Court. This Court has long held that arguments raised for the first time on appeal will not be considered. *See, e.g., Pope v. Motel 6*, 121 Nev. 307, 114 P.3d 277, 285 (2005); *Singer v. Chase Manhattan Bank*, 111 Nev. 289, 292, 890 P.2d 1305, 1307 (1995) ("Because this argument was not raised before the district court, we decline to consider it.") (citing *Gibbons v. Martin*, 91 Nev. 269, 534 P.2d 915 (1975)); *Hewitt v. State*, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997) ("several of [appellant's] arguments have been raised for the first time on appeal. We conclude that appellant's failure to raise these issues below precludes appellate review.") (citation omitted) (emphasis added); *Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) ("It is well established that arguments raised for the first time on appeal need not be considered by this court."); *State of Washington v. Bagley*, 114 Nev. 788, 792, 963 P.2d 498, 501 (1998) (holding that parties cannot raise issues for the first time on appeal). Because Wolfus failed to raise the non-existent distinction that Qualified Employee Incentive Stock Options are not contemplated by Section 25017(e) and not purchased or sold and gratuitously granted without consideration before the District Court, this Court should not consider these arguments for the first time on appeal.

b) Wolfus' Employee Stock Options are "Rights to Purchase" Under Section 25017(e).

In this newly devised argument, Wolfus argues that Section 25017(e) applies only to warrants and convertible securities, but not to Wolfus' qualified employee stock options. OB 39. As stated above, this argument should not be considered on appeal. However, should the Court determine to entertain this new argument raised on appeal, it must be rejected.

First, rules of statutory construction require that the Court consider the plain meaning of the statutory language. Under California law, courts analyzing statutory language should "start by considering the ordinary meaning of the statutory language, the language of related provisions, and the structure of the statutory scheme." *Gund v. Cty. of Trinity*, 10 Cal. 5th 503, 511, 472 P.3d 435, 440 (2020) (citing *Weatherford v. City of San Rafael*, 2 Cal. 5th 1241, 1246, 395 P.3d 274, 277 (2017)); *National Lawyers Guild v. City of Hayward*, 9 Cal. 5th 488, 498, 464 P.3d 594, 601 (2020) ("[W]e begin by looking to the statutory language. If the language is clear in context, our work is at an end."); *In re A.N.*, 9 Cal. 5th 343, 351, 462 P.3d 974, 977 (2020) ("We start with the statute's words, which are the most reliable indicator of legislative intent. We interpret relevant terms in light of their ordinary meaning, while also taking account of any related provisions and the overall structure of the statutory scheme . . . .").

The plain language of Section 25017(e) defines the timing of a "sale of [1] a warrant or [2] ***right to purchase*** or [3 right to] subscribe to another security of the same or another issuer…[4] a security which gives the holder a present or future right or privilege to convert the security into another…." CAL. CORP. CODE § 25017(e) (emphasis added). Warrants and convertible securities are repeatedly listed separately from "rights to purchase" and are separated by the word "or," implying the provision applies to warrants, convertible securities, ***and*** "rights to purchase" stock. Based on a plain reading of the statute, there can be no dispute Section 25017(e) applies to stock options, including employee stock options, in addition to other securities, including warrants and convertible securities.[23]

Second, legal commentators writing about the California Securities Act, addressing the import of Section (e), explicitly recognize its applicability to the exercise of stock options:

> **Exercise of stock options, etc.:** Shares issuable by exercise of stock options or warrants or conversion rights

[23] *See* 6C SEC. REGULATION FORMS § 13:10 n.2 (2020) ("The grant of an option is considered the offer of a security under some states' blue-sky laws.") (citing CAL. CORP. CODE § 25017); *see also* GUY P. LANDER, 14B U.S. SEC. LAW FOR INT'L. FIN. TRANS. & CAPITAL MKT. § 15:10 (2d ed. 2020) ("As a result of specific statutory wording, under California law, the issuance of a warrant or right to subscribe to another security of the same or another issuer includes the offer and sale of the other security only at the time of the issuance of the warrant, option or right to acquire the other security. The exercise of the warrant or right to subscribe does not constitute an offer or sale. For this reason, any required qualification of an employees' stock option plan must be completed at the time of the grant of the options.") (citing CAL. CORP. CODE § 25017(e)).

> in other securities, are deemed "offered" or "sold" *when the options, warrants or convertible securities are sold …* rather than later when they are exercised.

C. HUGH FRIEDMAN ET AL., CAL. PRACTICE GUIDE CORPS. CH. 5-C § 2(f)(1)(b) [5:259] (James F. Fotenos et al. eds., 2020) (*citing* CAL. CORP. CODE § 25017(e)).

Third, Wolfus' unsupported argument that because there is no consideration for the grant of stock options, no sale can occur, and no securities fraud can occur because there are no damages at the time of the grant must be rejected. OB 44. Not only does this argument directly contradict the California statute, it makes no sense. Section 25017(e) does not address "when the securities fraud occurs." Rather, it dictates as a matter of law that the offer or sale is deemed to occur at the time of the grant.

Wolfus chose to sue under the California Securities Act and its very terms negate his arguments. OB 44. Had Wolfus relied on misrepresentations made in 2009, he could have sought relief under the California Securities Act if he could establish the other statutory requirements, including privity, scienter, justifiable reliance, and damages. But Wolfus only alleged that misrepresentations and omissions were made in 2013 and 2014—after he left Midway as a Director. Applying Section 25017(e)'s plain language, the District Court held that any purchase or sale relating to his stock options occurred in 2009 when he was "granted" qualified employee incentive stock options. AA 793 & 795. That is why

the District Court held that his claims failed.[24] Because the statute is plain that the "purchase or sale" occurs when the stock options are granted, Wolfus' new argument raised for the first time on appeal fails.

c) Wolfus' Reliance Upon People v. Boles is Completely Misplaced and Misleading.

Wolfus curiously relies on *People v. Boles*, 35 Cal. App. 2d 461, 95 P.2d 949 (1939), an 80-year-old criminal case from the 1930s, which does not even remotely deal with the issues before this Court. OB 42-43. Wolfus misleadingly suggests *Boles* "arose out of a criminal prosecution for violation of the then California Corporate Securities Act." OB 42. But the California Securities Act that is the subject of Wolfus' claims was not enacted until 30 years after the *Boles* decision was issued.

Not only does the *Boles* decision have no relevancy to the Court's interpretation of the California statute that was enacted in 1968 and subsequent commentary, but Wolfus' reliance on the case is misleading and inaccurate. Wolfus claims that the *Boles* case held "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." This misrepresents the import and

[24] Wolfus argues there is a dearth of reported cases in California "holding that a 'sale' occurs when options are granted rather than when they are exercised, shares are issued and consideration is paid." OB 41. But the lack of reported cases is likely attributable to the fact that Section 25017(e) is clear on its face.

holding in *Boles*. Nowhere in *Boles* does the court make such a holding, much less refer to any provision similar to Section 25017(e), which was not enacted for another 30 years. *Boles* does not demonstrate, address, or even suggest when a "purchase or sale" of a stock option is deemed to have occurred. Because *Boles* has no relevance, directly or even tangentially, to the issues currently before this Court, the opinion should be disregarded.

3. Wolfus Failed to Allege a False Statement or Omission by Any of the Respondents "In Connection With a Purchase or Sale of a Security."

The District Court properly concluded that the SAC also failed to state a claim for relief under the California Securities Act because it is devoid of any allegations that Respondents made a false statement or omission to Wolfus in connection with the sale of securities. Setting aside that the exercise of the stock options was not a purchase or sale, 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* AA307 ¶ 1, AA329 – AA330 ¶ 66, and AA335 – AA336 ¶ 87. But this is not sufficient under Cal. Corp. Code §§ 25401 or 25501. The SAC does not contain ***any*** statements purportedly made by the Respondents. Rather, the SAC alleges—without any factual support—that all the Respondents generally "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."[25] *See* AA328 – AA329 ¶ 65, AA335 ¶ 86. Without a specific misrepresentation by a specifically named Respondent, Wolfus' claim for violations of the California securities statute fails as a matter of law. *Goodman v. Kennedy*, 18 Cal. 3d 335, 346, 556 P.2d 737 (1976) (dismissing case because plaintiff failed to allege that defendant made an untrue statement of material fact or omitted a material fact). Because the SAC fails to allege a false statement or omission by any of the Respondents in connection with the purchase or sale of a security, the District Court was correct in dismissing the claim and this Court should affirm.

4. The California Securities Act Requires Privity, But the Respondents Are Not Sellers of Securities.

Wolfus' California Securities Act claim fails for the additional reason that he does not and cannot allege facts showing he was in privity with any of the Respondents—which is required for a Section 25501 claim. Wolfus concedes that privity is required for violations of Sections 25401 and 25501 but incorrectly claims

[25] 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." AA335 – AA336 ¶ 87.

that "privity is only required between Wolfus and Midway and not the Respondents." OB 30.

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) (holding that the defendant broker-dealer was not liable for a violation of section 25401 because the investors did not purchase their securities from the broker dealer). The Ninth Circuit has also held that "liability under section 25401 requires strict privity." *Jackson v. Fischer*, 931 F. Supp. 2d 1049, 1063 (N.D. Cal. 2013) (citing *SEC v. Seaboard Corp*., 677 F.2d 1289, 1296 (9th Cir. 1982); *see also Scognamillo v. Credit Suisse First Boston LLC,* No. C03–2061 TEH, 2005 WL 2045807, at *9 (N.D. Cal. Aug 25, 2005) ("Unlike section[ ] 25401 ... sections 25400 and 25500 do not require direct privity—i.e., a sale from defendant to plaintiff.")). In other words, there must be privity between Wolfus and a defendant—*i.e.*, defendant must have been the party who sold the security to (or purchased the security from) plaintiff. *See Apollo*, 158 Cal. App. 4th at 252–54, 70 Cal. Rptr. 3d 199.[26]

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[26] *See* C. HUGH FRIEDMAN ET AL., Cal. Practice Guide Corps. Ch. 5-C 4(b)(3)(a)(1)(a) [5:399.2] (James F. Fotenos et al. eds., 2020) (noting that the "§ 25401 prohibition on misrepresentations and omissions was originally derived from the [Securities Act of 1933] § 12(a)(2), which has been construed to impose liability on the seller and other persons who act on his or her behalf or who are vicariously liable. However, the two sections are not substantially identical. The federal statutes refer only to a 'seller' without addressing the liability of participants. In contrast, the

Wolfus does not (and cannot) allege he purchased any shares of Midway stock from any Respondents. Rather, the SAC clearly alleges purchases were made directly from Midway. AA339 - 341 ¶¶ 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 Respondents 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").

Wolfus attempts to skirt his lack of privity with Respondents by claiming joint and several liability as "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, Wolfus must plead particularized facts establishing a ***primary violation*** of Sections 25401 and 25501. As the Court stated in *Jackson v Fisher*, 931 F. Supp. 2d 1049, 2013 WL 6732872, at *13-14 (N.D. Cal. Dec. 20, 2013):

California Corporate Securities Law expressly addresses the liability of various participants. For this reason, there is no justification for imposing liability on anyone other than the direct seller (or purchaser) under [Sections] 25401 and 25501.") (citations omitted).

> While § 25504 is broader than its federal law counterpart, there must nonetheless be an underlying primary violation in order to impose liability on persons who control the primary violator, or are in some other way connected with aiding in the act or transaction constituting the violation.

See also In re Alliance Equip. Lease Program Sec. Litig., No. 98-CV-2150 J (NLS), 2002 WL 34451621, at *11 (S.D. Cal. Oct. 15, 2002) ("Section 25504 requires a primary violation of 25501.").

The District Court correctly concluded that Wolfus' claims against the Respondents are based on the exercise of Midway stock options, ***which were granted in 2009***. AA810 – AA811 ¶¶ 23-25. Because Wolfus does not allege violations of Section 25501, he cannot state a claim for secondary liability under Sections 25403 or 25504.

In the absence of a viable claim of primary liability against Midway, Wolfus cannot state a claim against the Respondents for "control person" liability under Section 25504—particularly given the claims asserted against the Respondents are based solely on statements by Midway, which Wolfus has not shown to have been false or misleading when made. *See Weiss v. NNN Capital Fund I, LLC*, No. 14-CV-02689-H (NLS), 2015 WL 11995251, at *6 (S.D. Cal. June 11, 2015).

V. CONCLUSION

The District Court correctly dismissed Wolfus' *First Cause of Action (Securities Fraud Against the 2013 and 2014 Control Defendants)* for failure to state

a claim upon which relief can be granted. As a matter of law, under the plain language of Cal. Corp. Code § 25017(e), neither the exercise of stock options nor the issuance of securities received pursuant to such right is an offer or sale within the coverage of the California Corporate Securities law.

The only stock purchases at issue in this case are two **exercises of options** granted to Plaintiff while he was a Director of Midway pursuant to Midway's stock option plan. Wolfus does not dispute that those options were granted to him in 2009 with an expiration date of 2014. Because under California law, the purchase or sale occurred in 2009 when the stock options were granted to Wolfus, and there are no allegations of misrepresentations or omissions by Midway or its directors and officers in 2009 (when Wolfus was CEO of Midway), the District Court properly concluded that Wolfus failed to state an actionable claim for relief under the California Securities Act. In addition, his claim fails for lack of privity between Wolfus and the Respondents, who are former officers and directors of Midway Gold, and the failure to plead with particularity facts demonstrating Respondents' participation in the false statements. Accordingly, this Court should affirm the District Court's (i) *Order Granting Defendants' Motions to Dismiss Second*

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Amended Complaint dated January 10, 2020 and (ii) the *Judgment* dated March 4, 2020 in their entirety.

Dated this 25th day of November 2020.

/s/ Robert J. Cassity

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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, Version 14.0.7173.5000 (32-bit), in Times New Roman 14-point font, double spaced.

I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 9,237 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

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

Dated this 25th day of November 2020.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 25th day of November 2020, a true and correct copy of **RESPONDENTS' ANSWERING BRIEF** was electronically filed with the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System or by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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