7TH JUDICIAL DISTRICT COURT

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

STATE OF IDAHO, DEPARTMENT OF FINANCE, SECURITIES BUREAU, Plaintiff, vs. THOMAS L. GOODRICH, Defendant.	Case No. CV-03-7029 **MEMORANDUM DECISION AND ORDER**

I. PROCEDURAL BACKGROUND

On November 14, 2003, plaintiff State of Idaho, Department of Finance ("DOF") filed a verified complaint against defendant Thomas L. Goodrich ("Goodrich") alleging that he violated Sections 30-1403 of the Idaho Securities Act ("Act") by selling investment contracts (bundles of automobile finance contracts where CreditMaster Finance, LLC was the creditor and certain used auto buyers were debtors) to investors without disclosing to them that Credit Master Finance, LLC, ("CreditMaster Finance") was in financial trouble. The only relief sought by DOF's verified complaint is a permanent injunction from violating Section 30-1403 in the future.

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On January 20, 2004, Goodrich filed an answer denying liability and alleging several affirmative defenses, including the statute of limitations in I. C. Sec. 5-218(4). Neither party requested a jury trial.

On July 8, 2004, DOF filed a motion for summary judgment, supported by the affidavits of Gary Stokes, Robert Turk and Connie Hafen, and also a transcript of sworn testimony given by Goodrich to DOF investigators on February 5, 2003. On August 27, 2004, Goodrich filed an affidavit (dated August 16th) in opposition to the motion, and also his own motion for summary judgment, seeking dismissal of the complaint. Goodrich filed a brief in opposition to DOF's motion for summary judgment and in support of his own motion, with various attachments including a copy of an affidavit from John Simmons filed in federal bankruptcy court in another action. On August 26, 2004, DOF filed a reply brief and in opposition to Goodrich's motion for summary judgment..

On August 31, 2004, DOF filed a motion to strike portions of Goodrich's affidavit and exhibits. On August 31, 2004, Goodrich filed a brief in opposition to DOF's motion to strike.

Both summary judgment motions were orally argued on September 1, 2004. Having considered the motions, affidavits, excerpts from depositions, supporting and opposing legal memoranda, and oral argument, this Court concludes that because there are no genuine issues of material fact, DOF's motion for summary judgment must be granted in part, and Goodrich's motion for summary judgment must be denied.

II. STANDARD OF REVIEW

A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter

of law." Rule 56(c), I.R.C.P.; *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997). Upon considering a motion for summary judgment, all controverted facts are liberally construed in favor of the non-moving party. *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29 (1994). Moreover, the court draws all reasonable factual inferences and conclusions in favor of the non-moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529, 887 P.2d 1034, 1036 (1994). In ruling on a motion for summary judgment, the district court is not permitted to weigh the evidence or to resolve controverted factual issues. *Bybee v. Clark*, 118 Idaho 254, 257, 796 P.2d 131, 134 (1990).

The party moving for summary judgment always bears the burden of proving that no genuine issue of material fact exists on an element of the non-moving party's case. If the moving party fails to challenge an element or fails to present evidence establishing the absence of a genuine issue of material fact on that element, the burden does not shift to the non-moving party, and the non-moving party is not required to respond with supporting evidence. *Orthman v. Idaho Power Co.*, at 600, 944 P.2d at 1363.

If the moving party has met its burden by either an affirmative showing of the moving party's evidence or by a review of the non-moving party's evidence, the burden shifts to the non-moving party to establish that a genuine issue for trial does exist. *Id.; Navarrette v. City of Caldwell*, 130 Idaho 849, 851, 949 P.2d 597, 599 (1997). To withstand a motion for summary judgment, the non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990); *Zimmerman v. Volkswagen of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 70 (1996).

The fact that opposing parties both file motions for summary judgment does not in itself establish that there is no genuine issue of material fact, and this is so because by filing a motion for summary judgment a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues or theories. However, where opposing parties both move for summary judgment based on the same evidentiary facts and on the same theories and issues, the parties effectively stipulate that there is no genuine issue of material fact. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982). The rules do not contemplate the transformation of the court, sitting to hear a summary judgment motion, into the trier of fact when cross motions for summary judgment have been filed. Moss v. Mid-America Fire & Marine Ins. Co., 103 Idaho 298, 647 P.2d 754 (1982).

The rules do not contemplate the transformation of the court, sitting to hear a summary judgment motion, into the trier of fact when cross motions for summary judgment have been filed. Moss v. Mid-America Fire & Marine Ins. Co., 103 Idaho 298, 647 P.2d 754 (1982). However, if an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982); Blackmon v. Zufelt, 108 Idaho 469, 700 P.2d 91 (Ct. App. 1985); Sewell v. Neilsen, Monroe, Inc., 109 Idaho 192, 706 P.2d 81 (Ct. App. 1985).

Rule 56(e), I.R.C.P., requires that both supporting and opposing affidavits be made on personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Moreover, inadmissible

opinions or conclusions do not satisfy the requirements for proof of material facts. *Hecla Mining Co. v. Star-Morning Co.*, 122 Idaho 778, 783-786, 839 P.2d 1192, 1197-1200 (1992). The question of admissibility of affidavit and deposition testimony is a threshold question to be answered by the trial court before applying the required liberal construction and reasonable inferences rule in favor of the party opposing a motion for summary judgment. No objection or motion to strike is required before a trial court may exclude or not consider evidence offered by a party, *Hecla Mining Co.*, 122 Idaho at 784, 839 P.2d at 1198; *Ryan v. Beisner*, 123 Idaho 42, 45, 844 P.2d 24, 27 (Ct. App. 1992).

III. STATEMENT OF MATERIAL FACTS

On April 10, 1995, Goodrich filed article of organization with the Idaho Secretary of State for CreditMaster Finance. Goodrich was the sole member and managing officer of CreditMaster Finance. Goodrich was also a member and officer of CreditMaster Auto Sales, LLC, ("CreditMaster Auto") a used automobile dealership started by Goodrich in about 1993.

CreditMaster Auto sold used cars in Idaho Falls, Idaho, financing some with installment sales security agreements referred by the parties in this action as "auto finance contracts." After CreditMaster Finance was created, CreditMaster Auto sold most of those auto finance contracts to CreditMaster Finance in order to maintain liquidity to purchase more used autos to offer for sale to the public. Other than Goodrich, the two limited liability companies had separate employees, and each maintained separate payroll records.

In August, 1996, Robert Turk contacted Goodrich and indicated that he may be interested in purchasing CreditMaster auto finance contracts for investment purposes. After several discussions Turk purchased several auto finance contracts from Credit Master. In June, 1999

Turk directed the Bank of Commerce (custodian of his IRA account) to purchase a "bundle" of six auto finance contracts from CreditMaster Finance for the purchase price of $24,999.04.

The date of the sale was June 8, 1999. The agreement stated that CreditMaster Finance would:

1) Perform collection functions for the assigned contracts.

2) Make payments to the Buyer as per the attached amortization schedule.

3) Repossess vehicles if necessary.

4) Provide titles to the vehicles financed by the assigned contracts. Titles are to show Buyer as lien holder and are to be held by Buyer as lien holder and are to be held by Buyer until contract payments to Buyer have been paid in full.

5) Contracts to be signed by officer of CreditMaster Finance, LLC, under "Creditor's Assignment" and the "With Recourse" box is to be checked.

Connie Hafen met with Goodrich in 1997 through husband Bryant Hafen, and purchased some auto finance contracts from CreditMaster. On July 29, 1999, Hafen directed the Bank of Commerce (her IRA custodian) to purchase a "bundle" of four Credit Master auto finance account contracts from CreditMaster Finance for the purchase price of $14,097.71. The sales agreement is dated July 30, 1999, and contains obligations of CreditMaster Finance that are identical to those in Turk's agreement, quoted above.

In April, 1999, Gary Stokes, who is Connie Hafen's brother became interested in purchasing auto finance contracts from CreditMaster Finance after talking with Bryant Hafen. Stokes purchased a "bundle" of six CreditMaster auto finance contracts on April 14, 1999 for the purchase price of $25,000. Although the actual sales agreement is not in this record, Neither party asserts that the obligations of CreditMaster were any different from those quoted above from the Turk sales agreement.

At the time of the aforesaid sales of auto finance contracts by CreditMaster Finance to Turk and the Bank of Commerce as IRA custodian for Hafen and Stokes, the purchasers did not ask for, and Goodrich did not provide them with, any current financial information on behalf of CreditMaster Finance.

In his answer to the complaint Goodrich states at paragraph 11, in part:

> Defendant admits that by March 1999 he knew that CreditMaster Finance, LLC's projected revenues may not have been sufficient to meet its obligations when and as they had become and were becoming due. Defendant admits that during and after March 1999, he was involved in CreditMaster Finance, LLC, offering and selling high rate, sub-prime contracts to investors. Defendant denies the allegations that disclosure was not made to those investors of the financial condition of CreditMaster Finance, LLC; indeed, defendant affirmatively alleges that such disclosure was made to each such investor.

Further, in paragraph 13 of his answer, Goodrich states:

> In response to paragraph X of the complaint, defendant agrees that CreditMaster Finance, LLC's financial condition after March, 1999 was a material fact as to which disclosure to investors in the high rate, sub-prime contracts was required in order to not mislead investors in such agreements as to CreditMaster Finance, LLC's ability to meet its obligations in respect to those agreements (i.e., administer them (i.e. receive and process payments, and make reasonable efforts to collect payments past due and / or on high rate, sub-prime contracts as to which the debtors were in default) and remit the amounts received, net of the administ5ration costs, to the investors in the respective sub-prime automobile retail installment sales agreements). Defendant, however, affirmatively alleges that such financial condition was in fact disclosed to each such investor, none of whom was misled in any way.

On February 3, 2003, in Boise, Goodrich gave sworn testimony answer to questions posed by DOF investigators Colleen Adams and Jim Burns. This testimony was taken and transcribed by M. Dean Willis, a certified shorthand reporter. Goodrich testified that he did not provide any purchaser of the auto finance contracts sold by CreditMaster Finance with any balance sheets of CreditMaster Finance, unless the purchaser specifically asked for one. (Tr. at p. 19).

In Goodrich's August 16th affidavit filed in this action, he testified that Turk, Hafen and Stokes did not ask for any financial information about CreditMaster Finance when purchasing auto finance contracts. (Aff, paras. 20, 27, 33, 36, 37, and 40). While Goodrich's affidavit states that he did not affirmatively mislead any purchaser of auto finance contracts, the affidavit contains no facts to support Goodrich's allegations in paragraphs 11 and 13 of his answer that he did provide financial information about CreditMaster Finance to Turk, Hafen and Stokes. By affidavit, Turk, Hafen and Stokes all testified that they did not receive any financial information about CreditMaster Finance before, or at the time, they or their IRA custodian purchased auto finance contracts in April, June or July, 1999.

In August, Goodrich prepared a memo outlining the problems of CreditMaster Finance. (Aff., para. 55). On October 8, 1999, Goodrich sent this memo to Turk, Hafen, Stokes and other purchasers of auto finance contracts. (Id. at para. 56).

On September 30, 2003, Goodrich filed Chapter 7 Bankruptcy Petition in the District of Idaho. The trustee appointed in Goodrich's bankruptcy is currently managing CreditMaster Finance.

IV. ANALYSIS

A. Motions to Strike Portions of Goodrich, Turk, Hafen and Stokes Affidavits.

Both parties seek to strike portions of the affidavits filed by the other party based on hearsay, speculation and conclusions. This Court has read the affidavits, and agrees that portions of all such affidavits are inadmissible. Rule 56(e), I.R.C.P., requires that both supporting and opposing affidavits be made on personal knowledge, set forth facts that would be admissible in evidence, and show that the affiant is competent to testify to such facts. Moreover, inadmissible opinions or conclusions do not satisfy the requirements of proof under Rule 56 to

either support or oppose a motion for summary judgment. *Hecla Mining Co., supra.*

Therefore, this Court must strike all the inadmissible hearsay, speculation, and conclusions without foundation, contained in the affidavits of Goodrich, Turk, Hafen and Stokes.

B. Cross Motions for Summary Judgment.

The motions for summary judgment raise the following issues for decision:

1. Does the three year statute of limitations in I. C. § 5-218(4) bar this action for injunctive relief under I. C. § 30-1442?

2. Does the automatic stay under the federal bankruptcy code bar this action for injunctive relief?

3. Are the auto finance contracts sold by Goodrich on behalf of CreditMaster Finance "securities" as defined by the Idaho Securities Act?

4. Did Goodrich violate I.C. § 30-1403 in April, June or July, 1999 by not providing Turk, Hafen, Stokes and the Bank of Commerce with then current statements of financial condition of CreditMaster Finance?

1. I.C. § 5-218(4) Does not bar the Injunctive Relief Sought by DOF.

Goodrich's motion for summary judgment argues that DOF's complaint is barred by the three-year statute of limitations for bringing actions premised on fraud or mistake prescribed in I.C. § 5-218(4) because the complaint was filed on November 14, 2003 and the cause of action occurred between April and July of 1999. Goodrich cites *Young Elec. Sign Co. v. State Ex Rel., Winder*, 135 Idaho 804, 25 P.3d 117 (2001).

The DOF argues in opposition that I.C. § 5-218(4) only applies to damages actions, and not to this action brought by the State pursuant to section 30-1442 of the Securities Act, to enjoin Goodrich against future violations of the Act. DOF also cites *Young, supra.*, and *State v. Shama Res. Ltd. P'ship*, 127 Idaho 267, 899 P.2d 977 (1995),

In *Young Elec. Sign Co. v. State Ex Rel., Winder*, 135 Idaho 804, 25 P.3d 117 (2001) the Department of Transportation initiated an administrative complaint seeking to have a sign removed from YESCO's property. The hearing officer concluded that YESCO was required to remove the sign. On appeal, YESCO argued that the action was barred by I.C. §§ 5-218, 5-224 and 5-216. The district court and Idaho Supreme Court affirmed. The Idaho Supreme Court cited decisions from other states as persuasive authority holding that a state exercising its police power under statute is immune from statutes of limitations, and stated:

> . . . the Department is granted the power to regulate and enforce the placement and maintenance of signs. We agree with the director's observation that the Department's actions were consistent with the exercise of its police powers, as authorized by the legislature, and hence were not barred by the statute of limitations." *Id.* at 808, 25 P.2d at 121.

Under I.C. § 30-1442(3), the Director of the Idaho Department of Finance is authorized to file an action for injunctive relief "[w]henever it appears to the director that any person has engaged or is about to engage in any act or practice constituting a violation of this chapter, or any rule or order hereunder. . . ." In *State v. Shama Res. Ltd. P'ship, supra*, the defendants sold limited partnership interest that constituted securities. The defendants had not registered the securities with the State, nor had defendant McGary registered with the State as a broker-dealer as required by the Act. The State alleged that the defendant violated I.C. §§ 3-1403(2) and 3-1403(3) because they failed to inform investors that the securities were not registered and that McGary had not registered as a broker-dealer with the State. The State was awarded summary judgment on these claims and the general partner in a limited partnership was held liable for violations. *Id.* at 268-69, 273, 899 P.2d at 978-79, 983. The fact that an individual is furthering the interests of an entity that he has an interest in does not shield him from liability and enforcement action under the Act.

It is clear that Idaho Code section 5-218 is a limitation on actions for damages, but was not intended to bar actions for injunctive relief filed by the State of Idaho under the Idaho Securities Act. Therefore, this action is not barred by the statute of limitations.

2. The Action is not Barred by the Automatic Stay of the Bankruptcy Code.

11 U.S.C. § 362(a) states that an action against an individual who has a bankruptcy proceeding pending is automatically stayed under federal law, insofar as it is in the nature of debt collection. However, 11 U.S.C. § 362(b)(4) exempts from the stay actions to enforce a governmental agency's police or regulatory power from the automatic stay in bankruptcy.

Therefore the automatic stay under federal bankruptcy law does not bar this action.

3. The Auto Finance Contracts sold by Goodrich for CreditMaster Finance were "Securities" under the Idaho Securities Act.

DOF argues that Goodrich sold "investment contracts" to investors within the meaning of the Act, administrative regulations promulgated pursuant to the Act and case law construing the Act. The affidavits of Turk, Stokes and Hafen indicate that each invested money in the form of a purchase of a "bundle" of CreditMaster Finance auto loan contracts. The auto loan contracts were sold to investors at face value and they generally carried an interest rate of 24%. DOF argues that this attractive interest rate was the profit the investors reasonably expected to receive. Turk, Stokes and Hafen attested to this expectation in their affidavits.

DOF argues that Turk, Stokes and Hafen were engaged in a "common enterprise" with Goodrich and CreditMaster Finance and that the facts of this case easily meet the definitions of an "investment contract" found in Rule 300.03 of the Rules. DOF cites *State v. Gertsch*, 137 Idaho 387, 49 P.3d 392, 392 (2002) in which the Court stated that it had adopted the 3-prong test for the existence of an investment contract enunciated in *S.E.C. v. W.J. Howey Co.*, 328 U.S.

293, 298-99 (1946). This test is commonly known as the "Howey-Forman" test. *Id.* at 401, 49 P.3d at 396.

Goodrich argues that the investment sales contracts at issue are composed of a negotiable promissory note and a security interest and therefore are "chattel paper" under Article 9 of the Uniform Commercial Code. Goodrich argues that when a holder sells chattel paper to a buyer (as CreditMaster Finance did to Stokes and the Bank of Commerce in this case), the buyer then may enforce the contract against the obligor on that promissory note and if necessary, by foreclosing against the security. When chattel paper is sold "with recourse" this does not render chattel paper to be a security and therefore DOF's action fails. Goodrich cites *W.J. Howey Co.* in which the Court defined investment contract as, "[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." *Id.* at 328 U.S. at 299. Goodrich argues that the concept of vertical commonality denotes the seller as the "promoter" or the person seeking the investment of third parties, which he does not believe applies to him. Goodrich argues, because Turk, Stokes and Hafen initiated contact with him, CreditMaster was the offeree in the transaction.

Goodrich also argues that there is no horizontal commonality. Goodrich cites *Banco Español de Crédito v. Sec. Pacific Nat'l Bank*, 763 F. Supp. 36 (1991) (*affirmed in Banco Español de Crédito v. Sec. Pacific Nat'l Bank*, 973 F.2d 51 (2d Cir. 1992) in which the Court held that "because the plaintiffs . . . did not receive an undivided interest in a pool of loans, but rather purchased participation in a specific, identifiable short-term Integrated loan, the loan participation did not have an identity separate from the underlying loan" which was not itself a security. *Id.* at 42. Here, Goodrich argues, there was no pooling of interests. Goodrich argues

that the payments received from a third-party debtor on a contract that had been purchased by Turk, Stokes or Hafen could not be used to benefit the purchaser of any other contract. Rather, Goodrich argues, only if a third-party debtor defaulted on a contract that had been sold by CreditMaster Finance did the "with recourse" provision mean that revenues CreditMaster Finance was receiving would be applied to make up the short fall.

Idaho Code § 30-1402(12) defines "security" for purposes of the Act. An "investment contract" is a "security" under this statute. DOF has promulgated administrative rules pursuant to the Act. The rules are known as "Rule Pursuant to the Securities Act" ("Rules") and are found at IDAPA 12.01.08. Rule 300.03 (IDAPA 12.01.08.300.03) defines "Investment Contract." It provides:

> "Investment contract" as used in Section 30-1402(12), Idaho Code, includes, but is not limited to, either or both of the following:
>
> a. Any investment in a common enterprise with the expectation of profit to be derived primarily through the managerial efforts of someone other than the investor. In this Section, a "common enterprise" means an enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and successes of those seeking the investment or of a third party (also known as vertical commonality);
>
> b. Any investment by which an offeree furnishes value to an offeror and a portion of this value is subjected to the risks of the enterprise, and the furnishings of said value are induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above said value, will accrue to the offeree as a result of the operation of the enterprise, and the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

The issue of whether a particular set of facts constitutes a security is a question of law. *Gertsch* at 387, 49 P.3d at 392. Therefore, the Court must determine whether the facts in this case are in accord with the three prongs of the Howey-Forman test. The Howey-Forman test 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.* Rule 300.03(a) parallels this test. DOF argues that the purchase of "bundles" of these contracts by Turk, Stokes and Hafen under such circumstances constituted parting with money for the purpose and in reasonable expectation of making a profit.

With regard to the first prong of the test, the *Gertsch* Court stated that "an 'investment' typically involves parting with money for the purpose and in the reasonable expectation of making a profit." *Id.* at 392, 49 P.3d at 397. Goodrich testified that auto finance contracts were sold to investors at face value and those contracts typically carried an interest rate of 24% and that the investors were relying on his managerial efforts. The purchase of these contracts by Stokes and the Bank of Commerce for Hafen and Turk, with a reasonable expectation of profit satisfies the first prong of the Howey-Forman test.

The existence of a common enterprise, as is required in the second prong of the Howey-Forman test, is indicated if either "horizontal commonality" or "vertical commonality" is presented under the facts. Horizontal commonality arises where each individual investor's fortune is tied to the fortunes of other investors by a pooling of assets, combined with the pro-rata distribution of profits. Vertical commonality depends upon the relationship between each investor and the promoter and it occurs where "the fortunes of investor are interwoven with and dependent on the efforts and success of those seeking the investment or of third parties. Either form of commonality demonstrates a common scheme or enterprise. *Id.* Because Stokes and the Bank of Commerce for Hafen and Turk were dependent upon Goodrich and CreditMaster Finance for the success of their investments, vertical commonality existed here.

Under the third prong of the test requiring a reasonable expectation of profits to be derived from the entrepreneurial or management efforts of others, "profits are generally defined

as either 'capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from use of the investors' funds.'" *Id.* at 393, 49 P.3d 398 (*citing United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975)). Under this prong, profits are derived from the efforts of others and this prong is satisfied if "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." *Id.* Because the returns on the investments depended on the managerial efforts of Goodrich and not those of Turk, Stokes and Hafen, the third prong of the Howey-Forman test is satisfied.

Therefore, Goodrich sold "investment contracts," which are includes as "securities" within the Idaho Securities Act.

4. Goodrich Violated the Idaho Securities Act by not Providing Purchasers With Then Current Financial Statements of CreditMaster Finance in April, June and July, 1999.

DOF argues that Goodrich violated the I.C. §§ 30-1403 of the Securities Act by not giving then current financial statements of CreditMaster Finance to purchasers of the auto finance contracts prior to their investment in CreditMaster Finance contracts. I.C. § 30-1403(2) makes it unlawful for any person, "in connection with the . . . sale . . . of any security . . . to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading . . . ." DOF argues that the Idaho Supreme Court has found violations of these provisions of the Act under similar circumstances and cites *Shama, supra.*

Goodrich argues that even if the investment contracts were securities, there was no misrepresentation or fraud. Goodrich states that as early as March 1999 he knew that CreditMaster Auto was experiencing financial difficulties, but argues that he did not have an affirmative duty to disclose this to buyers of CreditMaster Finance, because it was a different

company. Goodrich argues that the only contractual promise made was the "with recourse" provision, which is what he considers to be "a promise *in futuro*." Therefore, Goodrich argues, it can only mislead if CreditMaster Finance intended not to make good on the promise at the time the contract was entered into. Goodrich argues that the evidence is to the contrary and that CreditMaster Finance intended to follow through with its "with recourse" promises. Goodrich states that CreditMaster Finance marshaled its assets to do so but by October 1999 it became clear that CreditMaster would become insolvent unless it restructured its service arrangements. Lastly, Goodrich argues that CreditMaster Finance's financial status was **not material** to Turk, Hafen and Stokes, because they did not ask for financial information.

The statutory language of I.C. § 30-1403(2) does not contain any requirement that investors must request information on "material facts" necessary to make statements actually made not misleading. When Goodrich delivered to Stokes and to the Bank of Commerce on behalf of Hafen and Turk, the written sales contract expressly stating that CreditMaster Finance would "perform collection functions," "make payments to the Buyer," "repossess vehicles," and "provide titles to the vehicles financed" it was then incumbent on Goodrich to provide such purchasers with current financial information of CreditMaster Finance. This is because CreditMaster's statements as to what it would do are misleading if it is financially unable to complete these obligations. Since Goodrich's answer admitted that production of financial information was material to the auto finance contract purchaser's decision to buy, he cannot by argue create a genuine issue of fact. Further, even if he went back and moved to amend his answer, this Court is the trier of fact, it would hold that such information is material to all such purchasers as a matter of common sense.

Stokes and the Bank of Commerce for Hafen and Turk bought CreditMaster Finance auto finance contracts with the written "with recourse" promise. Under this promise, CreditMaster Finance committed to either repurchase a contract if the borrower defaulted on it or to make the payments due under the contract to the investor. Turk, Stokes and Hafen testified that they would not have purchased CreditMaster Finance auto loan contracts if they had known the CreditMaster Finance was in financial trouble because the "with recourse" promise CreditMaster Finance made was only of value if CreditMaster Finance was able to meet all its short term and long term financial commitments. Disclosure of then current financial statements is necessary for any purchaser to determine CreditMaster Finance's future ability to pay if car debtors defaulted.

Because there are no genuine issues of material fact that Goodrich failed to disclose material information (about CreditMaster Finance's current financial condition) in April, June and July, 1999 to the three purchasers of CreditMaster Finance auto finance contracts in order to make CreditMaster Finance's statements of its future obligations to collect, transmit debtor payments , repossess vehicles, transfer titles, and be liable on recourse after debtor default, Goodrich violated section 30-1403(2). This Court need not consider the alleged violations of sections 30-1403(1) or (3).

Therefore DOF's motion for summary judgment must be granted, and Goodrich's motion for summary judgment must be denied.

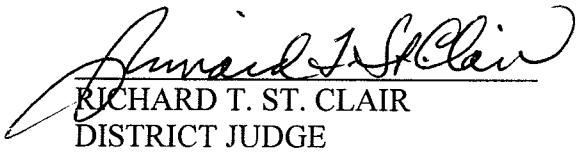
V. CONCLUSION AND ORDER

Based on the foregoing analysis the Court concludes, and

THEREFORE IT IS HEREBY ORDERED that the Department of Finance's motion for summary judgment is GRANTED, and Goodrich's motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that all inadmissible portions of the affidavits of Goodrich, Hafen, Turk and Stokes are STRICKEN.

DATED this 4th day of ~~September~~ October, 2004.



RICHARD T. ST. CLAIR
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2004, 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.

Joseph B. Jones
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RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By _____
Deputy Clerk