

Aug. 28. 2008 11:32AM

BURTON HAYNES MARANO MITCHELL

No. 5203 P. 1/20

STATE OF IDAHO)
County of KOOTENAI)⁹⁹

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**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO, DEPARTMENT OF
FINANCE, SECURITIES BUREAU,

Plaintiff,

vs.

JACK LEE SMILEY.

Defendant.

Case No. **CV 2007 2341**

**ORDER ON MOTIONS TO STRIKE,
AND MEMORANDUM DECISION
AND ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

I. ORDER ON MOTIONS TO STRIKE.

On May 22, 2008, plaintiff State of Idaho, Department of Finance, Securities Bureau (State) filed its Motion for Summary Judgment. Extensive briefing was filed by both parties, affidavits were filed by both parties, and oral argument was held on July 28, 2008. Near the beginning of that oral argument, counsel for defendant Smiley (Smiley) did not object to the late filing of the Second Affidavit of Alan Conilogue (State's counsel), which contained copies of two district court decisions, deposition transcript excerpts of the November 20, 2007 deposition of Smiley, and Exhibit 2 to that deposition of Smiley, as long as the defendant had an opportunity to respond to the case law attached to that Second Affidavit of Alan Conilogue. The Court allowed Smiley until July 30, 2008, to file a response brief. Such a brief was filed on July 30, 2008, and has been reviewed by the Court.

At the beginning of oral argument on the State's summary judgment motion, the

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Court heard argument on Motions to Strike that were filed by both parties, regarding the opposing parties' affidavit. This Court pronounced its rulings on the record, and on two separate occasions in making that pronouncement, ordered counsel for Smiley to prepare an order to that effect. It has been one month since that hearing, and no proposed order has been submitted by defendants counsel. Accordingly;

IT IS HEREBY ORDERED plaintiff's (State's) Motion to Strike the Affidavit of Jack Smiley is **DENIED**.

IT IS FURTHER ORDERED defendant's (Smiley's) Motion to Strike the Affidavit of Timothy Martin is **GRANTED** as to the first sentence of paragraph 7; the first sentence of paragraph 8; all of paragraph 9 and the first sentence of paragraph 11; due to the fact that Timothy Martin has not been disclosed as an expert, unless those portions are offered to show what Timothy Martin advised the plaintiff regarding Timothy Martin's investigation (not for the truth of the matter asserted). In all other aspects, the Motion to Strike the Affidavit of Timothy Martin is **DENIED**.

II. MEMORANDUM DECISION AND ORDER GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT.

A. Background.

In 2004, Smiley planned to purchase Iraqi currency, "Dinar", while such currency was bottomed-out, and then resell it once the Iraqi economy recovered. Smiley began soliciting money from investors, allegedly promising a return of \$1 million on an investment of \$1,000. Smiley states that he merely promised that \$1,000 would purchase 1 million Dinar. Smiley would transact these purchases and sales of currency through a contact he had in Iraq, a third party known as "Ali." The Idaho Department of Finance (State) learned of Smiley's "scheme" and issued a Cease and Desist Order on June 2, 2005. The State alleges that defendant entered into 63 agreements, which

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Smiley named "Joint Venture Agreements", before the Cease and Desist Order issued, and that Smiley entered into 98 more Joint Venture Agreements **after** the Cease and Desist Order issued.

The State argues Smiley violated both the Idaho Uniform Securities Act and the Idaho Commodity Code. Smiley argues that whether the joint venture agreements constituted a "security" is a question for the jury which this Court cannot resolve on summary judgment, that questions of material fact remain, and that the State is not entitled to judgment as a matter of law.

B. Standard of Review.

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991). Standards applicable to summary judgment require the district court to liberally construe facts in the existing record in favor of the party opposing the motion, and to draw all reasonable inferences in favor of the non-moving party. 119 Idaho 434, 436, 807 P.2d 1272, 1274. If the record contains conflicting inferences or if reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* The moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

The question of whether a transaction constitutes a security has been interpreted both as a question of fact and a question of law. *State of Idaho, Department of Finance*

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v. Resource Service Co., Inc., 130 Idaho 877, 880, 950 P.2d 249, 252 (1997) (citations omitted). The Supreme Court of Idaho has stated that it:

[A]grees with those jurisdictions holding that, although characterization of a transaction raises questions of both law and fact, the ultimate issue of whether a particular set of facts constitutes an investment contract is a question of law. *U.S. v. Carman*, 577 F.2d 556, 562 (9th Cir. 1978).

Resource Service Co., 130 Idaho at 880. Questions regarding the materiality of omissions in security fraud cases can be determined material as a matter of law at summary judgment where the omissions are "so obviously important to an investor that reasonable minds could not differ as to their materiality." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S.Ct. 2126, 2133 (1976)

C. Analysis.

1. The Idaho Uniform Security Act.

a. Smiley's Actions Fall Within the Idaho Uniform Security Act

The State argues the agreements Smiley referred to as Joint Venture Agreements were in fact "investment contracts" which are defined as "securities" under the Idaho Uniform Security Act (the Act). "Security" is defined in the Act as:

[A] note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract;....

I.C. § 30-14-102(28). The Act includes as an investment contract:

[A]n investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor. "Common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors...

I.C. § 30-14-102(28)(d). The United States Supreme Court has set forth the *Howey-*

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Forman test to determine the existence of an investment contract. The Idaho Supreme Court adopted the *Howey-Forman* test to identify investment contracts under the Idaho Securities Act in *Resource Service Co.*, *supra*, 130 Idaho 877, 882, 950 P.2d 249, 254. The *Howey-Forman* test for the existence of an investment contract requires: (1) an investment of money, (2) a common enterprise, and (3) a reasonable expectation of profits to be derived from the entrepreneurial or management efforts of others. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-299, 66 S.Ct. 1100, 1102-1103 (1946); *United House Found. Inc., v. Forman*, 421 U.S. 837, 852, 95 S.Ct. 2051, 2060 (1975). In *Resource Service Co.*, the Idaho Supreme Court stated that in applying the *Howey-Forman* test, it is important to note that the federal definition of "security" embodies a flexible, not static, principle. 130 Idaho 877, 881, 950 P.2d 249, 253. The definition of "security" was purposefully made broad so that it would encompass the "countless and variable schemes devised by those who seek the use of money of others on the promise of profits." *Howey*, 328 U.S. 293, 299, 66 S.Ct. 1100, 1103

The State argues that the first prong of the *Howey-Forman* test is met because the investors considered the "Dinar scheme" an investment in which they would give Smiley money, Smiley would buy Dinar, and Smiley would later sell the Dinar at a profit for the investors. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 11. Smiley argues this first prong involves parting with money for the purpose and with the reasonable expectation of making a profit, which must be determined objectively (see *Resource Service Co.*, *supra*, 130 Idaho 877, 882, 950 P.2d 249, 254), and that the question of whether Smiley's investors had a reasonable expectation of making a profit is a jury question that cannot be resolved on summary judgment. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 11.

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In *State v. Gertsch*, 137 Idaho 387, 49 P.3d 392 (2002), the Idaho Supreme Court evaluated whether the defendant had engaged in the sale of investment contracts and stated that, as to the first prong of the *Howey-Forman* test: "[t]his analysis focuses on the question of whether the investors expected 'profits' or something different, more akin to interest on a loan." 137 Idaho 387, 392, 49 P.3d 392, 397. In the present case, the investors gave money to Smiley to purchase the Dinars with the understanding that Smiley would hold the Dinars until the investment paid off and Smiley would keep 50% of the proceeds. Affidavit of Johnny Bryant, ¶ 4; Affidavit of Martin Gennuso, ¶ 4; Affidavit of Stephen Heuer, ¶ 13. The payment of a fee may be an investment if the customer reasonably anticipates, in light of the scheme as a whole, a return on his or her payments. *Resource Service Co.*, 130 Idaho 877, 882, 950 P.2d 249, 254. In the instant case, the investors arguably would have paid a fee, 50% of the proceeds, in addition to their initial payments to Smiley. Thus, the investors expected something in return for the money they gave to Smiley. Smiley does not provide this Court with an explanation of what the investors' purpose was, or what they were reasonably expecting, if not profit. The first prong is proven by the State.

The State argues that the second prong of the *Howey-Forman* test is met as both horizontal commonality and vertical commonality exist here. Memorandum in Support of Plaintiff's Motion for Summary Judgment, pp. 12-13. Vertical commonality exists where the fortunes of investors are interwoven and dependent on the efforts and successes of those seeking the investment, or on the efforts of third parties. *Gertsch*, 137 Idaho 387, 392, 49 P.3d 392, 397. Horizontal commonality exists where each individual investor's fortune is tied to the fortunes of other investors through the pooling of assets. *Id.* The Act, in defining common enterprise, makes clear that a common

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enterprise exists in Idaho where "the fortunes of the investors are interwoven with those of either the person offering the investment, a third party, or other investors." I.C. § 30-14-102(28)(d). Thus, in Idaho, a showing of either vertical or horizontal commonality suffices. Smiley states that, for the purposes of the Memorandum in Opposition to Motion for Summary Judgment only, he concedes that if the Joint Venture Agreements satisfy the first prong and I.C. § 20-14-102(23) [*sic*- Defendant clearly means to reference subsection 28], then the common enterprise prong is satisfied. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 11. The same concession was made by Smiley's counsel at oral argument.

Because the investors had to rely on Smiley's knowledge and efforts to purchase and sell the currency, the investors' success or failure were interwoven with his. The investors stated that their role was only to provide money, nothing more. Affidavit of Johnny Bryant, ¶ 4. It was Smiley who had "Ali", Smiley's contact in Iraq, after all Deposition of Jack Smiley, p. 19, LI. 8-12. The investors never discussed with Smiley how the Dinars would be delivered, who would take delivery, or any deadline by which the Dinars would be delivered. Affidavit of Martin Gennuso, ¶ 4; Affidavit of Stephen Heuer, ¶ 13. The reasonable inference from these statements is that the investors relied on Smiley and that the investor's fortunes were interwoven with the person offering the investment, Smiley. Horizontal commonality is present here, because Smiley pooled all monies received from investors and did not keep records to distinguish how many Dinars he purchased for each investor. Deposition of Jack Smiley, pp. 22-23, LI. 25-1. However, had the investment paid off, there is no evidence that each investor would receive a pro rata distribution of the profits. See *Gertsch*, *supra*, 137 Idaho 387, 393, 49 P.3d 392, 398. Even absent Smiley's concession, the second prong is met.

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The third prong of the *Howey-Forman* test is satisfied in Idaho where the profit is derived primarily from the efforts of a person other than the investor. I.C. § 30-14-102(28)(d). The State argues that because investors played no role other than to provide money, they clearly expected profits derived primarily from the efforts of someone other than themselves. Memorandum in Support of Plaintiff's Motion for Summary Judgment, pp. 13-14. Smiley argues that the joint venture's success was unrelated to Smiley's efforts because the joint venturers were buying and holding the currency expecting profits from market movement not the efforts of anyone else. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, pp. 11-12. While Smiley argues that the efforts expected to generate the return do not include merely holding of the property in anticipation of appreciation, or market inflation, (Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 12; 79A C.J.S. *Securities Regulations* § 381(2008)), it is uncontested that Smiley purchased the property in question here, and would be the one to resell the property for profit. It is clear the Smiley was doing more than merely holding the currency waiting for market fluctuation. Here, the investors claim that they never employed any managerial skills to the funds, they merely believed that Smiley would purchase Dinars on their behalf, hold the currency, and then sell the Dinars for a profit, Smiley keeping half of those profits for himself. See Affidavit of Johnny Bryant, ¶ 4; Affidavit of Martin Gennuso, ¶ 4; Affidavit of Stephen Heuer, ¶ 13. It is also patently clear, as none of the monies paid to Smiley have been returned to the investors and none of the Dinars purchased by Smiley were turned over to the investors, that the investors in fact *never* retained any control over the property invested in or the funds invested. See Affidavit of Janet Carpenter, ¶ 13; Affidavit of Stephen Heuer, ¶ 11. The State has also proven the third

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prong. There is no dispute of material fact that Smiley's actions, specifically his "Joint Venture Agreements" with these investors, fall within the Idaho Uniform Security Act.

b. Smiley Violated the Uniform Securities Act.

The Act requires that all non-exempt securities being offered or sold be registered. Idaho Code § 30-14-301 reads:

It is unlawful for a person to offer or sell a security in this state unless: (a) the security is a federal covered security; (b) the security, transaction or offer is exempted from registration under section 13- 14-201 through 30-14-203, Idaho Code; or (c) the security is registered under this chapter.

Smiley concedes the joint venture agreements were not registered pursuant to the Act, but argues that whether they are in fact securities which must be registered remains a question of fact. The State has put forth uncontroverted evidence the so-called joint venture was not registered and was not a federally registered security. Affidavit of Marilyn Chastain, ¶ 3. The so-called joint venture is also not exempt under Idaho Code § 30-14-102(28) (b) or (c) of the Act as it is not an insurance or endowment policy; annuity contract; or interest in a contributory or non-contributory pension or welfare plan subject to ERISA. I.C. § 30-14-102(28) (b),(c). Having proven that the joint venture agreements at issue are securities, the State has also proven that Smiley violated the Act by not registering the agreements. Idaho Code § 30-14-402(a) states:

It is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this chapter as an agent or is exempt from registration as an agent under subsection (b) of this section.

Smiley has conceded he did not register as required by the Act, but argues that he need not do so if the agreements are not securities, which he claims remains a question of fact. As discussed above, the so-called joint venture agreements are securities and Smiley has therefore violated the Act by failing to register as an agent.

c. Smiley Committed General Fraud Under the Securities Act.

i. Untrue Statement of Material Fact.

The Act provides that:

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly: (1) to employ a device, scheme, or artifice to defraud; (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (3) to engage in an act, practice or course of business that operates or would operate as a fraud or deceit upon another person.

I.C. § 30-14-501. The State argues Smiley violated Idaho Code § 30-14-501(2) by falsely claiming that the investment was guaranteed, that the investment would pay off in the time promised, that the currency would be safely stored, that the investment would be returned upon request, that the investment would be returned at all, and that the money invested would be used only to pay for Dinars and not for Smiley's personal expenses. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 25. Smiley argues, again, that there existed no Act violation because whether the agreements were securities remains a question of fact and because whether the allegedly untrue statements were material remains a question of fact. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 15. As cited by both parties, in *TSC Industries, Inc., v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132 (1976), the United States Supreme Court held that an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. There must have been a substantial likelihood that a reasonable investor would have viewed the disclosure of the omitted fact as significantly altering the total mix of the information available. *Id.* If the omitted facts are so obviously important to the investor, that reasonable minds couldn't differ as to their materiality, the

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ultimate issue of materiality can appropriately be resolved as a matter of law by summary judgment. 426 U.S. 438, 450, 96 S.Ct. 2126, 2133.

It is without question that a reasonable investor would have found the misrepresentations and omissions of Smiley so obviously important as to alter the total mix of information available. The State argues that the entire "scheme" was based on Smiley's false representation that the Dinar is tied to 10-year oil contracts, when in fact the Dinar is not tied to oil contracts and cannot appreciate substantially because it is a crawling peg to the United States dollar. These are facts obviously important to the investors. Memorandum in Support of Motion for Summary Judgment, p. 18; Affidavit of Michael Gorham, ¶¶ 27, 24, and 48. The State claims Smiley made false guarantees that the investors would not lose any of their money, when Smiley admits he did not even know what event(s) would have to occur to trigger a rise in the Dinar's value. Smiley deposition, p. 20, L. 23 – p. 21, L.7. The State has submitted proof that currency markets, by their very nature, can decline and increase. Memorandum in Support of Motion for Summary Judgment, pp. 18-20; Affidavit of Michael Gorham, ¶¶ 41-44. The State has proven Smiley falsely promised a quick pay off, between a week and 90 days, when he made this same promise to several people over the course of multiple years. *Id.*, p. 20; Affidavit of Johnny Bryant, ¶ 1.d; Affidavit of Stephen Heuer, ¶¶ 1-2; Affidavit of Martin Gennuso, ¶ 1.c., ¶ 1.d; Smiley deposition, p. 64, L. 22 – p. 65, L. 12; Smiley deposition, Exhibit 9. Smiley admitted in his deposition that the investment has still not paid off, and he admitted his statement of a quick payoff was not true. Memorandum in Support of Motion for Summary Judgment, pp. 20-21; Smiley deposition, p. 65, LI. 17-22. The State has proven Smiley falsely promised to refund monies if the joint venture were dissolved, yet he has not yet given any investors any money back. Memorandum in Support of Motion for Summary Judgment p. 21;

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Smiley deposition, Exhibits 10, 15, 16; Smiley deposition, p. 49, LI. 14-21. The State has proven Smiley falsely promised to keep the Dinars in a safety deposit box, falsely promised to execute a power of attorney so that investors could get at them if he died, and continued to make these promises even after he closed the safety deposit boxes. *Id.*, p. 22; Smiley deposition, pp. 69, L. 24 – p. 70, L. 4, p. 90, LI. 3-11; Smiley deposition, Exhibit 16. Smiley made false statements that he was opening an affiliate office in Coeur d'Alene, but in fact did not do so. *Id.*; Smiley deposition, p. 60, LI. 5-10.

Smiley converted the investor funds despite promising not to use any funds until the investment paid off. *Id.*, pp. 23-25; Smiley deposition, p. 61, LI. 4-23, p. 84, L. 18- p. 85, L. 7; Smiley deposition, Exhibit 8, 14.

The only argument Smiley makes is that the affidavit of Timothy Martin should be stricken, as to the conversion of funds, and that whether any of these statements were untrue statements of material fact or material omission is in dispute and therefore summary judgment would be inappropriate.

A mere scintilla of evidence will not create a material issue of fact. *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 681, 837 P.2d 805, 807 (1992). The non-moving party may not simply rest on allegations or denials. *Id.* Because Smiley has not set forth any evidence regarding these facts only he claims are disputed, the State's claims and proof of those claims, have gone, for all intents and purposes, unchallenged.

The State submitted two State of Idaho district court decisions, and Smylie responded. As set forth above in the section concerning "Standard of Review", the question of whether a transaction constitutes a security has been interpreted both as a question of fact and a question of law. *State of Idaho, department of Finance v.*

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Resource Service Co., Inc., 130 Idaho 877, 880, 950 P.2d 249, 252 (1997) (citations omitted). The Supreme Court of Idaho has stated that it:

[A]grees with those jurisdictions holding that, although characterization of a transaction raises questions of both law and fact, the ultimate issue of whether a particular set of facts constitutes an investment contract is a question of law. *U.S. v. Carman*, 577 F.2d 556, 562 (9th Cir. 1978).

Resource Service Co., 130 Idaho at 880. And questions regarding the materiality of omissions in security fraud cases can be determined material as a matter of law at summary judgment where the omissions are "so obviously important to an investor that reasonable minds could not differ as to their materiality." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S.Ct. 2126, 2133 (1976).

The State submitted *State v. Ultimate Ventures, Inc.*, Ada County Case No. CVOC 0309967D, an April 28, 2005, Ada County District Court Memorandum Decision. In this decision, the district court found the following omissions material under the TSC standard: (1) that three money judgments had been entered against the defendant, (2) that defendant had filed an affidavit and financial statement in the Supreme Court of British Columbia stating that he was indigent, (3) that a "Cease Trade Order" had been issued against defendant, and (4) that shareholder in a corporation of which defendant was an officer, director, and 100% shareholder had received over \$2 million in defendant corporation preferred shares without paying any cash for the shares. *State v. Ultimate Ventures, Inc.*, Ada County Case No. CVOC 0309967D, Memorandum Decision and Order Constituting Findings of Fact and Conclusions of Law, p. 19, ¶ 26. In response, Smiley argues that the materiality of omissions is a question of fact for the jury and that none of the omissions by Defendant in the instant case are such that a reasonable mind could reach only one conclusion. Supplemental Memorandum in

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Opposition to Plaintiff's Motion for Summary Judgment, p. 2. However, as discussed in detail below, Smiley's omissions here are such that reasonable minds can come to no other conclusion than that they are material. Smiley has made untrue statements of material fact, or omitted to state material facts necessary to make statements he made *not* misleading, with regards to registration of the securities, registration as an agent, the Cease and Desist Order, the storage and safekeeping of the Dinars themselves, return of the investment upon notice by any investor, and the use of invested monies for anything other than the purchase of Dinars. Like the defendant in *Ultimate Ventures, Inc.*, Smiley made and omitted statements of material fact that any reasonable investor would view as significantly altering the mix of information available; the failure to disclose the Cease and Desist Order here and the Cease Trade Order in *Ultimate Ventures, Inc.* are factually very similar.

In *State v. Arizona Idaho Mining, LLC and Douglas Baker*, Ada County Case CV-OC-2004-06423D, the district court applied the *Shama* standard for determining the materiality of statements and/or omissions. Order Granting Summary Judgment, pp. 25, 28; see, *State v. Shama Resources Limited Partnership*, 127 Idaho 267, 273, 899 P.2d 977, 984 (1995) ("The affidavits presented by the Department established that *some* of the *Shama* offerees and investors were unaware that *Shama* securities were not registered and that McGary was not a registered broker-dealer. These misrepresented facts are material because the information *may* have resulted in an alteration of the offerees or investors investment decision.") (emphasis added). Under this standard, it is very likely that any reasonable investor would find that Smiley's untrue statements and omissions with regards to registration of the securities, registration as an agent, the Cease and Desist Order, the storage and safekeeping of the Dinars themselves, return

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of the investment upon notice by any investor, and the use of invested monies for anything other than the purchase of Dinars, would have altered their investment decision.

Read in conjunction, *TSC* and *Shama* direct this Court to establish (1) whether misrepresented or omitted facts may have resulted in an alteration of investors' investment decision, in which case such misrepresentation or omissions would be material, and (2) whether they are so obviously important to an investor that reasonable minds could not differ as to their materiality, in which case this Court can determine materiality as a matter of law at summary judgment.

For the reasons stated above, this Court determines Smiley's statements, both those misrepresented and those omitted, were material because the information would have caused the investors to change or alter their investment decision and that the information was so obviously important to the investors that reasonable minds could not differ as to materiality.

ii. Omissions of Material Fact

Again, pursuant to Idaho Code § 30-14501(2), it is general fraud to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. The State alleges Smiley violated the Act by failing to disclose that he had been served with a Cease and Desist Order, that he was not registered as an agent, that the agreement was not registered as a security, and that he was relying on "Ali" to tell him when the investment would pay off. Memo in Support of Motion for Summary Judgment, pp. 25-26. Smiley again argues that the joint ventures were not securities, that materiality of the statement is a question of fact, and that genuine issues of fact remain. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 17.

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According to the reasoning of the Supreme Court in *TSC Industries, Inc.*, omissions by Smiley are material if a reasonable investor would have viewed the disclosure of the omitted facts as significantly altering the total mix of the information available. 426 U.S. 438, 449, 96 S.Ct. 2126, 2132 And, as noted by the State, the Idaho Supreme Court has held that it is fraud under the Act to sell securities that are not registered and for an agent to sell securities when that agent is not registered. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 272, 899 P.2d 977, 982 (1995). While the State has provided this Court with statements by the investors that Smiley omitted material facts to them, Smiley has failed to do more than merely rest on allegations and denials. *East Lizard Butte Water Corp., supra*, tells us you must do more in order to avoid a summary judgment being entered against you. 122 Idaho 679, 681, 837 P.2d 805, 807

2. Smiley Violated the Commodities Code.

The State argues that the same behavior Smiley engaged in which violated the Act, *supra*, also violates the Idaho Commodity Code (the Code). "A commodity means, ...any foreign currency..." Idaho Code § 30-1501 (3). The Code prohibits any person from selling, purchasing, or offering for sale or purchase any commodity except as provided in the exemptions set forth in Idaho Code §§ 30-1503 or 30-1504.

It is uncontradicted that Smiley purchased Dinars with the investors' money. It is uncontradicted that a Dinar is a foreign currency. Smiley argues his actions do not fall within the "commodities contract" definition of the Code. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 18. A commodity contract is defined as:

Any account, agreement or contract for the purchase or sale, primarily for speculation or investment purposes and not for the consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether delivery is intended by the parties....Any

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commodity contract offered or sold shall, in the absence of evidence to the contrary, be presumed to be offered or sold for speculation or investment purposes...

Idaho Code § 30-1501(4)(a). Smiley argues that, pursuant to the joint venture agreement, he used joint venture funds to purchase foreign currency on behalf of the joint venture and that the currency was physically delivered to him within 28 days from payment of the purchase price. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 19. Smiley hopes to fall within Idaho Code § 30-1501(4)(b), which states that the commodity contract definition does not include an contract or agreement which:

requires, and under which the purchaser receives, within twenty-eight (28) calendar days from the payment of good funds of any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.

However, because Smiley did not properly keep records indicating how many Dinars he purchased for each individual investor, and because he did not set up a separate bank account for the monies received from investors, he has no way of knowing when he received delivery of the total amount of each commodity to be purchased under the agreement. Further, Smiley has put forth no evidence that any agreement or contract he entered into *required* the purchaser to receive delivery with 28 days.

The Code and the Act, above, are similar in purpose and share much of the same language. The Code states regarding fraudulent conduct:

It is unlawful for any person, directly or indirectly, in connection with a commodity contract or commodity option: (a) to employ a device, scheme, or artifice to defraud; (b) to make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading; (c) to engage in any transaction, act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or (d) to

misappropriate or covert the funds, security, or property of any other person.

Smiley argues only that a determination of whether he made untrue statements of material fact and/or omitted statements of material fact, is a question of fact for the jury and that summary judgment is inappropriate. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 20. The Court, above, has answered Smiley's argument against Smiley.

The State argues that because of the similarity between the Act and the Code, scienter is likely not an element of fraud. However, even if this Court determines that a finding of scienter is necessary, it is found based on Smiley's own "reckless" (*CFTC v. Wilshire Investment Mgmt. Corp.*, 407 F.Supp.2d 1304, 1311 (D.Fla. 2005)) statements. Memorandum in Support of Motion for Summary Judgment, p. 33; Smiley deposition Exhibits 3-10. The statements Smiley has made ("The Iraqi currency will go public!" [Exhibit 3]; "I guarantee you will not lose any of your money" [Exhibit 7]; "The Iraq Currency Investment expects to pay off within the next few months [Exhibit 9]), support a finding of scienter. Where a defendant's conduct involves highly unreasonable omissions or misrepresentations which present a danger of misleading, and this is known to the Defendant or so obvious that it should be known, the requirement of scienter can be met. *CFTC v. Wilshire Investment Mgmt. Corp.*, 407 F. Supp.2d 1304, 1311 (D. Fla. 2005).

The State in discussing the commodities Code reiterates the argument made as to "materiality" earlier in discussing the securities Act, and cites federal commodities case law. Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 34. Ultimately, because of their similar language and purpose, the same untrue statements of material fact and the same omissions of material fact by Smiley which form the basis

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of his violations of the Act, also form the basis of his violations of the Code.

3. Smiley Failed to Comply with the Cease and Desist Order.

The Summary Cease and Desist Order dated June 2, 2005, was received by Smiley. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 20. This Order stated that it would become final thirty days after its June 2, 2005, date if no hearing is requested and none is ordered by the Director. There is no evidence in the record that any hearing was requested or ordered.

The State argues the Order was clearly violated as ninety-eight joint venture agreements were entered into following Smiley's receipt of the Order. In listing disputed facts in his Memorandum, Smiley does not dispute this claim (*Id.*, pp. 1-4), but does state that after receiving the Order, he ceased soliciting investors and ceased giving out written materials regarding the joint venture agreements. *Id.*, p. 20. Instead, Smiley makes the argument that "However, individuals continued to contact him and he entered into joint venture agreements with them." *Id.*, Smiley deposition, p. 33, LI. 5-8. Essentially that is a confession by Smiley that he violated the Cease and Desist Order. The Order clearly states, "...IT IS HEREBY ORDERED that Jack Lee Smiley shall Cease and Desist from violations of the Idaho Commodity Code or any other rule or order thereunder EFFECTIVE IMMEDIATELY." Summary Cease and Desist Order and Notice, p. 8. Clearly, Smiley violated the Cease and Desist Order by continuing to engage in the acts prohibited by it, acts that were clearly laid out in the nine-page Order. Merely ceasing to contact people in no way complies with an Order to cease and desist from violating the Code, although Smiley arguably ceased *some* of the behavior listed under the Factual Allegations section of the Order.

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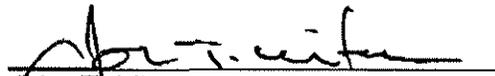
D. Conclusion and Order.

For the reasons stated above, and as to each charge by the State of Idaho, summary judgment is appropriate. On August 22, an Amended Temporary Restraining Order was signed by the Court. The terms of that Amended Temporary Restraining Order are now permanent. The State of Idaho must notice up a hearing as to the appropriate damages, as the State has claimed: 1) Imposition of a civil penalty for each single violation, 2) Disgorgement, 3) Restitution to investors, and 4) Appointment of a Receiver.

IT IS HEREBY ORDERED that plaintiff's Motion for Summary Judgment is GRANTED in all aspects;

IT IS FURTHER ORDERED that for plaintiff to obtain a judgment, the State must notice a hearing on remedies/damages within the next sixty (60) days. In the interim, the Amended Temporary Restraining Order will remain in effect.

Entered this 28th day of August, 2008.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the 28 day of August, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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