IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

Lane McNamara, et al., §
§
Plaintiffs, §
§
v. §
§
Bre-X Minerals Ltd., et al., §
§
Defendants. §
§

Civil Action No. 5-97-CV-159
(Jury)

SUPPLEMENTAL AFFIDAVIT OF PAUL MILLER

STATE  OF  TEXAS §
§
COUNTY OF BOWIE §

Paul Miller, being duly sworn, deposes and says:

1. My name is Paul Miller. I am a partner with the law firm of Miller, James, Miller, Wyly & Hornsby. I am co-counsel for plaintiffs in this case. Unless otherwise noted, I have personal knowledge of the facts contained in this affidavit; and the opinions and conclusions I have drawn are made on behalf of plaintiffs. This affidavit is to advise the Court of recent matters pertinent to the pending dismissal motions.

Ontario Bre-X Litigation

2. In an April 9, 1998 decision (Exh. A), the motions court in Ontario ruled on threshold pleading objections by the defendants in the Bre-X litigation there. That litigation largely consists of a series of stockbroker-client lawsuits. (Exh. B is a descriptive chart of the cases.) After a week of arguments on dismissal motions, the court ruled that the suits may proceed, at least at this stage, on common law claims of misrepresentation and conspiracy and on a statutory claim of false advertising, albeit with “reservations” about several claims:
• “I have very serious reservations about the sufficiency of this pleading” against broker Scotia McLeod. (Exh. A at 18)
• The “claim is so scant as to only pass . . . by a mere whisper.” (18)
• “I also have reservations” as to other brokers. (18)
• The pleadings “as against the analysts are at best unclear.” (27)
• The pleadings “do, just barely, contain the requisite elements” of fraud. (28)

The Ontario court struck all claims of breach of fiduciary duty (21-22) and of a professional engineers statute (34-35), struck all broker class definitions (16), and stayed claims against certain defendants (33-34).

3. As the decision reflects, the Ontario litigation is not the Canadian counterpart to this U.S. suit, despite what defendants repeatedly have suggested to this Court:

• The defendants are different. Key defendants here -- adviser J.P. Morgan, market-maker Lehman Brothers, and recently-added Barrick Gold -- are not involved in the Ontario litigation.

• The main claims are different. Unlike in the U.S., there are no private civil remedies available under Canadian securities laws. For that reason, the Ontario litigation is primarily based on common law misrepresentation claims which normally would require proof of individual reliance.

• The relief sought is different. The suits against the principal targets of the Ontario litigation -- seven Canadian brokerage firms -- do not seek relief on behalf of a class of all injured Bre-X/Bresea purchasers (as the U.S. action does), but rather only for groups of former clients of the brokers.

4. According to defendants’ statements in Canada (contrary to what they are telling this Court), the Ontario ruling was a defeat for the plaintiffs. Nesbitt bragged that the Ontario “judge decided in favor of the seven broker dealers, including Nesbitt,” and its counsel reportedly “said he won some key victories”; Felderhof’s attorney “thought the result [for plaintiffs] was as bad as [they] reasonably should have expected.” (Exh. C, Apr. 9, 1998 Nesbitt press release; Exh. D, Apr. 10, 1998 Globe & Mail article). The broker defendants and Kilborn are appealing the court’s
rulings upholding claims for misrepresentation and false advertising, and they are attacking the false advertising claim on constitutional grounds. (See, e.g., Exh. E, broker appeal motions) These appeals may delay progress in the case. (Exh. F, Apr. 16, 1998 Financial Post article)

Evidence of U.S. Conduct/Effects

5. **Coates affidavit.** On April 6, 1998, former Bre-X controller Bryan A. Coates filed in the Calgary bankruptcy court a sworn affidavit dated January 31, 1998. (Exh. G are copies of two exhibits to the Coates affidavit.) One of the exhibits is excerpts from draft minutes for a December 15, 1996 Bre-X board of directors meeting. They reflect that, along with two of Bre-X’s U.S. advisers -- J.P. Morgan (Doug McIntosh and Leslie Morrison) and Republic Bank of New York -- the Bre-X directors debated and adopted a $5 million offshore “indemnity” fund for their protection. This was the same day as Barrick’s letter about its no-gold independent assay results. (See Exh. 2 to Wyly Aff., Dkt. #163; see also Amended Compl. ¶63)

6. Another Coates exhibit is a March 10, 1997 document titled, “Bre-X Group of Companies: Presentation to Chubb Insurance Company of Canada.” Bre-X outlines the “History and Operations” of the Bre-X/Bresea/Bro-X group and its “Busang Partner Selection.” Significantly, it explains the group’s stockholder makeup, reflecting a major American ownership:

<table>
<thead>
<tr>
<th></th>
<th>Can.</th>
<th>US</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bre-X</td>
<td>%</td>
<td>53.1</td>
<td>44.1</td>
</tr>
<tr>
<td>Bresea</td>
<td>%</td>
<td>39.1</td>
<td>56.3</td>
</tr>
<tr>
<td>Bro-X</td>
<td>%</td>
<td>45.8</td>
<td>49.8</td>
</tr>
</tbody>
</table>

[28 [sic: ] 2.8]
Bre-X also notes the companies’ interlocked boards and managements (which is relevant to “control person” issues regarding personal jurisdiction):

**Board of Directors**

<table>
<thead>
<tr>
<th></th>
<th>Bresea</th>
<th>Bre-X</th>
<th>Bro-X</th>
</tr>
</thead>
<tbody>
<tr>
<td>D.G. Walsh</td>
<td>*</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>J.B. Felderhof</td>
<td>*</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>R.C. Francisco</td>
<td>*</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>T.S. McAnulty</td>
<td>*</td>
<td></td>
<td>*</td>
</tr>
<tr>
<td>H. Lyons</td>
<td>*</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>P. Kavanagh</td>
<td></td>
<td>*</td>
<td>*</td>
</tr>
</tbody>
</table>

D.G. Walsh - Chairman, President & CEO
Bresea, Bre-X, Bro-X

J.B. Felderhof - Vice-Chairman
Bresea, Bre-X, Bro-X

R.C. Francisco - Executive Vice-President & CFO
Bresea, Bre-X, Bro-X

T.S. McAnulty - Vice President Investor Relations

B.A. Coates - Vice President, Corporate Controller & Secretary

H. Lyons - Independent Financial Consultant

P. Kavanagh - Former Senior VP Explorations American Barrick & President Newmont Canada
Consulting geological engineer

The document lists the companies’ U.S. and other advisers:

**Current Professional Advisors**

- **Auditors:** KPMG [US]
- **Legal:** Bennett Jones Verchere [Can]
  MacLeod Dixon [Can]
  Sullivan & Cromwell (US)
  Sharwood Elkie Wilkie (Aus)
- **Financial:** JP Morgan [US]
  Republic National Bank [US]
- **Tax Advisors:** KPMG [US]
  Price Waterhouse [US]
  Loyers & Volkman [Can]
- **Bankers:** CIBC [Can]
The presentation concludes with plans to “Develop Busang deposit . . . Current reserves - 71 million ounces; Potential - 100-200 million ounces,” while emphasizing the “high profile” of the group “due to its exploration success.”

7. Lyons interview. During this same 1996-97 time period, during which J.P. Morgan was advising Bre-X on its corporate strategies, Bre-X directors were considering yet another critical issue: the rounded gold in its core samples. Incredibly, as defendant Lyons confirms in his FIA interview (Exh. H), the board debated the point “again and again and again”:

DH At any point prior to this point in time, the end of March [1997] . . ., had he [defendant Kavanagh] raised anything at any meetings you attended that suggested there was any concern with the situation at Busang?

HL There’s been about four meetings where the topic of rounded gold and sheared gold have come up. We went through those meetings at least four times with Felderhof and Kavanagh leading the charge, . . . and Kavanagh would always come around and he would agree that you know, this does happen with that type of deposit. That subject has been discussed at a minimum of four times. That was all before this point in time. Yes, that’s right.

DH Do you recall what triggered the discussion?

HL It was either . . . a mining analyst for an investment dealer or a geologist somewhere got a hold of the Normet Report from June of ‘96. That would have been in the fall [of 1996], I think and raised the question of the rounded gold and the sheared gold . . . We’d been through that a number of times, so. . . .

DH How did the various parties stack up on that issue at the meeting, was Felderhof in charge of that?

HL Well, Felderhof and a component of course was the theory that, that was a common occurrence in at least three major deposits in Indonesia and New Zealand and at this -- that this is the way it happens and that’s that, and it would be discussed for maybe an hour. Usually
those conversations were done on long distance phone calls for about an hour. We’d discuss that.

DH You say usually Mr. Kavanagh would come around . . . ?

HL Yes, he would question it. I can remember at least two or three days where he would question the basic assumption. We’d go back over it again and again and again . . . .

(Exh. H at 13-14) “Kavanagh would feel uncomfortable with [the presence of rounded gold] so we would go over it again.” (Exh. H at 19) As the Court knows, the presence of river-bed rounded gold in the hard-rock Busang samples was among the most fundamental red flags recognized by Strathcona in compiling its May 1997 report that confirmed the fraud.

8. J.P. Morgan estimate. At the dismissal motions hearing, counsel for J.P. Morgan scoffed that anyone could rely on its U.S. analyst’s crucial declaration -- made in July 1996 to the Financial Post, a respected and widely-read Canadian business daily newspaper -- that Busang may hold as much as 150 million ounces of gold. “What investor conceivably could look at [his statement in] the paper . . . and think that makes a difference in their investment decision?” Transcript at 70 (Mar. 30, 1998).

9. In fact, according to materials that plaintiffs recently obtained, even other analysts relied on the statement as a credible estimate by an informed professional (one who had toured Busang). These excerpts about Bre-X from the “Gold Stock Analyst” newsletter reflect the lasting impact of the J.P. Morgan statement:

• ANALYSIS: . . . July/Aug: 16 analysts visited prop, many saying 100 mil oz there; Morgan Stanley [sic] ests 150.0 mil oz (must really want to be Co’s lead US/Intl banker/broker for likely future financing and/or equity sales now poss w/NASDAQ listing). (9/96 report)

• ANALYSIS: Most analysts saying 100 mil oz; JP Morgan est 150.0 mil oz. (1/97 report)
• ANALYSIS: Most analysts saying 100 mil oz; JP Morgan est 150.0 mil oz. (5/97 report)

Exh. I is copies of pages from “Gold Stock Analyst,” a monthly newsletter edited by a U.S.-based mining analyst. This important pre-NASDAQ conduct by J.P. Morgan, a U.S. defendant, which was directed to and impacted Canadian investors (as well as Americans), was a key event in the Bre-X scandal. Under Robinson and Itoba, this U.S. conduct alone would provide subject matter jurisdiction for plaintiffs to bring 1934 Act claims against all defendants.

10. U.S./Texas effects. The American mutual funds that purchased large blocks of Bre-X stock were widely held in this State. According to records that plaintiffs secured this month, four of these U.S. funds alone sold over $1.2 billion of their shares in Texas in 1996-97:

Fidelity [Magellan; ContraFund; American Gold; Precious Metals] Boston $1.17 billion
Invesco [Gold Portfolio] Denver $49.8 million
IDS [Precious Metals; Global Growth] Minneapolis $16.7 million
United Services [U.S. World Gold] San Antonio $5.9 million

(Exh. J is copies of reports to the Texas Securities Board, on behalf of the mutual funds listed above for the fiscal years during which they held Bre-X stock, as well as a summary chart prepared for the Court’s convenience.)

11. Defendants’ injunction threats. Remarkably, recent Canadian press reports reflect that some defendants may be planning to seek a “rare anti-suit injunction” in Ontario, should this Court refuse to exclude Canadians from the proposed class. (See, e.g., Exh. K, Apr. 22, 1998 Financial Post article) Suffice it to say that any such attempt to endrun the Court’s authority would

---

1 Similarly, this analyst relied on estimates by defendants Kilborn -- “the only indep determined number” (4/96 report) -- and Nesbitt, whose “respected analyst [Bianchini] . . . raised est to 62 mil tot oz at site” (9/96 report), at the same time as the J.P. Morgan 150 million-ounce declaration.
be improper, unprecedented, and extremely damaging to the interests of the class and to the jurisdiction of this Court.

David Walsh Affidavit

12. Plaintiffs (and the public) recently learned that defendant Walsh and his family drained $36 million from Bahamian bank accounts after his companies’ fraud was uncovered. Within days of the Strathcona report in May 1997, Walsh sent handwritten orders to his Bahamas banker (“effective immediately”) to close his accounts, which were held by “international business companies” structured to conceal his family’s true ownership, and to hand over the money to his wife “by 3 p.m. today. . . . Do not delay this matter any further.” (¶15, Exh. L, Walsh Aff. dated July 18, 1997) When the bank balked, Walsh sued. (Exh. M, Apr. 20, 1998 Globe & Mail article) He eventually secured orders releasing the funds (which were procured from insider stock sales).

13. Importantly, Walsh swore to facts that undercut aspects of the pending dismissal motions. First, despite Kilborn’s portrayal of its role as a detached computer modeler, the Bre-X group actually relied on it to “confirm” critical mining procedures. According to Walsh,

Bre-X had, over the period of exploration and drilling, retained independent geological consultants of international stature [i.e., Kilborn], to confirm our drilling and assaying results.

(Exh. L ¶10) Similarly, contrary to Felderhof’s insistence that he was a humble office manager with no control over the group, Walsh affirms that

Mr. Felderhof[’s role was] to provide and supervise the geological expertise [for Bre-X] through a team of geologists recruited by him and employed by Bre-X or its subsidiaries.

(Exh. L ¶3) Thus, Kilborn’s and Felderhof’s denials of responsibility are not credible, as even one of their co-defendants confirms.
14. Equally ridiculous is defendants’ insinuation that Walsh’s absence from the case so far is “strategic.” Joint Response at 7 (Dkt. #190). Quite simply, he’s been dodging service. After months of trying to catch him, plaintiffs now finally appear close to serving Walsh. (Exh. N is a copy of his attorney’s Apr. 21, 1998 agreement with plaintiffs’ counsel regarding service in the Bahamas.) And, as the Court is aware, defendant Bre-X is in the case; it has agreed, and the Calgary bankruptcy court has ordered, that the statutory stay is lifted for purposes of certification of the proposed plaintiff class. (Exh. O is a copy of Bre-X’s Nov. 25, 1997 consent.)

Scienter Pleading

15. Plaintiffs have previously demonstrated that, in passing the PSLRA, Congress did not intend to alter the standards for pleading scienter under the securities laws. Under the majority view, the requisite inference of scienter may be established by identifying circumstances indicating conscious or reckless behavior or by alleging facts showing a motive for committing fraud and a clear opportunity for doing so. (Dkt. # 76 at 9-14). In Zuckerman v. Foxmeyer Health Corp., 1998 U.S. Dist. LEXIS 4227 (N.D. Tex. Mar. 31, 1998) (Exh. P), the court adopted the prevailing position. In so doing, it specifically rejected a key defense advanced by defendants here -- namely, that the PSLRA eliminated the recklessness and motive/opportunity tests as standards for liability under the securities laws. Id. at *12 n.2 and *13.

Cross-Border Classes

16. In re Lloyd’s Am. Trust Fund Litig., 1998 U.S. Dist. LEXIS 1199 (S.D.N.Y. Feb. 4, 1998) (Exh. Q), demonstrates the lack of merit of one of defendants’ objections to including certain Canadian class members in this case. The court in Lloyd’s certified a class comprising all non-settling members of certain Lloyd’s underwriting syndicates, even though non-U.S. members make up two-thirds of the class. The largest non-U.S. group, representing 39 percent of the whole class,
reside in the United Kingdom, where Lloyd’s is located. The court rejected the argument that foreign residents should be excluded from a U.S. class action if a U.S. judgment would not have res judicata effect in their countries of residence. *Id.* at *43-45.

- 

Sworn to me this _____ day of April, 1998. 

Paul Miller

__________________________
Notary Public, in and for the State of Texas