

IN THE SUPREME COURT OF THE STATE OF NEVADA

NANOPIERCE TECHNOLOGIES, INC.,
A NEVADA CORPORATION; STEPHEN
SEITZ, AN INDIVIDUAL; JANE SEITZ,
AN INDIVIDUAL; KATHY KNIGHT-
MCCONNELL, AN INDIVIDUAL;
JAMES STOCK, AN INDIVIDUAL;
MAUREEN O'SULLIVAN, AN
INDIVIDUAL; AND HELEN KOLADA,
AN INDIVIDUAL,

Appellants,

vs.

THE DEPOSITORY TRUST AND
CLEARING CORPORATION; THE
DEPOSITORY TRUST COMPANY; AND
THE NATIONAL SECURITIES
CLEARING CORPORATION,
Respondents.

No. 45364

FILED

NOV 05 2007

BY *[Signature]*
ANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER DENYING REHEARING

This is a petition for rehearing, styled "Petition for Rehearing and/or Clarification," of our September 20, 2007 opinion affirming a district court order that dismissed appellants' securities fraud action.

Contrary to the title of appellants' rehearing petition, appellants state that they are "not seek[ing] rehearing" of our September 20 opinion. Instead, appellants request that this court "remand this case to the district court with directions to permit [them] to seek leave to file a second amended complaint, thereby giving [them] the opportunity to allege state-law challenges" that do not conflict with the Securities Exchange Act of 1934 or any regulations promulgated thereto. But because we affirmed the district court's order dismissing appellants' complaint, effectively terminating this case, no portion of the case remains

07-24140

to be litigated.¹ Second, leave to amend a complaint generally is within the district court's sound discretion,² and thus should have been sought in the district court in the first instance.³

¹See U.S. Ex Rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 241 (1st Cir. 2004) (recognizing that the a complaint's dismissal constitutes a final decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" (quoting Acevedo-Villalobos v. Hernandez, 22 F.3d 384, 388 (1st Cir. 1994)); cf. Greene v. Dist. Ct., 115 Nev. 391, 393-94, 990 P.2d 184, 185 (1999) (recognizing with approval the policy favoring the finality of judgments and terminating litigation expeditiously); Zalk-Josephs Co. v. Wells Cargo, Inc., 81 Nev. 163, 400 P.2d 621 (1965) (noting that when a district court dismisses a case for failure to state a claim on which relief can be granted, and the plaintiff fails to request leave to amend the complaint, the dismissal constitutes a decision on the merits for res judicata purposes).

As appellants point out in their petition, the district court's order does not indicate whether its dismissal was with prejudice. But "in the absence of a clear statement to the contrary," the dismissal of a complaint for failure to state a claim on which relief can be granted "is presumed to be with prejudice." See U.S. Ex Rel. Karvelas, 360 F.3d at 241; see also Greene, 115 Nev. at 393, 990 P.2d at 185 (noting that "[f]ederal court interpretations of Federal Rules of Civil Procedure, as counterparts to the Nevada Rules of Civil Procedure, are persuasive but not controlling authority").


²See NRCP 15(a) (providing that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . [o]therwise a party may amend the party's pleading only by leave of court"); Kantor v. Kantor, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) (noting that a motion for leave to amend under NRCP 15(a) is addressed to the district court's sound discretion).

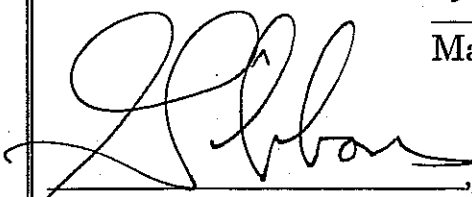
³In opposing respondents' motion to dismiss the amended complaint based on NRCP 9(b), appellants asserted that any failure of their amended complaint to comply with that rule's pleading with particularity requirement "subjects the complaint to . . . dismissal with leave to amend."

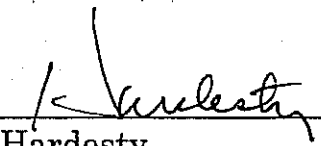
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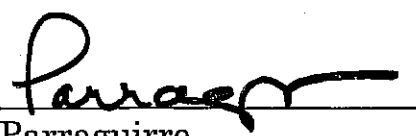
Additionally, even ignoring appellants' plain statement that they are "not seek[ing] rehearing" of our September 20 opinion, and instead construing appellants' petition as one to rehear the merits of our decision, rehearing is not warranted.⁴

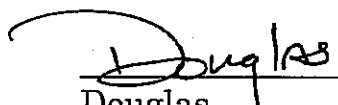
It is so ORDERED.

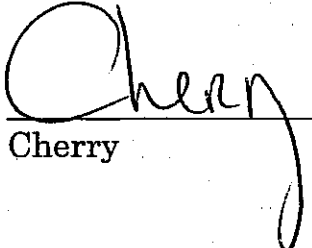

_____, C.J.
Maupin



_____, J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Cherry


_____, J.
Saitta

... continued

Appellants' request for leave to amend unequivocally pertains only to the particularity of their fraud allegations, and thus is insufficient to constitute a request for leave to amend their complaint if the district court concluded, under NRCP 12(b)(5), that they failed to assert a claim on which relief could be granted. Indeed, appellants' rehearing petition fails to direct us to any request made in the district court that they be given leave to amend their complaint to assert viable state law claims.

⁴NRAP 40(c).

cc: Hon. Brent T. Adams, District Judge
Robert Eisenberg, Settlement Judge
Christian Smith & Jewell
Heard, Robins, Cloud, Lubel & Greenwood, LLP
Koerner, Silberberg & Weiner, LLP
Lionel Sawyer & Collins/Reno
Michael J. Morrison
O'Quinn, Laminack & Pirtle
Laxalt & Nomura, Ltd./Reno ✓
Proskauer Rose LLP
William E. Cooper Law Offices
Bailey Merrill
Brian G. Cartwright
North American Securities Administrators Association, Inc.
Mark Pennington
Woodbury & Kesler
Washoe District Court Clerk