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J. DAVID NAVARRO, Clerk
By Jennifer Kennedy DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

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

STATE OF IDAHO, Department of Finance, Plaintiff, vs. ELIE MICHAEL SAKARAN, an individual, and PACIFIC CAPITAL, INC., a Delaware corporation, Defendants.	Case No. CV-OC-99-05241-D MEMORANDUM DECISION AND ORDER

This case was filed by the State of Idaho, Department of Finance ("Department') on September 29, 1999, against Defendants Elie Michael Sakaran ("Sakaran") and Pacific Rim Capital, Inc. ("Pacific Rim"). The Verified Complaint alleges violations of the Idaho Securities Act ("Act"), Title 30, Chapter 14, Idaho Code. The Complaint alleges that Sakaran, on behalf of Pacific Rim , solicited Idaho residents to invest in securities. The Complaint further alleges that Sakaran is not licensed by the Idaho Department of Finance as a salesman, thereby violating Idaho Code §30-1406. Count One alleges the sale or offer of sale of securities by Sakaran, who has never been licensed with the Idaho Department of Finance as a salesman. Count Two alleges that Pacific Rim violated Idaho Code §30-1406 by acting as a broker-dealer when it was not licensed by the Department. Counts Three and Four allege the false and misleading nature of omissions and statements made by Sakaran in offering to sell or selling securities in Idaho. Count Five alleges that Sakaran's pattern of

misrepresentations and omissions operated as a deceit upon offerees and investors. A default judgment was entered against Defendant Pacific Rim on December 2, 1999.

The Department seeks a permanent injunction prohibiting Sakaran from selling securities in the State of Idaho and from committing securities fraud in the future. Further, the Complaint seeks that restitution be ordered to the individuals the Department alleges were harmed by the Defendant's conduct, and requests a civil penalty in the amount of $10,000.00 for each violation and an award of attorney fees.

The parties have filed cross motions for summary judgment. The Department seeks partial summary judgment on Counts One, Three, Four, and Five as to Defendant Elie Michael Sakaran. The State's motion has been designated as a partial summary judgment because the Department is not attempting to prove each specific allegation contained in Count Three.

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The underlying facts are as follows:

Don Day (Day) was an acquaintance of Sakaran in California. Day bought stock from Sakaran while Day resided in California. Day took a job with Kit Manufacturing Company and moved to Idaho in July, 1997. After Day moved to Idaho, Sakaran spoke with Day while Day was in Idaho and advised Day of an opportunity to invest in certain stocks at a discount. Day mentioned the opportunity to his boss, Gerald Wannamaker (Wannamaker) and another Kit Manufacturing employee, James Homberger (Homberger). Homberger had also moved to Idaho from California and had previously purchased stock from Sakaran while residing in California. Ultimately, Day, Homberger, and Wannamaker purchased shares in Conectisys Corporation (CNES) and Uniforms of American, Inc. (UNIF). Payments for the stocks were made to Pacific Rim. Sakaran sent Day a fax

to Idaho on March 10, 1998, with a fax cover sheet stating it was from Conectisys Corp. The telephone at Sakaran's office was answered "Conectisys Corporation". See Affidavit of Don Day.

ANALYSIS

Summary judgment is appropriate only if the affidavits, depositions, admissions and other evidence in the record demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), I.R.C.P., Hines v. Hines, 129 Idaho 847, 934 P.2d 20 (1997). When considering a motion for summary judgment, the court "liberally construes the record in a light most favorable to the party opposing the motion and draws all reasonable inferences and conclusions in that party's favor." Brooks v. Logan, 130 Idaho 574, 576, 944 P.2d 709, 711(1997). Where the evidentiary facts are undisputed and the court rather than a jury will be the trier of fact, "summary judgment is appropriate, despite the possibility of conflicting inferences, because the court alone will be responsible for resolving the conflict between those inferences." Riverside Development Co. v. Ritchie, 102 Idaho 515, 519, 650 P.2d 657, 661(1982). This case has been scheduled for a jury trial, but neither party made a timely demand for a jury trial.

In support of its motion for summary judgment, the Department contends that it is undisputed that Sakaran has never been registered with the Department as a salesman, and Sakaran admits this. The Department argues that Sakaran offered and sold securities to Idaho residents, Day, Wannamaker, and Homberger in the form of stock in Conectisys Corporation and Uniforms for America, Inc. As a consequence, the Department claims Sakaran violated Idaho Code §30-1406 by selling or offering to sell securities in Idaho while not licensed as a salesman. Specifically, the Department argues Sakaran was a salesman representing a broker-dealer, Pacific Rim. The Department contends that Pacific Rim was a broker-dealer engaged in the business of effecting

transactions in securities for the account of others or for its own account. Further, the Department claims Sakaran was also a salesman representing issuers, Conectisys Corporation and Uniforms for America, Inc. In support of its argument, the Department contends Sakaran claimed he represented both of these companies. See Affidavit of Don Day, James E. Homberger, and Gerald R. Wannamaker. Additionally, the Department makes reference to the fax Sakaran set to Day with a cover sheet which states the fax is from CONECTISYS CORP. Further, the Department makes reference to Sakaran's office telephone which answered "Conectisys Corporation. See Affidavit of Don Day.

In response, Sakaran disputes that he represented Conectisys or Uniforms for America. Sakaran argues that he did not sell securities, but, rather, he purchased securities with Wannamaker and Day so that they could all obtain a discount. The three individuals pooled their money and invested their money at about the same time in order to buy securities at a bigger discount. Sakaran also contends that he did not receive a commission or compensation for the sale of the securities. Finally, Sakaran contends that his activities are exempt from the registration requirements of I.C. §30-1406. Section 30-1406 reads in pertinent part:

Idaho Code §30-1406 states in pertinent part:

> 30-1406. Registration or notice filing required of broker-dealers, salesmen, investment advisers, investment adviser representatives. [Effective until October 12, 1999.].
>
> (1) It is unlawful for any person to transact business in this state as a broker-dealer or salesman unless he is registered under this chapter, and it is unlawful for any broker-dealer or issuer to employ a salesman unless the salesman is registered under this chapter.

Idaho Code §30-1402(2) defines "salesman" as follows:

> (2) "Salesman" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. . .

Idaho Code §30-1402(7) defines "issuer":

> (7) "Issuer" means any person who issues or proposes to issue any security, except that with respect to certificates of deposit, voting-trust certificates or collateral-trust certificates or with respect to certificates of interest or shares in any unincorporated investment trust not having a board of directors or persons performing similar functions or of the fixed, restricted management or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued.

Sakaran claims he is exempt from registration pursuant to Idaho Code §30-1402, which defines broker-dealer as follows:

> (3) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Broker-dealer" does not include:
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> ****
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> (c) a person who has no place of business in this state if during any period of twelve (12) consecutive months he does not direct more than fifteen (15) offers to sell or to buy into this state in any manner to persons other than those specified in subsection (3)(b) of this section.

The Idaho Courts have held that the Department has the burden of showing a violation of I.C. §§ 30-1406. See *State v. Shama Resources L.P.*, 127 Idaho 267, 899 P.2d 977 (S. Ct. 1995).

Sakaran contends the Department has failed to show that he has violated I.C. §§30-1406. Sakaran argues that in order to meet the definition of salesman, the Department must allege and prove that Sakaran worked as a salesman for a broker-dealer in effecting or attempting to effect purchases or sales of securities. Therefore, Sakaran argues, it must be determined that Pacific Rim fits the definition of broker-dealer. Sakaran contends that the Department has failed to show that Pacific is a

broker-dealer. Specifically, Sakaran argues that Pacific Rim does not have a place of business in the State of Idaho, and the Department has failed to produce evidence showing that Pacific Rim made 15 offers to sell or buy securities which were directed into the State of Idaho by Pacific Rim during any period of twelve (12) consecutive months. The affidavit of Regis Possino, president and sole shareholder of Pacific Rim has not done so. Thus, Sakaran contends Pacific Rim fails to meet the definition of broker dealer, therefore, Sakaran could not have represented a broker-dealer. However, Pacific Rim is in default in this case and a judgment has been entered against it. Therefore, it has judicially admitted the allegations against it. In response, the Department argues that the exception to I.C. §30-1402(2) refers to "**offers** to sell or to buy in this state. ." The Department argues that the exception applies only to "offers" and not to actual sales. Therefore, the Department contends the exception does not apply to Pacific Rim.

Idaho Code §30-1402(1) provides distinct definitions for the term "sale" and "offer" as follows:

> (10) "Sale" or "sell" includes every contract of sale or contract to sell or dispose of, a security or interest in a security for value. "Offer" or "offer to sell" includes every attempt or offer to dispose of, and every solicitation of an offer to buy, a security or interest in a security for value.

Inasmuch as the Securities Act contains distinct definitions for the term "offer" and the term "sales", the Court finds that the exception to registration for a broker-dealer as found in §30-1402(3)(c) pertains only to offers to sell or buy, but not to actual sales of securities. Further, Pacific Rim has admitted it was acting as a broker-dealer.

Although Sakaran argues that he could not be a salesman of securities under I.C. §30-1402 because he did not receive a commission for the sale of securities, the Idaho Supreme Court has

recently adopted the "financial benefit" test to determine whether an individual meets the definition of a seller under the Idaho Securities Act:

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

Meyers v. Lott, 133 Idaho 846, 993 P.2d 609 (S. Ct. 2000).

Here, the record shows Sakaran received a discount on the purchase of stock in return for finding investors which would provide a larger pool of capital for investment. The discount presumably provided an economic benefit to Sakaran, and the deposition of Sakaran shows that he was motivated at least in part by desire to serve his own financial interests by obtaining the discount. Sakaran Deposition, pp. 37-38.

This does not end the inquiry, however. Sakaran claims he was acting in his individual capacity by the pooling of funds with Day, Wannamaker and Homberger to obtain a mutually beneficial discount, and was not acting on behalf of Conectisys or any other issuer. Thus, questions of fact exist as to whether Sakaran was acting as a salesman or whether he was pooling capital with Day, Wannamaker and Homberger. Therefore, summary judgment on the issue of whether Sakaran was acting as a salesman for Pacific Rim at the time the securities were sold is denied.

During his deposition, Sakaran was queried concerning the fax cover sheet from Sakaran which states it is from Conectisys Corp. Sakaran stated he had no idea why the cover sheet was sent.

He stated that it was the "dumbest thing I've ever done" and that "maybe the girl typed it up." See Deposition of Elie Sakaran, pp. 73-74. He denies having acted for Conectisys. Therefore, a question of fact exists as to whether Sakaran was a seller for Conectisys, the issuer of securities. Drawing all inferences in favor of Sakaran, summary judgment is inappropriate on this issue as well.

The Department next argues that regardless of whether Sakaran was a "salesman," he failed to provide pertinent information "in connection with the offer, purchase or sale" of securities, in violation of Idaho Code § 30-1403, which provides in relevant part:

> **30-1403. Unlawful offers--Sales--Purchases.--**It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly,
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> * * * *
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or
> (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

The Department asserts that Sakaran clearly sold securities to the Idaho buyers, and thus his failure to provide certain information regarding restrictions on the shares and other matters constitute a violation of the foregoing statutory anti-fraud provisions. It relies on State v. Shama Resources Ltd. Partnership, 127 Idaho 267, 899 P.2d 977 (1995) for the proposition that intent is not an element of a fraud claim under the statute, apparently in response to Sakaran's claim that he did not know of the stock restrictions or at least did not intend to mislead. While the Department is correct in its analysis of Shama, it does not follow that the Department is entitled to summary judgment on this issue. In Shama, it was not disputed that the defendant was actually selling securities. In this case, however, Sakaran denies that he was selling securities; rather, he claims that he was investing in the stock right along with the alleged victims. Under the standards governing motions for summary judgment,

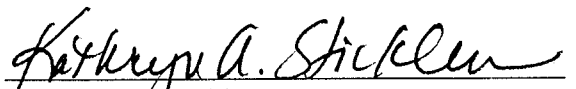
Sakaran's contentions raise genuine issues of material fact which make summary judgment inappropriate.

CONCLUSION

Based upon the foregoing, there are genuine issues of material fact which preclude the entry of summary judgment in this case. Therefore, the motion for summary judgment is denied.

IT IS SO ORDERED.

Dated this 27th day of September, 2000.



Kathryn A. Sticklen
District Judge

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.C.R. to each of the attorneys of record in this cause in envelopes addressed as follows:

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