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DISTRICT COURT OF NEVADA

COUNTY OF CLARK

TED R. BURKE; MICHAEL R and LAURETTA L. KEHOE; JOHN BERTOLDO; PAUL BERNARD; EDDY KRAVETZ; JACKIE and FRED KRAVETZ; STEVE FRANKS; PAULA MARIA BARNARD; LEON GOLDEN; C.A. MURFF; GERDA FERN BILLBE; BOB and ROBYN TRESKA; MICHAEL RANDOLPH, and FREDERICK WILLIS,

Plaintiffs,

vs.

LARRY L. HAHN, individually, and as President of and Treasurer of Kokoweef, Inc., and former President and Treasurer of Explorations Incorporated of Nevada; HAHN'S WORLD OF SURPLUS, INC., a Nevada corporation; PATRICK C. CLARY, an individual; DOES 1 through 100, inclusive;

Defendants,

and

KOKOWEEF, INC., a Nevada corporation; EXPLORATIONS INCORPORATED OF NEVADA, a dissolved Nevada corporation;

Nominal Defendants.

/

CASE NO. A558629

DEPT. XIII

DATE: 12/8/08
TIME: 9:00 a.m.

DEFENDANTS LARRY HAHN AND HAHN'S WORLD OF SURPLUS, INC.'S MOTION TO DISMISS AMENDED VERIFIED DERIVATIVE COMPLAINT

Defendants Larry Hahn ("HAHN") and Hahn's World of Surplus, Inc. ("SURPLUS")(HAHN and SURPLUS sometimes collectively referred to herein as "MOVING DEFENDANTS") hereby

move this Court for its order dismissing the present case on the basis that Plaintiffs have failed to set forth a claim upon which relief can be granted. This Motion is made and based upon all of the pleadings and papers on file and the points and authorities set forth herein.

DATED this 3rd day of November, 2008.

M NELSON SEGEL, CHARTERED

By _____
M NELSON SEGEL, ESQUIRE
Nevada Bar No. 0530
624 South 9th Street
Las Vegas, Nevada 89101
Attorneys for Defendants Larry Hahn and
Hahn's World of Surplus, Inc.

NOTICE OF MOTION

TO: PLAINTIFFS; and

TO: JENNIFER TAYLOR, ESQUIRE, their attorney.

NOTICE IS HEREBY GIVEN that the hearing on the above and foregoing DEFENDANTS LARRY HAHN AND HAHN'S WORLD OF SURPLUS, INC.'S MOTION TO DISMISS AMENDED VERIFIED DERIVATIVE COMPLAINT will be held in Dept. No. XIII of the above-entitled Court, in the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Clark County, Nevada on the 8th day of December, 2008, at the hour of 9:00 A. M., or as soon thereafter as counsel be heard.

DATED this 3rd day of November, 2008.

M NELSON SEGEL, CHARTERED

By _____
M NELSON SEGEL, ESQUIRE
Nevada Bar No. 0530
624 South 9th Street
Las Vegas, Nevada 89101
Attorneys for Defendants Larry Hahn and
Hahn's World of Surplus, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTUAL BACKGROUND

The original Verified Derivative Complaint ("ORIGINAL COMPLAINT") in this matter was filed by Plaintiff Ted Burke ("BURKE") and the other plaintiffs (BURKE and the other plaintiffs collectively referred to herein as "PLAINTIFFS") on or about the 7th day of March, 2008 as a derivative action pursuant to NRCP 23.1. After holding a lengthy evidentiary hearing on the detailed allegations of allegedly wrongful conduct by MOVING DEFENDANTS, this Court entered an order that found Kokoweef, Inc. ("KOKOWEEF") had met its burden under NRS §41.520(3) that "that there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against [KOKOWEEF] will benefit [KOKOWEEF] or its security holders." PLAINTIFFS had a very simple burden, present any fact that would support their detailed allegations of alleged wrongdoing by MOVING DEFENDANTS. They failed to carry their simple burden! As a result of the hearing, PLAINTIFFS were required to post security in the sum of Seventy Five Thousand Dollars ($75,000)("SECURITY ORDER").

PLAINTIFFS terminated their attorney and retained new attorneys. Approximately ten (10) days after the Court entered the SECURITY ORDER, PLAINTIFFS filed the so-called Amended Verified Derivative Complaint ("AMENDED COMPLAINT") which **removed all factual allegations of specific misconduct** and added purported claims for violations of state and federal securities laws based upon generalized statements and parroting of various statutes. The AMENDED COMPLAINT also added KOKOWEEF, Inc.'s attorney, Patrick C. Clary, Esquire ("CLARY"), as a defendant.

The present motion has been brought on the basis that PLAINTIFFS have failed to satisfy the basic pleading requirements for the commencement of a derivative action or a securities action. More importantly, a securities claim is personal to the shareholder, or shareholders, who were defrauded and is against the corporation and the person, or persons, who acted in concert with the corporation to defraud the purchaser or seller of the security. By definition, Plaintiffs, who allege to have been defrauded in the purchase or sale of a security, cannot represent the interests of the shareholders in a derivative action. This is discussed below.

This Motion is made pursuant to Rule 12(b)(5) of the Nevada Rules of Civil Procedure ("NRCP") for Plaintiffs' "failure to state a claim upon which relief can be granted," which defense can be asserted by motion. NRCP 12(b)(5) provides:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (5) failure to state a claim upon which relief can be granted, ... A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . . If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Supreme Court has had long standing standards for dismissal of a complaint pursuant to NRCP 12(b)(5). In the case of *Hampe v. Foote* 118 Nev. 405, 47 P.3d 438 (2002), at page 408, the Court stated:

> This court rigorously reviews a district court's dismissal of an action under NRCP 12(b)(5) for failure to state a claim. [*Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000)]. All factual allegations in the complaint are regarded as true, and all inferences are drawn in favor of the non-moving party. *[Id.* (citing *Simpson v. Mars, Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997))]. A complaint should only be dismissed if it appears beyond a reasonable doubt that the plaintiff could prove no set of facts, which, if true, would entitle him to relief.[Id.]. **Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief.** [*Nevada Power Co. v. Haggerty*, 115 Nev. 353, 358, 989 P.2d870, 873 (1999). (Emphasis added).

The Supreme Court recently modified those standards. In *Buzz Stew, LLC v. City of North Las Vegas*, __ Nev. ___, 2008 WL 1747877 (2008). The Court stated, at page 3 of the Opinion:

> The City's motion to dismiss Buzz Stew's complaint under NRCP 12(b)(5) "is subject to a rigorous standard of review on appeal." Accordingly, this court will recognize all factual allegations in Buzz Stew's complaint as true and draw all inferences in its favor. Buzz Stew's complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief. [FN6].

Footnote 6 stated,

> Our prior cases have not been completely consistent in applying the standard of review for failure to state a claim upon which relief can be granted. The appropriate standard requires a showing beyond a doubt. To the extent that these cases required a showing of proof beyond a reasonable doubt, they are disavowed.

PLAINTIFFS DO NOT FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF THE SHAREHOLDERS

NRCP 23.1 sets forth a requirement that the Plaintiffs represent the interests of the shareholders and provides:

> The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

Based upon the allegations of the AMENDED COMPLAINT which must be taken as true for the purpose of this Motion to Dismiss, KOKOWEEF has at least Five Hundred Eighty (580) shareholders, with at least One Million Fifty Seven Thousand Five Hundred Sixty Five (1,057,565) shares of common stock outstanding. Based upon the allegations set forth in paragraphs 19 through 32 of the AMENDED COMPLAINT, PLAINTIFFS hold Eighty Seven Thousand Five Hundred Sixty Eight (87,568) shares of the issued and outstanding shares of common stock of KOKOWEEF. PLAINTIFFS represent a small number of shareholders of KOKOWEEF. It should be noted that the original solicitation of each of the PLAINTIFFS, with the exception of BURKE, was made by BURKE and they were brought into KOKOWEEF by BURKE.

Utilizing the numbers set forth in the AMENDED COMPLAINT, the PLAINTIFFS hold approximately Eight and Two Tenths percent (8.2%) of the outstanding shares of common stock of KOKOWEEF. If this matter proceeds, KOKOWEEF will show the Court that BURKE only holds Five Thousand (5,000) shares of the common stock of KOKOWEEF, not the Seventy Five Thousand (75,000) shares that he alleges. In actuality, the PLAINTIFFS only hold Twelve Thousand Five Hundred Sixty Eight (12,568) shares of the common stock of KOKOWEEF, or One and One Tenth (1.1%) percent of the issued and outstanding shares of the common stock of KOKOWEEF!

PLAINTIFFS have failed to include **any** allegations in their Complaint which would show that they fairly and adequately represent the interests of the shareholders as required by NRCP 23.1. This aspect of NRCP 23.1 has not been addressed by the Supreme Court of Nevada. However, the 9th Circuit Court of Appeals addressed the similar federal rule in the case *Larson v. Dumke*, 900 F.2d 1363 (9th Cir. 1990) where it stated, at page 1367:

> An adequate representative must have the capacity to vigorously and conscientiously

> prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the class. *See e.g., Lewis v. Curtis,* 671 F.2d 779, 788-89 (3d Cir.), *cert. denied,* 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982); *Owen v. Modern Diversified Industries, Inc.,* 643 F.2d 441, 443-44 (6th Cir.1981) (no antagonistic interests); *GA Enterprises, Inc. v. Leisure Living Communities, Inc.,* 66 F.R.D. 123, 125-27 (D.Mass.1974), *aff'd,* 517 F.2d 24, 26-27 (1st Cir.1975). Other courts have stated certain factors to determine adequacy of representation: "(1) indications that the plaintiff is not the true party in interest; (2) the plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit; (3) the degree of control exercised by the attorneys over the litigation; (4) the degree of support received by the plaintiff from other shareholders; ... (5) the lack of any personal commitment to the action on the part of the representative plaintiff"; *Rothenberg v. Security Management Co.,* 667 F.2d 958, 961 (11th Cir.1982) (citations omitted), (6) the remedy sought by plaintiff in the derivative action; (7) the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; and (8) plaintiff's vindictiveness toward the defendants. *Davis v. Comed, Inc.,* 619 F.2d 588, 593-94 (6th Cir.1980). These factors are "intertwined or interrelated, and it is frequently a combination of factors which leads a court to conclude that the plaintiff does not fulfill the requirements of 23.1." *Id.* at 593. We are satisfied that an evaluation of these factors is important in determining the adequacy of representation by a derivative plaintiff under Rule 23.

A review of the AMENDED COMPLAINT makes it clear that PLAINTIFFS' interests are different than the majority of the shareholders of KOKOWEEF. PLAINTIFFS spend most of their AMENDED COMPLAINT, eight of ten "causes of action", attempting to set forth a claim for relief that entitles them to rescission and damages. A review of the prayer of the AMENDED COMPLAINT shows that PLAINTIFFS are not representative of the shareholders of KOKOWEEF.

The prayer starts with, " Plaintiffs pray for judgment and relief against Defendants as follows: . . ." This shows that the relief is being requested for the benefit of the PLAINTIFFS, not KOKOWEEF. More importantly, there is NO prayer for the benefit of KOKOWEEF, which is the *sine qua none* basis of a derivative action!

Further review of the prayer shows that a requirement paragraph 8 seeks rescission and restitution for PLAINTIFFS. Nothing set forth in the prayer seeks to benefit any shareholder other than the PLAINTIFFS.

MOVING DEFENDANTS believe paragraphs 4 and 5 show the true basis of the present action. They provide:

> 4. For the removal of HAHN as a director of KOKOWEEF; and
>
> 5. For the reinstatement of BURKE as a director and corporate secretary.

It is the belief of MOVING DEFENDANTS that the true purpose of this litigation is to enable

BURKE to take control of KOKOWEEF for his benefit and to the detriment of the shareholders of KOKOWEEF who are not plaintiffs herein.

A review of the factors set forth in *Larson* make it clear that PLAINTIFFS do not represent the interests of the majority of the shareholders of KOKOWEEF and actually, have interests that are contrary to the interests of the other shareholders. PLAINTIFFS may not maintain a derivative action against MOVING DEFENDANTS and KOKOWEEF.

PLAINTIFFS MAY NOT PROCEED WITH A DERIVATIVE ACTION DUE TO THE LACK OF ADEQUATE PARTICULARITY FOR FAILING TO SEEK APPROVAL OF THE BOARD OF DIRECTORS

Rule 23.1 further provides, also in pertinent part, as follows:

> The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort.

NRS §41.520(2) also contains language that addresses the obligations to seek action from the board of directors and provides, in pertinent part:

> The complaint must also set forth with particularity the efforts of the plaintiff to secure from the board of directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

PLAINTIFFS have set forth allegations that HAHN controlled the board of directors; therefore, it would have been futile to seek its approval. Paragraph 42 of the AMENDED COMPLAINT provides, in pertinent part:

> As a result of the facts set forth herein, Plaintiffs have not made any demand on the Kokoweef Board of Directors to institute this action against Hahn. Such demand would be a futile and useless act because the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute the action for the following reasons:
>
> a. Due to Hahn's position as President and Treasurer, and holding a majority of the shares, he is in a position to and does control the Board and the company and its operations. There are seven board members, two of which are controlled by Hahn. However, a quorum of five is required to hold a board meeting.

A review of these allegations make it clear that PLAINTIFFS have not satisfied their obligations under NRS §41.520(2). PLAINTIFFS state that the board consisted of seven (7) members. They

also stated that HAHN controlled two members of the board of directors. Since HAHN would have been the subject of any board action, he would have been obligated to recuse himself from consideration of the action, leaving a board of six (6) directors. What PLAINTIFFS have not included in their complaints, but they have filed in other documents with the Court, Plaintiffs Burke and Kehoe were directors at the time of the filing the ORIGINAL COMPLAINT herein. Additionally, a third director, Richard Duchek, was part of BURKE's group who sought the records of Explorations Incorporated of Nevada, Inc. ("EIN ") and KOKOWEEF for the purpose of conducting an audit, but never did so. Therefore, PLAINTIFFS had three of six directors prior to making a request. Even if the allegations are taken as true, as must be done in a Motion to Dismiss, there is one other director who could have sided with PLAINTIFFS and the Board could have approved commencing an action.

The Nevada Supreme Court has recently revisited the demand area and published a definitive decision in *Shoen v. SAC Holding Corporation et al*, 122 Nev. 621, 137 P.3d 1171 (2006).

The Court discussed two Delaware cases, *Aronson v. Lewis*, 473 A.2d 805, 812 (Del.1984), *overruled in part on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del.2000) and *Rales v. Blasband*, 634 A.2d 927 (Del. 1993). The *Aronson* case had set forth the requirements of making a demand when the board of directors made a business decision that is to be challenged by the dissident shareholders. *Rales* applied the test from *Aronson*, but modified it for situations where the present board had not participated in the matter that is the subject of the action. There does not appear to be a dispute that the alleged wrongful conduct, at least to the extent that purported wrongful conduct was alleged in the original Verified Derivative Complaint ("ORIGINAL COMPLAINT") filed herein,[1] was not approved by the board of directors.

The *Schoen* case addressed the requirement set forth in NCRP 23.1 to make a demand upon the Board of Directors of a corporation prior to commencing an action under NRS §41.520. The

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[1] It is the interpretation of MOVING DEFENDANTS that the so-called Amended Verified Derivative Complaint sets forth two distinct causes of action, which are mutually exclusive. "Causes of Action" Nine and Ten appear to be drafted to support the derivative nature of Plaintiffs' Complaint. "Causes of Action" One through Eight appear to be set forth the support allegations of securities fraud. These claims, by their nature, seek a recovery AGAINST the corporation and are not proper "derivative" actions. This position is supported by the "wherefore clause" which is seeking damages on behalf of the Plaintiffs and seeks rescission of their "purchase" of stock.

Court stated, commencing on page 1183:

> Thus, as with the *Aronson* test, under the *Rales* test, directors' independence can be implicated by particularly alleging that the directors' execution of their duties is unduly influenced, manifesting "a direction of corporate conduct in such a way as to comport with the wishes or interests of the [person] doing the controlling." A lack of independence also can be indicated with facts that show that the majority is "beholden to" directors who would be liable or for other reasons is unable to consider a demand on its merits, for directors' discretion must be free from the influence of other interested persons.
>
> And again, to show interestedness, a shareholder must allege that a majority of the board members would be "materially affected, either to [their] benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders." Allegations of mere threats of liability through approval of the wrongdoing or other participation, however, do not show sufficient interestedness to excuse the demand requirement. Instead, as the Delaware courts have indicated, interestedness because of potential liability can be shown only in those "rare case[s] where defendants' actions were so egregious that a substantial likelihood of director liability exists."
>
> . . .
>
> The Delaware court's approach is a well-reasoned method for analyzing demand futility and is highly applicable in the context of Nevada's corporations law. Hence, we adopt the test described in *Aronson,* as modified by *Rales,* above. When evaluating demand futility, Nevada courts must examine whether particularized facts demonstrate: (1) in those cases in which the directors approved the challenged transactions, a reasonable doubt that the directors were disinterested or that the business judgment rule otherwise protects the challenged decisions; or (2) in those cases in which the challenged transactions did not involve board action or the board of directors has changed since the transactions, a reasonable doubt that the board can impartially consider a demand. [62]
>
> FN62. *Rales,* 634 A.2d at 933-34. We note that in practice, the *Aronson* and *Rales* "disinterested and independent" tests often amount to the same analysis--*i.e.,* whether directorial interest in the challenged act or the outcome of any related litigation negates impartiality to consider a demand. *See, e.g., Beam II,* 845 A.2d 1040;*Kohls v. Duthie,* 791 A.2d 772, 780-81 (Del.Ch.2000). Additionally, we point out that, on an even-numbered board, the vote of disinterested and independent directors may be blocked by one-half of the board's total members. *See Beam II,* 845 A.2d at 1046 n. 8 (citing *Beneville v. York,* 769 A.2d 80, 85 n. 5 (Del.Ch.2000)). Thus, when considering whether the "majority" of an even-numbered board is incapable of impartially considering a demand under the tests for demand futility, the "majority" equals at least one-half of that board.

Applying these factors to the present case, it is clear that PLAINTIFFS had a duty to make demand upon the Board of Directors of KOKOWEEF and the failure to do so prohibits their pursuit of the present matter as a derivative action. They have failed to satisfy the requirements of NRS §41.520(2) and NRCP 23.1.

The allegations of the AMENDED COMPLAINT, as well as the statute and rule, show that

Plaintiffs have done little, if anything, other than parroting the rule. It is important to note that PLAINTIFFS have not made any allegation regarding themselves as directors or the fact, based upon their pleadings, one director existed who was not under the control of HAHN. Had PLAINTIFFS sought to have a board meeting held to discuss the alleged claims against MOVING DEFENDANTS, the sixth director could have voted in their favor and an action would have been commenced by KOKOWEEF against HAHN. If HAHN refused to have a meeting, as alleged in the AMENDED COMPLAINT, this fact could have been alleged to support the futility of consulting the board of directors. The failure to seek approval of the board of directors is fatal to the continuation of the present action as a derivative action under NRS §41.520(2) and NRCP 23.1.

THE CLAIMS ALLEGING SECURITIES FRAUD MUST BE DISMISSED

NO PRIVATE RIGHT OF ACTION EXISTS UNDER NRS §90.460

While the allegations of facts in the AMENDED COMPLAINT are few and far between, MOVING DEFENDANTS believe the first eight "causes of action" are based upon an alleged violation of Chapter 90 of Nevada Revised Statutes. It appears that the bases for the claims are alleged violations of NRS §90.460 and §90.570.

A review of NRS §90.460 makes it clear that this statute is to be enforced by the "Administrator" and is not a private right of action. Therefore, PLAINTIFFS cannot support a claim for relief based upon a violation of this statute.

PLAINTIFFS HAVE FAILED TO PLEAD WITH ADEQUATE SPECIFICITY

The AMENDED COMPLAINT appears to be seeking a recovery based upon a violation of NRS §90.570. Said statute provides:

> NRS §90.570 Offer, sale and purchase.
>
> In connection with the offer to sell, sale, offer to purchase or purchase of a security, a person shall not, directly or indirectly:
>
> 1. Employ any device, scheme or artifice to defraud;
>
> 2. Make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading in the light of the circumstances under which they are made; or
>
> 3. Engage in an act, practice or course of business which operates or would operate

as a fraud or deceit upon a person.

To set forth a claim for relief under NRS §90.570, a party must affirmatively show that the elements of NRS §90.570 are present. This includes one of the three (3) subsections.

In the case of *G.K. Las Vegas Limited Partnership v. Simon Property Group, Inc.* 460 F. Supp 2d 1246 (2006), the United States District Court, interpreting the application of NRS §90.570 stated:

> Plaintiff asserts that the above-referenced omissions and misrepresentations constituted a violation of Section 906.70. [sic]. (The Court quoted NRS §90.570 above this language and it is clear that it is interpreting the application of said statute.)
>
> Plaintiff incorporates its allegations for this predicate by reference to Count 8 of the SAC. As with its false pretenses predicate, Plaintiff has failed to allege any act by Melvin or Herbert Simon. Though the complaint is rife with allegations against "Defendants" generally, Count 8 does not contain a single mention of either Herbert or Melvin Simon by either alleging any individual or directorial action. As discussed above, the threshold required by Rule 9(b) that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Plaintiff has failed to do so.

Two issues arise from this case. First, the reference to "Rule 9(b)" is from the Federal Rules of Civil Procedure. However, the text of NRCP 9(b) is identical to FRCP 9(b). Therefore, the Court's finding that the allegations in said case were not adequate would apply herein.

NRCP 9(b) states:

> Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

The pleading requirements of NRCP 9(b) were set forth long ago. The Supreme Court of Nevada stated in *Brown v. Kellar*, 97 Nev. 582, 636 P.2d 874 (1981), at page 584:

> In actions involving fraud, the circumstances of the fraud are required by NRCP 9(b) to be stated with particularity. The circumstances that must be detailed include averments to the time, the place, the identity of the parties involved, and the nature of the fraud or mistake.

A review of the AMENDED COMPLAINT is confusing. In paragraph 49, PLAINTIFFS allege:

> Defendants, through the sale of unregistered securities, have employed a device, scheme or artifice to defraud members of the public described in specificity in paragraphs I through 38 above.

First, MOVING DEFENDANTS cannot tell whether PLAINTIFFS are alleging that the "members of the public" are described above, or the "device, scheme or artifice to defraud" has been described "in specificity." If PLAINTIFFS are stating that they have specified the wrongful conduct, this is not true! It is impossible to tell what, when, where or to whom wrongful action took place.

The second issue is whether this reference to "members of the public" is an assertion of a class action case. If so, the rigorous pleading requirements of the Private Securities Litigation Reform Act, 15 U.S.C.A. § 78u-4(b)(2), would come into play. Even if we interpret the AMENDED COMPLAINT to be a claim by on behalf of the named PLAINTIFFS only, they have failed to carry their burden under NRCP 9(b).

NO PURCHASE OR SALE OF A SECURITY OCCURRED

The key to PLAINTIFFS' claims arise under NRS §90.660 which provides "civil liabilities" for the enumerated acts. One is subsection (1)(d) that provides a cause of action for a violation of NRS §90.570(2).

An essential element of an action under NRS §90.570 is the purchase or sale of a security. While the language of NRS §90.570 should be sufficient, the Court in *G.K. Las Vegas Limited Partnership* addressed the issue and stated, at page 1260:

> Nevada Securities Fraud (Count 8)
>
> For the same reasons set forth in Section I(E) of this Order discussing Plaintiff's claims for violations of Nevada securities laws, the Court holds that Plaintiff has failed to state a claim.[FN8]
>
> > FN8. Notwithstanding the discussion in Section I(E), the Court also finds that Plaintiff lacks standing to enforce civil liability for the alleged violations of Section 90.570 of the Nevada Revised Statutes. Civil liability for violations of Nevada securities laws are set forth in Section 90.660 of the Nevada Revised Statutes. This statute expressly limits recovery to parties who purchase a security in violation of Section 90.570 and other provisions.

There is no allegation in the AMENDED COMPLAINT that a purchase or sale of a security occurred. While MOVING DEFENDANTS are not certain of the basis of the present action, it appears that PLAINTIFFS believe they have an action based upon the reorganization involving EIN and KOKOWEEF. Paragraphs 21 through 32 of the AMENDED COMPLAINT contain the following allegation:

. . . were issued . . . shares of EIN stock, which were exchanged for KOKOWEEF shares of stock by the Plan of Reorganization dated August 31, 2006.

Paragraphs 19 and 20 relating to Plaintiff Burke and Plaintiff Kehoe, who were directors of KOKOWEEF, state, . . . were issued . . . shares of KOKOWEEF stock. . ." Since PLAINTIFFS have failed to allege any purchase or sale of a security, they do not have standing to allege a violation of NRS §90.570.

The exchange of shares of the common stock of EIN for shares of the common stock of KOKOWEEF was not a "purchase or sale" that would satisfy the requirements of NRS §90.570. While no Nevada case has addressed this issue, the federal courts have dealt with the "purchase or sale" issues as set forth in 15 U.S.C. 78j(b), commonly known as Section 10(b) of the Securities Exchange Act. The Court, in *Gelles v. TDA Industries, Inc.* 44 F.3d 102 (2nd Cir 1994), stated at page 104:

> A transaction need not involve cash to constitute a purchase or sale under Rule 10b-5. The Supreme Court has held that the simple exchange of shares in a merger qualifies as a purchase or sale when shareholders become "shareholders in a new company" as a result of "an alleged deception [that] has affected shareholders' decisions in a way not at all unlike that involved in a typical cash sale or share exchange." *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 467, 89 S.Ct. 564, 572, 21 L.Ed.2d 668 (1969). In determining whether changes in the rights of a security holder involve a purchase or sale, courts must decide whether there has occurred "such significant change in the nature of the investment or in the investment risks as to amount to a new investment." *Abrahamson v. Fleschner,* 568 F.2d 862, 868 (2d Cir.), *cert. denied* 436 U.S. 905, 913, 98 S.Ct. 2236, 2253, 56 L.Ed.2d 403, 414 (1978). A distinction is drawn between an " 'internal corporate management' decision which only incidentally involve[s] an exchange of shares ... [and] a major corporate restructuring requiring the same kind of investment decision by the shareholders as would a proposed merger with a separate existing corporation." *In re Penn Central Sec. Litig.*, 494 F.2d 528, 534 (3d Cir.1974). Only the latter constitutes a purchase or sale for purposes of Rule 10b-5.

The action that occurred in this matter fits into the category of "internal corporate management decision which only incidentally involves an exchange of shares." In this matter, each shareholder of EIN received the same number of shares in KOKOWEEF that they had in EIN. Nothing changed other than the creation of a new entity. Therefore, no purchase or sale of a security occurred and PLAINTIFFS have no cause of action under NRS §90.570.

. . .

PLAINTIFFS DO NOT HAVE INJUNCTIVE RIGHTS

Plaintiffs have alleged in paragraph 47 and 56 of the AMENDED COMPLAINT as follows:

> Plaintiffs are also entitled to all remedies available under NRS §90.640, including a temporary restraining order, permanent or temporary prohibitory or mandatory injunction or a writ of prohibition or mandamus; . . .

The entire text of NRS §90.640 has been attached hereto as Exhibit "A". Paragraph 1 of NRS §90.640 provides, in pertinent part:

> 1. Upon a showing by the Administrator that a person has violated or is about to violate this chapter, or a regulation or order of the Administrator under this chapter, the appropriate district court may grant or impose one or more of the following appropriate legal or equitable remedies . . . .

The plain language of this section makes it clear that the remedies set forth are those of the "Administrator", which is defined in NRS §90.215 as the Administrator of the Division and "Division" is defined in NRS §90.230 as the Securities Division of the Office of the Secretary of State. A review of the entire text of NRS §90.640 makes it clear that the purpose of the statute is to provide the Administrator with the authority to obtain relief in court, in addition to the administrative remedies available. There is no provision in the statute for a "private right of action." Therefore, any claim alleged in the AMENDED COMPLAINT under NRS §90.640 should be stricken, along with paragraphs 3, 11 and 12 of the prayer that seeks relief thereunder.

SECURITIES CLAIMS MUST BE DISMISSED FOR FAILURE TO NAME NECESSARY PARTIES

In addition to the problems with the pleading as set forth above, the Complaint must be dismissed based upon the failure of Plaintiffs to name necessary parties. MOVING DEFENDANTS are somewhat confused by the AMENDED COMPLAINT. The ORIGINAL COMPLAINT purported to be a derivative action. Plaintiffs named KOKOWEEF as a "nominal defendant" in that document.

In the AMENDED COMPLAINT, KOKOWEEF is still named as a "nominal defendant." However, the bulk of the claims set forth in the AMENDED COMPLAINT are for the benefit of the PLAINTIFFS, not KOKOWEEF and are purportedly based upon illegal sales of securities. What PLAINTIFFS fail to set forth is that KOKOWEEF is the only party that can be considered an

"issuer" under NRS §90.255 which provides in pertinent part, "'Issuer' means a person who issues or proposes to issue a security."

NRCP 19(a) discusses necessary parties and provides:

> Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

While KOKOWEEF is named as a "nominal" defendant in this matter, it has not been named as a defendant in any of the "causes of action." As the issuer, it would be liable to the PLAINTIFFS if they were able to prove a cause of action for the violation of NRS §90.570. Without KOKOWEEF, complete adjudication of the PLAINTIFFS' claims cannot take place.

BURKE IS LIABLE TO PLAINTIFFS BASED UPON HIS SALES OF THE SECURITIES

Many, if not all, of the PLAINTIFFS in this case were solicited by BURKE to purchase shares of stock in EIN or KOKOWEEF. NRS §90.660 provides, in pertinent part:

> A person who offers or sells a security in violation of any of the following provisions:
> . . .
> (d) Subsection 2 of NRS §90.570;
> is liable to the person purchasing the security.

As set forth above, the PLAINTIFFS obtained their shares of stock in EIN or KOKOWEEF through solicitations by BURKE. Additionally, BURKE was a member of the board of directors of KOKOWEEF when the reorganization with EIN was conducted. If KOKOWEEF engaged in the sale of unregistered securities, BURKE would be liable, along with KOKOWEEF, for the injuries, if any, to PLAINTIFFS, including himself.

BURKE is a necessary defendant in this matter. The case must be dismissed unless BURKE is made a defendant herein.

CONCLUSION

This Motion has set forth various issues with the AMENDED COMPLAINT. The PLAINTIFFS failed to seek approval of the board of directors of KOKOWEEF prior to commencing this matter and they are not representative of the shareholders. More importantly, they hold interests that are adverse to the other shareholders through "causes of action" one through eight which seeks recovery for their benefit, not KOKOWEEF. Finally, KOKOWEEF is a necessary defendant to the claims of PLAINTIFFS; therefore, this matter may not proceed on as a derivative action.

MOVING DEFENDANTS have also set forth points of law that make it clear that no cause of action exists under Chapter 90 of Nevada Revised Statutes because no "purchase or sale" of a security occurred. If the Court is convinced that PLAINTIFFS have properly set forth a claim for relief under Chapter 90 of Nevada Revised Statutes, the Court must still dismiss the AMENDED COMPLAINT on the basis that neither KOKOWEEF nor BURKE have been named as defendants. Without KOKOWEEF and BURKE, a complete adjudication cannot take place herein. Finally, claims under NRS §90.460 and §90.640 cannot be properly maintained by PLAINTIFFS as they are remedies available to the Administrator only.

For the foregoing reasons, the Court should dismiss the AMENDED COMPLAINT.

DATED this 3rd day of November, 2008.

M NELSON SEGEL, CHARTERED

By _____
M NELSON SEGEL, ESQUIRE
Attorneys for Defendants Larry Hahn and
Hahn's World of Surplus, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of November, 2008, she served a copy of the DEFENDANTS LARRY HAHN AND HAHN'S WORLD OF SURPLUS, INC.'S MOTION TO DISMISS AMENDED VERIFIED DERIVATIVE COMPLAINT 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 ROBERTSON & VICK, LLP. 401 North Buffalo Drive, Suite 202 Las Vegas, Nevada 89145 *Facsimile Number (702) 247-6227*	Patrick Clary, Esquire 7201 West Lake Mead Drive, Suite 410 Las Vegas, Nevada 89128 *Facsimile Number (702) 382-7277*

The undersigned further certifies that on said date, she further faxed copies of above referenced document to the counsel listed above at their last known facsimile numbers.

By _____
An employee of M NELSON SEGEL, CHARTERED

* * * Memory TX Result Report (Nov. 3. 2008 6:54PM) * * *

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Date/Time: Nov. 3. 2008 6:42PM

File No.	Mode	Destination	Pg(s)	Result	Page Not Sent
0651	Memory TX	2476227	P. 20	OK	
	diana	3827277		OK	

Reason for error
E. 1) Hang up or line fail
E. 2) Busy
E. 3) No answer
E. 4) No facsimile connection
E. 5) Exceeded max. E-mail size

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Attorneys for Defendants Larry Hahn and Hahn's World of Surplus, Inc.

DISTRICT COURT OF NEVADA

COUNTY OF CLARK

TED R. BURKE; MICHAEL R and LAURETTA L. KEHOE; JOHN BERTOLDO; PAUL BERNARD; EDDY KRAVETZ; JACKIE and FRED KRAVETZ; STEVE FRANKS; PAULA MARIA BARNARD; LEON GOLDEN; C.A. MURFF; GERDA FERN BILLBE; BOB and ROBYN TRESKA; MICHAEL RANDOLPH, and FREDERICK WILLIS,

Plaintiffs,

vs.

LARRY L. HAHN, individually, and as President of and Treasurer of Kokoweef, Inc., and former President and Treasurer of Explorations Incorporated of Nevada; HAHN'S WORLD OF SURPLUS, INC., a Nevada corporation; PATRICK C. CLARY, an individual; DOES 1 through 100, inclusive;

Defendants,

and

KOKOWEEF, INC., a Nevada corporation; EXPLORATIONS INCORPORATED OF NEVADA, a dissolved Nevada corporation;

Nominal Defendants.

/

CASE NO. A558629
DEPT. XIII

DATE: 12/8/08
TIME: 9:00 a.m.

DEFENDANTS LARRY HAHN AND HAHN'S WORLD OF SURPLUS, INC.'S MOTION TO DISMISS AMENDED VERIFIED DERIVATIVE COMPLAINT

Defendants Larry Hahn ("HAHN") and Hahn's World of Surplus, Inc. ("SURPLUS")(HAHN and SURPLUS sometimes collectively referred to herein as "MOVING DEFENDANTS") hereby

EXHIBIT "A"

§90.640. Power of court to grant relief

1. Upon a showing by the Administrator that a person has violated or is about to violate this chapter, or a regulation or order of the Administrator under this chapter, the appropriate district court may grant or impose one or more of the following appropriate legal or equitable remedies:

(a) Upon a showing that a person has violated this chapter, or a regulation or order of the Administrator under this chapter, the court may singly or in combination:

(1) Issue a temporary restraining order, permanent or temporary prohibitory or mandatory injunction or a writ of prohibition or mandamus;

(2) Impose a civil penalty of not more than $2,500 for a single violation or $100,000 for multiple violations in a single proceeding or a series of related proceedings;

(3) Issue a declaratory judgment;

(4) Order restitution to investors;

(5) Provide for the appointment of a receiver or conservator for the defendant or the defendant's assets;

(6) Order payment of the Division's investigative costs; or

(7) Order such other relief as the court deems just.

(b) Upon a showing that a person is about to violate this chapter, or a regulation or order of the Administrator under this chapter, a court may issue:

(1) A temporary restraining order;

(2) A temporary or permanent injunction; or

(3) A writ of prohibition or mandamus.

2. In determining the appropriate relief to grant, the court shall consider enforcement actions taken and sanctions imposed by the Administrator under NRS 90.630 in connection with the transactions constituting violations of this chapter or a regulation or order of the Administrator under this chapter. If a remedial action is imposed pursuant to this section, the costs of the proceeding, including investigative costs and attorney's fees, may be recovered by the Administrator.

3. The court shall not require the Administrator to post a bond in an action under this section.

4. Upon a showing by the administrator or securities agency of another state that a person has violated the securities act of that state or a regulation or order of the administrator or securities agency of that state, the appropriate district court may grant, in addition to any other legal or equitable remedies, one or more of the following remedies:

(a) Appointment of a receiver, conservator or ancillary receiver or conservator for the defendant or the defendant's assets located in this State; or

(b) Other relief as the court deems just.