

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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 DISTRICT COURT
 7TH JUDICIAL DISTRICT
 BONNEVILLE COUNTY ID

STATE OF IDAHO, DEPARTMENT OF)
 FINANCE, SECURITIES BUREAU,)

Plaintiff,)

vs.)

BEVERLY RAE BOWEN, JOHN)
 ALFRED LOWDEN, KEVIN KRUGER)
 SUTTON, and NGS TRUST,)

Defendants.)

Case No. CV-01-2070

**FINDINGS OF FACT AND
 CONCLUSIONS OF LAW**

FINDINGS OF FACT

Beverly Rae Bowen (Bowen) was a real estate agent in the Idaho Falls area.

Bowen was selling security interests in the NGS Trust investment program to individuals in the Idaho Falls area. NGS Trust securities have never been registered with the Idaho State Department of Finance. Bowen has never been licensed as a securities salesperson with the Idaho State Department of Finance.

John Alfred Lowden (Lowden) has been a licensed insurance agent in Idaho since 1981. Lowden specializes in selling life and health insurance and annuities. Many of Lowden's clients are elderly.

Lowden is not licensed with the Idaho State Department of Finance as a securities salesperson.

Bowen asked Lowden if he might have any clients that would be interested in investing in the NGS Trust. Lowden introduced Bowen to some of his insurance clients. Those clients were Alvin Roessner, Thelma and Clynneth Kirkham, F. Pat and Gail Walker, and Elma

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Coolidge Carder. All of these individuals are between the ages of 74 and 91.

Lowden brought Bowen to each of the individual's homes, introduced them, and attended the meetings in which Bowen explained the NGS Trust. On a few occasions, Lowden answered his clients' questions concerning the program. Lowden communicated to his clients that he thought the investment was a good idea. Lowden also told his clients that he wanted to invest in the program.

During the sales presentations, Bowen represented to Lowden's clients that the NGS Trust was an offshore investment program in which investors would receive a guaranteed return of 8% per year, and could expect returns of up to 60% per month. Bowen told the investors that \$5,300 was required to invest in the NGS Trust.

Bowen also told all of the investors that, in order to invest in the NGS Trust, they must pay an additional \$1,250 for a set of Global books and tapes (Global Tapes) that explained the program.

Neither Bowen nor Lowden told the investors that the NGS Trust was not registered with the Idaho Department of Finance, or that Bowen and Lowden were not licensed as securities salespersons. Lowden's clients were not provided with any financial information concerning the NGS Trust, Kevin Sutton (the purported trustee of the NGS Trust), Bowen, or Lowden. Lowden's clients were not informed of the risk involved with the investment, nor were they provided information regarding the actual use of the proceeds.

Alvin Roessner, Thelma and Clynneth Kirkham, F. Pat and Gail Walker, and Elma Coolidge Carder invested in the NGS Trust. Each of these individuals lost their entire investment.

Investments in the NGS Trust and the Global Tapes were sold to the investors as a

package. Lowden discussed with Bowen whether he would receive commissions on the sale of the NGS Trust securities and was initially told there would be no commission. Later, Bowen told Lowden that after the sale to Mrs. Carder, he would make a commission from future sales of Global Tapes. Lowden also received a phone call from a representative of Global welcoming Lowden aboard as a sales representative after three or four Global Tape sets had been sold to his clients.

Lowden received a commission from the sale of the Global Tapes to Mrs. Carder. Mrs. Carder was the fourth client to whom the NGS Trust and Global Tapes had been sold. The sale to Mrs. Carder occurred in August, 1999.

During the summer of 1999, the Idaho State Department of Finance received inquiries from the Idaho Falls area regarding the NGS Trust, and commenced an investigation.

On April 13, 2001, the Idaho State Department of Finance filed a complaint against Bowen and Lowden for transacting business as broker-dealers or sales persons without having registered under the Idaho Securities Act pursuant to Idaho Code § 30-1406, selling or offering to sell unregistered securities pursuant to Idaho Code § 30-1416, and violations of the antifraud provisions of the Idaho Securities Act, Idaho Code § 30-1403(2) and (3).

On July 8, 2002, summary judgment was entered against Bowen.

The Idaho State Department of Finance's claims against Lowden were tried to the court on July 9, 2002.

CONCLUSIONS OF LAW

I. Idaho Code §§ 30-1406 and 30-1416

Idaho Code § 30-1406(1) prohibits any person from transacting business in this state as a broker-dealer or salesman of securities unless that person is registered as a securities broker-

dealer or salesman. Idaho Code § 30-1416 makes it unlawful for "any person to sell or to offer to sell any security in this state...unless such security is registered by notification, coordination or qualification under this chapter or is a federal covered security."

Lowden does not dispute that: (1) he is not registered to sell securities as a broker-dealer or salesman; (2) an investment in the NGS Trust is a security; (3) the NGS Trust is not registered with the Idaho State Department of Finance as a security; and (4) Lowden's clients purchased investments in the NGS Trust.

Lowden disputes that his actions constituted "transacting business" as a securities salesman under Idaho Code § 30-1406(1), or "selling or offering to sell" securities under Idaho Code § 30-1416.

"Transacting business" is defined as: "to buy or to sell or...offer to buy or offer to sell or dispose of, and every solicitation of clients or of any offer to buy or to sell, a security or interest in a security for value...." IDAPA 12.01.08.300.01. Whether Lowden "transacted business" in securities turns on whether Lowden sold, offered to sell, or solicited the sale of securities. Therefore, both Idaho Code §§ 30-1406(1) and 30-1416 require this Court to determine whether Lowden acted as a "seller" of securities.

In *Meyers v. Lott*, 133 Idaho 846, 993 P.2d 609 (2000), the Supreme Court of Idaho adopted the "financial benefit" test to define a "seller" of securities.

The threshold question is how to define a "seller" of securities under the Idaho Securities Act. This issue has not been decided by this Court. Two tests have developed in other jurisdictions to define the term "seller." The "financial benefit test" was adopted by the U.S. Supreme Court in *Pinter v. Dahl*, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988), interpreting the Federal Securities Act. The "substantial factor test" has been utilized by courts in Texas, Kansas and Washington, interpreting their respective state securities acts. See *Lutheran Brotherhood v. Kidder Peabody & Co.*, 829 S.W.2d 300, 306 (1992), set aside on other grounds 840 S.W.2d 384 (1992), *State ex rel. Mays v.*

Ridenhour, 248 Kan. 919, 930, 811 P.2d 1220, 1231 (1991), *Hoffer v. State*, 113 Wash.2d 148, 149, 776 P.2d 963, 964 (1989).

The substantial factor test is a broad test which allows individuals to be classified as sellers when their acts are deemed to be a substantial factor in bringing about the particular securities violation. The states which have utilized the substantial factor test have been motivated by a desire to protect as many investors as possible.

The financial benefit test defines a seller of securities as one who is motivated by pecuniary gain. This definition extends to "the person who solicits the purchase, motivated at least in part by desire to serve his own financial interests or those of the securities owner." *Pinter v. Dahl*, 486 U.S. at 630, 108 S. Ct. at 2070, 100 L. Ed. 2d at 671. This Court has attempted to maintain uniformity and continuity with the Federal Securities Act and has utilized federal law in interpreting the Idaho Securities Act. *Franchiseur v. Mountain View Irrigation Company, Inc.*, 100 Idaho 336, 597 P.2d 222 (1979). That approach is appropriate in this case. The financial benefit test offers courts a clear line in deciding whether an individual meets the definition of a seller under the Idaho Securities Act, while at the same time offering adequate protection to investors. The district court correctly adopted the financial benefit test.

Id., 133 Idaho at 849-50, 993 P.2d at 612-13.

Lowden is a salesperson by profession. Lowden appeared to his clients to be training to be a salesperson for the NGS Trust. Lowden's clients were told they must purchase the Global Tapes in order to invest in the NGS Trust. Lowden knew from his conversations with Bowen and the Global representative that he would earn a commission from all sales of the Global tapes after three or four sales had been made to his clients. Lowden introduced Bowen to four different clients, attended the sales presentations, answered his clients' questions about the investment program, and facilitated the exchange of money for the NGS Trust security and Global Tapes. Lowden received a commission from the fourth sale of the NGS Trust and Global Tapes to his clients.

Lowden's was motivated by his own financial interest in selling the NGS Trust securities and Global Tapes. Lowden acted as a seller of securities in violation of Idaho Code

§ 30-1416, and transacted business in securities in violation of Idaho Code § 30-1406(1).

II. Antifraud Provisions

Idaho Code § 30-1403 provides:

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly,

- (1) to employ any device, scheme or artifice to defraud,
- (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or
- (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

A. In Connection With

Lowden contends that he did not violate Idaho Code § 30-1403 because his conduct was not "in connection with" the sale of a security.

Idaho Code § 30-1403 is patterned after §10(b) of the Securities and Exchange Act of 1934 and Rule 10(b)-5 of the Securities and Exchange Commission. *See* 15 U.S.C. § 78j(b). The Idaho Securities Act should be construed in harmony with the interpretation of federal securities regulations. *See* Idaho Code § 30-1457.

In *Superintendent of Insurance of New York v. Bankers Life and Casualty Co.*, 404 U.S. 6, 92 S. Ct. 165, 30 L. Ed. 2d 128 (1971), the United States Supreme Court held that in order for the Securities and Exchange Act to effectuate its remedial purposes, § 10(b) should be read "flexibly, not technically and restrictively." *Id.*, 404 U.S. at 12, 92 S. Ct. at 169. The 9th Circuit has read the term "in connection with" to include fraud that "somehow 'touch' upon securities transactions." *S.E.C. v. Clark*, 915 F.2d 439, 449 (1990).

In this case, Lowden acted as a seller of securities to his clients. Lowden's omissions were material and directly related to his clients' decision to invest in the NGS Trust. Lowden's

course of action, in which he accompanied Bowen, introduced her to his clients, and facilitated the exchange of money, in order to receive an eventual commission, has a substantial nexus with the sale of the NGS Trust security.

Lowden acted "in connection with" the sale of securities.

B. Material Omissions

Section 30-1403(2) prohibits making any material untrue statement or omission in connection with the sale of a security. Materiality is measured by whether a reasonable investor would consider the omitted fact important in deciding whether to invest. *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976).

Lowden failed to disclose: (1) that neither he nor Bowen was registered as a securities salespersons or broker-dealers under the Idaho Securities Act; (2) that the NGS Trust was not registered as a security; (3) any financial information concerning the investment, himself, or Bowen; (4) the risk associated with investing in the NGS Trust; and (5) the actual use of the proceeds received from the investors.

Lowden made material omissions in connection with the sale of a security in violation of Idaho Code § 30-1403(2).

C. Act of Fraud or Deceit

Section 30-1403(3), I.C., prohibits any act, practice or course of business which would operate as a fraud or deceit upon any person. In *State v. Shama Resources Limited Partnership*, 127 Idaho 267, 899 P.2d 977 (1995), plaintiff's showing that defendant was not registered to sell securities and engaged in the act of selling unregistered securities was enough to meet the plaintiff's burden for summary judgment.

As in *Shama*, Lowden was not a registered broker-dealer or salesman and acted as a seller

of unregistered securities to his clients. Lowden failed to inform his clients: (1) he was not registered to sell securities in the state of Idaho, and (2) of the actual use of the funds he received from them.

Lowden engaged in a course of action which operated as a deceit upon his clients in violation of Idaho Code § 30-1403(3).

III. Penalties and Costs

A. Penalties

Idaho Code § 30-1442(3) provides that “[u]pon a showing that a person has engaged or is about to engage in an act or practice constituting a violation of this chapter...[a permanent injunction] shall be granted....”

Lowden has violated §§ 30-1403, 30-1406, and 30-1416 of the Idaho Securities Act. A permanent injunction should be entered against Lowden enjoining him from any acts, practices, or omissions which would constitute violations of the Idaho Securities Act.

Idaho Code § 30-1442(3)(a) further provides, in the court’s discretion, for “[a]n order restoring to any person in interest any consideration which may have been acquired or transferred in violation of this chapter.”

Lowden’s clients lost their entire investments in the NGS Trust. The evidence shows his clients incurred losses in the following amounts: Mr. Roessner invested \$6,550; the Walkers invested \$6,550 and incurred a \$230.76 loss on an annuity withdrawal; the Kirkams invested \$6,550; and Mrs. Carder invested \$6,550. Lowden’s clients’ total loss is \$26,430.76. Lowden should be ordered to pay restitution in the amount of \$26,430.76.


Idaho Code § 30-1442(3)(b) also provides for a penalty of \$10,000 for every proven violation of the Idaho Securities Act, to be granted in the court’s discretion. This Court does

not find Lowden's actions to have been malicious, or that imposition of such penalties is necessary to deter further violations of the Idaho Securities Act. Therefore, this Court will not grant such penalties.

B. Attorney Fees and Costs

Idaho Code § 30-1442(3)(c) provides for the Idaho State Department of Finance to recover costs, "which in the discretion of the court may include an amount representing reasonable attorney fees and reimbursements for investigative efforts." Reasonable attorney fees and reimbursements for investigative efforts should be granted against Lowden.

DATED this 8th day of August, 2002.


GREGORY S. ANDERSON
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2002, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

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Clerk of the District Court
Bonneville County, Idaho

By Tracy B. Senke
Deputy Clerk