

DEC 21 2009

By J. DAVID NAVARRO, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, DEPARTMENT OF
FINANCE, SECURITIES BUREAU,

Plaintiff,

vs.

DEREK F.C. ELLIOTT, JAMES B. ,
CATLEDGE, DAVID BRIMLEY, STEVE
CABEZUD, BARBARA NAGEL, JOHN
THOMSON, TREVOR WALKER, SUN
VILLAGE JUAN DOLIO ASSOCIATES,
LLC, IMPACT INC., IMPACT NET WORTH,
LLC, NET WORTH SOLUTIONS,

Defendants.

Case No. CVOC 0903323

ORDER DENYING IMPACT
DEFENDANTS' MOTION TO
DISMISS

This matter came before the Court on Nevin, Benjamin, McKay & Bartlett, LLP and Diaz, Reus & Targ, LLP's Motions to Withdraw as attorney of record for all Impact/Catledge Defendants; the Impact/Catledge Defendants Motion to Dismiss; and Plaintiff's Motion for Sanctions/Motion to Compel. The Court heard oral argument on November 2, 2009. Alan Conilogue appeared for the State of Idaho, Department of Finance (Department). Scott McKay appeared to argue his motion to withdraw as attorney of record for all Impact/Catledge Defendants: James Catledge; Impact Inc.; Impact Net Worth, LLC; New Worth Solutions; and David Brimley. Michael Diaz appeared

1 telephonically to argue his motion to withdraw as attorney of record for all Impact/Catledge
2 Defendants.

3 The Court first heard oral argument on the motions to withdraw. Plaintiff indicated he would
4 not object to the motions to withdraw after the motion to dismiss had been heard, but that due to
5 repeated delays by Defendants Plaintiff was concerned that this hearing on the motion to dismiss not
6 be vacated. The Court then took up the matter of the motion to dismiss. Scott McKay and Michael
7 Diaz declined to argue on the motion to dismiss, representing to the Court that Defendants had
8 engaged new counsel and had not authorized Counsel to make any further arguments on their behalf.
9 The Court noted that no notice of appearance or notice of substitution of counsel had been filed to
10 date and that no other counsel appeared for Defendants. Alan Conilogue argued in opposition to the
11 motion to dismiss. Finally, the Court took up the matter of Plaintiff's Motion for Sanctions/Motion
12 to Compel, which was vacated without objection by Defendants. The Court took the motions to
13 withdraw and the motion to dismiss under advisement at that time.
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15 On November 18, 2009, Monte Stewart filed a Notice of Substitution of Counsel for
16 Defendants James Catledge, Impact Inc., Impact Net Worth, LLC, and New Worth Solutions. On
17 November 30, 2009, the Court entered an order permitting the firms Nevin, Benjamin, McKay &
18 Bartlett, LLP and Diaz, Reus & Targ, LLP to withdraw as counsel of record for Defendant David
19 Brimley.
20

21 BACKGROUND

22 This action is brought by the Department under the Idaho Uniform Securities Act. It is
23 alleged that in order to raise funds for certain development projects the Elliot Defendants, Derek
24 Elliott and Sun Village Juan Dolio Associates, and their related entities began selling fractional
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1 interests in the properties and marketed these fractional interests as investment opportunities. It is
2 further alleged that the Impact/Catledge Defendants, James Catledge, Impact Inc., Impact Net Worth,
3 LLC, and New Worth Solutions, along with David Brimley, subsequently joined forces with the
4 Elliott Defendants to commit securities fraud and engage in "a multi-level network marketing
5 scheme selling insurance, mortgage application leads, and securities." The products were allegedly
6 sold in Idaho labeled as interests in real property; but according to the Department the products were
7 unregistered securities.

8
9 The Department asserts that several individuals, including the named individual Defendants,
10 materially aided in the furtherance of the fraud and selling of the unregistered securities by locating
11 potential associates and potential investors and/or by making material misrepresentations and
12 material omissions to potential investors. It is alleged that each of these individuals assisted in the
13 unlawful sale of the unregistered securities without registering with the Department as required by
14 the Act.

15 On July 19, 2007, Defendant James B. Catledge signed a Consent Order to Cease and Desist
16 from engaging in certain violations of the Idaho Uniform Securities Act and the Idaho Residential
17 Mortgages Act. The Department alleges that Catledge and other Defendants violated the Consent
18 Order by continuing to engage in these activities.

20 STANDARD OF REVIEW

21 In considering a motion to dismiss under Idaho Rule of Civil Procedure 12(b), the court may
22 examine only those facts that appear in the complaint and any facts that are appropriate for the court
23 to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App.
24 1990). "[T]he nonmoving party is entitled to have all inferences from the record and pleadings
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1 viewed in its favor, and only then may the question be asked whether a claim for relief has been
2 stated.” *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 310. “The issue is
3 not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to
4 support the claims.” *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995)
5 (quoting *Greenfield v. Suzuki Motor Co. Ltd.*, 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

6 MOTION TO DISMISS

7 The Impact/Catlegde Defendants move for dismissal of the Verified Complaint on three
8 grounds: 1) Counts One through Four and Count Six are barred by the statute of limitation; 2) the
9 fraud based claims fail to meet the particularity requirements of IRCP 9(b); and 3) the Department
10 has failed to join Robert and Joyce Rasmussen as necessary and indispensable parties.

11 I. Statute of Limitations

12 Defendants assert that Idaho Code § 30-14-509(j) is the applicable statute of limitations and
13 that this one or two year statute of limitations bars Counts One through Four and Count Six as all of
14 the events relating to those counts occurred outside of that period. The Department counters that a
15 statute of limitations is not applicable to the State unless expressly made so, citing the axiom *quod*
16 *nullum occurrit regi* (time does not run against the king) and the Department counters that the
17 provision cited by Defendants does not apply to enforcement actions, but only to private civil actions
18 brought under § 30-14-509(b)-(f).
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21 In its October 30, 2009 Order Denying Defendant Trevor Walker’s Motion to Dismiss, the
22 Court held that § 30-14-509(j) does not apply to enforcement actions. Idaho’s Uniform Securities
23 Act provides for four different types of actions. Criminal prosecution under § 30-14-508 has a five
24 year statute of limitations. The Court found that the plain language of subsection 30-14-509(j)
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1 limited the applicability of one and two years statutes of limitations to the subsections listed Private
2 civil actions brought under § 30-14-509 (b) through (f). The Court further found that, civil actions
3 instituted by the administrator under § 30-14-603 and actions for administrative enforcement under §
4 30-14-604, which allows the administrator to seek enforcement by the court of an administrative
5 order or notice, do not have a statute of limitations provided by the Act. Finally, the Court found that
6 it is these two sections under which the Department has brought this action against the Defendants.

7
8 In its Order, the Court held that in the absence of an express provision for these two sections,
9 the four year provision of § 5-224 is applicable, citing *Blaine County v. Butte County*, 45 Idaho 193,
10 261 P. 338, 340 (1927) (holding that the Legislature passed the predecessor to § 5-224 “for the
11 express purpose of making the statutory limitation apply with equal force to actions brought by the
12 state in its sovereign and proprietary capacity, as well as to those brought by private parties”) and
13 citing *Aetna Cas. & Sur. Co. v. Gulf Resources & Chemical Corp.*, 600 F.Supp. 797 (D.C. Idaho
14 1985). On November 6, 2009, Plaintiff moved the Court to Reconsider this portion of its October 30,
15 2009 Order asserting that the Idaho Supreme Court has clarified that exercises of the State’s police
16 power are not limited by Idaho Code § 5-224 and asserting the regulation of securities is within the
17 police power.¹

18
19 Because the two years statute of limitations provided by Idaho Code § 30-14-509(j) is not
20 applicable to this action brought by the Department, Counts One through Four and Count Six are not
21 barred as untimely. Defendants’ motion to dismiss Counts One through Four and Count Six is
22 DENIED.

1 2. Particularity of the Fraud Claims

2 Defendants contend that Plaintiff has failed to plead the fraud claims with sufficient
3 particularity. In its October 30, 2009 Order Denying Defendant Trevor Walker's Motion to Dismiss,
4 the Court held that the Verified Complaint pleads the two elements of Idaho statutory securities fraud
5 with sufficient particularity.

6 Acknowledging that Idaho appellate courts have not addressed whether a securities fraud
7 action brought under Idaho Code §§ 14-30-603 and 604 must be pled with particularity, the Court
8 applied the reasoning of the federal courts and held that the elements of a securities fraud action are
9 to be pled with particularity. "To establish fraud under [Idaho Code], the Department must show that
10 [a defendant] made untrue statements of material fact or omitted any material facts in connection
11 with the sale, offer, or purchase of any security." *State v. Shama Resources Ltd. Partnership*, 127
12 Idaho 267, 272, 899 P.2d 977, 982 (1995). In its Verified Complaint, the Department describes the
13 nature of the investment scheme; the parties involved in the scheme and their role; the location of the
14 actions as having taken place in Idaho; the types of sales made; nine misrepresentations made by the
15 Defendants and other involved persons; why those misrepresentations are false; and material
16 omissions made by Defendants and other involved persons.
17

18 Because the Verified Complaint pleads the two elements of Idaho statutory securities fraud
19 with sufficient particularity, Defendants' Motion to Dismiss for failure to plead with particularity is
20 DENIED.
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22 3. Failure to Join an Indispensable Party

23
24 ¹ As Defendant Brimley is currently without representation and no proceedings may be had in this action which would
25 affect the rights of Defendant Brimley for a period of twenty days after service of notice of withdrawal of counsel, the
26

1 The Defendants contend that the allegations in the complaint are based substantially on the
2 direct actions of the Rasmussens and that due to their central role as the heads of Impact in Idaho,
3 complete relief cannot be granted unless the Rasmussens are joined as defendants. Plaintiff argues
4 that the Rasmussens are not indispensable parties because enforcement of the securities laws of
5 Idaho can be accomplished without joining the Rasmussens and because the Act does not require that
6 all possible violators be joined in an enforcement action.

7 The party asserting a failure to join an indispensable party has the burden to demonstrate the
8 indispensability of the party. *Ada County Highway Dist. v. Total Success Investments, LLC* 145
9 Idaho 360, 372, 179 P.3d 323, 335 (2008) (citing *Volco, Inc. v. Lickley*, 126 Idaho 709, 713 n. 6, 889
10 P.2d 1099, 1103 n. 6 (1995). “Whether or not a party is indispensable to an action depends largely
11 upon the relief sought.” *Barlow v. International Harvester Co.*, 95 Idaho 881, 896, 522 P.2d 1102,
12 1117 (1974). A party shall be joined if:
13

14 (1) in the person’s absence complete relief cannot be accorded among those already
15 parties, or (2) the person claims an interest relating to the subject of the action and is
16 so situated that the disposition of the action in the person’s absence may (i) as a
17 practical matter impair or impede the person’s ability to protect that interest or (ii)
18 leave any of the persons already parties subject to a substantial risk of incurring
19 double, multiple, or otherwise inconsistent obligations by reason of the claimed
20 interest.

21 Idaho Rule of Civil Procedure 19(a)(1).

22 Defendants seemingly argue that complete relief cannot be afforded among those already
23 parties because Defendants are at risk of being ordered to pay restitution of approximately three and
24 a half million dollars and the Rasmussens should also liable for any such damages found. However,
25 Defendants fail to cite a provision in the Act or a case from any jurisdiction which requires that all

26 Court is disinclined to rule on the motion for reconsideration at this time.

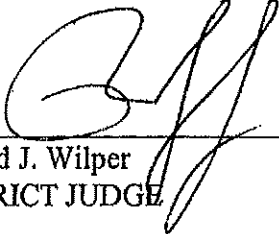
1 potential wrongdoers in a securities enforcement action be joined. Nor was the Court able to locate
2 such a provision or case. Rather, the Court finds it instructive to look to tort law, “[A] joint or
3 concurrent tort feisor, whose liability is joint and several, is not an indispensable party to an action
4 based on the tort.” *Spencer v. Spencer*, 91 Idaho 880, 883, 434 P.2d 98, 101 (1967).

5 Plaintiff seeks four remedies: 1) declaratory judgment that Defendants have violated Idaho’s
6 Uniform Securities Act; 2) that Defendants be permanently enjoined from engaging in any act or
7 practice in violation of the Act; 3) that Defendants jointly and severally be ordered to pay a civil
8 penalty for each violation of the Act; and 4) that Defendants be ordered jointly and severally to make
9 restitution.
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11 The Court finds that complete relief may be afforded to the Plaintiff among the parties
12 currently joined. Further, the Court finds no provision requiring the joinder of all potential
13 participants in a securities enforcement action. Therefore, the Rasmussens are not an indispensable
14 party to this action. Defendants’ Motion to Dismiss for failure to join an indispensable party is
15 DENIED.
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17 IT IS SO ORDERED.
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19 Dated this 21ST day of December, 2009.
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23 Ronald J. Wilper
24 DISTRICT JUDGE
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CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 22 day of December, 2009, I caused a true and correct copy of the foregoing ORDER DENYING IMPACT DEFENDANTS' MOTION TO DISMISS to be served by the method indicated below, and addressed to the following:

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J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

By INGA JOHNSON
Deputy Clerk