

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

STATE OF IDAHO, DEPARTMENT OF
FINANCE, SECURITIES BUREAU,

Plaintiff,

vs.

JACK LEE SMILEY,

Defendant.

Case No. CV 07-2341

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

COMES NOW Plaintiff herein and submits this memorandum in support of its motion for summary judgment.

SUMMARY OF THE CASE

This is a civil law enforcement action. Defendant Jack Lee Smiley has been illegally raising money from individuals to invest in Iraqi currency, in violation of Idaho's Uniform Securities Act and of the Idaho Commodity Code. The Idaho Department of Finance has sued to stop the illegal fundraising and to get restitution for the investors. This is a crucial matter

because, as shown below, the investment cannot work as structured and Defendant Smiley is refusing to return investor money.

In late 2004, Defendant Smiley learned from a stranger of a plan to buy Iraqi currency, called Dinars, which supposedly had dropped drastically in value when Iraq was invaded and Saddam Hussein deposed. The plan was to buy the Dinar while it was bottomed out, and when the Iraq economy recovered the Dinar would rise back to normal levels, a drastic increase. Invest \$1,000 and you'll obtain a return of \$1,000,000, according to Smiley.

To effectuate the plan, Smiley solicited money from investors with which to buy Dinars. During the sales pitch, Smiley misrepresented the risks of the investment. Among other things he stated that the investment was risk free; he guaranteed the investors would not lose any money. Smiley also failed to tell investors salient facts about the investment. Over 100 people invested with Smiley, giving him a total of over \$1,000,000.

The Idaho Department of Finance learned of Smiley's scheme and issued a Cease & Desist Order on June 2, 2005. Smiley did not cease and desist, but continued to illegally raise money to buy Dinars, through 2007.

Smiley's actions violated Idaho's Uniform Securities Act (the Act). Smiley's agreements with his investors to purchase Dinars on their behalf, which he memorialized in written "Joint Venture Agreements," constituted securities in the form of investment contracts. These investment contracts and securities are regulated by the Act.

Smiley violated the Act when he purchased Dinars and was not registered or licensed as required by law, and when he issued securities that were not registered as required. His false statements and his omissions of material information essentially tricked investors into investing, which constituted fraud under the Act.

Foreign currency is a regulated commodity under the Idaho Commodity Code (the Code). Smiley violated the Code when he purchased Dinars. Smiley also violated the Code when he continued his scheme after being ordered to cease & desist. His false statements and his omissions of material information essentially tricked investors into investing, which constituted fraud under the Code.

STATEMENT OF UNDISPUTED FACTS

For purposes of this motion, the State relies upon the deposition of Defendant Jack Lee Smiley and upon affidavits of Johnny Bryant, Janet Carpenter, Marilyn Chastain, Alan Conilogue, Martin Gennuso, Michael Gorham, Stephen Heuer, and Timothy D. Martin. The affidavits have been filed with the Court concurrently with this Memorandum in Support. True and correct copies of individual pages from these transcripts, containing statements relied upon in this Memorandum, are attached to this Memorandum.

The facts listed below, based upon the above cited evidence, are undisputed.

The Dinar Investment Scheme

1. Smiley purchased and offered to sell Dinars as part of his plan. (Smiley deposition, p. 17, ll. 7- 8).
2. Smiley entered into well over 100 “Joint Venture Agreements” or contracts, all for the purchase of Iraqi Dinars. Smiley’s records show 112 “Joint Venture Partners” and 11 more that had been “cancelled.” (Smiley deposition, Exhibit 12).
3. Records gathered by the Idaho Department of Finance during its investigation and discovery show that 161 agreements were executed. (Affidavit of Alan Conilogue ¶ 2; Exhibit A to Affidavit of Alan Conilogue).

4. Before he began to solicit money from investors, Smiley bought some Dinars, held them for a short time, and resold them. (Smiley deposition, pp. 10-11, ll. 20 – 6).

5. Investors in the Dinar scheme considered it as an investment in which they would give Smiley money, he would buy Dinars and sell them later at a large profit for the investors. (Affidavit of Johnny Bryant, ¶ 4; Affidavit of Martin Gennuso, ¶ 4).

6. Nothing was required of investors in the Dinar investment other than payment of money. Investors were not required or expected to make any effort other than provide funds. (Affidavit of Johnny Bryant, ¶ 4).

7. Most investors did not know the source of the Dinars and could not assist in the purchase. (Smiley deposition, pp.83-84, ll. 5- 17).

8. Smiley revealed the source of the Dinars only to people who promised they would not circumvent him. (Smiley deposition, p.83, ll. 19-24).

9. Investors invested a total of \$1,195,009 in Smiley's Dinar investment program. (Affidavit of Timothy D. Martin, ¶ 12.a.).

10. The Joint Venture Agreements entered into between Smiley and investors provide that all net profits from the operation of the agreement will be divided 50% to Smiley and 50% to the investor. (Smiley deposition, Exhibits 10, 15, 16).

11. Smiley did not keep records to distinguish how many Dinars he purchased for a particular investor (Smiley deposition, pp. 22-23, ll.25-1).

12. Smiley did not set up a separate bank account for investor money, but instead mingled those moneys in with his personal accounts. (Smiley deposition, pp. 26-27, ll.22-6).

13. Several of the joint ventures were dissolved by Smiley, and several investors requested their money back, but Smiley has refused to return the money. (Smiley deposition, p.

95, ll. 23-25; p. 102, ll.; p. 105, ll. 2-9; Affidavits of Martin Gennuso, Stephen Heuer, Janet Carpenter).

Registration

14. The Dinar investment security offered and sold by Smiley was not registered with the Idaho Department of Finance. (Affidavit of Marilyn T. Chastain, ¶ 3).

Income

15. Smiley's legitimate income was from Social Security and a military disability. (Smiley deposition, Exhibit 14).

16. Smiley's income sources initially provided \$538.00 and \$108.00 respectively, for a monthly total of \$646.00. (Exhibit A to Affidavit of Timothy D. Martin).

Cease and Desist Order

17. The Idaho Department of Finance issued a Summary Cease and Desist order on June 2, 2005 and served it on Jack Smiley. (Affidavit of Timothy D. Martin; Smiley deposition, pp. 32-33, ll.22-19; Smiley deposition, Exhibit 2).

18. Smiley did not stop soliciting investors and he continued to enter into commodity contracts and to buy Dinars after he was served with a Summary Cease and Desist order on June 2, 2005. (Smiley deposition, p. 33, ll. 5-8).

19. Smiley continued to accept investor money, some of which he used to purchase Dinars, at least through June 2007. (Smiley deposition, Exhibit 16, Joint Venture Agreement executed between Smiley and Bill Ice as Gold Eagle, LLP on June 27, 2007).

20. Smiley executed 63 agreements before the Cease and Order issued on June 2, 2005, and 98 after. (Affidavit of Alan Conilogue ¶ 4, and Exhibit B thereto).

Misrepresentations and Omissions

21. Smiley did not tell the investors in the Dinar investment security that he had been served with an Order to Cease and Desist (Affidavit of Johnny Bryant, ¶ 3; Affidavit of Janet Carpenter, ¶ 5; Affidavit of Martin Gennuso, ¶ 3; Affidavit of Stephen Heuer, ¶ 14).

22. Smiley did not tell the investors in the Dinar investment security that he was not registered as an agent and that his securities were not registered (Affidavit of Johnny Bryant, ¶¶ 9, 10, 11; Affidavit of Martin Gennuso, ¶¶ 7-9).

23. Smiley did not tell the investors in the Dinar investment that he was relying on some other person to tell him when the investment paid off (Affidavit of Johnny Bryant, ¶ 9; Affidavit of Martin Gennuso, ¶ 6).

24. Smiley did not tell the investors in the Dinar investment that he had closed the safe deposit boxes and was storing the Dinars in canvas suitcases. (Smiley deposition, p. 70, ll. 18-21).

25. Smiley told his investors that the investment was going to pay off very soon, possibly within a few months (Affidavit of Johnny Bryant, ¶ 1.d.; Affidavit of Steven Heuer, ¶¶ 1-2; Affidavit of Martin Gennuso, ¶¶ 1.c. and 1.d.; Smiley deposition, pp. 64-65 ll. 22-12; Smiley deposition, Exhibits 5, 9).

26. Smiley's assertions that the investment would pay off quickly were false. (Smiley deposition, p. 65 ll.17-22).

27. Despite promising that the investors could cancel the agreement and get at least some of their money back, (Smiley deposition Exhibits 10, 15, 16) Smiley is currently refusing to return the money to investors, and is refusing to give the investors the Dinars he purchased for them. (Smiley deposition, p 49, ll. 14-19; Affidavit of Martin Gennuso, ¶ 8). Smiley does not know what event must occur to trigger the rise in value. (Smiley deposition, pp. 20-21, ll. 23-7).

28. Smiley relied on "Ali" to tell him when to sell the Dinars. (Smiley deposition, p. 19, ll. 8-12).

29. Smiley guaranteed that an investment of \$1,000 would return \$1,000,000. (Smiley deposition, p. 48, ll. 12-15).

30. Smiley promised to his investors in writing that the Dinars would be kept in a safety deposit box. (Smiley deposition, Exhibits 10, 16).

31. Smiley executed a power of attorney so that the investors could access the safety deposit box should he expire. (Smiley deposition, Exhibits 10, 16).

32. Although Smiley initially did place the Dinars in safety deposit boxes, he later removed them. (Smiley deposition, pp. 69-70, ll. 24-4).

33. Smiley knowingly executed the same documents, with the same promise to store the Dinars in a safety deposit box, even after he closed down the safety deposit boxes. (Smiley deposition, p. 90, ll. 3-11).

34. Smiley told investors that he would be opening a currency office in Coeur d'Alene, Idaho, but he did not do so. (Smiley deposition, Exhibit 7, Smiley deposition, pp. 60, ll. 4-9).

35. Smiley promised investors that he would not use any investor's money until the investment succeeded. (Smiley deposition, p. 61, ll. 4 - 23; Smiley deposition, Exhibit 8).

SUMMARY JUDGMENT

Summary judgment is appropriate "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 a judgment as a matter of law." Rule 56(c), Idaho Rules of Civil Procedure.

I.R.C.P. 56(e) provides in pertinent part:

...When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

These rules were reviewed by the Idaho Supreme Court in *Baxter v. Craney*, 135 Idaho 166, 16 P.3d 263 (2000). At page 170 of 135 Idaho 166, the Court stated:

...Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court, read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law. See I.R.C.P. 56(c); *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). The burden of proving the absence of material facts is upon the moving party. [Citation omitted.] The adverse party, however, "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e); see also, *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986). In other words, the moving party is entitled to a 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. See *Badell*, 115 Idaho at 102, 765, P.2d at 127 (citing *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

The Department asserts that the pleadings, affidavits, discovery documents, and admissions on file herein establish that there are no genuine issues of material fact, and the Department is entitled to the entry of summary judgment as a matter of law.

UNIFORM SECURITY ACT VIOLATIONS

1. Smiley's Dinar investment program is a security.

1.A. Definition of security. Idaho's Uniform Securities Act, at Idaho Code § 30-14-102(28)(d), defines a security as including an investment contract, as explained below. To understand this, it is necessary to understand several general principles.

First, similarly to the federal securities laws, the Idaho Uniform Securities Act is remedial in nature; its primary purpose is to protect the public. It must therefore be read broadly in order to accomplish that purpose. Tcherepnin v. Knight, 389 U.S. 332, 336, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967). That canon has specifically been followed in determining whether a particular scheme falls within the definition of security. SEC v. Glenn W. Turner Enters., Inc., 474 F.2d 476, 480-81 (9th Cir. 1973). The United States Supreme Court has stated as follows:

The fundamental purpose undergirding the Securities Act is to “eliminate serious abuses in a largely unregulated securities market.” (Citations omitted). In defining the scope of the market that it wished to regulate, Congress painted with a broad brush. It recognized the virtually limitless scope of human ingenuity, especially in the creation of “countless and variable schemes devised by those who seek the use of the money of others on the promise of profits,” (citation omitted), and determined that the best way to achieve its goal of protecting investors was “to define ‘the term “security” in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security.’ (Citations omitted). Congress therefore did not attempt precisely to cabin the scope of the Securities Acts. Rather, it enacted a definition of “security” sufficiently broad to encompass virtually any instrument that might be sold as an investment.

Reves v. Ernst & Young, 494 U.S. 56, 110 S.Ct. 945, 949, 108 L.Ed.2d 47 (1990).

Second, in determining the definition of a security, “form should be disregarded for substance and the emphasis should be on economic reality.” Tcherepnin, 389 U.S. at 336.

Finally, Idaho’s Uniform Securities Act is an adaptation of the Uniform Securities Act of 2002. Idaho Code § 30-14-608(a) exhorts the Director of the Idaho Department of Finance to use the Act in such a way as “to effectuate greater uniformity in securities matters among the federal government, self-regulatory organizations, states, and foreign governments.” Idaho Code § 30-14-608(b) further provides:

Policies to consider. In cooperating, coordinating, consulting, and sharing records and information under this section and in acting by rule, order, or waiver under this chapter, the administrator shall, in the administrator's discretion, take into consideration in carrying out the public interest the following general policies:

- (1) Maximizing effectiveness of regulation for the protection of investors;
- (2) Maximizing uniformity in federal and state regulatory standards.

Therefore, the decisions of federal courts and the courts of those states which have also adopted securities acts serve as guidance in answering questions arising under Idaho's Act.

1.B. Definition of investment contract. Idaho Code § 30-14-102(28)(d) states that a security:

Includes as an "investment contract" an 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;

This section reflects a definition of investment contract which has been developed by both federal and state courts. The definition is derived originally from the landmark decision SEC v. W.J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed 1244 (1945). In Howey, investors purchased tracts of citrus groves in Florida along with service contracts for maintenance of the groves. Investors, primarily business and professional persons with no expertise in citrus farming, were given no authority over management of the groves. They were attracted to the investment by expectation of profit. The Court held that the transactions involved investment contracts, and set forth the following definition and approach to analysis:

(A)n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.... (This definition) embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profit.

328 U.S. at 298-299. In arriving at its decision, the Court looked beyond the mere categorization of what was being sold. The Court examined the true substance of the offer.

The respondent companies are offering something more than fee simple interests in land, something different from a farm or orchard coupled with management services. They are offering an opportunity to contribute money and to share in the

profits of a large citrus fruit enterprise managed and partly owned by respondents.... (The offerees) have no desire to occupy the land or to develop it themselves; they are attracted solely by the prospect of a return on their investment.

328 U.S. at 299-300.

Idaho Code § 30-14-102(28), quoted above, embodies the Howey test for investment contracts and has three elements: (1) investment of money, (2) in a common enterprise, (3) with the expectation of profit from the efforts of others. The scheme offered by Smiley meets all three criteria.

1.B. (1) Investment of money. The first part of the Howey test, and of the investment contract definition contained in the Act, is the investment of money. In State of Idaho, Department of Finance v. Resource Service Co., Inc., 130 Idaho 877, at 882, 950 P.2d 249, at 245 (1998), the Supreme Court defined investment:

“An ‘investment’ typically involves parting with money for the purpose and in the reasonable expectation of making a profit.” S.E.C. v. Energy Group of Am., Inc., 459 F.Supp. 1234,1239 (1978)

Investors in the Dinar scheme considered it as an investment in which they would give Smiley money, he would buy Dinars and sell them later at a large profit for the investors. (Affidavit of Johnny Bryant ¶ 4; Affidavit of Martin Gennuso ¶ 4) This element is satisfied in this case by the investments of the many investors, totaling \$1,195,009, in Smiley’s Dinar investment program. (Affidavit of Timothy D. Martin ¶ 12.a.; See Smiley deposition Exhibit 12 and Affidavit of Alan Conilogue, Exhibit A, for lists of investors¹)

¹ The lists do not match. Smiley maintained his list to track his investors. The list in the Conilogue affidavit is a list of all executed Joint Venture Agreements. The difference is that some investors invested multiple times with Smiley.

1.B. (2) Common enterprise. The second element of the Howey test is a requirement that the investment be made in a common enterprise, which exists if there is either vertical or horizontal commonality.

To determine if a common enterprise exists, courts have looked for either “horizontal commonality” or “vertical commonality.” *See, e.g., S.E.C. v. R.G. Reynolds Enters., Inc.*, 952 F.2d 1125, 1134 (9th Cir. 1991)

State of Idaho v. Gertsch, 137 Idaho 387, 392, 49 P.3d 392, 397 (2002) Vertical commonality “occurs where ‘fortunes of the investor are interwoven with and dependent upon the efforts and successes of those seeking the investment or of third parties.’ S.E.C. v. Unique Fin. Concept, Inc., 196 F.3d 1195, 1195 (11th Cir. 1999).” Gertsch, 137 Idaho at 392.

Vertical commonality exists in Smiley’s Dinar investment program because the investors relied on Smiley’s knowledge and efforts to purchase Dinars and sell them at the opportune time. If Smiley is not successful in selling the Dinars at a gain, the venture will fail. Further, the success of the investors is interwoven with Smiley’s, as is evidenced by the Joint Venture Agreements² between Smiley and the investors. The agreements provide that “All net profits from the operation of this joint venture will be divided 50% to party ‘A’ [Smiley] and 50% to party ‘B’ [the investor] ...” (Smiley deposition, Exhibits 10, 15, 16³)

A finding of common enterprise may also be based upon horizontal commonality, which is defined

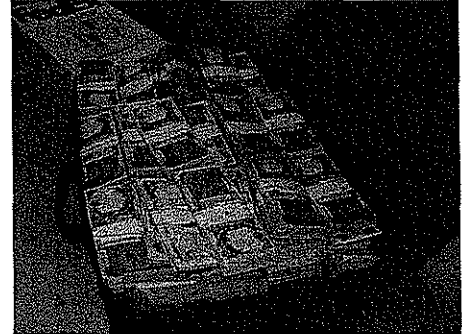
as the situation where each individual investor’s fortune is tied to the fortunes of the other investors by the pooling of assets, often combined with the pro-rata distribution of profits.

Gertsch, 137 Idaho at 392.

² The memorandum refers to joint ventures and joint venture agreements for matters of clarity. Defendant Smiley has chosen this nomenclature to describe his investment. The Department does not concede that Smiley established functioning legal joint ventures.

³ This is a standard clause in all the joint venture agreements. Exhibit 10, 15 and 16 are examples.

Horizontal commonality is present in Smiley's program because the assets were pooled. Smiley did not keep records to distinguish how many Dinars he purchased for a particular investor (Smiley deposition, pp. 22-23, ll.25-1). He did not set up any separate bank account for investor money, but instead just mingled it in with his personal accounts. (Smiley deposition pp. 26-27, ll.22-6) The picture at the right (Exhibit D to Conilogue Affidavit) shows about half of the Dinars purchased by Smiley, stored in a canvas suitcase, showing that Smiley literally pooled the investment. Smiley's investment scheme has both vertical and horizontal commonality, and therefore the common enterprise element of an investment contract is also met.



1.B. (3) Expectation of profits from the efforts of others. The third element of the Howey test, that profits from an enterprise are expected solely from the efforts of others, has been tempered by subsequent decisions. A majority of courts now require only that "the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." SEC v. Glenn Turner Enters., Inc., 474 F.2d 476, 482 (1973). As adopted in Idaho, in order to constitute an investment contract, it must be expected that the profit will be "derived primarily from the efforts of a person other than the investor." Idaho Code § 30-14-102(28)(d).

The evidence is uncontested on this point. Investors were not required or expected to make any effort other than providing funds in order to reap the fantastic profit.

I understood that Mr. Smiley would purchase Dinars for me and hold them until the investment paid off. He was to hold them so that he could sell them at the proper time. I simply believed that Mr. Smiley would buy Dinars on my behalf with my money, that he would sell them later and give me a substantial profit, and

that he would keep an amount of the proceeds for his trouble. We did not discuss whether I would take delivery of the Dinars, or that he would, or whether anyone would. We did not discuss whether we would require the Dinar supplier to deliver the Dinars, and we did not discuss any length of time or deadline by which the Dinars would be delivered. **My role was only to provide the money, and nothing more.** (Affidavit of Johnny Bryant, ¶ 4) (emphasis added).

In fact, Mr. Smiley took pains to ensure that investors could not participate in the effort. He believed that some investors had learned from him how to make the investment and “circumvented” him. (Smiley deposition, pp.83-84, ll. 5- 17). Accordingly, he revealed the source of the Dinars only to people who “promised me they wouldn’t circumvent us ...” (Smiley deposition, p.83, ll. 19-24). Most investors did not know the source of the Dinars and could not assist in the purchase. Smiley personally held all the Dinars and refused to give any to investors, even upon request. (Smiley deposition, p.49, ll. 14 - 19) Investors had no role to play other than providing cash. Thus, this final element of an investment contract also exists. The Joint Venture Agreements offered by Smiley were investment contract securities and therefore controlled by Idaho’s Uniform Securities Act.

VIOLATIONS

2. The Dinar investment security was not registered (Count Eight). The Act requires that all non-exempt securities being offered or sold must be registered. Idaho Code § 30-14-301 states:

30-14-301. **Securities Registration Requirement.** 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 sections 30-14-201 through 30-14-203, Idaho Code; or (c) The security is registered under this chapter.

Smiley has not asserted that his Dinar investment security was registered. According to the Idaho Department of Finance, with which the securities must be registered, the Dinar investment security offered and sold by Smiley was not registered as required by the Act, nor was it a

federally registered security. (Affidavit of Marilyn T. Chastain, ¶¶ 3). Further, the Dinar investment is not a federal covered security, nor is it exempt from registration. Smiley has therefore violated Idaho Code §30-14-301.

3. Smiley transacted business as an agent of an issuer when not licensed (Count Nine). Idaho Code § 30-14-402(a) requires that all persons who offer or sell securities in this State be registered as an agent.

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.

Agent is defined in Idaho Code § 30-14-102.

(2) "Agent" means an individual, other than a broker-dealer, ... who represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities.

(17) "Issuer" means a person that issues or proposes to issue a security, ...

When Smiley signed up investors with his joint venture agreement, he issued securities. When he talked to people and convinced them to invest, he acted as an agent. Smiley offered and sold the Dinar investment contract security during a period when he was not registered as an agent with the Department. (Affidavit of Marilyn T. Chastain, ¶ 3); Smiley therefore violated Idaho Code § 30-14-402(a).

4. Smiley misrepresented and omitted material facts in connection with the offer and sale of securities (Count Six). Idaho Code § 30-14-501, General Fraud provides:

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

(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 the light of the circumstances under which they are made, not misleading;

Scienter. As an initial matter, it is important to understand that intent or scienter is not an element of securities fraud under Idaho Code § 30-14-501. In State v. Shama Resources Limited Partnership, 127 Idaho 267, 272, 899 P.2d 977, 982 (1995), the Court held⁴:

Examining the literal words of the statute and giving the statutory language its plain and literal meaning, as we are required to do, (citation omitted), we conclude that **intent is not an element of securities fraud** under I.C. §§ 30-1403(2), (3) ... Under I.C. §§ 30-1403(2), (3), it is sufficient that the person engage in those enumerated activities, in connection with the offer, sale, or purchase of a security, to commit securities fraud under the relevant portions of the Idaho Securities Act. (emphasis added)

Materiality. The United States Supreme Court has addressed the definition of materiality in a securities context in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976). A corporate shareholder alleged in that action that a certain proxy solicitation had contained statements which were false with respect to material facts and had omitted to state material facts necessary in order to make the statements therein not false or misleading, in violation of the Securities Exchange Act of 1934 and SEC Rules. The Court was thus compelled to consider materiality, and set forth the following:

The general standard of materiality that we think best comports with the policies of (SEC) Rule 14a-9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.... It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the

⁴ The Shama Court construed the prior version of Idaho's Securities Act. The language in question changed only minimally in the current act. Idaho Code §30-1403, the anti-fraud section, reads:

Unlawful Offers -- Sales -- Purchases. It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly,

...

(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

disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.

426 U.S. at 449. As shown above, materiality is determined by the Court. Proof that the omitted or misrepresented fact would have the investor not to invest is not required. The fact is material if the Court determines that a reasonable investor would change his or her mind because of knowing, or not knowing, the fact.

The above has become the standard of materiality in Idaho. In Shama, 127 Idaho at 273, the Court stated that certain facts were material to offerees and investors, “because the information **may** have resulted in alteration of the offerees or investors investment decision.” (emphasis added)

Therefore this Court must determine whether the information provided by Smiley when he offered and sold the Dinar investment contract security contained misrepresentations of material fact, or whether it omitted material facts. That is, would the reasonable investor consider the facts misrepresented and omitted important in making a decision concerning investment in Smiley’s Dinar investment security?

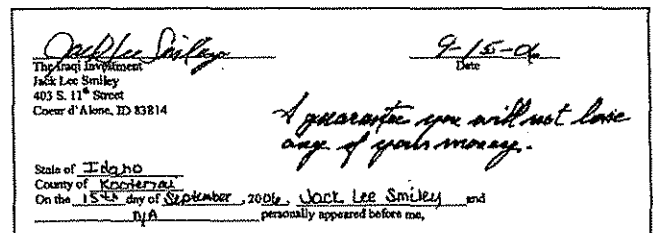
4.A. Fraud - Untrue statements of material fact. Smiley’s misrepresentations and false statements violated the Idaho Uniform Securities Act. Smiley enticed investors into giving him money by making false assurances and promises, and by failing to advise them of material facts, in violation of Idaho Code § 30-14-501(2).

False premise. The entire scheme as represented is based on the false premise that the Iraqi Dinar will appreciate outrageously against the US dollar, returning either 99,900% or 3,200% to investors, depending on which of Smiley’s statements are used. (See discussion under False Guarantee below). However, the Iraqi Dinar is being managed by the Central Bank of Iraq as a crawling peg to the US Dollar. (Affidavit of Michael Gorham, ¶ 40). Being pegged to the dollar means that the Dinar is

being managed in a way as to maintain its relationship with the dollar. Therefore, the Dinar will not appreciate substantially.

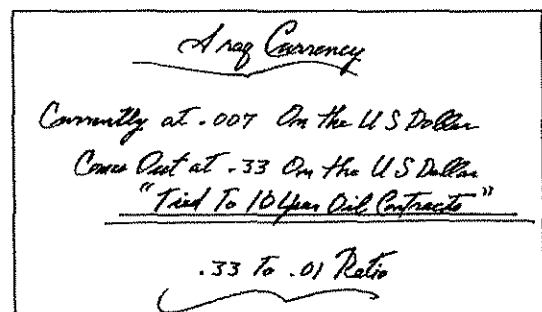
The premise is also false because, as Smiley represented to his investors, the Dinar is supposedly “Tied to 10 year oil contracts.” (Smiley deposition, Exhibits 10, 16. See second exemplar below.) There is no evidence that the Dinar is tied to oil contracts. (Affidavit of Michael Gorham, ¶ 48) Rather it is tied, pegged, to the dollar as a crawling peg. (See Affidavit of Michael Gorham, ¶ 27 for discussion of crawling peg.)

False Guarantee. The Joint Venture Agreements prepared by Smiley and sent to his investors included a third page titled “Addendum to Joint Venture Agreement.” Each Addendum contained the statement “I guarantee you will not lose any of your money!” Smiley wrote this



guarantee on a blank form and then reproduced it as necessary for each new investor. (Smiley deposition, p. 69, ll. 5-13). Thus, each Addendum contained this guarantee. (Smiley deposition, Exhibits 10, 16. See exemplar.). The guarantee is false for several reasons.

To begin with, it is absurd on its face. Rewards are commensurate with risk. Smiley led investors to believe that they would receive a return of 3200% (Smiley deposition Exhibit 5, excerpt at right; Affidavit of Michael Gorham, ¶ 39), and that an investment of \$1,000 would return \$1,000,000, which is a return of 99,900%.⁵ “Well, again, when I said



⁵ Using the rate of return formula set forth in *Intermediate Financial Management*, p. 20, Brigham and Davies, 7th Ed, Thompson Learning, Inc. (2002) shows that Smiley is promising a 99,900% return on investment. Rate of return = (amount received – amount invested) / amount invested. Thus \$1,000,000-\$1,000 = \$999,000. \$999,000 / \$1,000 = 999, or 99,900%. Using the 33 to one ratio yields: 33-1=32 32/1=32, or 3,200%.

that – my agreement with all of my joint venture partners is that for every thousand put in, we'd get a million.” (Smiley deposition, p. 58, ll. 7-9). Returns of that magnitude cannot be obtained without some risk, and therefore Smiley could not guarantee the investment. Further, the investment is premised on a steep rise in the value of the Dinar. Given the ongoing war in Iraq, the strength of the Iraqi economy is uncertain. The Iraqi government has already withdrawn and reissued the currency once. The government is unstable.

Smiley could not make this guarantee because he did not and does not understand what could cause the Dinar to rise 3,200%, or 99,900% depending on which of his statements you consider, in value. He testified that he does not know what event must occur to trigger the rise in value.

Q. Did you have any other way to know when it would pay off other than Mr. Ali would call you and tell you?

A. Well, I believed that it would be all over the newspaper. I believe that it would be on the Internet. I believe that there are joint venture partners with me that are reading this stuff every day. So there's enough of us that somebody is going to – if I don't get it first, they're going to call me and say, hey, it just happened. (Smiley deposition, pp. 20-21, ll. 23-7)

Smiley is simply relying on an individual he refers to as “Ali” to tell him when it is time to sell the Dinars. “Q. How would you know when to sell them, the Dinars? A. Well, I asked Ali three, four, five times if he'd be sure to call me as soon as it revalued, and he said that he would.” (Smiley deposition, p. 19, ll. 8-12). If Smiley does not understand how the investment works, his belief that it can not lose is just blind faith, and his guarantee is false and misleading.

Further, the investment as Smiley structured it fundamentally misunderstands the foreign currency market. When looking at currencies that have sustained the steepest increases in value, and assuming that a trader bought at the lowest price and sold at the highest, the best outcome

possible was 140%. (Affidavit of Michael Gorham, ¶¶ 35, 41). Guaranteeing that an investment in the Iraqi Dinar would yield a 3,200% return is false and misleading, because such a return has no reasonable likelihood of occurring. (Affidavit of Michael Gorham, ¶ 43). Guaranteeing that investors in the Iraqi dinar would not lose any money betting on a currency transaction is also false and misleading. Currency markets by their very nature can decline as well as increase. (Affidavit of Michael Gorham, ¶ 44).

False promise of swift pay off. Part of Smiley's sales pitch to his investors was that the investment was going to pay off very soon. In April, 2005, Smiley told Johnny Bryant that "the investment would pay out in no more than 90 days." (Affidavit of Johnny Bryant, ¶ 1.d.). In January, 2006 "He [Smiley] said that the increase in value would happen by mid-March 2006, but could happen any day. Mr. Smiley convinced me that the matter was urgent and that if I did not act immediately I could lose the opportunity." (Affidavit of Stephen Heuer, ¶¶ 1-2). In August, 2006, Smiley told Martin Gennuso that the investment would pay off within a week (Affidavit of Martin Gennuso, ¶ 1.c.), and that "the organization Mr. Smiley was working with was going to stop all incoming transactions the next day because the Dinar was going to go public the next week." (Affidavit of Martin Gennuso, ¶ 1.d.). Smiley also made this statement in writing, and gave some of his investors a document stating: "The Iraqi Currency Investment expects to pay off within the next few months." (Smiley deposition, pp. 64-65, ll. 22-12, Smiley deposition, Exhibit 9).

When questioned in November, 2007 about the truth of his assertions that the investment would pay off quickly, Smiley testified:

Q. And it has not paid off yet, has it?

A. No, sir.

Q. So even though you may have believed it at the time, that statement turned out not to be true; isn't that correct?

A. Yes sir.

False promise of liquidity. Smiley promised investors in the Joint Venture Agreements that the joint venture could be dissolved on 90 days written notice, and that upon dissolution the investor would receive half of the invested money back.

Either party "A" or party "B" has the right to dissolve this joint venture for any reason, but only after a 90 day written notice of intent to dissolve the joint venture has been delivered to the other party and after the 90 day period has passed.

In the event of dissolution, all remaining obligations of the joint venture will be paid out of the remaining resources of the joint venture. All remaining assets after payment of all remaining obligations will be divided 50% to party "A" and 50% to party "B".

(Smiley deposition, Exhibits 10, 15, 16).

Several of the joint ventures were dissolved by Smiley, and several investors requested their money back, but Smiley has refused to return the money. (Smiley deposition, p. 95, ll. 23-25; p. 102, ll.; p. 105, ll. 2-9; Affidavit of Martin Gennuso ¶¶ 11,12,13, of Stephen Heuer ¶ 11, and of Janet Carpenter ¶ 13).

Q. A number of your joint venture partners have asked for their US dollars back, correct?

A. Yes.

Q. Have you given any of those partners any US dollars back?

A. No.

(Smiley deposition, p, 49, ll. 14-21).

False promise of safekeeping. Smiley falsely promised his investors in writing that the Dinars would be kept in a safety deposit box. The "Addendum to Joint Venture Agreement"

included the statement “Jack will secure a safety deposit box at [bank name⁶] for the purpose of ‘storing’ the Iraq Currency purchased.” (Smiley deposition, Exhibit 16, excerpt below).

2. Jack will secure a safety deposit box at Washington Mutual, Coeur d’Alene, Idaho branch for the purpose of “storing” the Iraq Currency purchased. Safety Deposit Box Number is 420.

Smiley also executed a power of attorney so that the investors could access the safety deposit box should he expire. (Smiley deposition, Exhibits 10, 16). Although Smiley initially did place the Dinars in safe deposit boxes, he later removed them.

Q. And your initial plan was to store the Dinars in safe deposit boxes?

A. I did store them in safe deposit boxes.

Q. They’re currently not stored there; is that correct?

A. Yes.

(Smiley deposition, pp. 69-70, ll. 24-4).

Thus, his promise to keep them in a safety deposit box was false. Worse, he knowingly executed the same documents, with the same promise to store the Dinars in a safety deposit box, even after he closed down the safety deposit boxes.

Q. Thank you. The very last page of that document [Exhibit 16 to Smiley deposition; joint venture agreement for Bill Ice] has a Bates stamp of 157. It’s dated 27 June, ’07, and, in fact, has a notary stamp to that date. You’ve written in there “to have full access to safe deposit box at the Washington Mutual Bank.

At the time you executed this agreement, that box had been shut down; isn’t that correct?

A. Yes. I just didn’t change some of the material on it.

(Smiley deposition, p. 90, ll. 3-11). Dinars, like dollars, are fungible. They are printed on paper and therefore are flammable. Safe storage of such items is essential. It would be material to investors that their flammable, fungible currency be safely stored.

⁶ Smiley used different banks at different times.

Affiliate office. Smiley made several other false statements in the documents he handed to investors to induce them to invest. For one, he told investors that he would be opening a currency office in Coeur d'Alene, Idaho but he did not do so.

We are opening an Affiliate "Currency Office" in C/A, ID in 2005.

(Exemplar from Exhibit 7, Smiley deposition).

Q. Bottom of page two, three stars, you say "We are opening an affiliate currency office in Coeur d'Alene."

A. Yeah, right.

Q. Did you open that office?

A. No, sir.

(Smiley deposition, p. 60, ll. 5-10).

Conversion of funds. Smiley promised that "I don't use a nickel of your money until we succeed." (Smiley deposition, p. 61, ll. 4-23; Smiley deposition, Exhibit 8). This was false because Smiley used investor money for his personal needs before the investment paid off. An analysis of Smiley's bank records by Department investigator and Certified Fraud Examiner Timothy D. Martin reveals large discrepancies in the disposition of investor funds and in his income and his spending. As explained below, the only reasonable inference from these discrepancies is that Smiley converted investor funds to his own use.

Investigator Martin has examined Smiley's bank records for the years 2005 through 2007, and has gained an understanding of the transactions represented therein. Smiley's legitimate income was from Social Security and a military disability. Smiley wrote a letter to investor John DeVries dated March 28, 2005, and in it stated "I am basically broke and this investment opportunity will help me get back on my feet. I'm currently living on Soc. Security and USMC disability." (Smiley deposition, Exhibit 14). When asked about his income, Smiley testified:

Q. You state in here [Exhibit 14] that you're living on Social Security, and I guess that US Marine Corps disability. At that time, did you have any other source of income?

A. Just what my friends would send me from time to time.

Q. I guess from friends and occasionally loans; is that correct?

A. Yes.

Q. Since this date, March 28th, '05, have you developed any other sources of income?

A. I got into a travel service business for \$500. It's a network marketing program.

Q. Making any money on it?

A. I'm starting to make a little money. ...

(Smiley deposition, pp. 84-85, ll. 18-7).

These sources initially provided \$538.00 and \$108.00 in income respectively, for a monthly total of \$646.00.⁷ The records for the period February 1, 2005 through November 2, 2007 show total Social Security and disability income of \$ 16,760.80. Smiley's bank records also show other non-investor sources of money, such as monetary gifts. In all, the records show that Smiley deposited \$53,499.99 of non-investor money into his various bank accounts, which he mingled with investor money. (See Affidavit of Timothy D. Martin, ¶ 12, and Exhibit A thereto).

The records show that Smiley was entrusted with \$1,195,009 of investor money, and they show that he sent the amount of \$1,031,300, to Dinartrade.com, for a shortfall of \$163,709. (Affidavit of Timothy D. Martin, ¶ 16). Finally, the records show that during this period Smiley withdrew \$420,083.96 from his various bank accounts. (Affidavit of Timothy D. Martin, ¶ 16.d.). This amount does not include money spent to buy Dinars, but instead primarily represents spending for personal use. Smiley's legitimate income was only \$53,499.99, yet he managed to spend \$420,083.96.

⁷ These amounts fluctuated a bit over time. See Exhibit A to Affidavit of Timothy D. Martin for specifics.

Smiley produced his Dinars to be counted by Investigator Martin and this author on November 19, 2007. Smiley was found to possess 1,264,420,000.00 in Dinars. During the period Smiley bought most of his Dinars the mid point of the exchange rate was \$1 for 1,402 Dinars. (Affidavit of Timothy D. Martin, ¶ 20). At this rate, 1,264,420,000.00 in Dinars represents \$901,868.76, which is a bit over \$260,000 less than Smiley was given in investor money. The only reasonable inference here is that Smiley sold some of the Dinars he had purchased with investor money, deposited the proceeds into his bank accounts, and spent the money. Since the investment has not paid off, Smiley's statement that he would not use any investor money until the investment succeeded was false.

In the course of making a decision regarding this investment, a reasonable investor would consider it significant that the investment could be not guaranteed, that it would not pay off in the time promised, that it would not be stored safely as promised, that it would not be returned upon request as promised, and in fact would not be returned at all, and that money invested would be used to pay personal expenses of Smiley instead of purchasing Dinars. That information would likely alter an offeree's investment decision. Smiley has therefore violated Idaho Code § 30-14-501(2) by making these misrepresentations.

4.B. Fraud - Omissions of material fact Smiley's omissions of material fact violated the Idaho Uniform Securities Act. Smiley enticed investors into giving him money by failing to advise them of material information about the investment, in violation of Idaho Code § 30-14-501(2).

The undisputed facts prove that Smiley failed to provide the following information to investors in the Dinar investment security: that he had been served with an Order to Cease and Desist (Affidavit of Johnny Bryant, ¶ 3; Affidavit of Janet Carpenter, ¶ 5; Affidavit of Martin Gennuso, ¶ 3; Affidavit of Stephen Heuer, ¶ 14); that he was not registered as an agent and that his securities were not registered (Affidavit of Johnny Bryant, ¶ 10,11,12; Affidavit of Martin Gennuso, ¶ 7,8,9); that he was relying on

some other person to tell him when the investment paid off (Affidavit of Johnny Bryant, ¶ 9; Affidavit of Martin Gennuso, ¶ 6); and that he had closed the safe deposit boxes and was storing the Dinars in canvas suitcases.

Q. Did you tell your investors that you were going to close the safety deposit boxes?

A. I didn't think it was necessary. No, I didn't.

(Smiley deposition, p. 70, ll. 18-21).

The Dinar investment, and money contributed to it, was controlled solely by Smiley. Smiley is currently refusing to return the money to investors, or to hand over to them the Dinars he purchased. (Smiley deposition, p 49, ll. 14-21; Affidavit of Martin Gennuso, ¶ 11, 12). A reasonable investor would consider it significant, in making a decision regarding this investment, that Smiley had been ordered by the Department to cease and desist from promoting the unlawful investment, that Smiley and his investment were not registered as required by law, that Smiley was relying on some other person to determine that the investment had paid off, and that he had removed the Dinars from the safety deposit boxes. That information would likely alter an offeree's investment decision.

Further, the obvious purpose of the statutory anti-fraud material omissions requirement is that the promoter not omit material information. An investor considering whether to give money to a promoter would obviously want to know that the regulating agency, the Idaho Department of Finance, considered the investment to be unlawful. The above omissions are therefore material, and a finding is warranted that Smiley violated Idaho Code § 30-14-501(2).

The Shama Court held that omitting to tell investors that the securities were not registered, and that the promoter was not registered as required, was material and constituted fraud under Idaho Code § 30-1403(2) and (3) (now Idaho Code § 30-14-501(2)).

The Department met its burden of establishing that McGary committed securities fraud under I.C. §§ 30-1403(2), (3) through the affidavits of investors and offerees who stated that McGary omitted material facts to them about McGary not being a registered broker-dealer and about the Shama securities being unregistered.

Shama, 127 Idaho at 272. As shown by affidavits on file in this action and as discussed above, Smiley did not tell the investors that the securities were not registered and that he was not registered as an agent. Smiley therefore committed securities fraud.

4.C. Other fraudulent conduct (Count Seven) Idaho Code § 30-14-501 provides:

General Fraud. 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;
- (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

The State asserts that Smiley has both employed a device, scheme or artifice to defraud, and has engaged in acts, practices and courses of business that operated as a fraud or deceit through the above described misrepresentations and omissions. Materiality is not relevant to whether Smiley's actions operated as a fraud and deceit. It is enough that investors were beguiled into investing under false premises.

As discussed above, Smiley raised money on his Dinar investment for two years, most of which occurred after he was ordered to cease and desist. He duped investors by providing false and misleading information, and by not giving them information that might have caused them not to invest. He told investors that the investment would pay off soon, and he used this statement to create a sense of urgency in the investor, even after he had been promoting the investment for a year or more. He made many statements designed to lure uninformed investors into giving him money. He did not tell investors that he would keep half their money even if the investment did not pay off, and that he used investor money for personal expenses. The ongoing

misrepresentations and omissions were in furtherance of his scheme and artifice to defraud, and they also constituted acts, practices or courses of business that operated as a fraud or deceit. Therefore, Smiley has violated Idaho Code §§ 30-14-501(1) and (3).

5. Conclusion. If the Court determines that Smiley's joint venture contracts are indeed investment contracts, the registration violations are established simply by showing that Smiley and his investments were not registered, which the Department has done. The Department has also shown that Smiley's misstatements and omissions were of a nature that a reasonable investor might have altered the investment decision had the investor known the truth. Even if a specific fact here and there might not have changed the investor's mind, Smiley's actions to raise investor money, keep half of it and spend it on personal expenses, without the investor knowing this, were deceitful and fraudulent.

6. Judgment Idaho Code § 30-14-603(a) provides that "the administrator may maintain an action in any court of competent jurisdiction to enjoin the act, practice, or course of business and to enforce compliance with this chapter or a rule adopted or an order issued under this chapter." Under 603(b)(1), the Court may issue an injunction, under 603(b)(2)(A) it can appoint a receiver, and under 603(b)(2)(C) can order disgorgement and restitution, and can impose a penalty of up to \$10,000 per violation of the Act.

Smiley's registration violations, his many misrepresentations and omissions, and his fraudulent and deceitful practices entitle the Department to a judgment awarding the penalties, disgorgement, restitution for investors, and appointment of a receiver as set forth in the statute.

COMMODITIES CODE VIOLATIONS

The Idaho Commodity Code violations Smiley committed are based on the same conduct that constituted violations of Idaho's Uniform Securities Act because Smiley's purchase of and

offers to sell Dinars, i.e. commodities, also constituted securities, implicating both statutes. Rather than duplicate the arguments, this section will reference relevant discussion above.

1. The Idaho Commodity Code is similar to the Uniform Securities Act. Before examining Smiley's specific violations, it is necessary to understand the Code. The Code is relatively recent law in Idaho, and no reported Idaho cases construe it. Nevertheless, some guidance is available. The statute itself states that it is designed to protect investors, and should be construed in a manner to accomplish that goal.

Idaho Code § 30-1508. **Purpose.** The provisions of this chapter may be construed and implemented to effectuate the general purpose to protect investors, to prevent and prosecute illegal and fraudulent schemes involving commodity contracts and to maximize coordination with federal law and laws of other states and the administration and enforcement thereof.

The Commodity Code was designed to work in concert with securities law and both can apply to the same transaction. Idaho Code § 30-1507 states:

SECURITIES STATUTES UNAFFECTED. Nothing in this chapter shall impair, derogate or otherwise affect the authority or powers of the director under the Idaho securities act or the application of any provision thereof to any person or transaction subject thereto.

In Saxe v. E.F. Hutton & Co., Inc., 789 F.2d 105, 109 (2nd Cir. 1986) the Court was construing the federal Commodities Exchange Act, and noted "Traditionally, courts have looked to the securities laws when called upon to interpret similar provisions of the CEA." This approach was followed in Merrill Lynch Futures, Inc. v. Sands, 143 N.H. 507, 727 A.2d 1009 (1999).

Like Idaho's Uniform Securities Act, the Code is administered by the Idaho Department of Finance and both laws regulate some aspect of Idaho's financial markets. The anti-fraud provisions of the Code are almost identical to those in the Idaho Uniform Securities Act, other

than that the Code adds a violation for misappropriating or converting investor funds.

Accordingly, cases construing securities anti-fraud language are persuasive.

Thus, the Department asserts that the standards for scienter, materiality and for finding violations of the anti-fraud provisions of the Idaho's Uniform Securities Act announced in Shama, 127 Idaho 267, and discussed above should also apply to Idaho's Commodity Code.

2. The Code applies to Smiley's Dinar investment scheme. Defendant Jack Lee Smiley violated Idaho's Commodity Code in several different ways. He made untrue statements of material fact. He omitted to state material facts in circumstances in which such statements were required. He misappropriated or converted investor funds. He employed a device, scheme or artifice to defraud. He violated an order issued by the Director of the Department of Finance. Finally, Smiley unlawfully offered to purchase and did purchase commodities under a commodity contract. Each will be discussed in turn, but it will be helpful to first to review portions of the Code as applied in this case.

Idaho Code § 30-1501(3) defines "Commodity" to include "any foreign currency." The Iraqi Dinar is a foreign currency, and is therefore a commodity regulated by the Commodity Code.

Idaho Code § 30-1502 provides that "no person shall sell or purchase or offer to sell or purchase any commodity under any commodity contract or ... offer to enter into or enter into as seller or purchaser any commodity contract..." Smiley purchased and offered to sell Dinars as part of his plan. "Well, as I understood it, as a joint venture, we would buy the Dinar..." (Smiley deposition, p. 17, ll. 7 - 8).

Q. Did you tell your joint venture partners that there was a fee for purchasing Dinars to Mr. Ali?

A. I said, naturally there's a fee when we buy it; he's in business. Naturally there's a fee when we sell it back to him; he's in business.

(Smiley deposition, p. 48, ll. 9-13).

Idaho Code § 30-1501(4)(a) defines “Commodity contract ” as “Any account, agreement or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities ...” Smiley entered into well over 100 “Joint Venture Agreements” or contracts, all for the purchase of Iraqi Dinars. Smiley’s records show 112 “Joint Venture Partners” and 11 more that had been “cancelled.” (Smiley deposition, Exhibit 12). Records gathered by the Department during its investigation and discovery show that 161 agreements were executed. (Affidavit of Alan Conilogue ¶ 2; Affidavit of Alan Conilogue, Exhibit A).

Idaho Code § 30-1501(4)(a) also provides that “Any 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...”

3. Smiley conducted unlawful commodity transactions (Count One).

Idaho Code § 30-1502 provides:

Unlawful Commodity Transactions. Except as otherwise provided in sections 30-1503 or 30-1504, Idaho Code, no person shall sell or purchase or offer to sell or purchase any commodity under any commodity contract or under any commodity option or offer to enter into or enter into as seller or purchaser any commodity contract or any commodity option.

Smiley has purchased 1,264,400,000 Dinars pursuant to his investment scheme, and has offered to sell them at some point, as shown above. Before he began to solicit money from investors, Smiley bought some Dinars, held them for a short time, and resold them.

So I thought about it off and on, and I decided – I think it was in the fall, or late fall of 2004 that I’d buy some. And then I thought to myself, what am I getting into? I don’t know anything about this, and foreign currency.

And so I kept it for several weeks or so. And I called up the owner, Ali, and I said, say, you know, could I convert this back in? He said, certainly. So I sent

the money back to him, and so then I discovered what it cost to get in, what it cost to get out, et cetera, and that, in fact, he would exchange it.

Smiley deposition pp. 10-11, ll. 20 – 6) Smiley has not asserted any of the exemptions in Idaho Code §§ 30-1503 and 30-1504. Therefore, Smiley conducted unlawful commodity transactions in violation of Idaho Code § 30-1502.

4. Smiley misrepresented and omitted material facts in connection with the offer and sale of commodities (Count Two).

Scienter. Although no Idaho cases construe the Idaho Commodity Code, as shown in paragraph 1 above Idaho securities cases offer guidance. The statutes are similar in purpose, are administered by the same state agency, and share much language, some of it identical.⁸ Given these similarities and given the unequivocal statement in Shama, 167 Idaho 267, that scienter is not an element of fraud in an agency enforcement action brought under the securities statute, scienter or lack of it should not constitute a defense to commodities fraud. This standard is

⁸ Uniform Securities Act 30-14-501. It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

Idaho Commodity Code 30-1506. (1) It is unlawful for any person, directly or indirectly, in connection with a commodity contract or commodity option:

- (1) To employ a device, scheme, or artifice to defraud;
 - (a) To employ any 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
 - (b) To make any false report, enter any false record or make any untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;
 - (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.
 - (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 convert the funds, security or property of any other person.

consistent with the purpose of the Commodity Code, which is “to protect investors, [and] to prevent and prosecute illegal and fraudulent schemes.”

Should the Court choose to require a finding of scienter, the facts support such a finding. In a case brought by the Commodity Futures Trading Commission under the Commodity Exchange Act, 7 U.S.C.A. § 1 *et seq.*, the Court found scienter based on statements of the Defendant.

This requirement [scienter] can be met “when Defendant’s conduct involves ‘highly unreasonable omissions or misrepresentation ... that present a danger of misleading [customers]⁹ which is either known to the Defendant or so obvious that Defendant must have been aware of it.’”

CFTC v. Wilshire Investment Mgmt Corp. 407 F. Supp 2.d 1304, 1311 (D. Fla. 2005), quoting R.J. Fitzgerald 310 F.3d 1321,1328 (11th Cir 2002), quoting Ziamba v. Cascade Int’l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001). In finding scienter, the court noted the Defendants “were reckless in linking profit expectations to seasonal trends, suggesting that the market could be timed to generate large profits, and inflating profit expectations while downplaying risks.” Wilhsire at 1311.

Smiley has made many similar reckless and misleading statements for the purpose of getting investors to invest. See Smiley deposition exhibits 3 through 10. Some examples: “The Iraqi currency will go public!” (Smiley deposition Exhibit 3) “Being issued in late March or later in the year. Hallaburton (sic), Large Banks – Corporations, Politicians and the US Military are going to make millions when the new currency comes out (Just like it happened in Kuwait – 5% of Americans became millionaires then.¹⁰” (Smiley deposition Exhibit 5) “The Best Investment Opportunity In Your Lifetime!” (Smiley deposition Exhibit 6) “I guarantee you will

⁹ Brackets in original.

¹⁰ This assertion is so outrageous as to be laughable. American has 3 hundred million citizens. 5% would be 15 million. 15 million multiplied by 1 million dollars is 15 trillion dollars.

not lose any of your money.” (Smiley deposition Exhibit 7) “I administer all aspects and details of the investment, guarantee that you do not lose any money and I don’t use a nickel of your money until we succeed.” (Smiley deposition Exhibit 8) “The Iraq Currency Investment expects to pay off within the next few months.” (Smiley deposition Exhibit 9) “I guarantee you will not lose any of your money and you can request your money back at any time.” (Smiley deposition Exhibit 10)

Thus, similar to Wilshire, Smiley recklessly linked profit expectations to an allegedly inevitable currency appreciation, he suggested that the market could be timed to generate large profits, and he inflated profit expectations while downplaying the risks. These statements justify a finding of scienter.

Materiality. As with scienter, it is appropriate to look to Idaho securities law for the standard of materiality in commodities case. Rather than reproduce the argument, please see the materiality argument in paragraph 4 of the Securities section.

Again, should the Court decline to find Idaho securities law applicable, the federal commodity case cited above offer a standard for materiality.

A representation or omission is “material” if a reasonable investor would consider it important in deciding whether to make an investment. (cites omitted)

One cannot seriously dispute that the misrepresentations and omission [Defendants] made are material. Exaggerated statements of profit potential and suggestions that current conditions offer unique opportunities to profit would undoubtedly heavily influence a reasonable investor’s decision to invest.

CFTC v. Wilshire, 407 F, Supp at 1311. Also:

The final element, materiality, is satisfied as well. It is too obvious for debate that a reasonable listener’s choice-making process would be substantially affected by emphatic statements on profit potential (“200-300%”) and the suggestion that known and expected weather events are the vehicle for achieving those enormous profits. A reasonable investor would also be heavily influenced by the suggestion in the Commercial that, due to weather events, the present day offer an opportunity like no other to make money in the corn market.

CFTC v. Fitzgerald, 310 F.3d at 1330. Smiley's statements of exaggerated profits based on allegedly known and expected currency events yielding a money making opportunity like no other, and the misrepresentation and omission discussed below, are material.

Fraud. Idaho Code § 30-1506 provides, in language strikingly similar to the Idaho's Uniform Securities Act:

Fraudulent conduct -- Liability of principals, controlling persons and others.

(1) It is unlawful for any person, directly or indirectly, in connection with a commodity contract or commodity option:

(a) To employ any device, scheme or artifice to defraud;

(b) To make any false report, enter any false record or make any untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in the 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 convert the funds, security or property of any other person.

4.A. Fraud - Untrue statements of material fact. Smiley's omissions of material fact violated the Idaho Commodity Code. As quoted above, Idaho Code § 30-1506(b) makes it unlawful "To make any false report, enter any false record or make any untrue statement of material fact ..."

The same misrepresentations discussed above regarding securities apply under a Commodity Code analysis. Rather than reproduce them here, please see the discussion above. As shown above, Smiley made false guarantees, false promises of a swift payoff, false promises of liquidity, false promises of safekeeping, false statements about not using investor money until the investment paid off, and other false statements. The entire premise of the investment was false because the Dinar is pegged to the dollar and cannot appreciate drastically.

4.B. Fraud - Omissions of material fact. Smiley's omissions of material fact violated

the Idaho Commodity Code. Idaho Code § 30-1506 states:

Fraudulent conduct -- Liability of principals, controlling persons and others.

(1) It is unlawful for any person, directly or indirectly, in connection with a commodity contract or commodity option:

(b) To ... omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."

Smiley misled his investors into giving him money by withholding facts which would have tended to cause them not to invest, in violation of Idaho Code § 30-1506(1)(b). Again, as discussed above, Smiley failed to disclose to prospective investors that the Dinar commodity transaction was unlawful, that he was fundamentally ignorant about how his investment scheme would work, that he had been ordered by the Department to cease and desist from promoting the investment, that he had closed down the safe deposit boxes and that he used investor money for personal expenses.

A reasonable investor would therefore consider it significant, in making a decision regarding this investment, that Smiley had been ordered by the Department to cease and desist from promoting the unlawful investment, that Smiley's investment was unlawful, that Smiley was relying on some other person to determine that the investment had paid off, and that he had removed the Dinars from the safety deposit boxes. That information would likely alter an offeree's investment decision. Further, the obvious purpose of the statutory requirement is that the promoter not omit material information. An investor considering whether to give money to a promoter would obviously want to know that the regulating agency, the Idaho Department of Finance, considered the investment to be unlawful. The above omissions are therefore material, and a finding is warranted that Smiley violated Idaho Code § 30-1506(1)(b), particularly if the Court finds the Shama holdings applicable to Commodity Code cases.

4.C. Fraud – Other fraudulent conduct. (Counts Three and Four). As with other sections, the Department incorporates Other Fraud proof and arguments set forth in part 4.C of the Securities Act section of this memorandum. As noted in the section, scienter and materiality are irrelevant to a finding of fraudulent and deceitful acts and practices. It is enough to show that Smiley deceived his investors, which the Department has shown above.

5. Smiley failed to comply with the Cease and Desist Order (Count Five). Smiley violated the Commodity Code when he failed to comply with the Summary Cease and Desist Order issued June 2, 2005. The Director of the Idaho Department of Finance has authority to issue cease and desist orders.

30-1510. **Enforcement.** (1) If the director believes, whether or not based upon an investigation conducted under section 30-1509, Idaho Code, that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule or order hereunder, the director may:

(a) Issue a cease and desist order;

The Department served a Summary Cease and Desist Order, dated June 2, 2005, on Smiley. (Affidavit of Timothy D. Martin; Smiley deposition, pp. 31-32, ll. 24-19; Smiley deposition, Exhibit 2). Smiley did not stop soliciting investors and he continued to enter into commodity contracts and to buy Dinars.

Q. After you received this order, did you continue entering into Joint Venture Agreements with joint venture partners?

A. When people called me, I did.

(Smiley deposition, p. 33, ll. 5-8).

Smiley continued to accept investor money, some of which he used to purchase Dinars, at least through June 2007. Exhibit 16 to Smiley's deposition is a Joint Venture Agreement executed between Smiley and Bill Ice as Gold Eagle, LLP on June 27, 2007. Smiley executed 63 agreements before the Order issued on June 2, 2005, and 98 after. (Affidavit of Alan

Conilogue, Exhibit B). Smiley's refusal to comply with the Cease and Desist Order constituted multiple violations of the Order.

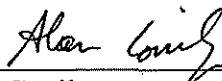
5. Conclusion. Under Idaho law, it is unlawful to conduct commodities transactions unless one of the exemptions applies, which Smiley has not asserted. Smiley's purchase of and offers to sell Dinars are unlawful commodity transactions. The Department has also shown that Smiley's misstatements and omissions were of a nature that a reasonable investor might have altered the investment decision had the investor known the truth. Even if a specific fact here and there might not have changed the investor's mind, Smiley's actions to raise investor money, keep half of it and spend it on personal expenses, without the investor knowing this, were deceitful and fraudulent.

6. Judgment. Idaho Code § 30-1511 provides that upon a showing that a person has violated an order of the Director, the Court may grant legal or equitable remedies. In addition to a permanent injunction, the Court may grant the following remedies.

- (i) Imposition of a civil penalty in an amount which may not exceed twenty-five thousand dollars (\$25,000) for any single violation or one hundred thousand dollars (\$100,000) for multiple violations in a single proceeding or a series of related proceedings;
- (ii) Disgorgement;
- (iv) Restitution to investors wishing restitution; and
- (v) Appointment of a receiver or conservator for the defendant or the defendant's assets.

Smiley's many violations of the Cease and Desist Order entitle the Department to a judgment awarding the penalties, disgorgement, restitution for investors, and appointment of a receiver as set forth in the statute.

RESPECTFULLY SUBMITTED this 21 day of May, 2008.



Alan Conilogue
Deputy Attorney General
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the ___ day of June, 2008, I caused to be served a true and correct copy of the MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT upon all parties of record in the proceeding by U.S. Mail, postage prepaid, to the following:

Susan Patricia Weeks	[]	U.S. mail, postage prepaid
James, Vernon & Weeks, PA	[]	certified mail
1875 North Lakewood Drive, Ste. 200	[<input checked="" type="checkbox"/>	overnight mail
Coeur d'Alene, ID 83814	[]	hand delivery

John L. Runft	[<input checked="" type="checkbox"/>	U.S. mail, postage prepaid
Runft & Steele Law Offices	[]	certified mail
1020 W. Main Street, Ste 400	[]	overnight mail
Boise, ID 83702	[]	hand delivery



Rita Jensen