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Attorneys for Defendant Kokoweef, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

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TED R. BURKE; MICHAEL R and LAURETTA L. KEHOE; JOHN BERTOLDO; PAUL BERNARD; EDDY KRAVETZ; JACKIE and FRED KRAVETZ; STEVEN FRANKS; PAULA MARIA BARNARD; PETE T. and LISA A. FREEMAN; 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; DOES I-X, inclusive; DOE OFFICERS, DIRECTORS and PARTICIPANTS I-XX, Defendants, and KOKOWEEF, INC., a Nevada corporation; EXPLORATIONS INCORPORATED OF NEVADA, a dissolved Nevada corporation; Nominal Defendants.	) CASE NO. A558629) DEPT. NO. XIII) DEFENDANT KOKOWEEF, INC.'S OPPOSITION TO PLAINTIFFS' (1) SO-CALLED *RENEWED* MOTION TO STRIKE RENEWED MOTION TO REQUIRE SECURITY FROM PLAINTIFFS AND (2) *EX PARTE* MOTION FOR ORDER SHORTENING TIME THEREON AND DEFENDANT KOKOWEEF, INC.'S COUNTER-MOTION FOR SANCTIONS DATE OF HEARING: 6/27/08 TIME OF HEARING: 10:00a.m.

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I.

THE OPPOSITION

A. Introduction

The Plaintiffs have apparently abandoned their previously submitted "Motion to Strike Renewed Motion to Require Security from Plaintiffs; Order Shortening Time" (which, according to Blackstone, was finally filed yesterday, June 18, 2008) and have this date, June 19, 2008, submitted (to the undersigned counsel via FAX) their "Renewed Motion to Strike Renewed Motion to Require Security from Plaintiffs; Order Shortening Time." On June 17, 2008, Defendant Kokoweef, Inc. filed its Opposition to the earlier Motion to Strike and to the accompanying *Ex Parte* Motion for Order Shortening Time together with its Counter-motion for Sanctions, all of which is incorporated herein by this reference.

The only major difference, however, between the earlier Motion to Strike and now the so-called *Renewed* Motion to Strike is that in his new accompanying Declaration, the Plaintiffs' counsel has changed the dates of his vacation, so that such counsel will not now be available for the evidentiary hearing scheduled for June 27, 2008 at 10:00 a.m. on the pending Renewed Motion to Require Security from Plaintiffs, which was filed on June 12, 2008, but which the Plaintiffs now seek, for the second time, to strike!

The Court summarily denied the Defendants' previous Motion to Strike at the last hearing and should to the same with their Renewed Motion to Strike, which is obviously frivolous, unnecessary and unwarranted. A motion to strike is not the proper response to the Renewed Motion to Require Security from Plaintiffs, which the Court expressly authorized Defendant Kokoweef, Inc. to file and intends,

instead, to hear on the merits at an evidentiary hearing.

In their Points and Authorities in support of their Renewed Motion to Strike, the Plaintiffs cited a Nevada Supreme Court Case, State ex rel. Office of Att'y Gen., Bureau of Consumer Prot. v. NOS Comm. Inc., 120 Nev. 65, 84 P.3d 1051 (2004), a copy of the Opinion in which is attached hereto as Exhibit A. The facts concerning the procedural error in that case have no bearing on the facts in the instant case. In the cited case, *no* affidavit were attached to the motion for preliminary injunction, where affidavits are incorporated by reference in the Defendant Kokoweef, Inc.'s Renewed Motion.

There has been no procedural error in this case, the Court denied the previous Motion to Strike, and the Court should likewise deny this essentially same so-called Renewed Motion also summarily, along with its predecessor, and without issuing an Order Shortening Time, all of which are a total waste of the time of both the Court and counsel.

II.

THE COUNTER-MOTION FOR SANCTIONS

What could be more "frivolous, unnecessary or unwarranted" than the three motions to strike that the Plaintiffs have submitted? Can it be denied that the tactics which the Plaintiffs are using through their counsel "multipl[y] the proceedings in a case as to increase costs unreasonably and vexatiously?" After the Court summarily denied the first motion to strike, isn't the submission of these two additional motions to strike equate to actions constituting their "fail[ing] and refus[ing] to comply with any order of a judge of the court?" EDCR Rule 7.60(b).

It is respectfully submitted that this is precisely the type of conduct that the above-cited Rule was intended to address.

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III.

CONCLUSION

For the foregoing reasons, the Renewed Motion to Strike and the *Ex Parte* Motion for Order Shortening Time should be denied, and the Counter-motion for Sanctions should be granted.

Respectfully submitted,

CLARY CANNON LLP

By _____
Patrick C. Clary

Attorneys for Defendant Kokoweef, Inc.

CERTIFICATE OF SERVICE BY MAILING

The above and foregoing Defendant Kokoweef, Inc.'s Opposition to (1) Plaintiffs' Motion to Strike Renewed Motion to Require Security from Plaintiffs and (2) *Ex Parte* Motion for Order Shortening Time Thereon and Defendant Kokoweef, Inc.'s Counter-motion for Sanctions were served on the Plaintiffs by mailing a copy thereof, first-class postage prepaid, to their attorney, Neil J. Beller, Esq., Neil J. Beller, Ltd., 7408 West Sahara Avenue, Las Vegas, Nevada 89117, and were served on Defendants Larry L. Hahn, individually, and as President of and Treasurer of Kokoweef, Inc. and former President and Treasurer of Explorations Incorporated of Nevada, and Hahn's World of Surplus, Inc. by mailing a copy thereof, first-class postage prepaid, to their attorney, M Nelson Segel, Esq., 724 South Ninth Street, Las Vegas, Nevada 89101, on June 19, 2008.

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By _____
Patrick C. Clary

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120 Nev. Adv. Op. No. 11

THE STATE OF NEVADA EX REL. OFFICE OF THE ATTORNEY GENERAL, DIVISION OF CONSUMER PROTECTION; FRANKIE SUE DEL PAPA, IN HER CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF NEVADA; AND TIMOTHY HAY, IN HIS CAPACITY AS THE CONSUMER ADVOCATE, Appellants,
v.
NOS COMMUNICATIONS, INC., A MARYLAND CORPORATION; AND AFFINITY NETWORKS INCORPORATED, A CALIFORNIA CORPORATION, Respondents.

No. 40348.

Supreme Court of Nevada.

February 25, 2004.

Appeal from an order denying injunctive relief. First Judicial District Court, Carson City; Michael R. Griffin, Judge.

Affirmed.

Brian Sandoval, Attorney General, and John R. McGlamery, Deputy Attorney General, Carson City, for Appellants.

Lionel Sawyer & Collins and Laura K. Granier and Dan R. Reaser, Reno, for Respondents.

BEFORE SHEARING, C.J., BECKER and GIBBONS, JJ.

OPINION

PER CURIAM:

This appeal involves determination of the standards that govern the issuance of a preliminary injunction when a government agency seeks injunctive relief under a consumer protection statute. To obtain injunctive relief, the state or government agency must demonstrate a reasonable likelihood that the statutory conditions authorizing injunctive relief exist. No showing of irreparable injury or inadequate legal remedy is necessary. Although in this case the district court applied an incorrect standard in reviewing the request for injunctive relief, we affirm the district court order on other grounds.

FACTS

Respondents NOS Communications, Inc., and Affinity Networks Incorporated (collectively, the Company) provide intrastate and interstate telecommunication

services to business and residential customers throughout the nation, including Nevada.

Based on numerous customer complaints filed against the Company, appellant Office of the Attorney General, Division of Consumer Protection (DCP) determined that the Company was engaging in deceptive trade practices in violation of NRS 598.0963. NRS 598.0963(3) provides that the Attorney General's Office may bring an action for injunctive relief against a person engaging in a deceptive trade practice.

Before the DCP filed an enforcement action under NRS 598.0963, the Company filed a complaint for declaratory judgment and injunctive relief against the DCP. The Company sought a declaration that it was not engaging in deceptive trade practices.

Shortly after filing an answer, but without filing a counterclaim, the DCP filed a motion for a preliminary injunction. The DCP sought to enjoin the Company from engaging in allegedly deceptive trade practices. The Company denies that it engaged in deceptive trade practices.

The district court denied the DCP injunctive relief, concluding that an existing administrative hearing—a Nevada Public Utility Commission (PUC) rulemaking workshop involving enactment of a consumers' bill of rights involving some of the disputed practices—was an adequate remedy at law. This appeal followed.

DISCUSSION

Whether a preliminary injunction should be granted is a question addressed to the district court's discretion.[1] "The denial of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact."[2]

I. Procedural defect

NRS 598.0963(3) allows the DCP to obtain injunctive relief when it "bring[s] an action in the name of the State of Nevada." Pursuant to the statute, the DCP is required to assert an affirmative claim to obtain injunctive relief. Because the DCP did not assert an affirmative claim for injunctive relief in its answer or through a counterclaim and did not attach affidavits containing admissible statements or admissible documents to the motion, we conclude that the motion for preliminary injunction was procedurally defective. Therefore, we conclude that the district court did not abuse its discretion by denying the DCP injunctive relief.[3] However, we address the merits of the district court's ruling to clarify our jurisprudence in this area.

II. Preliminary injunction standard for statutory enforcement action

The DCP urges this court to follow Nevada Real Estate Commission v. Ressel[4] and caselaw from other jurisdictions that presume irreparable injury in a statutory enforcement action. The Company argues that the district court applied the proper

traditional standard for injunctive relief, requiring a showing of irreparable injury and an inadequate remedy at law.[5] We agree with the DCP.

In Ressel, a government agency sought injunctive relief in a statutory enforcement action. Unlike the case at bar, the respondents in Ressel admitted that the statutory conditions had been satisfied. This court concluded that the government agency was not required to prove irreparable harm in an enforcement action when the statutory conditions were met.[6]

Like Nevada, other jurisdictions presume irreparable injury when the statutory conditions of an enforcement action have been satisfied.[7] It is well settled that a state or government agency seeking injunctive relief based on an enforcement action need not plead or prove irreparable injury or an inadequate remedy at law.[8] Instead, the state or government agency must only "show that the statute was violated and that the statute relied upon specifically allows injunctive relief."[9]

In this case, in order to obtain injunctive relief, the DCP was required to show a reasonable likelihood that the statute was violated. Specifically, the DCP was required to demonstrate a reasonable likelihood that the Company was engaging in deceptive trade practices in order to obtain injunctive relief. The district court, however, analyzed the motion using traditional standards for granting equitable, rather than statutory, injunctive relief. It found that the PUC hearings constituted an adequate legal remedy and that the DCP failed to show irreparable harm. The district court then denied the motion for injunctive relief.

By considering whether the DCP had an adequate legal remedy, the district court erred because equitable considerations, such as irreparable harm and an inadequate legal remedy, are presumed in a statutory enforcement action. Thus, the only issue before the district court was whether the DCP presented admissible evidence establishing a reasonable likelihood that the Company was engaging in deceptive trade practices.[10] Once such a showing is made, an injunction should issue.

CONCLUSION

To obtain injunctive relief in a statutory enforcement action, a state or government agency need only show, through competent evidence, a reasonable likelihood that the statute was violated and that the statute specifically allows injunctive relief. Because the DCP did not assert a counterclaim or properly support its request, we conclude that the motion for preliminary injunction was procedurally defective and was properly denied. Therefore, we affirm the district court order denying the DCP injunctive relief.[11]

Notes:

1. Nevada Escrow Service, Inc. v. Crockett, 91 Nev. 201, 202-03, 533 P.2d 471, 472 (1975).

2. U.S. v. Nutri-cology, Inc., 982 F.2d 394, 397 (9th Cir. 1992).

3. See Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (stating that appellate court will uphold lower court decision even if it relied on wrong grounds so long as it reached correct result).

4. 72 Nev. 79, 294 P.2d 1115 (1956).

5. See Number One Rent-A-Car v. Ramada Inns, 94 Nev. 779, 780-81, 587 P.2d 1329, 1330 (1978).

6. See Ressel, 72 Nev. at 80-81, 294 P.2d at 1115-16 (concluding that, where a state's policy is declared by statute allowing a government agency to seek injunctive relief, the sole conditions for the issuance of such an injunction are those fixed by the act itself).

7. See, e.g., U.S. v. Odessa Union Warehouse Co-op, 833 F.2d 172, 175 (9th Cir. 1987) (noting that a court's function in deciding whether to issue an injunction authorized by statute to enforce and implement congressional policy is different than when weighing claims of two private litigants); Vill. of Riverdale v. Allied Waste Transp., 777 N.E.2d 684, 688 (Ill. App. Ct. 2002) (concluding that the principle underlying the willingness of courts to issue an injunction based on a statutory enforcement action is that harm to the public at large can be presumed from the statutory violation alone); Ackerman v. Tri-City Geriatric & Health Care, 378 N.E.2d 145, 148-49 (Ohio 1978) (concluding that a statutory action granting a government agent the right to sue for injunctive relief has a different history and purpose than an equitable action for injunctive relief); 42 Am. Jur. 2d Injunctions § 23 (2000) (explaining that when permanent injunctive relief is sought pursuant to statutory authority, no showing of irreparable injury is necessary and courts should not seek to apply their equitable discretion to grant an injunction).

8. Vill. of Riverdale, 777 N.E.2d at 688.

9. Id.

10. The Company argued below, and on appeal, that the DCP was prohibited from seeking injunctive relief on other grounds, including: (1) the filed rate doctrine, (2) preemption by PUC regulatory authority, (3) unconstitutional impairment on interstate commerce, (4) limitation of statutory provisions to unauthorized transfers of telecommunication provider or unauthorized charges, (5) preemption by Federal Communications Commission, and (6) equal protection violations. The district court rejected these contentions and we affirm.

11. Nothing in this opinion is intended to prohibit the DCP from seeking to amend its pleadings and filing a new motion for injunctive relief.
