

APR 29 2005

J. DAVID NAVARRO, Clerk
By  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.

HOWARD HASKELL HUCKS, and PAUL
CROXTON DELZELL, d/b/a LANDMARK
TECHNOLOGY & DEVELOPMENT, INC.,

Defendants.

Case No. CV OC 0404516D

MEMORANDUM DECISION RE:
MOTION FOR SUMMARY JUDGMENT

APPEARANCES

For Plaintiff: A. Rene Martin, Deputy Attorney General for the State of Idaho
For Defendants: Howard Haskell Hucks, Pro se and Paul Croxton Delzell, Pro se

PROCEEDINGS

The State of Idaho, Department of Finance, Securities Bureau, (the "State") brought this action against the Defendants Howard Haskell Hucks, Paul Croxton Dalzell and Landmark Technology and Development, Inc. alleging that the Defendants violated the Idaho Securities Act. This matter came before the Court on the State's motion for summary judgment.

STATEMENT OF FACTS

The Defendants Howard Haskell Hucks (Hucks) and Paul Croxton Delzell

1 (Delzell) are residents of California. Hucks and Delzell conducted business as
2 Landmark Technology & Development, Inc. ("Landmark"). Hucks represents that he is
3 the president and chairman of the board of directors of Landmark. Delzell represents
4 that he is the secretary, compliance officer, and a director of Landmark. Landmark is
5 purportedly engaged in the business of developing and using a new "vortex pump"
6 technology that would extract gold by reprocessing old mine tailings.

7 In 2001, Hucks and Delzell provided information regarding Landmark's business
8 prospects to two Idaho residents, William B. Schoen and Richard Brooks. Hucks and
9 Delzell represented to Schoen and Brooks that they were seeking funding for
10 Landmark's business venture. Based upon information received from Hucks and
11 Delzell, Schoen and Brooks each tendered \$5,000.00 to Landmark. This was
12 accomplished through a "Landmark Technology & Development, Inc. Revenue
13 Participation Agreement," which was sent to Schoen and Brooks by the Defendants.
14 Schoen and Brooks each signed the Revenue Participation Agreement and returned it
15 to the Defendants. Schoen and Brooks also each sent \$5,000.00 to Hucks. Schoen
16 and Brooks transferred money to Landmark with the promise of receiving the return of
17 their money plus a percentage of Landmark's net revenues. Schoen and Brooks have
18 never received the return of their \$5,000.00, nor any interest or dividend proceeds.
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20 In July 2003, the State of Idaho, Department of Finance began an investigation
21 into this case when the transaction that Hucks and Delzell had engaged in appeared to
22 be securities violations. The State eventually filed this action alleging that Hucks and
23 Delzell illegally offered and sold approximately \$10,000.00 in securities, in the form of
24 investment contracts, to Schoen and Brooks. Count I of the Complaint alleges that the
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1 Defendants failed to register securities as required by the Idaho Securities Act, Idaho
2 Code § 30-1416. Count II alleges that Hucks and Delzell failed to register as broker-
3 dealer or salesmen to offer for sale securities as required by Idaho Code § 30-1406.
4 The record reflects that Landmark was never registered with the State of Idaho to offer
5 or sell securities within the State of Idaho and Hucks and Delzell were never registered
6 as broker-dealers or salesman to offer securities for sale. Therefore the issue for the
7 Court is whether the transactions between the Defendants, Schoen and Brooks are
8 investment contracts and therefore unregistered securities, in violation of Idaho law.

9 The State also alleges that Hucks and Delzell violated the anti-fraud provisions
10 of the Idaho Securities Act. In the course of the States' investigation of this matter, an
11 investigator for the Department of Finance, James A. Burns, subpoenaed the bank
12 records of Defendant Hucks. An analysis of the bank accounts shows that Hucks
13 received the moneys from Schoen and Brooks and used that money for personal
14 expenses such as payments to restaurants, gas stations, and grocery stores. However,
15 there is no evidence of any mining or mining related business that can be reasonably
16 inferred from a review of the bank statements. The State's Complaint against Hucks
17 and Delzell includes three counts of securities fraud. Count III of the Complaint alleges
18 Hucks and Delzell violated Idaho Code § 30-1403(2), by the omission of material facts
19 in connection with the offer and sale of a security. Count IV alleges another violation of
20 the anti-fraud provision, Idaho Code § 30-1403(2), by the misrepresentation of material
21 facts in connection with the offer and sale of a security in Idaho. Count V alleges yet
22 another violation of the anti-fraud provision under Idaho Code § 30-1403(3), whereby
23 Hucks and Delzell' acts, practices, and course of business operated as a fraud or deceit
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1 upon other persons.

2 The State seeks relief in the form of: (1) a judgment holding that Hucks and
3 Delzell violated Counts I through V; (2) an injunction prohibiting Hucks and Delzell from
4 committing any further violations of the Securities Act; (3) an injunction prohibiting
5 Hucks and Delzell from offering or selling securities under any exemptions under the
6 Act without the prior written consent of the Director of the Department of Finance; (4) an
7 award of at least \$10,000.00 in the form of a money judgment to the State as restitution
8 for the victims of the Defendants violations of the Securities Act, pursuant to Idaho
9 Code 30-1442(3)(a); (5) civil penalties against Hucks and Delzell awarded to the State
10 in the amount of \$10,000.00 for each violation of the Securities Act, pursuant to Idaho
11 Code § 30-1442(3)(b); and (6) appointment of a receiver or conservator for Hucks and
12 Delzell' assets, pursuant to Idaho Code § 30-1442(3). This matter is set for a court trial
13 to begin May 10, 2005.
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15 Hucks and Delzell do not dispute that they received the sums of money set forth
16 above. The position that Hucks and Delzell assert is that their contact with Schoen and
17 Brooks was for the purpose for obtaining a loan and not the sale of securities. At the
18 pre-trial conference Hucks and Delzell stipulated that the court could enter an order
19 granting an injunction prohibiting both Defendants and Landmark from offering or
20 selling securities under any exemptions under the Act without the prior written consent
21 of the Director of the Department of Finance.
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23 LEGAL STANDARD

24 Rule 56(c) of the Idaho Rules of Civil Procedure provides that summary
25 judgment is "rendered forthwith if the pleadings, depositions, and admissions on file,
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1 together with the affidavits, if any, show that there is no genuine issue as to any
2 material fact and that the moving party is entitled to a judgment as a matter of law."
3 I.R.C.P. 56(c). The non-moving party may not simply rely upon mere allegations in the
4 pleadings, but must set forth in an affidavit specific facts showing there is a genuine
5 issue for trial. I.R.C.P. 56(e).

6 Generally, the trial court is not permitted to weigh the evidence or resolve
7 controverted factual issues when ruling on a motion for summary judgment; rather the
8 party resisting a motion for summary judgment is entitled to a favorable view of
9 conflicting evidence. *See Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982).
10 "However, where the trial court rather than a jury will be the trier of fact, summary
11 judgment is appropriate, despite the possibility of conflicting inferences because the
12 court alone will be responsible for resolving the conflict between those inferences."
13 *Small v. State*, 132 Idaho 327, 334, 971 P.2d 1151, 1158 Ct. App. 1998); *see also*
14 *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct. App. 1985) (when the
15 judge will be the trier of fact, he is free to arrive at the most probable inferences to be
16 drawn from uncontroverted evidentiary facts). Therefore, the court is free to draw
17 inferences it deems most probable in conformity with the evidence presented. *See*
18 *Anderson*, 103 Idaho at 660, 651 P.2d at 925.

21 DISCUSSION

22 Federal law may be used in interpreting the Idaho Securities Act because the
23 Idaho Supreme Court has acknowledged the desirability to maintain uniformity and
24 continuity with the federal securities acts. *Meyers v. Lott*, 133 Idaho 846, 850, 933 P.2d
25 609, 613 (2000).

1 **1. The Investment in Landmark Constitutes a Security**

2 Idaho Code § 30-1402(12) defines a “security” to include an “investment
3 contract.” See I.C. § 30-1402(12) (2004)¹. The Department of Finance promulgated
4 administrative rules (the “Rules”) pursuant to the Idaho Securities Act. One of the
5 Rules defines an “investment contract” as:

6 “Investment Contract” as used in Section 30-1402(12), Idaho Code,
7 includes, but is not limited to, either or both of the following:

- 8 a. Any investment in a common enterprise with the expectation of
9 profit to be derived primarily through the managerial efforts of
10 someone other than the investor. In this Section, a “common
11 enterprise” means an enterprise in which the fortunes of the
12 investor are interwoven with and dependent upon the efforts
13 and successes of those seeking the investment or of a third
14 party (also known as vertical commonality);
15 b. Any investment by which an offeree furnishes value to an
16 offeror and a portion of this value is subjected to the risks of the
17 enterprise, and the furnishings of said value are induced by the
18 offeror’s promises or representations which give rise to a
19 reasonable understanding that a valuable benefit of some kind,
20 over and above said value, will accrue to the offeree as a result
21 of the operation of the enterprise, and the offeree does not
22 receive the right to exercise practical and actual control over the
23 managerial decisions of the enterprise.

24 Rules Pursuant to the Idaho Securities Act, IDAPA 12.01.08.300.03.

25 This Rule parallels the *Howey-Forman* test set forth by the United States
26 Supreme Court and adopted by the Idaho Supreme Court. *State v. Gertsch*, 137 Idaho
387, 49 P.3d 392, 398 (2002) (citing *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946)).
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. *Id.*

1 Whether a particular set of facts constitutes a security is a question of law. *Id.* at 395.

2 The first prong of the *Howey-Forman* test requires the investment of money.
3 This simply means parting with money for the purpose and in the reasonable
4 expectation of making a profit. *Id.* at 397. In this case, the State has presented
5 evidence that Schoen and Brooks each invested \$5,000.00 in Landmark with the
6 reasonable expectation of receiving the return of that investment along with a portion of
7 Landmark's profits. The "Landmark Technology & Development, Inc. Revenue
8 Participation Agreement" that was entered into by the parties plainly provides that
9 Schoen and Brooks will receive a percentage of Landmark's profits in return for their
10 investment in Landmark.
11

12 The second prong of the *Howey-Forman* test requires the existence of a
13 common enterprise. *Id.* Vertical commonality is the relationship between each
14 individual investor and the promoter and occurs where "the fortunes of the investor are
15 interwoven with and dependent on the efforts and success of those seeking the
16 investment or of third parties." *Id.* This prong is satisfied in this case because the
17 fortunes of Schoen and Brooks were interwoven with and dependent on the efforts and
18 successes of the Landmark promoters Hucks and Delzell.
19

20 The third prong of the *Howey-Forman* test requires a reasonable expectation of
21 profits to be derived from the entrepreneurial or management efforts of others. *Id.* at
22 398. This element is satisfied in this case because Schoen and Brooks reasonably
23 expected profits that were to come from Landmark's success. Schoen and Brooks
24

25 ¹ The Idaho Securities Act was superseded by the new "Uniform Securities Act" effective September 1,
26 2004. This action is governed by the Idaho Securities Act because the acts occurred prior to the effective
date of the new act.

1 were not afforded the right to exercise any control over the decisions involving
2 Landmark's activities. They were not afforded the opportunity to participate in
3 Landmark's activities in any meaningful way. Rather the profits would come from the
4 efforts of Hucks, Delzell, and other third parties.

5 The Court will find that these facts meet the definition of a security under Idaho
6 Code, the administrative rules, and the *Howey-Forman* test. A review of the Revenue
7 Participation Agreement leaves no doubt that Schoen and Brooks were "investors" in
8 Landmark. Defendant Delzell, in his memorandum in opposition to this motion,
9 attempts to argue that the money was only a personal loan; but Delzell does eventually
10 admit that "[n]one-the-less, the Revenue Participation Agreement Hucks was coerced
11 into providing does meet the definition of a security." There is no evidence to support
12 the argument that the money received from Schoen and Brooks was intended as a
13 personal loan rather than a security. The "Revenue" Participation Agreement clearly
14 provides that the "investor" will receive an interest in Landmark's net revenue in return
15 for their investment. Whether a particular set of facts constitutes a security is a
16 question of law and the Court will find that the Revenue Participation Agreement is
17 within the definition of an investment contract and thus constitutes a security.
18 Defendants Hucks and Delzell offered and sold securities to Schoen and Brooks and
19 must comply with the Idaho Securities Act.
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22 **2. Defendants Violated the Registration Provisions of the Act**

23 "The purpose of securities registration is to protect investors by promoting full
24 disclosure of information necessary to make informed investment decisions." *State v.*
25 *Shama Resources Limited Partnership*, 127 Idaho 267, 273, 899 P.2d 977, 983 (1995).
26

A. OFFERING OR SELLING UNREGISTERED SECURITIES

1
2 Idaho Code § 30-1416 provides:

3 It is unlawful for any person to sell or to offer to sell any security in this
4 state, except securities exempt under section 30-1434, Idaho Code, or
5 except securities sold in transactions exempt under section 30-1435,
Idaho Code, unless such security is registered by notification, coordination
or qualification under this chapter or is a federal covered security.

6 Idaho Code § 30-1402(10) defines the terms "sell" to include every contract of sale or
7 contract to sell or dispose of, a security or interest in a security for value. I.C. § 30-
8 1402(10). That section also provides that "[o]ffer' or 'offer to sell' includes every
9 attempt or offer to dispose of, and every solicitation of an offer to buy, a security or
10 interest in a security for value." *Id.* Therefore any person who engages in the
11 solicitation of an offer to buy falls within the statute. *See Pinter v. Dahl*, 486 U.S. 622
12 (1988).
13

14 When defining a "seller" of securities under the Idaho Securities Act, the Idaho
15 Supreme Court adopted the "financial benefit test" that was applied by the U.S.
16 Supreme Court in *Pinter v. Dahl*, 486 U.S. 622 (1988), interpreting the Federal
17 Securities Act. *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000). The financial
18 benefit test defines a seller of securities as one who is motivated by pecuniary gain. *Id.*
19 at 850. This definition extends to "the person who solicits the purchase, motivated at
20 least in part by desire to serve his own financial interests or those of the securities
21 owner." *Id.*
22

23 The Court will find that Both Hucks and Delzell violated I.C. 30-1416 by offering
24 and selling unregistered securities to Schoen and Brooks. Hucks telephoned both
25 Schoen and Brooks about the Landmark's project. He gave details to each about the
26

1 project. He solicited Schoen and Brooks to enter into the Revenue Participation
2 Agreement and he was motivated by a desire to serve his own financial interest. That
3 desire was fulfilled when Hucks received the investment moneys from Schoen and
4 Brooks. Delzell also had continuous contact with Schoen and Brooks. Delzell admits in
5 his affidavit submitted to the Court that he solicited funding for Landmark's project and
6 he received a finders fee in return. The Court will find that Delzell was actively engaged
7 in the solicitation of the investment from Schoen and Brooks. Delzell prepared written
8 information about the project that he sent to Schoen and Brooks. Delzell had numerous
9 other contacts with Schoen and Brooks. Delzell received \$1,000.00 from the funds
10 invested by Schoen and was therefore financially motivated in offering and selling the
11 securities. The Court will find that Defendants did sell and offer to sell securities to
12 Schoen and Brooks. There is no dispute that these securities sold by Defendants were
13 not registered as required by the Act. Accordingly, the Court will find that the State is
14 entitled to judgment as a matter of law that Defendants Hucks and Delzell violated the
15 registration requirement of the Idaho Securities Act pursuant to Idaho Code § 30-1416.
16

17 Delzell argues that the securities were exempt from the registration requirement
18 under I.C. § 30-1435. However once the State, as the moving party, meets its burden
19 to establish that Hucks and Delzell violated the Idaho Securities Act, then the person
20 claiming the exemption has the burden of proving that affirmative defense. See I.C.
21 §30-1456; *State v. Shama Resources Limited Partnership*, 127 Idaho 267, 273, 899
22 P.2d 977, 983 (1995). The exemptions from the registration provisions of the securities
23 acts are construed narrowly. See *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980). The
24 Court will find that Delzell failed to provide factual and legal support for the argument
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1 that the securities were exempt from registration requirements. Delzell supports his
2 argument with no more than the assertion that "my reading of the Idaho Securities
3 Code § 30-1435 would seem to grant us an Exemption. . . ." Defendants have failed to
4 meet their burden of proving the securities are exempt from the registration
5 requirements.

6 B. UNREGISTERED SALESPERSON OR BROKER-DEALER

7 Idaho Code § 30-1406(1) provides that: "[i]t is unlawful for any person to transact
8 business in this state as a broker-dealer or salesman unless he is registered under this
9 chapter, and it is unlawful for any broker-dealer or issuer to employ a salesman unless
10 the salesman is registered under this chapter." The term "to transact business" is
11 defined as "to buy or to sell or contract to buy or to sell or dispose of a security or
12 interest in a security for value." IDAPA 12.01.08.300.01. The definition also includes
13 every solicitation of any offer to sell a security for value. *Id.*

14
15 The Court will find that there is no issue of fact as to whether Defendants Hucks
16 and Delzell sold securities in Landmark to Schoen and Brooks. Both Defendants
17 actively participated in the selling of the Landmark securities by making representations
18 and providing information regarding Landmark's project in order to induce Schoen and
19 Brooks to invest money in Landmark. Delzell admits that he called both Schoen and
20 Brooks, at Huck's request, to obtain funds for Landmark. Delzell prepared a memo that
21 he sent to Schoen and Brooks, which outlines the details of the investment process.
22 Delzell also concedes that he prepared two "Revenue Participation Agreements," at
23 Huck's request, and sent them to Schoen and Brooks. Hucks also actively participated
24 in selling the securities through telephone conversations with Schoen and Brooks.
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1 Hucks ultimately received the investment monies of Schoen and Brooks. The Court will
2 find that the State is entitled to judgment as a matter of law that Defendants Hucks and
3 Delzell violated I.C. § 30-1406(1) by transacting business in Idaho as a broker-dealer
4 and/or salesman without registering as required by the Idaho Securities Act.

5
6 **3. Defendants Committed Securities Fraud.**

7 To establish fraud under I.C. § 30-1403(2), the State must prove that Hucks and
8 Delzell made untrue statements of material fact or omitted any material facts in
9 connection with the sale, offer, or purchase of any security. See I.C. § 30-1403(2);
10 *Shama Resources Limited Partnership*, 127 Idaho at 272, 899 P.2d at 982. To establish
11 fraud under I.C. § 30-1403(3), the State must show that Hucks and Delzell engaged in
12 an act, practice, or course of business that operated or would operate as a fraud or
13 deceit upon any person. See I.C. § 30-1403(3); *Shama Resources Limited Partnership*,
14 127 Idaho at 272, 899 P.2d at 982. The State is not required to show the intent to
15 defraud or detrimental reliance. *Id.*

16
17 **A. MISREPRESENTATIONS**

18 The Court will find that Defendants Hucks and Delzell made material
19 representations of fact that constitutes securities fraud. Hucks and Delzell made
20 numerous representations to Schoen and Brooks that the investment monies would be
21 used to further Landmark's mining venture. During telephone conversations Hucks and
22 Delzell assured Schoen and Brooks that their investment monies would be used to get
23 Landmark's project up and running and to obtain necessary software. See *e.g. Affidavit*
24 *of Richard Brooks*, at 3. The memo that Defendant Delzell sent to Schoen and Brooks
25 provides that the investment monies will be used to "jump start the operation" by finding
26

1 alternative mine sites and designing and testing a prototype. The Revenue
2 Participation Agreement itself provides that "Investor" will pay \$5,000.00 to Landmark
3 for an interest in the net revenue of Landmark's mining operations.

4 Despite Defendants representations that the investment monies would be used
5 to further Landmark's mining operations, Hucks and Delzell did not use the monies in
6 such a manner. Rather the evidence shows that the monies were used to compensate
7 Delzell and to pay the personal expenses of Hucks. *See Affidavit of James Burns.*
8 Hucks and Delzell do not contend that any of the investment proceeds were spent to
9 further Landmark's operations, rather Hucks and Delzell now try to classify the
10 transactions as personal loans for Hucks, essentially admitting that the monies were
11 used on Huck's personal expenses. Defendant Delzell admits that he received
12 \$1,000.00 of the investment monies as repayment of personal loans that Delzell had
13 made to Hucks.
14

15 Hucks and Delzell misrepresentations of how the investment monies would be
16 used are material facts because the facts would influence the decision of a reasonable
17 investor in determining whether to invest or not. The Court will find that Defendants'
18 misrepresentation of material fact constitutes security fraud under I.C. § 30-1403(2).
19

20 B. OMISSIONS

21 The Court will also find that Hucks and Delzell's omission of material facts
22 constitutes securities fraud under I.C. § 30-1403(2). Hucks and Delzell failed to inform
23 Schoen and Brooks that the securities in Landmark were not registered with the State
24 of Idaho as required by I.C. § 30-1416(1). Hucks and Delzell also failed to inform
25 Schoen and Brooks that Defendants were not registered as securities brokers or
26

1 salesman as required by I.C. § 30-1406(1). Such omissions have been held to
2 constitute securities fraud. *Shama Resources Limited Partnership*, 127 Idaho at 272,
3 899 P.2d at 982. Any reasonable investor's decision to invest would be affected by
4 these facts had they been disclosed. The Court will find that Hucks and Delzell'
5 omissions constitute security fraud.

6 CONCLUSION

7 Based upon the foregoing, the Court will GRANT the State's motion for summary
8 judgment. There is no issue of material fact and the State is entitled to judgment as a
9 matter that Hucks and Delzell violated the Idaho Securities act as follows:

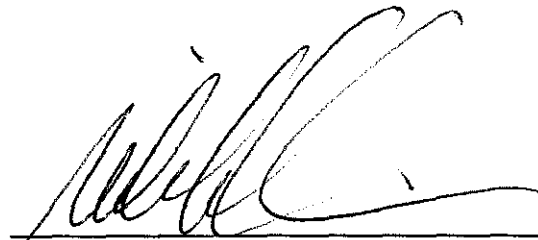
- 10 1. Defendants offered and sold unregistered securities in violation of I.C. § 30-
11 1416,
- 12 2. Defendants transacted business in Idaho as securities brokers and salesman
13 without being registered as required by I.C. § 30-1406(1),
- 14 3. Defendants committed securities fraud in violation of I.C. § 30-1403(2).

15 The Court will find the State is entitled to relief in the form of:

- 16 1. Restitution to be paid by Defendants, jointly and severally, in the amount of
17 \$5,000.00 to each Schoen and Brooks for a total of \$10,000.00;
- 18 2. Civil penalties to be paid by Hucks and Delzell in the amount of \$20,000.00
19 each, for a total of \$40,000.00, for their violations of the Idaho Securities Act
20 pursuant to I.C. § 30-1442(3)(b);
- 21 3. The State will be awarded its costs, which includes reasonable attorney's fees
22 and costs for investigative efforts, upon submitting a memorandum of costs to
23 the Court, pursuant to I.C. § 30-1442(3)(c).

The State will also submit to the Court a Judgment that sets forth the foregoing.

DATED this 29 day of April 2005.



MICHAEL McLAUGHLIN
DISTRICT JUDGE

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CERTIFICATE OF MAILING

I hereby certify that on the 29th day of April 2005, I mailed (served) a true and

correct copy of the within instrument to:


TRIAL COURT ADMINISTRATION
TWO (2) COPIES

A. RENE MARTIN
DEPUTY ATTORNEY GENERAL
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BOISE, ID 83720-0031

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J. DAVID NAVARRO
Clerk of the District Court

By: 
Deputy Clerk