

The View from South Dakota #2 (10-23-11), by Jim Hanhardt

Well, those lawyers have been busy, and there have been a couple of surprises in the last few months. So, to catch up on all the stuff since the last time I wrote, here's some more explanations. Again, I ain't a lawyer. But I've been looking over this court stuff and I think I can offer some explanations to sorta help translate all the legal language them lawyers use to fight each other and spend the client's money.

Since the last time I wrote, Ted's side got around to filing that Amended Complaint (08/04/2011 Verified Third Amended Complaint) they were asking to have the Court let them file in their 05/25/2011 Motion for Leave to File Second Amended Complaint to Conform to the Evidence on account of they had dug up some more dirt on EIN/Kokoweef/Larry. That document said Ted's side has now got the evidence that supports another Cause of Action (well, actually a Cause of Action already pleaded and then dismissed previously) so now there are 6 causes of action and here they are:

1. Civil Liability pursuant to NRS90.660 for Sale of Unregistered Securities
2. Negligent Misrepresentation
3. Breach of Fiduciary Duty
4. Unjust Enrichment
5. Corporate Waste
6. Constructive Fraud

Now you can read through the text of the complaint and the reasons for 1 thru 5, but you won't see any reasons for the Constructive Fraud but I reckon you'll get the idea when you read the definition: **constructive fraud** n. when the circumstances show that someone's actions gives him/her an unfair advantage over another by unfair means (lying or not telling a buyer about defects in a product, for example), the court may decide from the methods used and the result that it should treat the situation as if there was actual fraud even if all the technical elements of fraud have not been proven. Under contract law, a defendant can be liable to a plaintiff for constructive fraud if there was: (1) a false misrepresentation; (2) in reference to a material fact; (3) for the purpose of inducing the other party to rely on such representation; (4) on which the other party did justifiably rely; (5) which resulted in damages or injury; and (6) a fiduciary relationship between the parties.

Then Clary (that's the lawyer for Kokoweef Inc. and for himself) filed a motion (08/08/2011) saying EIN (Exploration Inc of Nevada) shouldn't be included in this Court Case, Ted Burke doesn't have his name on his shares and so he shouldn't be a Plaintiff, and the First and Second Causes of Action ought to tossed out.

Next, Segel (that's the lawyer for Larry and HWS [Hahn's World of Surplus]) filed a similar motion (08/10/2011) saying Ted and a couple of others should be dismissed as Plaintiffs, HWS should be dismissed as a Defendant, the First Cause of Action should be dismissed, and the Sixth Cause of Action should be dismissed 'cause it ain't explained.

Then Jennifer Taylor (Taylor is the lawyer for the Plaintiffs) files a motion for sanctions (08/15/2011) 'cause Clary & Segel ain't playing by the rules, or observing discovery deadlines, court directives, and stipulations between counsel (that's agreements that the lawyers make

amongst themselves as they work through this stuff). Now **sanctions** are penalties or other means of enforcement used to provide incentives for obedience with the law, or with rules and regulations. Within the civil law context, sanctions are usually monetary fines, levied against a party to a lawsuit or his/her attorney, for violating rules of procedure, or for abusing the judicial process.

And of course Clary & Segel rebut that sanction business (08/19/2011).

And Taylor rebuts Clary on that whole business (also 08/19/2011) about EIN being dismissed, Ted not being a stockholder, and those First & Second Causes of Action being dismissed.

And Taylor (also 08/19/2011) rebuts Segel on that business about Ted and a couple of others should be dismissed as Plaintiffs, HWS should be dismissed as a Defendant, the First Cause of Action should be dismissed, and says the Sixth Cause of Action was inadvertently omitted.

And Taylor rebuts the rebuttal on that sanction business.

And then a big surprise: Clary up and quits (08/30/2011)! He resigns as Kokoweef's lawyer and claims he's gonna retire. So Kokoweef Inc. has to get a new lawyer, Mr. Korrey. Now of course, this means another delay as the new lawyer Korrey needs some time to wrap his head around this Court Case and the Plaintiffs probably think it's an intended delay tactic. So there's a little extra drama thrown into the mix.

Then, just when you think it couldn't get much more dramatic, the Offer (Offer to Compromise; you can find this in [EIN and Kokoweef Corporate Documents](#) on the kokoweef.com homepage) shows up! Surprise #2! And it don't look like a compromise at all! It don't look a lot different than what the Plaintiffs are asking for in the Complaint. So what's up with that? When I first looked at that Offer, I wondered if Ted and the other Plaintiffs weren't staging a hostile takeover! It's one thing if you're fixin' to straighten out the Company; it's a whole 'nother thing if you're aim is to bust it up and cash it out.

Do you remember from the first letter I wrote: "So it's easy to view this as a fight between Larry and Ted, with a few folks throwin' in with them (the other names listed under Plaintiffs and Defendants) and it's easy to say there's two sides to this thing, and you gotta be on one side or the other. But I think there is a third side, and that side is the investors themselves, because we have an interest in this ourselves." Well, that's true. But as I thought about the Offer, I realized that to understand what the deal was, I needed to look at it from the perspective of the Plaintiffs and the Defendants. I needed to kinda stand in their shoes, so to speak, to get their point of view in order to comprehend their actions. And to do that, I had to start from the beginning.

Ted started this Court Case because of his concern over the Company being on solid legal footing and wondering where the money was going 'cause he was a Director with fiduciary responsibilities and that could be a problem if somebody went to sue the Company. He realized he didn't have the information he needed to properly fulfill his duties as a Director. So at the core of this Court Case are two issues:

1. Is the Company legal? Are the stocks sold lawfully, is the Company playing by the rules?

2. Where did the investor's money go? Was the money properly applied to the Company's (and thus the investor's) best interests or was it used for Larry Hahn's store or personal stuff?

Now the lawyers have brought some in some side bar issues into the mix as they've swirled around these two main issues, but the issues at the Court Case's core are: Is the Company LEGAL & where did the MONEY go? And the answers are in the company records. So obtaining those records is a big deal. The courts call that "discovery", part of the pre-trial litigation process during which each party requests relevant information and documents from the other side in an attempt to "discover" pertinent facts. Generally discovery devices include depositions, interrogatories, requests for admissions, document production requests and requests for inspection.

Now Ted has got himself a real uphill battle. Larry is going to fight this tooth and nail. It's gonna take a lot of time and a bunch of Ted's own money and I'll bet by the time this deal is over he's gonna wonder if he shoulda started it. But he's determined to see it through to the bloody end. And a lot of the investors are gonna see him as the bad guy for upsetting the apple cart to which Ted can't even reply 'cause the Court said he couldn't communicate with the investors (04/01/2010 Transcript of Proceedings - Hearing on Motion to Compel - Tuesday, March 30, 2010, pages 7-9, 22-27). And Ted doesn't want to have "unclean hands" 'cause that might jeopardize the case he's got so much invested into. "Unclean hands" is a legal doctrine which is a defense to a complaint, which states that a party who is asking for a judgment cannot have the help of the court if he/she has done anything unethical in relation to the subject of the lawsuit. Thus, if a defendant can show the plaintiff had "unclean hands," the plaintiff's complaint will be dismissed or the plaintiff will be denied judgment. Unclean hands is a common "affirmative defense" pleaded by defendants, which must be proved by the defendant. Example: Hank Hardnose sues Grace Goodenough for breach of contract for failure to pay the full amount for construction of an addition to her house which she admits. The court denies any relief to Hardnose when Goodenough proves that Hardnose had shown her faked estimates from subcontractors to justify his original bid to Goodenough.

And Larry just wants the Court Case to go away. Larry's side claims there ain't anything wrong with the Company (legal or money), but rather than make the effort to prove that by producing the records, their tactic is to delay the case 'til the Plaintiffs run out of money. Way back before the Court Case, when Ted first brought up his concerns about the Company being legal and tried to set up a Board of Directors meeting to hash it out, Larry takes the three Directors who were raising those concerns (Burke, Dutchik, & Kehoe) off the Board, to make it go away. Things would have been a lot different if Larry had just said "Well, Ted, if you have some concerns, here's the books. Look 'em over, consult with another attorney to get a second opinion on the legal stuff, bring your findings and concerns to the Board, and we'll sit down and figure out how to proceed." That's the kind of stuff a Board of Directors is supposed to do. Nobody likes to be second guessed; but you want somebody watching your backside; then you gotta be humble enough to not be offended when they do. Watching the Company's backside is the Board of Director's job. And that's why Directors are supposed to have the information (company records) to know what's goin' on. If the concerns had of been handled internally with the Board

of Directors, the money that is now being spent to make the lawyers rich coulda been spent on investigating/bringing the Company into compliance and mineral exploration.

And Larry tried to sue Dutchik and Ken Wright (Kokoweef Webmaster) to shut down the kokoweef.com site. Larry's kokoweef.inc site published just the court documents that were favorable to Larry's side; kokoweef.com published most of all the court documents as they became publically available regardless of which side they favored. I appreciate Richard's and Ken Wright's efforts in keeping us all informed.

In yet another effort to make the Court Case go away, Larry's side approached each of the Plaintiffs (except Ted) with an Offer of Judgment, offering them money to buy back their shares and repay the legal costs they had contributed to the Case (08/08/2011 So-Called Nominal Defendant Kokoweef, Inc.'s and Defendant Patrick C. Clary's Motion to Set Aside Default and to Dismiss So-Called Nominal Defendant Explorations Incorporated of Nevada, to Dismiss Plaintiff Ted R. Burke, and to Dismiss or, in the Alternative, for Summary Judgment on the First Cause of Action of the Verified Third Amended Complaint, and Defendant Patrick C. Clary's Motion for Summary Judgment on the Second Cause of Action of the Verified Third Amended Complaint and *Ex Parte* Motion for Order Shortening Time on Hearing, Exhibit C).

Ted's side's mission has been to get to the core of the LEGAL and MONEY issues.

Larry's side's mission has been to get the Court Case to go away by trying to get the Court to dismiss the claims and causes of action (without producing the records to show there was no basis), dismiss the Plaintiffs ('cause their names ain't on the shares), delay the Case 'til the Plaintiffs go away, and/or offer to settle by buying them out. And another effort was to try to get Ted's side to make an Offer of their own. The Courts encourage this settlement / mediation business 'cause it generally takes a lot less of the Court's limited time and resources than a Trial.

So Ted's side came up with the Offer of Compromise that wasn't a compromise. And from Ted's perspective it's gotta be that way. Larry's got 51% of the stock which means he can control the Company. So from Ted's perspective, anything less than taking over the company doesn't solve the problem. It's an all-or-nuthin' deal. You don't rebuild a termite ridden house on the old foundation 'cause the termites are still there. You gotta start over.

And I'll just bet Ted gritted his teeth a little when the Offer was made knowing what it was gonna look like to the investors he can't communicate with. And Larry took full advantage of the Offer Letter to show everybody how mean that Ted is. Of course the current Board of Directors couldn't accept it. And Ted's side knew that. But Ted's side can't compromise much and have a hope of effecting real change to the way the Company conducts business. Ted's side doesn't want to cash out the company. If that was their goal they would have considered or counter-offered those Offers of Judgment. Ted's goal can't be to make a profit by getting his money-and-then-some back, 'cause he's spent more on this Court Case than he could recover from Kokoweef's assets. Ted and the other Plaintiffs are sticking to their guns 'cause the

Company has control of the Mining Claims which they believe are worth exploring. That's why I came back into being involved after having been ostracized in 1990 because I had spoken up about getting the Company straight back then: the Company's got Crystal Cave! So I think we can safely speculate that the intention is to continue explorations.

But what are Ted's plans should he win this Case? What are the intentions concerning the Company? What's the Company gonna look like? That has all got to depend on how the Court Case turns out. Ted and the Plaintiffs and everybody else are just going to have to wait 'til it gets done, see what's left, and go from there. I'm betting Ted has enough to think about right now just getting through this Court Case. And even if he has given some thought to his intentions concerning the future of the Company, he can't let the investors know about 'em without damaging his standing with the Court. So that means the investors are just gonna have to wait and see.

Now I've tried to see it from both the Defendant's and Plaintiff's perspective. And it looks like I might be leaning a little more to the Plaintiff's side. So I guess it's fair to ask which side am I on? Well, like I stated before, I'm an investor myself and I'm on the investor's side, and therefore I want to be a part of a Company I can have confidence in, one that's on a solid legal foundation, one that will withstand the challenges of and be able to survive a major discovery. (Look at all the troubles we got now and we ain't even proven up the gold that was found in 2006!) To get on solid legal footing, something has to change. So I guess I'm gonna side with the ones that are going to promote a positive change, run a Company with a functioning Board of Directors that ask the hard questions that keep it on track, and that move the explorations forward in a reasoned scientific way relying less on luck and more on proven geological principles. The track record of the current Company management ain't too good on those points in the last few years and I don't have a lot of confidence in their willingness to change.

If anybody wants to yell at me directly for the opinions I've expressed here's my e-mail address:

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Well, that's my view #2 from way up in South Dakota,

Jim Hanhardt