

1 **OPPS**
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8 Attorneys for Defendants Larry Hahn
9 and Hahn's World of Surplus, Inc.

FILE #	<u>508101</u>
INDEX: YES	<u>NO</u>
CALENDAR:	
DATE 1:	<u>✓</u> <u>✓</u>
DATE 2:	
BY:	
OTHER:	<u>J.F.</u>
ATTORNEY:	<u>J.F.</u>
ROUTE TO:	

6 **DISTRICT COURT OF NEVADA**
7 **COUNTY OF CLARK**

8 TED R. BURKE; MICHAEL R. and)
9 LAURETTA L. KEHOE; JOHN BERTOLDO;)
10 PAUL BARNARD; EDDY KRAVETZ; JACKIE)
11 & FRED KRAVETZ; STEVE FRANKS;)
12 PAULA MARIA BARNARD; PETE T. and)
13 LISA A. FREEMAN; LEON GOLDEN;)
14 C.A. MURFF; GERDA FERN BILLBE;)
15 BOB and ROBYN TRESKA; MICHAEL)
16 RANDOLPH; and FREDERICK WILLIS,)

CASE NO. A558629
DEPT NO. XIII

13 Plaintiffs,

14 vs.

15 LARRY H. HAHN, individually, and as President)
16 and Treasurer of Kokoweef, Inc., and former)
17 President and Treasurer of Explorations)
18 Incorporated of Nevada; HAHN'S WORLD OF)
19 SURPLUS, INC., a Nevada corporation;)
20 PATRICK C. CLARY, an individual;)
21 DOES 1 through 100, inclusive;)

19 Defendants,

20 and

21 KOKOWEEF, INC., a Nevada corporation;)
22 EXPLORATIONS INCORPORATED OF)
23 NEVADA, a dissolved corporation,)

DATE: 1/12/09
TIME: 9:00 a.m.

24 Nominal Defendants.

25 **OPPOSITION TO APPLICATION FOR TEMPORARY RESTRAINING**
26 **ORDER, AND APPLICATION FOR TEMPORARY APPOINTMENT OF RECEIVER;**
27 **MOTION FOR PRELIMINARY INJUNCTION AND**
28 **MOTION FOR APPOINTMENT OF RECEIVER**

28 Defendants Larry Hahn ("HAHN") and Hahn's World of Surplus, Inc. ("SURPLUS") ("HAHN and

1 SURPLUS sometimes collectively referred to herein as "RESPONDING DEFENDANTS") hereby
2 respond and oppose the Motion for Application for Temporary Restraining Order, and Application
3 for Temporary Appointment of Receiver; Motion for Preliminary Injunction and Motion for
4 Appointment of Receiver ("INJUNCTION MOTION") filed by Plaintiffs.

5 **FACTUAL BACKGROUND**

6 The initial complaint in this matter was filed on or about the 7th day of March, 2008. Various
7 motions were heard by the Court. An evidentiary hearing was held on the 30th day of July, 2008, to
8 determine whether Plaintiffs should be required to post surety. This Court issued a Decision that was
9 entered on August 11, 2008, requiring Plaintiffs to post security in the sum of Seventy Five
10 Thousand Dollars (\$75,000).

11 In response to the order to post security, Plaintiffs filed a so-called Verified Derivative First
12 Amended Complaint by some, but not all, of the original named Plaintiffs ("AMENDED
13 COMPLAINT"). RESPONDING DEFENDANTS filed a Motion to Dismiss the AMENDED
14 COMPLAINT ("DISMISS MOTION") on or about the 4th day of November, 2008. Defendants
15 granted an extension of time to Plaintiffs, to, and including, Monday, November 24, 2008, to respond
16 to the DISMISS MOTION. This enabled Plaintiffs to file the INJUNCTION MOTION on or about
17 the 17th day of November, 2008. However, they did not serve the INJUNCTION MOTION upon
18 RESPONDING DEFENDANTS until late on the 24th day of November, 2008, when they delivered
19 their Opposition to the DISMISS MOTION. An order shortening time was obtained by Plaintiffs
20 to have the INJUNCTION MOTION heard with the DISMISS MOTION on December 8, 2008. The
21 parties entered into a stipulation to continue the hearings on Defendant Patrick C. Clary's Motion
22 for Sanctions ("SANCTIONS MOTION"), the DISMISS MOTION, and the INJUNCTION
23 MOTION from December 8, 2008, to January 12, 2009.

24 **POINTS AND AUTHORITIES**

25 The INJUNCTION MOTION, in its conclusion on page 21, requests a temporary restraining
26 order, a preliminary injunction and the appointment of a receiver. RESPONDING DEFENDANTS
27 were not advised of Plaintiffs' attempt to obtain a temporary restraining order; however, it appears
28 that the Court refused to address the issue as the matter was noticed for hearing. Therefore, this

1 Opposition only addresses the request for a preliminary injunction and the appointment of a receiver.

2 PLAINTIFFS HAVE NOT SET FORTH FACTS TO SUPPORT THE
3 ISSUANCE OF A PRELIMINARY INJUNCTION

4 Like the opposition filed by Plaintiffs to the DISMISS MOTION, Plaintiffs have set forth
5 pages of purported facts that are not included in the AMENDED COMPLAINT, nor supported by
6 competent affidavit. Most significantly, substantially all of the alleged "facts" were either presented
7 at the evidentiary hearing held in July 2008, or brought to the Court's attention prior to that time!

8 The Plaintiffs have set forth eight (8) items on pages 4 and 5 of the INJUNCTION MOTION.
9 These issues were addressed in the DISMISS MOTION. Additionally, Patrick C. Clary, Esquire
10 ("CLARY") has filed an affidavit that refutes these bald allegations. Plaintiffs have not provided
11 the Court with any credible evidence, or specific factual allegations, to support these conclusory
12 claims.

13 NRS §33.010 allows a Court to enter a injunction and provides:

14 33.010. Cases in which injunction may be granted

15 An injunction may be granted in the following cases:

16 1. When it shall appear by the complaint that the plaintiff is entitled to the relief
17 demanded, and such relief or any part thereof consists in restraining the commission
or continuance of the act complained of, either for a limited period or perpetually.

18 2. When it shall appear by the complaint or affidavit that the commission or
19 continuance of some act, during the litigation, would produce great or irreparable
injury to the plaintiff.

20 3. When it shall appear, during the litigation, that the defendant is doing or threatens,
21 or is about to do, or is procuring or suffering to be done, some act in violation of the
22 plaintiff's rights respecting the subject of the action, and tending to render the
judgment ineffectual.

23 This statute as been addressed in the case of *SOC, Inc. v. Mirage Resorts* 117 Nev. 403, 23 P.3d 243
24 (2001) at page 408, where the Court stated:

25 A party seeking the issuance of a preliminary injunction bears the burden of
26 establishing (1) a likelihood of success on the merits; and (2) a reasonable probability
27 that the non-moving party's conduct, if allowed to continue, will cause *irreparable*
harm for which compensatory damage is an inadequate remedy. (Emphasis added).

28 In the present case, this Court held an evidentiary hearing to consider the ability of Plaintiffs to prove

1 their case. Under NRS §41.530, the statute in issue for the evidentiary hearing, Plaintiffs simply had
2 to prove to the Court that there was a **possibility** that Kokoweef, Inc. (“KOKOWEEF”) would
3 benefit from the litigation. This was a very strong burden for RESPONDING DEFENDANTS to
4 overcome. However, it was done! The Court found that Plaintiffs could not prove that
5 KOKOWEEF had a possibility of benefitting from the litigation.

6 The Plaintiffs now have a burden of showing this Court that they have a “likelihood of
7 success!” Nothing has been presented to the Court to support this position. Without evidence to
8 show the “likelihood of success”, the Court cannot issue a preliminary injunction.

9 The second prong is to show that Plaintiffs are being irreparably harmed. The allegations of
10 the AMENDED COMPLAINT speak in terms of securities fraud. The allegations of the
11 AMENDED COMPLAINT, and the “prayer” seek rescission. This is an economic remedy.

12 NRS §90.660, the statute that Plaintiffs are purporting to use, provides, in pertinent part:

13 90.660. Civil liability

14 1. A person who offers or sells a security in violation of any of the following
15 provisions:

16 ...

17 (d) Subsection 2 of NRS 90.570;

18 is liable to the person purchasing the security. Upon tender of the security, the
19 purchaser may recover the consideration paid for the security and interest at the legal
20 rate of this State from the date of payment, costs and reasonable attorney's fees, less
21 the amount of income received on the security. A purchaser who no longer owns the
security may recover damages. Damages are the amount that would be recoverable
upon a tender less the value of the security when the purchaser disposed of it, plus
interest at the legal rate of this State from the date of disposition of the security, costs
and reasonable attorney's fees determined by the court. Tender requires only notice
of willingness to exchange the security for the amount specified.

22 The sole remedy under NRS §90.660 is rescission! As such, no irreparable harm can occur.
23 Therefore, Plaintiffs are not entitled to the issuance of a preliminary injunction as they cannot meet
24 their burden.

25 Since Plaintiffs have failed to provide the Court with a showing that they have a likelihood
26 of success on the merits or that they are being irreparably harmed, they are not entitled to the
27 issuance of a preliminary injunction. It should also be noted that the AMENDED COMPLAINT
28 does not contain any language requesting the issuance of an injunction pursuant to NRS §33.010.

1 The only reference to an injunction is in the language of paragraph 56 in the Second Cause of Action
2 on page 14, commencing on line 16. It seeks an injunction, among other relief, under NRS §90.640.
3 They are not entitled to such relief.

4 NRS §90.640 DOES NOT PROVIDE A BASIS TO PLAINTIFFS
5 FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION

6 This issue was addressed at length in the DISMISS MOTION. NRS §90.640 is a provision
7 that applies to the “Administrator” of the Securities Division of the Officer of the Secretary of State
8 for the State of Nevada. It is not a private right of action. Since this issue is set forth in detail as part
9 of the Motion to Dismiss and Reply, which are set to be heard at the same time as the MOTION,
10 RESPONDING DEFENDANTS shall not burden the Court with a repeat of the language set forth
11 therein. However, that language which was set forth to justify a dismissal of the claims brought
12 under NRS §90.640 as part of the Motion to Dismiss, should be sufficient to address said right in
13 relation to the issuance of a preliminary injunction.

14 RESPONDING DEFENDANTS ARE NOT USING ASSETS OF
15 KOKOWEEF FOR THEIR DEFENSE OF THIS MATTER

16 Plaintiffs have alleged, as well as their attorney in an affidavit, that RESPONDING
17 DEFENDANTS are utilizing the funds of KOKOWEEF for their defense. While RESPONDING
18 DEFENDANTS do not believe the Plaintiffs have properly presented the law in the state of Nevada
19 to the Court, they are not going to burden the Court with the need to address the issue. As set forth
20 in the affidavit of M Nelson Segel, Esquire, attached hereto as Exhibit “A”, all funds paid by
21 RESPONDING DEFENDANTS for the defense of this matter have come from their resources, not
22 KOKOWEEF.

23 RESPONDING DEFENDANTS do not deny that they are seeking funds to defend this
24 matter. However, any funds obtained will not be funds of KOKOWEEF. They will be paid to a
25 legal defense fund that is not affiliated with KOKOWEEF.

26 The allegations that RESPONDING DEFENDANTS are utilizing the assets of KOKOWEEF
27 ...
28 ...

1 to defend this matter, like most of the allegations in this case, are without factual basis.

2 PLAINTIFFS ARE NOT ENTITLED TO THE APPOINTMENT OF A RECEIVER

3 Plaintiffs have also sought the appointment of a receiver to take control of KOKOWEEF.
4 One of the bases for said right is purportedly NRS § 90.640. As RESPONDING DEFENDANTS
5 have already informed the Court, there is no private right of action under NRS §90.640. This statute
6 makes it clear that the right is that of the “Administrator” only.

7 Plaintiffs also attempt to assert the right to the appointment of a receiver under NRS
8 §32.010(1) which states:

9 In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject
10 any property or fund to his claim, or between partners or others jointly owning or interested in
11 the property or fund, on application of the plaintiff, or of any party whose right to or interest in
the property or fund, or the proceeds thereof, is probable, and where it is shown that the property
or fund is in danger of being lost, removed or materially injured.

12 This statute is very clear. However, we are not dealing with a “fraudulent purchase of property, .
13 . . . a creditor . . . , partners or [joint owners of any property or a fund.” Since the Plaintiffs do not
14 qualify as someone covered by the language of the statute, they cannot use it to apply to their matter.

15 Nevada has statutory provisions for the appointment of a receiver under appropriate
16 circumstances, none of which are present here. It appears that Plaintiffs were aware of this statute,
17 but realized they could not satisfy its provisions. This is evident from Plaintiffs’ citation to *Medical*
18 *Device Alliance, Inc. v. Ahr*, 116 Nev. 851, 862 P. 3d 135 (2000) which was brought under NRS
19 §78.650. Said statute allows the appointment of a receiver, when requested by “any holder or
20 holders of one-tenth of the issued and outstanding stock.” The appointment of the receiver may only
21 take place when one of the enumerated acts has occurred.

22 Since Plaintiffs cited the *Medical Device* case, they must have been aware of the specific
23 requirements for the appointment of a receiver for a corporation. Since they could not satisfy the
24 requirements of said statute, they sought an “end run” using statutes that clearly do not apply to the
25 facts of this case.

26 Plaintiffs have not provided this Court with a statutory basis for the appointment of a receiver

27 . . .

28 . . .

1 in this matter and the Court should deny the request.

2 CONCLUSION


3 RESPONDING DEFENDANTS believe the INJUNCTION MOTION will be moot if the
4 Court grants the DISMISS MOTION. In that event, Plaintiffs will not have standing to seek an
5 injunction or the appointment of a receiver. The DISMISS MOTION should be addressed before
6 burdening the Court with the INJUNCTION MOTION.

7 Even if the Court does not grant the DISMISS MOTION, the foregoing makes it clear that
8 Plaintiffs are unable to show the Court that they have a likelihood of success on the merits of this
9 case or that they will be irreparably harmed. This precludes the issuance of a preliminary injunction.
10 Additionally, they are not entitled to the appointment of a receiver under the applicable statute;
11 therefore, the Court should deny their request for the appointment of a receiver.

12 If the Court believes that Plaintiffs have raised issues that provide concern to the Court,
13 another evidentiary hearing should be held to show that Plaintiffs have no basis for the relief sought
14 herein. In that event, RESPONDING DEFENDANTS will be seeking an order of this Court to grant
15 an award of attorneys' fees and costs for the necessity of responding to this frivolous motion.

16 DATED this 27th day of December, 2008.

17 M NELSON SEGEL, CHARTERED

18
19 By 
20 M NELSON SEGEL, ESQUIRE
21 Nevada Bar No. 0530
22 624 South 9th Street
23 Las Vegas, Nevada 89101
24 Attorneys for Defendants Larry Hahn
25 and Hahn's World of Surplus, Inc.
26
27
28

AFFIDAVIT OF M NELSON SEGEL

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

I, M NELSON SEGEL, being duly sworn, depose and state:

1. I am an attorney at law duly licensed to practice before this Court; make this affidavit in support of Defendant Larry Hahn and Hahn’s World of Surplus, Inc.’s opposition to the Motion for Application for Temporary Restraining Order, and Application for Temporary Appointment of Receiver; Motion for Preliminary Injunction and Motion for Appointment of Receiver (“MOTION”); it is made from my own knowledge, unless stated upon information and belief; and I am competent to testify to the matters set forth herein.

2. I have reviewed the MOTION. It contains pages of purported facts that were not set forth in the Amended Complaint.

3. Plaintiffs have set forth eight items on pages 4 and 5 of the MOTION that purport to show nefarious conduct of Defendant Larry Hahn (“HAHN”) that justify the issuance of a preliminary injunction and appointment of a receiver. All of the items set forth on said pages were either addressed at the evidentiary hearing held in July 2008, or brought to the Court’s attention prior thereto. It is my understanding that the present counsel for Plaintiffs were not involved in the proceedings until after the evidentiary hearing. Therefore, they may not be aware that the Court had been advised of these purported facts prior to ordering Plaintiffs to post security in this matter.

4. Patrick C. Clary, the attorney for Kokoweef, Inc. (“KOKOWEEF”), and a named defendant in the Verified Derivative First Amended Complaint (“ Amended Complaint”), is submitting an affidavit to address the issues raised on pages 4 and 5 of the MOTION.

5. The MOTION, and the affidavit of counsel for Plaintiffs, asserts that HAHN has utilized the funds of KOKOWEEF to pay for my services. This is not true. All instruments delivered to me for payment of my fees have been drawn on the accounts of my clients.

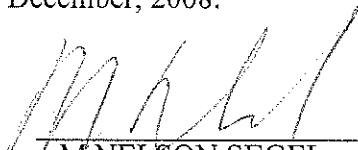
6. Plaintiffs have asserted that HAHN’s attempts to raise funds to defend this matter are the use of KOKOWEEF funds. This is not correct. A trust fund has been created to accept contributions from interested parties. None of the funds that are being provided are KOKOWEEF

1 funds. Legal defense funds are common place and proper.

2 7. While Plaintiffs have made allegations of HAHN's improper use of KOKOWEEF
3 funds for his defense, there is no basis in fact for these allegations. Plaintiffs have asserted numerous
4 purported facts that have no basis.

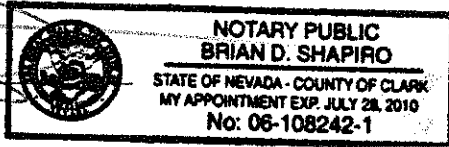
5 8. A lengthy affidavit of Plaintiff Michael Kehoe has been attached to the MOTION.
6 As the Court is aware, when the Amended Complaint was prepared, the Plaintiffs took out all of the
7 specific factual allegations of alleged wrongdoing of HAHN from the pleading. These were items
8 that they were unable to prove to the Court at the evidentiary hearing. While some of the statements
9 set forth in the new affidavit are different, it appears that a substantial portion of the affidavit is the
10 material that was removed from the Amended Complaint.

11 DATED this 24th day of December, 2008.

12
13 
14 _____
M NELSON SEGEL

15
16 SUBSCRIBED and SWORN to before me
17 this 24 day of December, 2008.

18 
19 _____
NOTARY PUBLIC



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CERTIFICATE OF MAILING

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The undersigned hereby certifies that on the 29th day of September, 2008, he served the foregoing OPPOSITION TO APPLICATION FOR TEMPORARY RESTRAINING ORDER, AND APPLICATION FOR TEMPORARY APPOINTMENT OF RECEIVER; MOTION FOR PRELIMINARY INJUNCTION AND MOTION FOR APPOINTMENT OF RECEIVER by causing true and correct copies to be placed in the United States Mail, postage fully prepaid thereon and addressed as follows:

Jennifer Taylor, Esquire 401 North Buffalo Drive, Suite 202 Las Vegas, Nevada 89145	Patrick Clary, Esquire 7201 West Lake Mead Drive, Suite 410 Las Vegas, Nevada 89128


An employee of M NELSON SEGEL, CHARTERED