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DISTRICT COURT

CLARK COUNTY, NEVADA

TED R. BURKE, MICHAEL R. and LAURETTA L. KEHOE; JOHN BERTOLDO; PAUL BARNARD; 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 H. HAHN, individually, and as President and Treasurer of Kokoweef, Inc., and former President and Treasurer of Explorations Incorporated of Nevada; HAHN'S WORLD OF SURPLUS, INC., a Nevada corporation; DOES I-X, inclusive; DOE OFFICERS, DIRECTORS and PARTICIPANTS I-XX,

Defendants,.

and

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

Nominal Defendants.

CASE NO. A558629
Dept. XIII

PLAINTIFFS' OPPOSITION TO SO-CALLED 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

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Plaintiffs Ted R. Burke; Michael R. and Lauretta L. Kehoe; John Bertoldo; Paul Barnard; Eddy Kravetz; Jackie and Fred Kravetz; Steven Franks; Paula Maria Barnard; Leon Golden; C.A. Murff; Gerda Fern Billbe; Bob and Robyn Treska; Michael Randolph and Frederick Willis (hereinafter collectively referred to as "Plaintiffs"), by and through their undersigned counsel of record, Robertson & Associates LLP, hereby file their Opposition to 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.

This Opposition is made and based upon the points and authorities submitted herewith, NRS 90.660, oral argument of counsel, and the pleadings and papers on file herein.

Dated August 19, 2011

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Defendants Clary's and Kokoweef's Motions to Set Aside, to Dismiss or for Summary Judgment lack merit, appropriate factual or legal support, and contain many of the same recycled

arguments and inaccuracies of their prior Motions. As such, and based upon Plaintiffs' opposition, Defendants' Motions should be, wholesale, denied.

I.

Defendants' Motion to Set Aside Default and Dismiss EIN Should be Denied as Explorations, Inc. of Nevada was Properly Served and No Basis Exists to Set Aside the Default

Default was entered against EIN more than two years ago. Yet, only now, EIN's putative counsel is seeking to have that default set aside on factually and legally insufficient grounds. EIN's argument regarding its corporate status is irrelevant under the facts of this case. The default entered was proper, and EIN's objection is untimely and otherwise fails to present good cause for it to be set aside, including failing to set out any legitimate authority to support its request.

EIN's failure to cite any authority, let alone relevant authority, warrants denial of its request that the default be set aside and EIN dismissed. EDCR 2.20(a) ("[a] party filing a motion must also serve and file with it a memorandum of points and authorities in support of each ground thereof. The absence of such memorandum may be construed as an admission that the motion is not meritorious, as cause for its denial or as a waiver of all grounds not so supported."). Nonetheless, should this Court consider the so-called "Motion to Set Aside Default and Dismiss EIN", it should still be denied.

Defendants' Motion to Set Aside the Default against EIN and then to dismiss EIN are two wholly different analyses to be completed by this Court, neither of which has merit.

A. Default was Proper and No Grounds Exist to Set it Aside:

The first part of the analysis on EIN's Motion requires this Court to determine if default was properly entered. Quite simply, it was. Counsel for EIN Kokoweef fails to explain, in any way, shape or form, why he believes service was improper. And, tellingly, EIN's purported counsel fails to provide this Court with a copy of the default entered against EIN. Had EIN's putative counsel done so, it would clearly demonstrate service upon EIN was properly effectuated.

Further, even if this Court was inclined, based upon EIN's bare-bones argument, to set aside the default, Plaintiffs believe this argument is untimely and therefore should be disregarded. Defaults are entered when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default. NRCP 55. A default can be set aside for good cause. Id. EIN's putative counsel has not even attempted to list good cause. Why? Because quite simply there is no good cause. Mr. Clary, EIN's putative counsel was hand-served with the three-day notice of intent to take default against EIN. EIN was served through its President, Larry Hahn. NRCP Rule 60 states that relief from Judgment or Order can be obtained

1. Defendants' unreasonable delay in seeking set aside warrants refusal

Defendants have waited two and one-half years to object to this default. Defendant EIN was properly served with summons on September 25, 2008. A copy of the Return of Service is attached hereto as Exhibit "1 ". The Three-Day Notice to Take Default against EIN was filed on 10/28/08, and hand-delivered to EIN's putative counsel. The Default was entered on February 26, 2009.

Now, two and one half years later and less than one month until the trial of this matter, Defendants are asking for relief for a default they were well aware had been entered. The intent of the rules related to service and defaults do not permit such a prejudicial delay to be rewarded. NRCP 60, which is referenced in NRCP 55, states:

> (c) Default judgments: Defendant not personally served. When a default judgment shall have been taken against any party who was not personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, and who has not entered a general appearance in the action, the court, after notice to the adverse party, upon motion made within 6 months after the date of service of written notice of entry of such judgment, may vacate such judgment and allow the party or the party's legal representatives to answer to the merits of the original action. When, however, a party has been personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, the party must make application to be relieved from a default, a judgment, an order, or other proceeding taken against the party, or for permission to file an answer, in accordance with the provisions of subdivision (b) of this rule.

There is no new evidence, no clerical errors or mistakes and service was properly effected. The default was entered two years ago. Therefore, Defendants are barred from seeking to have the default set aside. A district court has wide discretion in such matters and, barring an abuse of discretion, its determination will not be disturbed. Union Petrochemical Corp. v. Scott, 96 Nev. 337 (Nev. 1980). Plaintiffs' request that this Court's discretion be exercised to maintain the default and deny Defendants' request.

B. EIN's Corporate Status does not Warrant Dismissal:

The sole fact of dissolution does not absolve a corporation of liability and the arguments seeking dismissal of EIN based upon its dissolution should be disregarded. Plaintiffs admit that Explorations, Inc. of Nevada ("EIN") is a dissolved corporation. However, EIN's putative counsel fails to provide this Court with controlling statutory authority that clearly allows suits against dissolved corporations. In fact, NRS 78.585 expressly calls for continuing liability of dissolved corporations, and states:

> The dissolution of a corporation does not impair any remedy or cause of action available to or against it or its directors, officers or shareholders arising before its dissolution and commenced within 2 years after the date of the dissolution. It continues as a body corporate for the purpose of prosecuting and defending suits, actions, proceedings and claims of any kind or character by or against it and of enabling it gradually to settle and close its business, to collect and discharge its obligations, to dispose of and convey its property, and to distribute its assets, but not for the purpose of continuing the business for which it was established.

By EIN's own admission, the corporation was not dissolved until November 15, 2007. See Mot. 5:13-14. The initial Complaint against EIN was filed on March 17, 2008, well within the two years contemplated by NRS 78.585. Accordingly, EIN has either misunderstood, or misrepresented, the import of EIN's dissolution, and this argument should be disregarded.

Additionally, a review of the bank records from US Bank show that money was being transferred into and out of the EIN accounts up to and including 2009. See US Bank Statement Dated February 28, 2009, attached hereto as Exhibit "2". Further, Talon Stringham testified at the Evidentiary Hearing of July 28, 2008 that from his analysis of corporate documents, some of

the assets of EIN were not transferred to Kokoweef, Inc. Defendants have yet to explain where the missing assets have been disbursed. Finally, some of the mining claims are still held in the name of EIN. See January 19, 2011 report of Talon Stringham, a true and correct copy of which is attached hereto as Exhibit "3". Therefore, EIN should have answered, but did not answer, and the default was proper and should not be set aside, nor should EIN be dismissed.

Finally, EIN's arguments regarding the claims against it in the Verified Derivative First Amended Complaint are illogical. Defendants misrepresent the claims in the First Amended Complaint because EIN is clearly a party in the Demand Excused Allegations. A true and correct copy of the First Amended Verified Complaint is attached hereto as Exhibit "4". Kokoweef is similarly named, and yet, counsel for Kokoweef was able to prepare and file an Answer. Therefore, Defendant's baseless argument regarding EIN's being named in the Verified Amended Complaint should be disregarded.

II.

Defendants' Motion to Dismiss Should be Denied as Ted Burke is a Proper Plaintiff, or, in the alternative, his Status is as a Misjoined Plaintiff does not Warrant Dismissal

Defendants argue that Plaintiff Ted Burke has no standing to continue as a Plaintiff in this matter. Further, they claim that no legal authority is necessary for such an argument, and, as such, include none in the Motion. Neither, do they include any facts, documents or other such evidence necessary to prevail on their bare assertions that Mr. Burke is not a stockholder of record. What is clear, however, is whether the shares are held in the name of Ted R. Burke, or BFT Enterprises, LLC, Mr. Burke is the real party in interest to bring this claim. Painter v. Anderson, 96 Nev. 941, 943 (Nev. 1980) (a"real party in interest" pursuant to NRCP 17(a) means that an action shall be brought by a party "who possesses the right to enforce the claim and who has a significant interest in the litigation.").

Plaintiff Burke and his wife Olga together are the single manager of BFT Enterprises, which holds 75,000 shares of Kokoweef, Inc. Mr. Burke's mentally disabled son, Ted Raul Burke is the sole member. See Articles of Incorporation of BFT Enterprises, LLC, a true and

correct copy of which is attached hereto as Exhibit " 5". BFT was incorporated to protect the interests of BURKE's son, Ted. Plaintiff BURKE and his wife Olga are the only creditors or other party of interest other than their son. There are no other creditors who would be paid by the proceeds of BFT's ownership in the shares of KOKOWEEF.

Defendants claim, further, that Burke is not a proper Plaintiff because shares to either him, or BFT, were "rescinded, or has never been issued or distributed." A complete copy of Mr. Burke's shareholder file provided by Defendants is attached hereto as Exhibit "6". Defendants' own shareholder records prove that the 75,000 shares were indeed issued for work performed , an additional 70,000 shares were also issued and then rescinded because the work for the second issue was not performed by agreement, a ledger compiled by Defendant HAHN and adding machine tape showing several additional payments of cash made by Mr. Burke and stock certificates for additional shares purchased in BURKE's name as well. This fact alone defeats Defendants' allegation that Burke be dismissed. In addition, Mr. Burke's affidavit and attached documents attached hereto as Exhibit "7" include receipts for work performed, materials given and other consideration for which the 75,000 shares were issued and proof of the remaining 7,000 shares purchased.

However, Defendants' assertion that the shares issued were rescinded is further evidence of why Mr. Burke is truly the real party in interest, and of Defendants' wrongdoing. On July 11, 2007, a stock award was approved for Mr. Burke for work performed prior to that by Mr. Burke for the benefit of EIN and/or Kokoweef. See Minutes of Kokoweef, Inc., attached hereto as Exhibit "8". Pursuant to NRS 78.211:

> (1) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including, but not limited to, cash, promissory notes, services performed, contracts for services to be performed or other securities of the corporation. The judgment of the board of directors as to the consideration received for the shares issued is conclusive in the absence of actual fraud in the transaction.
>
> (2) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid.

Contrarily, Defendants have provided no documentation, other than non-admissible statements by counsel in a pleading that Mr. Burke holds no shares. And, no legal basis for any so-called rescission of those shares has been provided. In fact, this is a tactic Defendant Hahn has used for many years against many people. When a shareholder disagrees or even for no reason, Mr. Hahn rips up their shares. See Burke Affidavit, Ex. "7". Defendant Hahn further attempted to rescind shares granted to Plaintiffs Burke, Kehoe and Randolph in exchange for work performed for the benefit of the company. (See Affidavit of Michael Kehoe, attached hereto as Exhibit "9"). Therefore, Defendants' assertion that Plaintiff Burke's shares have been rescinded is illegal and should be disregarded.

NRCP 17 defines a real party in interest and states:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Based upon the facts surrounding BFT and the shares purchased by or issued to Ted Burke, the remedy, if any is needed, is not dismissal but to address any misjoinder through NRCP 21 ("[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."); see also Cummings v. Charter Hosp., 111 Nev. 639, 896 P.2d 1137 (1995).

Accordingly, Defendants' Motion to Dismiss Plaintiff Ted R. Burke should be denied.

III.

Defendants' Motions to Dismiss, or for Summary Judgment on the First and Second Causes of Action Should be Denied.

A. Defendants have Failed to Meet their Burden to Warrant a Dismissal or Summary Judgment on the First Cause of Action

Defendants Clary and Kokoweef seek dismissal on the First Cause of Action because it, allegedly, fails to state a claim upon which relief can be "made", pursuant to NRCP 12(b)(6)[1]. Mot. 7:11-12.

NRCP 12(b)(5) states that should a motion asserting defenses pursuant to NRCP 12(b)(5) include matters outside the pleadings, the motion should be treated as one for summary judgment. In this case, Defendants have presented declarations from Patrick Clary and Reta Van Da Walker to support their assertion that no violations of NRS 90.530(11) occurred. Accordingly, an analysis pursuant to NRCP 56 must be conducted. However, Defendants' mandated presentation falls far short of the requirements for NRCP 56 and the cases interpreting it and, as such, should be disregarded and the Motion denied.

Trial courts should exercise great care in granting summary judgment. Pleadings and documentary evidence must be construed most favorably to the party against whom the motion is made. Copeland v. Desert Inn Hotel, 99 Nev. 823, 673 P.2d 490 (Nev. 1983). Additionally, in determining whether a summary judgment is proper, the nonmoving party is entitled to have the evidence and all inferences therefrom accepted as true. Johnson v. Steel, Inc., 100 Nev. 181, 678 P.2d 676 (Nev. 1984). Further, the trial judge may not, in granting summary judgment, pass upon the credibility or weight of the opposing affidavits or evidence; that function is reserved for the finder of fact at trial. Hidden Wells Ranch, Inc. v. Strip Realty, Inc., 83 Nev. 143, 425 P.2d 599 (Nev. 1967). On summary judgment motion the court is obligated to accept as true all evidence favorable to the party against whom the motion is made. Id. In this matter, Plaintiffs have submitted sworn statements and the report of their securities expert, Edwin J. Apenbrink.

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[1] NRCP 12(b)(6) actually contemplates dismissal based upon failure to join a party under NRCP 19. Plaintiffs assume, however, based on the context of Defendants' Motion that the intended rule was NRCP 12(b)(5).

The evidence presented by Mr. Apenbrink demonstrates hundreds of violations in the sale of securities, all of which must be accepted as true. Id.

B. *Regardless of the Merger, Defendants have still Violated Nevada Securities Laws in the Distribution of Non-exempt, Unregistered Securities.*

Defendants' focus primarily on the transaction which permitted the merger between EIN and Kokoweef to convince this Court of the legality of the sales of shares of Kokoweef. Even assuming that the exemption filing under NRS 90.530(17)(b) was done correctly, Defendants sold shares in violation of Nevada's securities laws. And, the Nevada Securities Act has, as one of its express purposes, protection of a state's citizens from fraudulent securities transactions. See Re: Lucky Chance Mining and Jurisdiction Under the Nevada Securities and Commodity Acts, 1989 Nev. AG LEXIS 19 at *8.

1. Reta Van Da Walker's Declaration is not credible and is not sufficient for summary judgment.

NRCP 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Ms. Van Da Walker's Declaration fails to meet this criteria.

Defendants dispute whether the shares sold to Plaintiffs were legally distributed based on a Declaration by Rita Van Da Walker. However, Ms. Van Da Walker's Declaration and attachment, fail to provide any facts to demonstrate how she conducted her review of the shareholder records, how she determined statutory time frames, and how she counted the shareholders to determine whether violations had occurred. This deficiency alone precludes Ms. Van Da Walker's Declaration.

Additionally, Ms. Van Da Walker's opinion on the issue of shareholder counts pursuant to NRS 90.530(11) should be disregarded as she is not qualified to render an opinion on the subject. First, Ms. Van Da Walker has never tendered an expert report on any subject, has never been offered as a securities expert and is not a securities expert.

Further, during the evidentiary hearing held in this mater on July 30, 2008, Judge Denton declined to deem Ms. Van Da Walker an expert even in her field of accounting. A true and correct copy of this testimony is attached hereto as Ex. "10 ".

> "The Court: She wasn't proffered as an expert so I'm not going to deem her qualified as an expert."

Exhibit "10", 31:4-5.

Ms. Van Da Walker also testified and admitted that she is not qualified to testify regarding securities.

> "Q. Okay. Well, let me ask you this, speaking of records. As part of your analysis, have you ever looked at how the E.I.N. shareholders and the Kokoweef shareholders were treated in terms of the exchange of E.I.N. stock for Kokoweef stock?
>
> A. That is not my - my deal. I am accounting only."

Exhibit "10", 35:2-6.

In addition to not being qualified as an expert on the sales of securities, Ms. Van Da Walker's prior testimony shows that she is even an inadequate bookkeeper to opine on accounting, her alleged area of expertise, and specifically where detailed review and analysis of documents, such as the shareholder records, are concerned. Ms. Van Da Walker testified in one of prior Affidavits that:

> "Based upon my review of the books and records of EIN and KOKOWEEF, it is my opinion that, although they have been run as small businesses, their records are exceptionally clean and complete."

Affidavit of Reta Van Da Walker filed 5/16/08 2:22-24, a true and correct copy of which is attached hereto as Exhibit "11 ". However, the past three years and numerous "lost boxes" produced by Defendants since that time have painfully proved Ms. Van Da Walker was incorrect. Ms. Van Da Walker also testified that the work she had done for Kokoweef was full of errors and oversights. She did not record the reorganization correctly.

> Q. Let me ask you this, Ms. Van Da Walker. I assume what you're saying is, if I understand you, is that you didn't treat the transaction [reorganization] properly and you have since . . . attempted to do that . . . "

Exhibit "10, 34:10-13.

She did not reconcile individual receipts to checks but merely balanced them as a whole.

> When I was doing this, due to time constraints and the push that Mr. Dutchik and others were putting on me, I just balanced the receipts to the deposits and did not put them individually. So the money is in there, the banks are in balance and reconciled. The receipts are reconciled but they don't individually say that.

Exhibit "10", 19:9-12.

> And most of the transactions that we are - or they are referring to are on-going transactions with certain people or certain companies that are the same month after month after month or year after year. And therefore one receipt is as good as the other in - not really, but it is one of those things you look at, and most of them aren't material at all.

Exhibit "10", 20:16-20.

> The receipts were not individually done, and to do just a - I balanced all the receipts and deposits by the year; by the month and by the year. And I am very, very certain - in fact, I am positive beyond a shadow of a doubt that everything is in there.

Exhibit "10", 22:11-14.

Ms. Van Da Walker made several "errors" in recording information in the QuickBooks, information that Mr. Stringham found to be an indication of fraud, such as one payee listed in QuickBooks while the physical check listed another. In this case, Ms. Van Da Walker entered the check as payable to Greg Hahn when in fact it was payable to "Cash."

> When I am doing accounting in QuickBooks, I can enter ten checks every four minutes. And in this particular case they were on the receipt as Greg Hahn - cash and in Greg Hahn. I picked out the Greg Hahn. It is definitely a check to him for labor.

Exhibit "10", 23:10-13.

2. Plaintiffs' expert's report refutes the bare bones Van Da Walker Declaration

Edwin Apenbrink, the former Director of the Nevada Department of Securities, the man who oversaw the processing of Mr. Clary's Form N9, opined that many of the shares sold to the Plaintiffs were sold in violation of NRS 90.530 (11) in that more than 25 sales were made in a 12

month period. Attached hereto as Exhibit "12 " are the Declaration of Edwin J. Apenbrink in response to the Van Da Walker Declaration, along with his prior Affidavit and report.

Mr. Apenbrink's counts of sales of shares clearly demonstrates that there are genuine issues of material fact precluding Summary Judgment on the First Cause of Action.

C. The Filing of the Form N9 did not Correct the Defects in the EIN Shares or Protect Illegally Distributed Shares of Kokoweef.

Defendants rely on the filing of Form N9 with respect to shares issued by EIN. Mr. Clary repeatedly has relied on this assertion, yet glosses over the first required element for filing under NRS 90.530 (17). Specifically, NRS 90.530 (17)(b) states as follows:

> (b) The securities to be distributed are not required to be registered under the Securities Act of 1933, 15 U.S.C. §§ 77a et seq., written notice of the transaction and a copy of the materials, if any, by which approval of the transaction will be solicited, together with a nonrefundable fee of $300, are given to the Administrator at least 10 days before the consummation of the transaction and the Administrator does not, by order, disallow the exemption within the next 10 days.

Defendants did not rely on the statute for exemption from registration. Defendant Clary relied on his ability to manipulate the system and obtain an exemption due to an overloaded securities division.

At the September 18, 2007 meeting between Defendants Clary, Hahn and Plaintiff Burke, Clary admitted that the shares of EIN were illegally distributed. A true and correct copy of this pertinent pages of transcript is attached hereto as Ex. "13 ".

> "Mr. Burke: Now, here's the, you know, as Richard and I talked about the whole purpose of forming the new corporation was for what purpose?
>
> Mr. Clary: We - we have to (indiscernible).
>
> Mr. Burke: Well, what are we cleaning up?
>
> Mr. Clary: Cleaning up the securities violations.
>
> Mr. Burke: Okay. So we had securities violations that we could possibly be held liable for as it's board members?
>
> Mr. Clary: Yes."

Exhibit "13" 11:15-24.

> Mr. Clary: ". . . So my idea was - and I've done it multiple times and - and only had a problem with one of those many times I've done it - was to form a new corporation and try to wipe out - the fact of the matter is that 90-percent, 99-percent probably -- . .. of the securities transactions that weren't conducted lawfully."

Exhibit "13 ", 17-24:20.

> Mr. Clary: ". . . you pay the filing fee and file a form, . . . and if they don't do anything in ten days, you're exempt."

Exhibit "13 ", 26:23-25. See also, Clary's Motion for Sanctions, filed on10/27/08, p. 6.

Edwin Apenbrink, the former Director of the Nevada Department of Securities, the man who oversaw the processing of Mr. Clary's Form N9 opined that the filing of the form would not clean up any securities that were illegally issued prior to the reorganization. Nor would it protect from liability for the future sale of shares completed in violation of the Nevada Securities Act. See Ex. "12. "

> The purpose of this filing was stated to claim the exemption provided by NRS 90.530(17)(b). The Division conducts a perfunctory review of such filings to determine that the filing is timely, the fee is enclosed and that recipients of the offer receive some disclosure. Within those parameters this filing was perfected. This exemption would allow only the distribution of the securities of Kokoweef to the shareholders of EIN pursuant to the Agreement and Plan of Reorganization. This filing would not have any impact on the ongoing sales of securities of EIN and Kokoweef and would not, in any way, cleanse any past, or future, violations of the Act in connection with the distribution.

See Apenbrink Aff., pg 5. And in his 2-day interrogation by Defendants, Mr. Apenbrink further clarified this assessment.

> Q. That it is your opinion that any claims under 530 would be independent of shares issued in the reorganization; is that correct?
> A. Well, if a person received - who is a shareholder in EIN received his shares and they weren't in compliance, they would still have the same cause of action after they received their Kokoweef shares. I mean (17) (b) transactions only approves the merger.

See Exhibit "14 ", a true and correct copy of the deposition transcript of Edwin Apenbrink, 187: 21-25; 188:1-4.

> A. ... this filing would not have any impact on the ongoing sales of securities of EIN and Kokoweef and would not, in any way,

> cleanse any past, or future, violations of the Act in connections with the distribution.

Mr. Apenbrink further testified.

> Q What does that mean?
> A Well, one doesn't affect the other. And if the perfection of the (17) (b) transaction was intended in any way to cleanse past or future violations of the Act, it would have no effect on it at all.

Exhibit "14 ", 172:7 thru 14.

Outside of Reta Van Da Walker's so-called Declaration, Defendants have presented no evidence or other support to rebut Mr. Apenbrink's opinions and counts of the shareholders purchasing unregistered, non-exempt shares of Kokoweef. Despite anything said by Defendants to the contrary, the fact is undisputed that illegal securities were indeed sold to certain Plaintiffs in violation of provisions of NRS Chapter 90. The only question is who is liable for those sales.

Plaintiffs allege that Mr. Clary indirectly and/or directly controlled the actions of President and Treasurer, Larry Hahn, and was actively involved in the management of the corporation. Such "control" subjects not just Kokoweef, but Clary to liability for the sale of these unregistered, non-exempt securities. NRS 90.660 provides that not only is the person offering or selling violative shares liable to the purchaser:

> "[a] person who directly or indirectly controls another person who is liable under subsection 1 or 3, and a partner, officer or director of the persona liable, a person occupying a similar status of performing similar functions, any agent of the person liable, an employee of the person liable if the employee materially aids int eh act, omission or transaction constituting the violation, and a broker-dealer or sales representative who materially aids in the act, omission or transaction constituting the violation, are also liable jointly and severally with and to the same extent as the other person."

In support of Plaintiffs' assertions that both Kokoweef and Clary are liable for the sales of unregistered, non-exempt shares, Plaintiffs set forth the following facts:

" The Articles of Incorporation for Kokoweef Inc. list Mr. Clary's residence as the principal office of the corporation. Exhibit "15".

- Mr. Clary knew of the securities violations and came up with a plan to "clean up" the securities violations. Exhibit "13 ".
- Mr. Clary wrote a letter to the shareholders of EIN telling them to trade in their shares of EIN for shares of the new corporation KOKOWEEF. Exhibit "16".
- Mr. Clary came up with the Accredited Investor Agreement to address new sales after the reorganization, and the shareholder agreement required to be executed by Plaintiffs Michael and Lauretta Kehoe. Exhibit "17" .
- Mr. Clary attends many of the Board of Director Meetings and Annual Shareholder Meetings.
- Mr. Clary's continual participation is also evidenced by the 26 checks written to him since 2004, including and specifically 3 checks written on 5/16/06 and one on 6/8/6 which is the time that the majority of the illegal shares of Kokoweef sold to Plaintiffs was made.
- Mr. Clary participated in the financial coverup of the misappropriation of funds made by Mr. Hahn, beginning with the production of checks and receipts in 2007 at the request of Mr. Burke up to and including the production of altered receipts in March, 2011, which is addressed further in Plaintiffs' Motion for Sanctions.

D. Defendants' Strained Interpretation of a Rescission Offer should be Disregarded and it does not Sanction a Dismissal of Plaintiffs' Claims.

"Securities law must be interpreted to protect the investing public." Brockman Industries, Inc. v. Crolina Securities Corp. & Kronenfeld, 861 F.2d 798 (4th Cir. 1988) Defendants' assert that Offers of Judgment served on Plaintiffs "by virtue of their content, also constitute offers of rescission under NRS 90.660, which were not accepted by any Plaintiffs" and argue that, as such the claims by Plaintiffs [excluding Burke] should be dismissed. Mot. 11:2-6. The Court should disregard these statutory machinations, as Defendants are simply cherry-picking statutory provisions to suit their novel, unsupported arguments.

What was served on Plaintiffs were simply garden variety Offers of Judgment under NRS 68, and the refusal to accept these offers does not warrant dismissal of Plaintiffs' claims. In fact

a glance at the Offers of Judgment clearly show they are nothing but garden variety NRCP 68 offers. However, Defendants now want to deem these offers of judgment as NRS 90.680 rescission offers. It is Defendants' ludicrous interpretation that once litigation starts they can still serve a rescission offer, but absent certain elements. What was offered was either an offer of judgment or a rescission offer, but not both.

Nevada does not have any law interpreting this issue. However, in Brockman Industries, Inc. v. Crolina Securities Corp. & Kronenfeld, 861 F.2d 798 (4th Cir. 1988), the court addressed pre and post litigation issues in South Carolina's rescission code, which contains provisions akin to Nevada's. The purpose of the South Carolina rescission statute is to " ' allow parties to avoid litigation and quickly settle their differences.' " Id. at 801. However, South Carolina's two statutes, as here, contemplate rescission, for an alternative to lengthy litigation, or damages should relief and rescission only be obtained through litigation. The court stated that "in order to foreclose future litigation, an offer of rescission must comply with statutory requirements. Defendants' Offers of Judgment did not comply with Nevada's rescission statute, and, Plaintiffs' therefore, are having to seek relief through litigation. Accordingly, and as set out further below, Plaintiffs may maintain their claims, and Defendants' Motion should be denied.

1. Applicable law for rescission offers:

NRS 90.660 specifically states "Upon tender of the security, the purchaser may recover the consideration paid for the security and interest at the legal rate of this state from the date of payment, costs and reasonable attorney's fees, less the amount of income received on the security. . . .Tender requires only notice of willingness to exchange the security for the amount specified." NRS 90.660 1(f). This statute simply sets the damages a shareholder may recover for violations of the Nevada Securities Act. However, the specific terms of a rescission offer based upon admitted violations of the Nevada Securities Act is set out in NRS 90.680.

It is telling that Defendants have not included the statute which governs the terms for an offer of rescission, NRS 90.680, which requires:

> 1. Relief may not be obtained under subsection 1 of NRS 90.660 if, before suit is commenced, the purchaser:
>
> (a) Receives a written offer:
>
> (1) Stating the respect in which liability under NRS 90.660 may have arisen and fairly advising the purchaser of the purchaser's rights of rescission;
>
> (2) If the basis for relief under subsection 1 of NRS 90.660 is a violation of subsection 2 of NRS 90.570, including financial and other information necessary to correct all material misstatements or omissions in the information which was required by this chapter to be furnished to the purchaser as of the time of the sale of the security to the purchaser;
>
> (3) Offering to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid, plus interest at the legal rate of this State from the date of payment, less income received thereon, or, if the purchaser no longer owns the security, offering to pay the purchaser upon acceptance of the offer an amount in cash equal to the damages computed under subsection 1 of NRS 90.660 plus attorney's fees; and
>
> (4) Stating that the offer may be accepted by the purchaser at any time within a specified period of not less than 30 days after the date of its receipt by the purchaser or such shorter or longer time as the Administrator by order prescribes; and
>
> (b) Fails to accept the offer in writing within the period specified under subparagraph (4) of paragraph (a).
>
> 2. The Administrator by regulation may prescribe the form in which the information specified in subsection 1 must be contained in an offer made under subsection 1.
>
> 3. An offer under subsection 1 must be delivered to the offeree or sent in a manner which assures actual receipt by the offeree.
>
> 4. If, after acceptance, a rescission offer is not performed in accordance with either its terms or this section, the offeree may obtain relief under NRS 90.660 without regard to this section.

The Offers of Judgment attached as Exhibit C to the Motion simply do not meet the requirements of a rescission offer. While Defendants may try to argue that post-litigation, they are allowed to make a rescission offer, absent certain requirements that they don't like, such a strained interpretation would result in a ludicrous outcome.

2. The Offers of Judgment proffered by Defendants were defective as so-called Rescission Offers.

Defendants claim that Plaintiffs are not entitled to relief under NRS 90.660 because they refused Defendants' Offers of Judgment. Defendants state in their Motion that they claim and rely upon the provisions of the foregoing statute and that Plaintiffs' refusal of the offer extinguishes their claim for relief. In order for Plaintiffs to accept an Offer under NRS 90.680, it was necessary to determine which Plaintiffs held the illegally issued shares that would entitle them to relief. As the Court is well aware, Defendants have made every effort to avoid, preclude and delay the discovery of such evidence. However, the Offer of Judgment did not comply with NRS 90.680 in that it was filed after the commencement of litigation.

Failure to identify misstatements and violations:

A rescission offer under NRS 90.680 must include the basis for the violations under NRS 90.660. Additionally, NRS 90.680 specifically requires that the offer "Stat[e] the respect in which liability under NRS 90.660 may have arisen and fairly advising the purchaser of the purchaser's rights of rescission." Defendants' offers failed to do so.

If the basis for the offer is made under subsection 1 of NRS 90.660 and is based upon a violation of subsection 2 of NRS 90.570, Defendants would be obligated to include any "financial and other information necessary to correct all material misstatements or omissions in the information which was required by this chapter to be furnished to the purchaser as of the time of the sale of the security to the purchaser." NRS 90.660. Defendants have not corrected the material misstatements or omissions to which the Plaintiffs were entitled at the time of sale, i.e., the fact that the shares have been distributed in violation of Nevada Securities laws.

And if relief is considered under NRS 90.660, until the full extent of the financial damages to the shareholders was understood, Plaintiffs could not accept any offers to relinquish their shares. Tendering the shares would extinguish the Plaintiffs' right to pursue the derivative claims alleged and any relief to which they may also be entitled under said causes of action. In addition, the Offers were made from Nominal Defendant Kokoweef only and did not include compensation made from Plaintiffs Hahn, HWS or Clary.

However, the Offers specifically state and require Plaintiffs to exonerate Defendants from any wrong doings. Not only was no basis for the relief contained in the offer but the offer

specifically states that "Nothing in this Offer of Judgment shall be construed as an admission by KOKOWEEF that any wrongdoing has occurred or any debt is owed to the [Plaintiff]." The Offer, if accepted, would force the Plaintiffs to agree that no violations occurred upon which relief could be granted and would not constitute a meeting of the minds which would be present in a negotiated settlement. The plain purpose of Fed. R. Civ. P. 68 is to encourage settlement and avoid litigation. The rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success on the merits. Thus, NRCP 68 offers must provide a clear baseline from which plaintiffs may evaluate the merits of their case relative to the value of the offer. Basha v. Mitsubishi Motor Credit of Am., Inc., 336 F.3d 451 (5th Cir. La. 2003) an offer of judgment made pursuant to NRCP 68 must specify a definite sum or other relief for which judgment may be entered and must be unconditional. 12 Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice and Procedure § 3002, p. 92 (2d ed. 1997). This is because the plaintiff must know unequivocally what is being offered in order to be responsible for refusing such offer. Simmons v. United Mortg. & Loan Inv., LLC, 634 F.3d 754, 764 (4th Cir. 2011).

The offer Plaintiffs' refusal to accept an invalid Offer of Judgment does not extinguish their claims against Defendants Clary and Kokoweef. In fact, the Offers, as written, may not even qualify as a proper offer under NRCP 68. Instead, the Court should recognize the overarching intent of the securities act, protection of shareholders, not issuers. Plaintiffs have been subjected to the gamesmanship of Defendants both in this litigation, and in the operation of Kokoweef.

However, the Nevada Securities Act was implemented to provide protections from such gamesmanship. Here's the current game. If the remaining Plaintiffs had accepted the offers as written, Mr. Clary could then turn around and claim that Mr. Burke is not entitled to pursue an action because the other Plaintiffs accepted the statement that no wrongdoing has occurred. This is a strategy Mr. Clary is very familiar with, as admitted in discussing his drafting of the Accredited Investors Agreement, designed to frustrate Plaintiffs who discover they have been sold illegal shares.

> MR. CLARY: ". . .and with respect to the new stockholders, I wrote then my very, very tight agreement --. . . where I think it would be an uphill battle for anybody to sue the company and it's officers and directors for securities fraud because of the provision in that agreement where they acknowledge that you've complied."

Exhibit "13 ". 27:5-12.

> MR. CLARY: "Well, we have a reversal of that [weighing the evidence] because of the fact that we aren't complying with an exemption from registration under the securities laws, and in that case, somebody sues you and says you sold me unregistered securities. Bang. Okay. Well, you come back and say well, wait a minute we .. . we sold the unregistered security. We didn't do the registration, but we complied with an exemption. Well, then the burden of proof then shifts to the defendant instead of the plaintiff to prove you complied with the exemption. Well, our agreement is the proof. . . . You introduce that agreement, and you get the plaintiff on the witness stand you . . . did you sign this, didn't you say this, didn't you say this, didn't you say this, and you agree that this complied with the exemption. What the hell are you suing them for selling unregistered securities without an exemption when you signed the Goddamn thing."

Exhibit "13 ", 28:8-25; 29:1.

Attorney's Fees were not Provided in the Offers:

NRS 90.660 allows for reasonable attorney's fees. The offer of attorneys fees was insufficient to meet the costs incurred to obtain relief for each Plaintiff entitled to relief because the underlying statute specifically calls for reasonable attorney's fees. If the offer is silent as to costs, the court may award an additional amount to cover them. Where costs are defined in the underlying statute to include attorney's fees, the court may award fees as part of costs as well. Webb v. James, 147 F.3d 617, 622 (7th Cir. Ill. 1998).

Although Mr. Burke has assumed the majority of the burden of paying the attorneys' fees, he has done so with the understanding and agreement among the Plaintiffs that this was done so for the benefit of all of the named Plaintiffs. Relief for an individual Plaintiff, if obtained, would be done so because of the expense incurred by Plaintiff Burke and acceptance of the awards without "reasonable attorneys fees" incurred in the action would be unfair and detrimental to Plaintiff Burke.

The time frames in the Offers did not meet the requirements of NRS 90.680.

A rescission offer must provide a shareholder at least thirty-days for acceptance. The Offers of Judgment simply permitted the statutory ten (10) days, and counsel then granted a ten day extension. This deficiency in the time for acceptance fails to meet the obligations of NRS 90.680.

Based on the above, Defendants' argument that Plaintiffs' rights have been extinguished for failing to accept the NRCP 68 Offers of Judgment should be denied.

3. Defendants have engaged in additional violations of the Nevada Securities Act that preclude granting their Motions.

Finally, not only have Defendants violated the provisions listed in NRS 90.660 which lead to civil liabilities, but their continual delay tactics of finding of "lost boxes," which turn out to be the same receipts, and switching existing receipts that allegedly support certain checks, as set out more fully in Plaintiffs' Motion for Sanctions, during this proceeding constitute violations of two additional provisions of NRS Chapter 90. In fact, Defendants have submitted a fugitive Supplemental Report of their Forensic Accountant Sharon McNair, over a month past their deadline, alleging new evidence which Plaintiffs have not seen nor had the chance to review, yet again another "lost box."

NRS 90.600 provides as follows:

> It is unlawful for a person to make or cause to be made, in a record filed with the Administrator or in a proceeding under this chapter a statement that the person knows or has reasonable grounds to know is, at the time and in the light of the circumstances under which it is made, false or misleading in a material respect.

NRS 90.605 provides as follows:

> In any investigation, proceeding or prosecution with respect to any 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:
>
> 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

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:

(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;

(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

(c) Delay or hinder the investigation or prosecution of any person for 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.

Defendants have willfully and knowingly:

- offered into evidence a document they knew had been forged or fraudulently altered in the false set of Bylaws offered at the Evidentiary Hearing on July 30, 2008; Exhibit "18. "
- altered receipts supporting checks already submitted as evidence with the intent to conceal violations of NRS Chapter 90 and then offered these altered receipts into evidence; See Plaintiffs' Motion for Sanctions.
- Concealed or attempted to conceal from investors that the shares sold from Explorations Inc of Nevada were illegally distributed by reorganizing the company into Kokoweef Inc. and sending letters to investors asking them to exchange shares without informing them that the shares previously issued were illegally distributed; Exhibit "16 ".
- Delayed and hindered the investigation or prosecution of this case by continually finding "lost boxes" of receipts which upon examination were mainly the same receipts previously presented or reorganized to support different checks. See Plaintiffs' Motion for Sanctions.

Based on the above, Defendants' Motion to Dismiss is without merit and should be denied.

IV.

Summary Judgment is not Warranted on the Negligent Misrepresentation Claim

Negligent misrepresentation is a special type of financial harm for which tort recovery is permitted because absent such liability, the law would not exert significant pressure to avoid such liability. See Terracon Consultants v. Mandalay Resorts, 206 P.3d 81 (Nev. 2009). As discussed further, below, Defendant Clary, as corporate counsel for Kokoweef and EIN, held certain obligations, not just to Kokoweef and EIN, but to their officers, directors and shareholders. See generally, 56 SMU L. Rev. 885, 885-86 (2003), a true and correct copy of which is attached hereto as Exhibit "19 ". Clary's misrepresentations to the board and the shareholders are the types that this tort claim were intended to address because he failed to exercise reasonable care with regard to the information he communicated. Nanopierce Tech v. Depository Trust, 168 P.3d 73 (Nev. 2007).

Defendant Clary sets out in his Motion the elements of Negligent Misrepresentation. Plaintiffs assert that the writings and statements of Clary meet that definition. Plaintiffs purchased their shares with the understanding that they were legally distributed or properly exempt from registration. Plaintiffs' securities expert has opined that there were illegal shares. Defendants have presented no competent evidence to dispute that. Not only has Clary made negligent misrepresentations prior to the filing of this lawsuit but has continued to do so during the prosecution of this action, including his Declaration attached to the Motion.

Additionally, part of Clary's argument regarding his request for summary judgment on the Negligent Misrepresentation Claim is based upon the Declaration of Reta Van Da Walker. Ms. Van Da Walker offers an opinion that there were not sales of shares in violation of NRS 90.530(11). However, this Declaration should be disregarded as it is untimely without good cause for the tardiness and inappropriate as discussed herein.

Courts viewing similar situations involving corporate counsel have held those counsel accountable for their representations, as well as their failure to properly advise their clients. In

Kelly v. Kruse, Landa, Zimmerman & Maycock, 1988 U.S. Dist. LEXIS 18657 (D. Utah 1988), corporate counsel was found to be liable for failures in communications with the board and shareholders. In a situation very similar to Plaintiff Burke in the instant case, Plaintiff, Judith Kelly, an officer of the Corporation Earth Energy Resources brought an action against the law firm of Kruse, Landa, Zimmerman & Maycock ("Kruse Landa") after a judgment was entered against her in a rescission action that was brought by investors who purchased securities that were illegally marketed by the officer's partnership. The Kelly case involved selling shares in Earth Energy for the purpose of offering a series of oil and gas drilling limited partnership to be sold to the public. The corporation sold shares that were unregistered with the State of Nebraska and not covered under any applicable exemptions, just as the shares sold by Hahn for EIN.

On April 15, 1981, Board members, Duane McCleery, Phillip Rennert and Attorney Jeffrey Thompson met with attorneys James R. Kruse and Delbert M. Draper of Kruse, Landa. At that meeting, Rennert, McCleery and Thompson told Kruse and Draper, among other information, that "[t]he company was concerned about securities compliance and was eager to comply with the applicable state securities laws, was particularly concerned about the possibility of integration of securities offerings, and wished to register its broker-dealers in those states where such registration was necessary for the sale of its securities." Kelly, 1998 U.S. Dist Lexis at 14. In the instant case, Burke met with Hahn and Clary on September 18, 2007 to discuss his concerns that the shares of EIN were being sold in violation of Nevada Securities Laws.

In Kelly, in July 1981 defendants learned from McCleery that interests in Earth Energy limited partnerships had been sold without registration or exemption in Nebraska. Kruse advised that such sales were not proper and that Nebraska sales should not be made until Earth Energy obtained registration in that state. However, no effort was made at that time by defendants to assure that this information was conveyed to the other officers and directors of Earth Energy, including plaintiff, nor was any information conveyed to such persons as to how that fact might bear on their potential liability for securities marketing activities. Moreover, and even though defendants knew at this time that Earth Energy had marketed securities in Nebraska contrary to

legal advice given them, no effective monitoring system was established to avoid that problem in future offerings. Kelly, 1998 U.S. Dist Lexis at 15.

In the instant case, although Clary did inform Burke of his liability as an officer, no information on liability for illegal shares was conveyed to the other Board members of their potential liability, including Plaintiff Michael Kehoe or Richard Dutchik. Additionally, although Clary has for the first time, in his Declaration in support of the Motion, claimed he implemented procedures to assure sales of securities in compliance with the Nevada Securities Act, he did not, in fact implement any such procedures while Plaintiffs Burke and Kehoe were on the Board, and during a time when there were hundreds of sales of shares in violation of the Nevada Securities Act. See Declaration of Ted Burke, a true and correct copy of which is attached hereto as Exhibit "20 ". In fact, not only was no information regarding liability disseminated, but Clary and Hahn's attorney M. Nelson Segel participated in a scheme to wrongfully remove Burke, Kehoe and Dutchik as directors by producing a falsified set of bylaws which changed the provisions for removal of officers from the correct bylaws dated July 7, 2007 which would have precluded the removal.

In Kelly, Kruse Landa prepared and filed a 1981-E offering memorandum which did not disclose that prior offerings and sales made by Earth Energy had been made in violation of the securities laws of Nebraska. Moreover, defendants did not disclose this fact to plaintiff or advise the Board of Directors, including plaintiff, that disclosure of Earth Energy's illegal sales in Nebraska and its corresponding contingent liability was material information that should be disclosed to investors. Defendants made the decision on their own not to disclose this information in the offering memorandum. Kelly, 1998 U.S. Dist Lexis at 19-20.

In the instant case, Clary prepared and filed a Form N9 with the State of Nevada which failed to state that prior shares of EIN stock were illegally issued and in fact represented to the shareholders that the shares were indeed legal based upon NRS 90.530 (17)(b) that requires that the underlying securities be legally exempt prior to filing the Form N9. After the reorganization of EIN into KOKOWEEF, Clary wrote to the shareholders of EIN telling them that the reorganization was effected and instructing them to trade in their shares of EIN stock for

KOKOWEEF stock. At no time did Clary disclose to any of the EIN shareholders of previously issued shares, that they had been illegally distributed in violation of the Nevada Securities Act, and the impact that illegal distribution would have on their exchanged Kokoweef shares.

And finally, in Kelly, the Court found the firm failed to recommend and implement an adequate monitoring system that would reasonably insure that both the defendants and Earth Energy would be aware of the states in which securities marketing activities were going to be conducted, prior to such marketing activities being conducted. Kelly 1988 U.S. Dist. LEXIS 18657 at 28.

Clary not only did not put into place a monitoring system that would ensure no further illegal shares were made, but actively participated in a plan to prevent future shareholders from legal relief by drafting the Accredited Investors Agreement which all new purchasers would be asked to sign. Nonetheless, even after the "Clean-up" reorganization of EIN, there were still numerous securities violations made in the sale of KOKOWEEF shares, including sales made to several of the Plaintiffs. Clary either willfully participated in assisting Hahn to make the sales or failed in his duties as a securities attorney by failing to set up a monitoring system to assure no further illegal sales were made.

Where, in support of their claim under 15 USCS § 78t(a), plaintiffs alleged that certain individual defendants had direct and supervisory involvement in day-to-day operations of defendant companies and that they influenced and controlled, directly or indirectly, decision-making of companies, including content and dissemination of various statements and Securities and Exchange Commission filings that lead plaintiff shareholders alleged were false and misleading, they pled facts from which it could reasonably be inferred individuals were control persons. Bomarko, Inc. v. Hemodynamics, 848 F. Supp. 1335, 1337 (W.D. Mich. 1993). There must be some showing of actual participation in the corporation's operation or some influence before the consequences of control may be imposed. Further, there must be some showing of actual participation in the activities which allegedly violated the securities laws. This culpable participation standard is met for purposes of this motion, by evidence that the "controlling persons" encouraged and permitted the issuance of statements they knew were false.

Bomarko, Inc. at 1341.

Mr. Clary not only encouraged and permitted the issuance of statements he knew were false after the "clean up" but he in fact made those statements when he drafted and sent letters to EIN shareholders asking them to trade in their EIN shares and deliberately hid the fact that those EIN shares were illegally issued. Mr. Clary also actively participated in further sales by drafting and advising use of the Accredited Investors Agreement.

In addition to aiding and abetting the sale of illegal securities, Mr. Clary willfully participated in the cover-up of financial misdeeds by Defendant Hahn, as more fully set out in Plaintiffs' Motion for Sanctions.

Manning Gilbert Warren III writes in his article for the Southern Methodist University Law Review (Spring 2003) that:

> Corporate lawyers now work in a world that has become tragically sensitized to executive greed and financial fraud and the consequential damage to our capital markets. The reported corporate accounting frauds during the past five years evidence an epidemic of infectious financial fraud involving an overwhelming number of companies, from the dot.coms to the blue chips. One writer has recently concluded that the executives of "the vast majority of major corporations" have been "artificially inflating their profits." He concluded, as many others have, that extravagant executive stock options, a relatively recent phenomenon in executive compensation, have provided corporate managers with "a strong incentive to mislead investors about the true condition of their companies" by resorting to the exaggeration of corporate revenues. When more than half of America's top two hundred chief executive officers have mega-options with an average value of over $ 50 million, it is obvious, as economist Michael Jensen has concluded, that corporate managers facing internal financial difficulties will be heavily penalized for telling the truth and outrageously rewarded for lying, and that the resultant "unethical behavior [will be] extended to all sorts of things." In a similar vein, a well-known accounting academic has stated that the Lucent Technologies scandal taught him that blatantly improper revenue recognition "could happen anywhere" and that "these blue chip companies were just as susceptible to accounting trickery as the small ones." Consequently, corporate counsel should reject any presumption of regularity and stop feigning ignorance when confronted with information that appears, at first blush, to raise accounting issues. All corporate lawyers must familiarize themselves with the various deceptive practices that have led to the downfall of so many publicly-held companies in the last five years. Corporate counsel must understand the mechanisms used in the past to distort corporate earnings in order to recognize the red flags of potential distortion in the future. 2003 56 SMU L. Rev. 885,

> 885-886 It would be tantamount to malpractice to abdicate their responsibilities as legal experts to corporate accountants and then cower behind those accountants when the corporate client is subsequently charged with financial fraud.

Id.

Clearly, Mr. Clary had an obligation as corporate counsel for Kokoweef to inform the EIN shareholders of the legal status of their claims and failed to do so. Further, Clary knew that Defendant Hahn had sold shares in violation of Nevada Statutes and failed to set up a monitoring plan to ensure that future shares were in compliance with Nevada Statutes. And, finally, Clary knew of the risk of being a corporate director and failed to communicate that fact to Plaintiffs Ted Burke and Michael Kehoe. The Motion to Dismiss the Second Cause of Action is deficient and should be stricken.

IV.

CONCLUSION

WHEREFORE, Plaintiffs respectfully pray for the following relief:

1. That Defendants Motion to Dismiss be denied;
2. For additional attorney's fees incurred in the preparation of this motion;
3. For any and all additional relief as this Court deems just and proper.

Dated August 19, 2011

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