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7
8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

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

15 Plaintiffs,

16 vs.

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

21 Defendants,

22 and

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

25 Nominal Defendants.
26
27

) CASE NO. A558629
) DEPT: XIII

) **PLAINTIFFS' OPPOSITION TO**
) **DEFENDANT PATRICK C. CLARY'S**
) **MOTION FOR SANCTIONS**

1 Plaintiffs Ted R. Burke; Michael R. And Laretta L. Kehoe; John Bertoldo; Paul Barnard;
2 Eddy Kravetz; Jackie and Fred Kravetz; Steven Franks; Paula Maria Barnard; Peter T. and Lisa
3 A. Freeman; Leon Golden; C.A. Murff; Gerda Fern Billbe; Bob and Robyn Treska; Michael
4 Randolph and Frederick Willis (hereinafter collectively referred to as Plaintiffs), by and through
5 their undersigned counsel of record, Robertson & Vick LLP, hereby oppose Defendant Patrick C.
6 Clary's (hereinafter "Clary") Motion for Sanctions¹.

7 This Opposition motion is made and based upon the following Memorandum of Points
8 and Authorities, the exhibits attached hereto, the papers and pleadings on file herein, and any oral
9 argument allowed by the court herein.

10 DATED this 17th day of November, 2008.

11
12 ROBERTSON & VICK, LLP

13
14 By: 

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20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I.**

22 **INTRODUCTION AND STATEMENT OF FACTS**

23 This shareholder derivative action arises out of the Defendants' scheme to fraudulently
24 induce shareholders to purchase shares of corporate stock in a gold mine investment scheme
25 managed by defendant HAHN, in order for HAHN, and his handpicked directors, to finance their

26 ¹ Clary's Motion for Sanctions, with the hearing date mandated by EDCR 2.20, was filed on October 27,
27 2008, and received in Plaintiffs' office via mail on October 29, 2008. However, there was no Certificate of Service
28 by which Plaintiffs could calculate the due date for an Opposition. Giving Clary the benefit of the doubt that the
Motion for Sanctions was served the same day it was filed, i.e. October 27, 2008, Plaintiffs' Opposition would be
due November 17, 2008.

1 personal lifestyles under the guise of conducting a legitimate gold mine operation. This scheme
2 included the sale of unregistered and non-exempt securities in violation of NRS 90.460.
3 Plaintiffs allege that over the past 25 years, defendants HAHN, recently with the assistance of
4 Clary, solicited the sale of securities in both KOKOWEEF, and its predecessor company EIN, to
5 defraud approximately 1,200 investors, including Plaintiffs, through the sale of unregistered
6 securities to finance the construction of a private compound used solely for the personal use of
7 defendants at the mine location. As such, the First Amended Complaint also seeks damages
8 owed to the corporation as a result of the self-dealing, securities fraud, and conversion of
9 corporate assets by the Defendants.

10 The First Amended Complaint sets forth the following Causes of Action
11 against Clary:

- 12 (1) Violation of NRS § 90.460 for the Unlawful Sale of Unregistered
13 Securities;
- 14 (2) Violation of NRS § 90.570 for the Unlawful Sale of a Security by
15 Means of a Scheme to Defraud;
- 16 (3) Negligent misrepresentation;
- 17 (4) Fraud in the Inducement; and
- 18 (5) Fraudulent Concealment.

19 In response to the First Amended Complaint, Clary has apparently filed this Motion for
20 Sanctions. However, Clary's Motion for Sanctions contains merely a memorandum of points and
21 authorities "which consists of bare citations to statutes, rules or case authority" and which,
22 therefore, the court may decline to consider. NRC 2.20(e). The Motion for Sanctions also
23 contains a self-serving affidavit, which provides no additional support as required by NRC 2.20,
24 and is in violation of EDCR 2.22. Accordingly, on this ground alone, Clary's Motion for
25 Sanctions should be disregarded and dismissed.

26 Additionally, Clary's Motion for Sanctions should be denied as it fails itself to abide by
27 the requirements of NRC 11, which require that the legal contentions within it are warranted by
28 existing law and it fails to demonstrate, outside of the self-serving affidavit, that the factual

1 assertions complained of in the First Amended Complaint will not have evidentiary support after
2 a reasonable opportunity for further investigation or discovery.

3 **A. Statement of Relevant Facts:**

4 During the existence of EIN, the predecessor company to Kokoweef, HAHN issued an
5 undetermined number of shares to literally hundreds of investors in the gold mine for a sale price
6 of \$6 per share. The issuance of these shares of stock in EIN violated both federal and state
7 securities laws as more fully alleged in Plaintiffs' First Amended Complaint (hereinafter "FAC").

8 Defendant CLARY was the corporate counsel to EIN, and at all times relevant herein,
9 was and is the corporate counsel to KOKOWEEF. As set forth in the FAC, recognizing that EIN
10 and HAHN had violated both federal and state securities laws by issuing non-exempt shares in
11 EIN, CLARY was entwined in the plan and procedure by which these illegal transactions were
12 concealed from the existing shareholders by "reorganizing" EIN into a new corporation, called
13 KOKOWEEF. Clary himself notified the stockholders of this plan of reorganization.

14 On or about October 12, 2006, Defendant CLARY sent a written notice to the
15 stockholders of EIN identifying himself as corporate counsel to both EIN and KOKOWEEF, and
16 noting that on November 10, 2005, EIN and KOKOWEEF would enter into an "Agreement and
17 Plan of Reorganization" (hereinafter the "Plan"), whereby EIN would agreed to sell and assign to
18 KOKOWEEF all of EIN's assets in exchange for the voting shares of KOKOWEEF's common
19 stock. Defendant CLARY's letter instructed each stockholder of EIN to return his or her stock
20 certificates to KOKOWEEF in exchange for a new KOKOWEEF stock certificate. The Plan was
21 entered into on or about November 10, 2005. Under the Plan KOKOWEEF agreed to assume all
22 of EIN's assets, and KOKOWEEF agreed to assume all of the liabilities of EIN, "**excepting**
23 **liability to the Old Company's [EIN] stockholders**", in exchange for voting shares of
24 KOKOWEEF's common stock. KOKOWEEF was incorporated by Defendant HAHN on or
25 about May 25, 2004. Defendant CLARY acted as both corporate counsel for EIN and the
26 surviving corporation, KOKOWEEF.

27 Plaintiffs believe and have therefore alleged that CLARY, along with Defendant HAHN,
28 devised the scheme to "reorganize" EIN into KOKOWEEF in an attempt to conceal from the

1 shareholders the fact that 99% of EIN's stock sales were illegal. Plaintiffs' allegation that
2 Defendant CLARY has admitted that he wrote the Agreement and Plan of Reorganization in such
3 a way to avoid KOKOWEEF's liability to its unsuspecting shareholders for these securities
4 violations in violation of NRS 90.460 is properly based upon the evidence provided by Plaintiff
5 Burke, and it is likely that additional evidence will be uncovered once discovery commences.

6 Plaintiffs allege that Defendants failed to keep records of the identities of the
7 approximately 1,200 investors in EIN and KOKOWEEF, the amount of consideration paid by
8 each investor for their stock, and the number of shares issued by Defendants to each investor.
9 Further, Plaintiffs allege that Defendants failed to maintain financial statements and follow
10 generally accepted accounting principals for either EIN and KOKOWEEF.

11 On or about September 18, 2007, BURKE was invited to attend a meeting with
12 Defendants HAHN and CLARY. Clary himself has described this meeting as a "Settlement
13 Conference."² Clary Aff. ¶ 5. At this Settlement Conference, Burke will testify that he discussed
14 with CLARY his personal liability as a KOKOWEEF Director, for what BURKE perceived to be
15 KOKOWEEF's violation of the Bylaws and for what he believed to be HAHN's
16 misappropriation of corporate funds to pay for his personal expenses. Burke will testify that
17 CLARY responded that the reason KOKOWEEF was formed was an attempt to "clean up" the
18 multiple securities violations of EIN, that ninety-nine percent (99%) of EIN's stock sales by
19 Defendant HAHN were unlawful, and that the reorganization of EIN was to conceal the illegality
20 of the sale of EIN securities until a time when the statute of limitation had lapsed on these
21 violations.

22 Defendant CLARY further advised BURKE, and Burke will testify, that although 99%
23 probably of the securities transactions were not conducted lawfully, Clary believed that the
24 statute of limitations had run. However, CLARY did not tell BURKE that Defendants HAHN
25

26 ² This Settlement Conference followed a contentious series of events in which Plaintiff Burke sought to
27 have a Board of Directors meeting to address concerns regarding compliance with corporate bylaws, and which was
28 intentionally preempted by and conflicted with a "Special Meeting" of all shareholders scheduled by Hahn the same
day, and during which violations of the bylaws occurred, including improper nomination and appointment of
members of the Board of Directors.

1 had issued approximately 1,057,565 shares of unregistered securities in KOKOWEEF during
2 2007 to approximately 580 investors at a price of \$6 per share, violating NRS 90.460, and
3 Plaintiffs believe that evidence of these unregistered issuances will come out during discovery.

4 During the Settlement Conference, CLARY also advised BURKE that the sales of
5 securities in EIN and KOKOWEEF did not need to be registered with the SEC, because they fell
6 within an exemption provided by Rule 504 of Regulation D. However, Plaintiffs believe that the
7 sale of securities in EIN and KOKOWEEF were not eligible for the exemption provided by Rule
8 504 of Regulation D of the SEC because neither EIN or KOKOWEEF registered the offering of
9 shares with the State of Nevada or filed a Registration Statement with the State of Nevada or
10 delivered substantive disclosure documents as required to investors such as Plaintiffs. Further,
11 neither EIN nor KOKOWEEF filed a Form D after they first sold their securities, which is a
12 requirement under Rule 504 of Regulation D. Additionally, Defendant CLARY advised BURKE
13 that the sale of securities of EIN and KOKOWEEF were also exempt under Nevada securities
14 laws. However, Plaintiffs are informed and believe, and thereon allege, that these representations
15 were also false in that none of the transactions complied with the exemptions provided by NRS
16 §90.520 or NRS §90.530.

17 All of the factual contentions which Clary claims are not supported and in violation of
18 NRCP 11 will be supported by, at least, the testimony of Plaintiff Burke. It will then be up to the
19 finder of fact to determine the credibility of each testifying witness, including Clary, and decide
20 the weight of the evidence. Clary's motion is nothing more than a dispute of facts brought by a
21 Defendant who finds himself in the not unusual position of disagreeing with the presentation of
22 the facts by the Plaintiffs.

23 LEGAL ARGUMENT:

24 Clary's Motion misapprehends the intent and application of NRCP 11, and provides no
25 support for his assertion that the claims against him in the First Amended Complaint must fail.
26 NRCP 11 is not intended to be used by a defendant, simply because he is displeased with the
27 claims asserted against him. The Nevada Supreme Court has stated, as a general proposition,
28 that sanctions under this rule are not intended to chill an attorneys' enthusiasm or creativity in

1 reasonably pursuing factual or legal theories. Marshall v. Eighth Judicial Dist. Court, 108 Nev.
2 459 (1992). Additionally, NRCP 11 contemplates at least the opportunity to uncover evidentiary
3 support for factual contentions set forth in a complaint. NRCP 11(b)(3) specifically allows a
4 pleading to include factual contentions that either have evidentiary support or will have
5 evidentiary support after a reasonable opportunity for further investigation or discovery.

6 In this case, the facts set forth in the FAC were included based upon the knowledge,
7 information and belief of Plaintiffs' counsel and formed after an inquiry reasonable under the
8 circumstances. NRCP 11(b). Clary's Motion provides no viable facts or law in support of his
9 request for sanctions. Instead, Clary appears to believe that his self-serving affidavit allows him
10 to render ultimate facts sufficient to secure some type of dismissal. Discovery in this matter has
11 not even opened, and Plaintiffs anticipate finally being able to conduct a full review of
12 Kokoweef's records.³

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18 ³ In regard to a review of Kokoweef's records, Plaintiffs' assume that Defendants are abiding by the
19 requirements of NRS 90.605, which states: In any investigation, proceeding or prosecution with respect to any
20 violation of a provision of this chapter, a regulation adopted pursuant to this chapter, an order denying, suspending
or revoking the effectiveness of registration or an order to cease and desist issued by the Administrator, a person
shall not willfully:

- 21 1. Offer or procure to be offered into evidence, as genuine, any book, paper, document or record if the person
knows that the book, paper, document or record has been forged or fraudulently altered; or
- 22 2. Destroy, alter, erase, obliterate or conceal, or cause to be destroyed, altered, erased, obliterated or concealed,
any book, paper, document or record, with the intent to:
 - 23 (a) Conceal any violation of any provision of this chapter, a regulation adopted pursuant to this chapter, an
order denying, suspending or revoking the effectiveness of registration or an order to cease and desist issued by the
Administrator;
 - 24 (b) Protect or conceal the identity of any person who has violated any provision of this chapter, a regulation
adopted pursuant to this chapter, an order denying, suspending or revoking the effectiveness of registration or an
order to cease and desist issued by the Administrator; or
 - 25 (c) Delay or hinder the investigation or prosecution of any person for any violation of any provision of this
26 chapter, a regulation adopted pursuant to this chapter, an order denying, suspending or revoking the effectiveness of
registration or an order to cease and desist issued by the Administrator.

1 **A. The Amended Complaint Against Clary is proper, and Clary has no proper**
2 **knowledge, information or belief, to assert otherwise.**

3 Clary's Motion utterly misapprehends the First Amended Complaint. Clary was named
4 as a Defendant not, as he improperly and without support asserts, in an attempt to conflict him
5 out of the case, but because of evidence of his advice, organization and involvement in the
6 securities violations, negligence and fraud alleged in the First Amended Complaint.

7 In fact, Plaintiffs have no reason, as Clary claims, to concoct a "scheme" to disqualify
8 Clary, as the Motion to Disqualify was denied as untimely without prejudice to renew it a later
9 date. A true and correct copy of the May 19, 2008 transcript related to the Motion to Disqualify
10 is attached hereto as Exhibit "1". In denying the initial Motion to Disqualify, this Honorable
11 Court stated:

12 THE COURT: I don't think it's ripe anyway.

13 . . .

14 THE COURT: You're saying that Mr. Clary may have to be a witness or he may
15 end up being a party, but he's not now. So, as far as I'm concerned, that motion
16 doesn't have any merit and I'd deny it without prejudice. If he becomes trial
17 counsel or something and you think that he's going to be a witness, I'd consider it
18 then.

19 Ex. 1, p. 3, ll. 16-21.

20 Similarly, Clary may try to depict the Nevada State Bar's disposition of Plaintiff Burke's
21 Complaint as having been dismissed. However, the State Bar Counsel responding determined
22 that the matter would be more properly heard by this Honorable Court and noted "our experience
23 with the Disciplinary Boards of the State Bar, and its panels, indicates that they prefer not to act
24 as a substitute for the civil court process." A true and correct copy of this correspondence is
25 attached hereto as Exhibit "2".

26 Clary has provided no evidence, facts or law to support his hypothesis regarding the
27 intention for Plaintiffs' FAC. Accordingly, the Court may reject Clary's argument and position,

1 and deny Clary's Motion for Sanctions. See Quillen v. State, 112 Nev. 1369, 1380 (1996); Citti
2 v. State, 107 Nev. 89, 91 (1991).

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4 **B. The Amended Complaint is Warranted by Existing Law, and Is Legally**
5 **Sustainable, and Clary has failed to demonstrate otherwise.**

6 Clary's assertion that the FAC is not warranted by existing law contains nothing but the
7 argument of counsel. It may contain "points", but it does not contain any "authorities". Pursuant
8 to EDCR 2.20(a), absence of points and authorities in a motion may be construed as an
9 admission that the motion is not meritorious, as cause for its denial or as a waiver of all grounds
10 not so supported." Accordingly, Clary has waived any arguments or grounds to assert that the
11 FAC is not warranted by existing law.

12 Further, EDCR 2.20(e), again, allows a court to disregard a memorandum of points and
13 authorities which consist of bare citations to statutes, rules of cases authority. In this section,
14 Clary appears to claim that the FAC is not warranted by existing law because "there is no way" it
15 will "benefit the corporation or the security holders" and because it does not allege scienter
16 against Clary. Plaintiff Mot. 6:10-12; 6:17-19. However, no authority is presented for either of
17 these arguments, even in Clary's Affidavit. As such, in addition to EDCR 2.20, prior rulings by
18 the Nevada Supreme Court allow this court to disregard Clary's unsupported arguments. See
19 Quillen v. State, 112 Nev. 1369, 1380 (1996); Citti v. State, 107 Nev. 89, 91 (1991).

20 Finally, Clary attempts to argue that the FAC is not warranted by existing law because
21 Burke himself is not a Defendant. Again, Clary has failed to provide a shred of legal authority to
22 support this novel argument, and as such the Court may outright reject this assertion. See EDCR
23 2.20; See Quillen v. State, 112 Nev. 1369, 1380 (1996); Citti v. State, 107 Nev. 89, 91 (1991).

24 This portion of Clary's Motion lacks any authority and warrants denial by this Court.

25 ////

26 ////

27 ////

1 **C. Clary has failed to demonstrate, as required by EDCR 2.20, that the factual**
2 **contentions in the First Amended Complaint do not have and are not likely to have**
3 **evidentiary support through the commencement of discovery.**

4 Again, the extent of support for Clary's claim that the FAC lacks evidentiary support is
5 his self-serving affidavit. However, even this Affidavit is deficient and inappropriate for support
6 of his Motion. EDCR 2.22 states: "Affidavits/declarations must contain only factual,
7 evidentiary matter, conform with the requirements of NRC 56(e), and avoid mere general
8 conclusions or argument. Affidavits/declarations substantially defective in these respects may be
9 stricken, wholly or in part." Clary's Affidavit fails to meet the requirements of EDCR 2.22 and
10 NRC 56(e) and should be stricken.

11 In this case, the Affidavit of Patrick C. Clary in support of his Motion for Sanctions
12 contains conclusions general conclusions and arguments, assertions regarding conclusions of
13 law, disparaging comments about Plaintiffs' counsel, and other assumptions with no evidentiary
14 basis. Following, without limitation are a few such examples. In paragraph 7, he concludes that
15 the Transcript of the Settlement Conference "lacks credibility and is highly suspect". In
16 paragraph 8, he opines on the qualification of Burke to testify as a witness. In paragraph 11, he
17 attempts to act as the finder of fact in concluding that the allegations in the FAC are "not based
18 on any credible evidence whatsoever." In paragraph 12 of his Affidavit, Clary asserts that
19 Plaintiffs' new lawyers obviously are lacking in knowledge of securities laws. In paragraph 15,
20 he attempts to engage in telepathy by assuming Plaintiffs' intents and concluding that Plaintiffs'
21 new counsel have "concocted a scheme" to disqualify him. Further, while Clary, on one hand,
22 criticizes the credibility of the Transcript, he also, on the other hand, relies on certain portions to
23 support arguments in Motion. Specific examples of his reliance admission as to the veracity of
24 the transcript include paragraphs 12 and 14.

25 Again, this argument in Clary's Motion is wholly without legal or factual support.
26 Accordingly, the Court may disregard it in its entirety. See EDCR 2.20; EDCR 2.22; See Quillen
27 v. State, 112 Nev. 1369, 1380 (1996); Citti v. State, 107 Nev. 89, 91 (1991).

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III.

CONCLUSION

Based on all of the foregoing, it is respectfully requested that this Court deny Clary's Motion for Sanctions in its entirety.

DATED this 17th day of November 2008.

ROBERTSON & VICK, LLP

By: 

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CERTIFICATE OF SERVICE

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I hereby certify that on the 17th day of November, 2008, I served a copy of the above and foregoing Plaintiffs' Opposition to Defendant Patrick C. Clary's Motion for Sanctions by depositing a copy thereof for mailing at Las Vegas, Nevada, postage prepaid, addressed to:

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