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Of Attorneys for Plaintiff Tom Doe

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

TOM DOE, an individual proceeding under a pseudonym,

Plaintiff,

v.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a foreign corporation sole registered to do business in the State of Oregon; CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AND SUCCESSORS, a foreign corporation sole registered to do business in the State of Oregon; THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; and ORE–IDA COUNCIL, INC., BOY SCOUTS OF AMERICA, an Idaho non-profit corporation doing business in Oregon,

Defendants

Case No.: 1:09-cv-00351-BLW

PLAINTIFF'S RESPONSE TO BOY SCOUT DEFENDANTS' MOTION TO STRIKE, OR ALTERNATIVE MOTION FOR JUDGMENT ON THE PLEADINGS ON NEW FRAUD COUNTS

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INTRODUCTION

Defendants Boy Scouts of America, and Ore–Ida Council, Inc., Boy Scouts of America (collectively "Boy Scout Defendants"), move to strike Plaintiff's amended fraud claims, arguing that Plaintiff exceeded the scope of Judge Carter's granting of leave to amend. However, neither the hearing transcript nor the Order present such a limited grant of leave to amend. Even if the record did show the limited grant of leave that Defendants allege, Plaintiff complied with any identifiable limits. Furthermore, Plaintiff nowhere advanced what Defendants argue—that fraudulent concealment under Idaho statute was responsible for tolling the statute of limitations on Plaintiff's fraud claims. Finally, if this Court decides that the currently pleaded fraud claims exceed the scope of Judge Carter's Order, then Plaintiff requests this Court consider allowing them under FRCP 15's motion to amend standard, particularly since the Order did not otherwise dispose of this case.

Regarding Boy Scout Defendants' motion for judgment on the pleadings, Plaintiff offers the Court a part of the evidence already known (even without discovery having occurred here). This evidence forms the current basis of Plaintiff's fraud claims—*e.g.*, evidence of Defendants' knowledge of the danger of child abuse in Scouting, and knowledge of the danger of Larren Arnold in particular. Even under the heightened FRCP 9(b) standard, given these two bases of knowledge, Plaintiff can state a fraud claim under Idaho law for failing to disclose known dangers in Scouting prior to Plaintiff's agreeing to participate in Boy Scout Defendants' Scouting program.

BACKGROUND OF THE HEARING AND ORDER

Boy Scout Defendants make a great deal of Judge Carter's discussion with counsel regarding alleging the source of decisions that led to Plaintiff's abuse, but miss that this discussion was in the context of an admonition to Plaintiff to replead to satisfy FRCP 9 at the Rule 12(b)(6) stage.

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Judge Carter clearly allowed Plaintiff to replead his fraud claim. Hearing Tr. at 37, *submitted with Defendants' motion*. Judge Carter also discussed the possibility of allegations of specific conduct by BSA or LDS national leaders. *Id.* at 38. What Boy Scout Defendants gloss over is that Judge Carter did not limit the scope of what Plaintiff could replead, but was only offered his opinion that if Plaintiff failed to plead with greater specificity some actual, known actions by leaders in Defendants' organizations, he would consider dismissal:

> And the real question you should have in your mind is, is this judge going to rule definitively on this in a new 12B motion or is this judge going to let this go to summary judgment stage and take a look at this, because what you are hoping for, of course, is discovery. That is what you are really driving at.

Hearing Tr. at 37–38. Nothing in the colloquy stated that Plaintiff's right to replead was conditioned on repleading the fraud claim to explicitly allege a particular statement by a particular high official, only that such a claim might possibly be vulnerable to a Rule 12(b)(6) motion if it did not.

Judge Carter's Order was equally broad. The Order discussed pleading the fraud claim with respect to timeliness, giving weight to Defendants' argument that the personal injury statute of limitations, and its accompanying discovery rule—I.C. § 5-219(4)—applied. Order at 16. Even so, Judge Carter discussed the discovery rule without finding that I.C. § 5-219(4) applied, and did not limit Plaintiff to alleging facts ***only*** in conformance with I.C. § 5-219(4):

> It is difficult to apply this "discovery" rule [I.C. § 5-219(4)] in these circumstances, as the fourth claim's fraud allegations are not pled with the particularity required by Rule 9(b). ... Amendment will permit the Court to more accurately assess whether the fraud claims are barred even after application of the discovery rule.

Order at 16. Finally, the grant of leave to amend contains no explicit or implicit limitations on the nature of the claim to be repleaded, other than it being a fraud claim. Order at 17 ("The Motion is GRANTED as to the fourth claim, which is DISMISSED WITH LEAVE TO AMEND"). Notably,

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Judge Carter did not dismiss Plaintiff's entire case with only leave to replead the fraud claim; he allowed the repleading of Plaintiff's Oregon *respondeat superior* claims as well. *See* Order at 17.

FACTUAL BACKGROUND OF PLAINTIFF'S ALLEGATIONS

Without any discovery from Defendants to date,[1] the evidence that Plaintiff possesses regarding known child abuse in Scouting and the apparent practice of LDS child abuse reporting allows Plaintiff to state claims for fraud based on the fact that Defendants knew of and concealed, or failed to disclose, the danger of child abuse in Scouting. This core fact was extremely material to Plaintiff's participation in Scouting, and through either their *in loco parentis* relationship with Plaintiff, or their invitation to engage in a commercial relationship with Plaintiff, Defendants were required to disclose these facts.[2] Plaintiff is severely hampered in presenting the full scope of Defendant BSA's "Ineligible Volunteer" file ("IV files") pending a decision of the Oregon Supreme

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[1] Despite the fact that this case was filed originally in February of 2008, it is effectively only a few months old. Procedural disputes over removal and venue, as well as a stay pending resolution of an Idaho Supreme Court case meant that as of the August hearing, "24 of the 28 months have been eaten up with procedural matters." Hearing Tr. at 40. Following Judge Carter's ruling, Defendants answered, and then proceeded to seek certification for interlocutory appeal, and then petitioned for that interlocutory appeal before the Ninth Circuit. That petition was denied on January 11, 2011, and Defendants filed this motion less than one month later. Thus, since August of 2010, there still has been no time allocated to actual discovery. It is, from the standpoint of pleading and discovery, still a four month old case.

[2] Primarily, these facts are included for the Court's edification on the issues. Plaintiff recognizes that with the inclusion of this factual matter, pursuant to FRCP 12(d), it is within this Court's discretion to either exclude the evidence or convert this motion to a summary judgment motion. *See Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1533 (9th Cir. 1985). The factual submissions here concern only the issue of whether Plaintiff has properly alleged an omission that would constitute misrepresentation. To the extent Boy Scout Defendants ***factually*** challenge other issues—such as intent or fiduciary relationship, or elements not cited in the motion—Plaintiff would request time for discovery and the opportunity for additional briefing on those issues. *Grove*, 753 F.2d at 1532 ("The opportunity to respond [to a converted FRCP 12 motion] ***must*** include time for discovery necessary to ***develop facts justifying opposition*** to the motion") (emphasis added).

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Court—expected very shortly— to release the IV files to the public, after being admitted in evidence in the March-April 2010 Portland, Oregon *Lewis v. BSA* trial. The trial judge vacated the protective order but stayed his ruling pending a mandamus action. Even with this limitation, the information available outside the protective order is substantial. It is also only the tip of iceberg.

I. BSA'S KNOWLEDGE OF THE DANGER OF ABUSE IN SCOUTING.

Since at least 1920, Defendant BSA knew that it had a problem with child molesters using Scouting to gain access to boys. By the year 1920, Defendant BSA had in place a "red flag" system in part to identify individuals known to pose a danger of sexual molestation to Scouts. *Lewis v. BSA* Trial Tr. March 22, 2010 at 993:15–994:18 (Nathaniel Marshall), attached as Ex. 1 to Declaration of Kristian Roggendorf ("Roggendorf Dec"), filed herewith; Supplemental Declaration of Nathaniel Marshall (including exhibits) *attached to* Roggendorf Dec. as Ex. 2. In 1935, the Chief Scout Executive, Dr. James West, was quoted in a New York Times article and admitted that between the inception of the Boy Scouts and 1935, 2,919 men were placed in the red flag files. Ex. 2 at 7—New York Times, *Boy Scouts Head Explains "Red" List*, at N4 (June 9, 1935). Of those 2,919 men, "about 30 per cent" were "degenerates" who had "give[n] way to temptation" and abused Scouts. *Id.* At the 2010 trial, Mr. Nathaniel Marshall—Defendant BSA's head of registration and person in charge of the BSA's secret files on child molesters in Scouting—agreed that these numbers represented about 1,000 known abusers in Scouts by 1935. Ex. 1 at 994:9–14.

Defendant BSA apparently no longer has any of these early files; they have been destroyed. As Mr. Marshall described in his declaration in the *Lewis* case, the early red flag system was culled to remove the dead and elderly on a regular basis. Ex. 2 at 2, ¶¶ 5, 6. At some point, the BSA stopped destroying the files. *Id.* at 3, ¶ 7. It appears that the volume of files created from around

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1960 onward are complete, given that almost all of the categories for the files show at least one entry for that year (the first time on the BSA's chart that they do so), and that pattern persists through 1965–1985. *Id.* at 4-6. Even with the regular destruction of early files, the number of "P" (for "Perversion") files from 1920 through 1965 amounts to 379 individuals (not including the 1,000 admitted by Dr. West). *Id.* at 4, 5. From 1965 through 1985, the number of Perversion files jumps dramatically, and totals 1,123 files. *Id.* at 6. Mr. Marshall testified that the majority of the Perversion files—"most of them"—involved Scout leaders who molested children. Ex. 1 at 1042:24–1043:8. Even Defendant BSA's child abuse expert witness confirmed that the overwhelming majority of Perversion files involved child abuse allegations. *Lewis v. BSA* Trial Tr. April 2, 2010 at 22:22–23:19 (Dr. Janet Warren), *attached as* Ex. 3 to Roggendorf Dec. (of 855 files the expert examined, 766 involved some form of child molestation).

Not included in these or any of the later years' numbers are some Scout leaders whose files were destroyed after appealing their exclusion, or those granted "probation" after being discovered molesting boys, but allowed to remain in Scouting if further offenses were not discovered. Ex. 1 at 995:8–997:19. Defendant BSA knew that this "probation" status allowed known molesters to re-offend, as in the case of one Randall Merritt. *Id.* at 997:20–1000:8 (Mr. Merritt was discovered to have abused boys in 1972–73, given probation, and then re-offended). Similarly, Michael Nonclerg was caught molesting Scouts, but the local Scout Executive asked that the matter be dropped, because "if it don't stink, don't stir it." *Id.* at 1002:24–1004:25. Defendant BSA did drop it. *Id.*

Defendant BSA's willful blindness of the knowledge contained in the IV files was illustrated by an incident in Alaska. In a letter from Paul Ernst, Defendant BSA's then-director in charge of registration and the man in charge of the "red flag" files (now known by their current name, the

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"Ineligible Volunteer files"), to a local Scout Executive, Mr. Ernst instructed the local Scouter that BSA could not exclude a man from Scouting for "sleeping in the nude and showing boys pornographic books[.]" Ex. 1 at 1008:1–19. To Mr. Ernst, it only showed "poor judgment in dealing with Cub Scouts"—Cub Scouts being boys in Scouting ages 7 to 10. *Id.* at 1008:8-10. Mr. Ernst further stated that he did "not know however that this is a serious enough offense to refuse registration anywhere he might try to register unless there are more [instances]." *Id.* at 1008:11–13. Elsewhere, in the name of discretion, Scoutmaster Clyde Brock was allowed to quietly resign after two of his Scouts came forward with allegations of abuse—the threat of an investigation was used to coerce him into leaving without a fuss. *Id.* at 1010:7–1011:10. Also, in 1965, a "young man" involved in a troop admitted to abusing several Scouts, but the head of the sponsoring organization did "his best to protect Boy Scouting [by] trying to keep this incident as quiet as possible." *Id.* at 1012:2–24. Secrecy and denial about molestation in Scouting was the rule, not the exception.

The knowledge of Defendant BSA in the mid to late 1960s, prior to Plaintiff being abused, was certainly sufficient to place it on notice that molesters used Scouting to abuse boys, and how they did so. In just two of hundreds of instances, a 1969 file shows the Scouts had notice that a Hartford, Connecticut Scoutmaster abused boys in his home, and in 1966, one Mr. Mitchell abused a boy who visited his home to work on a merit badge. *Id.* at 1032:1–1034:5. Also, the pretext of learning about equipment, going on campouts, traveling to and from campouts, and other means of interacting with Scouts were all means known or knowable to Defendant BSA that molesters used to get at Scouts. *Lewis v. BSA* Trial Tr. March 22, 2010 at 1069:8–1071:24 (William Dworin), attached to Roggendorf Dec. as Ex. 4. Indeed, Defendant BSA knew that almost any activity that Scoutmasters engaged in with Scouts could form the pretext for sexual abuse. Yet still, no warnings

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were ever given, no policy of reporting to police was ever implemented, and these files were kept secret from everyone outside of the top echelons of the BSA—including sponsoring organizations (such as local LDS Church wards, schools, and civic groups), local Scout leaders, parents, and Scouts themselves. *See* Ex. 1 at 1040:24–1041:19.

Further, taken as a whole, the IV files represented a unique body of knowledge that would have allowed Defendant BSA to craft policies that would protect Scouts like Plaintiff from the abuse he suffered. Of the 1,123 files produced in the *Lewis* case, Plaintiff's expert was able to review several hundred prior to testifying at trial. *Lewis v. BSA* Trial Tr. March 24, 2010 at 1596:18–24 (Gary Schoener), attached to Roggendorf Dec. as Ex. 5. The largest single group of abusers found in the files was that of Scoutmasters. *Id.* 1599:11-14. The plaintiff's expert in *Lewis v. BSA* stated that the IV files resembled a "police investigatory system" for the national organization, cataloguing individuals by detailed physical description and personal specifics, and that such a system implied a significant problem with child abuse in Scouting. *Id.* at 1613:3–13. Defendant BSA was able to see from the IV files that molesters groomed their victims, how they did it, and saw that they would continue to molest children even after being caught, and in many cases convicted. *Id.* at 1625:6–1626:20; 1631:13–1632:16. Yet still, through all of this, Boy Scout Defendants issued no warnings. Instead they acted consistently with the 1965 file discussed by the expert, where the goal was to "keep th[e] incident as quiet as possible"—with this silence about abusers in the ranks of Scouting enabling the abusers to abuse children elsewhere. *Id.* at 1642:16–1644:5. Plaintiff thus has reason to believe that further discovery will show LDS Defendants, as the largest single collective sponsor of Boy Scout Troops, shared some or all of this knowledge of the dangers inherent to the Scouting program.

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Finally, a jury could reasonably infer that, given the evidence presented, the concealment and failure to disclose the problem of molestation in Scouting and the failure to train was to part of an intentional practice to shield the Boy Scouts from negative publicity. One of the IV files showed a "News Alert" memo with a preprinted cartoon fireman putting out a fire, discussing the media impact of a child abuse, and sent to the Chief Scout Executive, BSA's legal department, and other departments. Ex. 3 at 180:23–182:15. Defendant BSA "put out fires" when child abuse was uncovered. Additionally, James Terry discussed membership number scandals over the last "35 or 40 years," showing that Boy Scout Defendants have long been concerned about keeping membership numbers high, even if by artificial means. *Lewis v. BSA* Trial Tr. April 21, 2010 at 61:22–62:18 (James Terry), attached to Roggendorf Dec. as Ex. 6. Furthermore, Defendant BSA's own child abuse expert could find no evidence of false reports of abuse in the IV files. Ex. 3 at 102:18–24. Yet she nonetheless opined that Defendant BSA disclosing the problem would have been "feasible," but "not advisable," because parents would avoid sending their children into a program if they believed it had a problem with molestation. *Id.* at 128:4–14; 133:5–134:19. When read in the context of the failure to disclose the problem with adult volunteers molesting Scouts, these membership concerns would certainly allow a jury to conclude an intent on the part of Scouts to use fraudulent means to shield their reputation, and maintain their number of dues paying BSA members.

Therefore, Plaintiff alleges and contends that the director of registration services for the Boy Scouts of America, one Paul Ernst and his predecessors, knew that Scouting posed a concrete danger of abuse to a certain number of Scouts every year. Defendant BSA's files show a consistent pattern of more than 50 child molesters ***per year*** (there was no dispute that most of the abusers had multiple victims and that not all abusers or victims were found), between at least 1965 and 1985. Finally, the

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documents show that even when discovered, child molesting Scout leaders were often given the opportunity to reoffend by being granted "probation." In the face of all this, Defendant BSA's agents admit that no warnings were ever given to sponsoring organizations such as local LDS wards, or to local leaders, parents, and Scouts, about the dangers in Scouting. *See* Ex. 1 at 1040:24-1041:19.

II. KNOWLEDGE OF LARREN ARNOLD'S DANGER.

LDS Defendants learned of Larren Arnold's abuse of boys prior to Plaintiff being abused, and Plaintiff has reason to believe that this information was forwarded to LDS headquarters.

On January 7, 2009, parties in this case took a deposition (the only deposition in this case to date) of Mr. Richard White, the father of one of Plaintiff's friends in Scouting. Mr. White testified that his son, in the summer of 1964, told him that Arnold had "played with his thing"—meant and understood to be the boy's genitals—on a camping trip. Deposition of Richard White at 48:1–5; 48:15–49:1, attached to Roggendorf Dec. as Ex. 7. Mr. White informed the bishop of the ward, and a week later the bishop told Mr. White that he had "taken care of it." *Id.* at 48:6–10; 90:9–22. The abuse had occurred while the boy was traveling with Arnold, either in a vehicle while Arnold was driving or at the destination. *Id.* at 51:11–52:1; 85:18–86:4. LDS Defendants knew that Arnold was a danger prior to Plaintiff being abused.

As far as LDS procedure in such situations, Plaintiff has learned through counsel that it has been the policy of the LDS Defendants to instruct their agents to call a national "help line" to LDS headquarters in Salt Lake when faced with a problem such as a report of child abuse. In earlier, unrelated childhood sexual abuse case involving an LDS "home teacher," Beaverton, Oregon Stake President Myron Child testified on behalf of these same LDS Defendants on March 21, 2007. Mr. Child testified that when he learned of the abuse of that plaintiff, he immediately called the LDS

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"help line" to Salt Lake City. Deposition of Myron Child at 40:1–11, *attached to* Roggendorf Dec. as Ex. 8. Mr. Child assumed it was a lawyer to whom he spoke. *Id.* at 33:2–11. This is evidence from which a plausible inference can be drawn that local LDS leaders reported child abuse directly to LDS Defendants at their Salt Lake City headquarters.

Despite this information, Defendants invited and accepted Plaintiff into Scouting, which included caring for Plaintiff on camping trips away from his family. *See* Declaration of Plaintiff Tom Doe ("Doe Dec.") at ¶ 3, 5; BOY SCOUT HANDBOOK (1968) ("BSH") 238, *attached to* Roggendorf Dec. as Ex. 9. All Defendants taught Plaintiff to respect and obey Arnold in his role as Plaintiff's Scoutmaster and "Quorum Advisor." BSH 94, 236; Doe Dec. at ¶¶ 2, 3. Plaintiff did trust Arnold and thought of him as a "hero." *Id.* at ¶ 5. Plaintiff was not told to be wary of abuse or that molestation was a risk in Scouting, and allowed himself to go on trips with Arnold to camp and find new campsites. *Id.* at ¶¶ 4, 5. Arnold used this trust and authority to molest Plaintiff. *Id.* at ¶ 5.

Boy Scout Defendants have sought to stay discovery on Plaintiff's fraud claims pending resolution of this motion. Hamstrung by this limitation, Plaintiff can still allege that high-level individuals at Defendant BSA's headquarters knew of the ongoing and serious danger to boys in Scouting prior to Plaintiff's abuse. Plaintiff has also shown that prior to his abuse, LDS Defendants had notice—at least through their local agent, the bishop of the ward and perhaps higher in the Church—that Larren Arnold posed a known danger of molestation to boys. Finally, there is at least some evidence that local LDS leaders have been instructed to call a help line to Salt Lake City when faced with reports of child abuse. These are the facts on which Plaintiff bases his fraud claim. Now this Court must find whether the allegations in the current complaint fairly represent these facts and satisfy FRCP 9(b).

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ARGUMENT IN RESPONSE

I. PLAINTIFF'S REPLEADED FRAUD CLAIMS DO NOT VIOLATE ANY ORDER OF THE COURT.

As discussed above, neither colloquy with counsel nor the Court's Order limited the nature of Plaintiff's repleaded fraud claims. Defendant cites to several district court opinions and one Ninth Circuit opinion in which amendments were stricken for pleading outside of a limited grant to replead. Pursuant to FRCP 12(f), pleadings going beyond a limited right to amend may be stricken. But a careful look at the cases cited reveals significant differences between those cases and this one.

Serpa v. SBC Telecommunications, Inc., 2004 WL 2002444 (N.D. Cal. 2004), involved a plaintiff who amended her ERISA complaint to add relief (a civil penalty) that the court initially believed was not possible to assert under the law. *Serpa*, 2004 WL 2002444, *3 ("[as] the court's order granting leave to amend makes clear, a plaintiff alleging breach of fiduciary duty under section 1132(a)(3) 'must ensure that the remedy she seeks ... is equitable in nature.'"). Thus, the amendment made in *Serpa* was stricken because it was ***legally incorrect*** under the court's initial order granting leave to amend. However, after finding the amendment beyond the scope of the order, the *Serpa* court reversed its earlier limitation on adding civil penalties, relying in part on FRCP 15(a)'s "presumption ... in favor of granting leave to amend." *Serpa*, at *4, *citing Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The court found that the plaintiff ***was*** entitled to allege civil penalties based on the record, and granted her request to amend. *Serpa*, at *5, 7.

Plaintiff's amendment does not violate Judge Carter's Order. *Compare PB Farradyne, Inc. v. Peterson*, 2006 WL 2578273, *3 (N.D. Cal. 2006) ("the Court granted defendant's motion to dismiss and granted plaintiff limited leave to amend to assert ***an invalidity defense based on § 102(f)***") (emphasis added); *Inland Cities Exp., Inc. v. Diamond Nat. Corp.*, 524 F.2d 753, 755 (9th

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Cir. 1975) (oral request to amend the complaint at summary judgment hearing did not include specific allegation that the plaintiff attempted to insert after the judgment was entered). The Court here did not instruct Plaintiff to file any specific ***type*** of fraud claim or a discovery rule allegation, only that Plaintiff replead his ***fraud*** claims (and *respondeat superior* claims based on the Oregon abuse). Plaintiff did not go beyond that order. *See U.F.C.W. Local 56 Health and Welfare Fund v. J.D.'s Market*, 240 F.R.D. 149, 153 (D. N.J. 2007) (in addition to adding a party as allowed, plaintiff added an additional party and "two completely new legal theories ... which were not contemplated in Plaintiffs' motion to amend or by Judge Donio's Order"). Plaintiff here has repleaded only his fraud claims and his Oregon *respondeat superior* claims, as the Court instructed.

Yet even if the Order expressly limited the amendment, under the liberal amendment standard of FRCP 15(a) and *Foman v. Davis*, 371 U.S. 178 (1962), the amendments should be allowed. *See* 371 U.S. at 182 (leave to amend should be denied only where there is undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party). *See also Serpa*, 2004 WL 2002444, *4–5. Indeed, as the evidence shows, Plaintiff's amendments are not futile, and given the posture of this litigation, Defendants cannot meet their burden of demonstrating prejudice. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987) (defendants bear burden of showing prejudice). The motion to strike should be denied.

II. PLAINTIFF'S FRAUD CLAIMS ARE STATED PROPERLY.

A. PLAINTIFF'S FRAUD ALLEGATIONS SATISFY FRCP 9, TWOMBLEY *AND* IQBAL.

Plaintiff's Second Amended Complaint ("SAC") satisfies FRCP 9(b). "Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge and not just deny that they

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have done anything wrong." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (internal quotation marks and citations omitted) (ellipsis in original). In particular, "[t]o avoid dismissal for inadequacy under Rule 9(b), a complaint would need to state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir.2004). The Ninth Circuit has "occasionally relaxed the particularity requirement where plaintiffs cannot be expected to have personal knowledge of the relevant facts[.]" *Sanford v. MemberWorks, Inc*., 625 F.3d 550, 558 (9th Cir. 2010) (citation and internal quotation marks omitted).

Plaintiff's claims also meet the "plausibility" standards articulated in *Bell v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009). *Bell Atlantic v. Twombly* held that, in cases alleging a conspiracy (in *Twombly*, a conspiracy to restrain trade), there must be some ***known*** factual basis for plausibly but specifically inferring that a conspiracy exists. 550 U.S. at 556 ("stating [a Sherman Act] claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement [fixing prices in restraint of trade] was made"). This was true as well in *Ashcroft v. Iqbal*, where the only alleged factual basis for inferring an improper motive in detaining Mr. Iqbal was the disproportionate number of foreign-born Muslims detained. *See* 129 S.Ct. at 1951 (citing complaint). Yet, a non-discriminatory basis for investigating foreign-born Muslims existed because of the September 11, 2001 attacks. *Id*. at 1951 (given that the "September 11 attacks were perpetrated by 19 Arab Muslim hijackers ... members in good standing of al Qaeda ... [i]t should come as no surprise" that disproportionate numbers of Arab Muslims would be detained). Thus, without some direct evidence of discriminatory motive in *Iqbal*, "[t]hese bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a

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formulaic recitation of the elements of a constitutional discrimination claim[.]" 129 S.Ct. at 1951 (citations and internal quotation marks omitted). Instead, plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949, *citing Twombly*, 550 U.S. at 556.

"When fraud is alleged, it must be particularized as Rule 9(b) requires, but it still must be as short, plain, simple, concise, and direct, as is reasonable under the circumstances[.]" *Carrigan v. California State Legislature*, 263 F.2d 560, 565 (9th Cir 1959). By Defendant BSA's own count there are 379 individual Perversion files that still exist (and no one knows how many were destroyed), from before Plaintiff was abused. Plaintiff does not possess those documents, they are within the sole custody of Defendant BSA. Thus, Plaintiff alleged that by 1965, Defendants knew that "the Scouting program itself posed a danger to adolescent boys because the Scouting program had shown a concrete, longstanding, consistent, and widespread problem with sexual abuse by Scout leaders and adult volunteers."[3] SAC at ¶ 24. Despite this knowledge, Defendants maintained Arnold in a position of trust and respect over boys (knowing that he had abused at least one boy before), and Boy Scout Defendants issued the 1968 Boy Scout Handbook exhorting boys to trust, respect, and obey their Scoutmaster, in both cases without any warning to the boys or their parents. SAC ¶ 27.

Even under FRCP 9(b), *Twombley*, and *Iqbal*, this Court is still a notice pleading jurisdiction,

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[3] LDS Defendants' knowledge can be inferred from allegations in the SAC of their close working relationship with Boy Scout Defendants. SAC at ¶¶ 2–5. As shown above, Plaintiff has reason to believe and infer that LDS Defendants were aware of the risk posed by Scouting, at least in their own Church, because of direct reports by local LDS leaders. The claim of LDS Defendants' knowledge is plausible, and a reasonable inference based on facts that Plaintiff can prove, but is conceded to be minimal at this time. This situation fits the situation where the Ninth Circuit has "occasionally relaxed" the FRCP 9(b) particularity requirement for "matters within the opposing party's knowledge." *See Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir 1993) (citations omitted).

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and Plaintiff is not required to plead evidence. *See Stack v. Lobo*, 903 F.Supp. 1361, 1367 (N.D. Cal.1995) ("Rule 9(b) does not necessitate pleading of detailed evidentiary matter"). Plaintiff can of course plead the details related to the IV files if this Court so orders. But the pleading of the exact number of prior reports or the contents of those discussed in court does not appear to be required under FRCP 9(b). Also, under *Twombley/Iqbal*, the existence of the files and the knowledge and notice of danger that they provided are concrete factual predicates for establishing the "plausibility" of Plaintiff's fraud claims. Plaintiff here is not simply assuming a fraud occurred ***somewhere***: he has alleged the specific factual representations by respective Defendants of placing Arnold in an authoritative LDS role over boys, and instructing Scouts to trust and obey their Scoutmasters, all despite known and undisclosed risks, and with no warnings ever given. *See* SAC ¶ 27. Such facts satisfy both the particularity and plausibility requirements of federal practice. To the extent they do not, Plaintiff requests leave under FRCP 15 to allege the specific facts outlined above.

B. PLAINTIFF'S FRAUD CLAIMS USE THE FRAUD STATUTE OF LIMITATIONS.

Boy Scout Defendants go to a great length to argue an incorrect assumption: Boy Scout Defendants assume (without authority) that the Idaho "personal injury" statute of limitations applies to a claim sounding in fraud. This argument runs contrary to Idaho law.

In *Umphrey v. Sprinkel*, 682 P.2d 1247, 1253 (Idaho 1983), the Idaho Supreme Court held that because an action for fraud involved different elements and a higher standard of proof, a fraud based on arguable professional malpractice was not governed by the professional negligence statute of limitations of I.C. § 5-219(4), but by the statute of limitations for fraud actions, I.C. § 5-218(4). *Umphrey*, 682 P.2d at 1253 ("An action for fraud ... involves more than mere negligence. While it is a tort action, it is more in the nature of an intentional tort, requiring that the speaker have

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knowledge of the representation's falsity or ignorance of its truth, as well as intent ... [T]he plaintiff must prove all elements by clear and convincing evidence ... . Hence, we believe that an action for fraud and deceit is not within the purview" of I.C. § 5-219(4)) (citations omitted). Even though the term "wrongful acts or omissions" is used in I.C. § 5-219(4)—just as the term "personal injury" is used there—a claim of fraud ***cannot*** as a matter of logic fall under I.C. § 5-219(4). *Umphrey*, 682 P.2d at 1253 (if fraud was a "wrongful act" under 5-219(4), it would yield an "anomalous result" where "the underlying fraud would not toll the statute of limitations, but that fraudulent concealment of the fraud would do so"). This holds true for a fraud resulting in a "personal injury" (much as a medical malpractice claim would), just as much as "wrongful acts or omissions" of a professional.

Properly understood, Plaintiff's fraud claims resort to the statute of limitations found in I.C. § 5-218, which provides:

> An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

I.C. § 5-218(4). Plaintiff's fraud claims only accrued in 2007 or 2008 by virtue of his counsel's understanding of Scouting and the nature of claims Plaintiff could assert upon bringing suit; had he not sought representation, Plaintiff could never have known that prior to 1966 there had been well over 380 molesters discovered in Scouting (considering destroyed files).[4] In fact, prior to April

[4] The Second Amended Complaint cites to the *Lewis* trial's 2010 publicization of the IV files as the basis for Plaintiff's discovery of a fraud action based on Defendants' institutional knowledge. *See* Second Amended Complaint at ¶ 32. This allegation is in error. Plaintiff's counsel was aware of the existence of the files by late 2007, and alleged a fraud claim on behalf of Plaintiff based on this awareness in the complaint filed in February of 2008. Thus, Plaintiff's fraud claim accrued when Plaintiff's counsel alleged it on his behalf in late 2007 or early 2008. The allegation was mistakenly inserted in the current complaint, and is incorrect in alleging a 2010 discovery date. Counsel apologizes for this error, and Plaintiff requests leave of the Court to correct it.

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2010, it was not generally known to the public that Defendant BSA had an internal awareness of a systemic, inherent danger in the Scouting program. Once Plaintiff knew of Defendant BSA's specific knowledge of the dangers in Scouting, only then did the statute of limitations on Plaintiff's fraud claim begin to run. Thus, there is no need for Plaintiff to plead the elements of fraudulent concealment, and the motion for judgment on the pleadings should be denied on this basis.

C. PLAINTIFF HAS SPECIFICALLY ALLEGED THE ELEMENTS OF FRAUD.

Following Boy Scout Defendants' extended discussion of federal pleading standards, it is unclear how they divine Idaho law as setting the standard for pleading the elements of Plaintiff's fraud claims. Idaho law does not govern whether an allegation is sufficient to state a claim in this Court. *See* FRCP 9(b) ("intent, knowledge, and other conditions of a person's mind may be alleged generally"). The requirements for pleading the elements of misrepresentation, intent, and a fiduciary relationship under federal law have been met here.

1. Misrepresentation.

"Silence may constitute fraud when a duty to disclose exists. A party may be under a duty to disclose: (1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it." *Sowards v. Rathbun*, 8 P.3d 1245, 1250 (Idaho 2000) (citations omitted).

The misrepresentation here was that Boy Scout Defendants never disclosed that they had a known problem with Scouting, or a known danger from Arnold. To the extent a negative can be pled, Plaintiff has done so. As for the positive statements or actions that make the failure to disclose

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a fraud, the SAC alleges the appointment of Arnold as Quorum Advisor and Scoutmaster by Bishop Hales, and the statements from the Boy Scout Handbook that show misleadingly partial statements about trusting one's Scoutmaster. To the extent the facts need to be established in this response, Plaintiff has done so in his attached declaration and excerpts from the Boy Scout Handbook. *See* Doe Dec. at ¶¶ 3–5; BSH at 94, 218, 236, 238.

These allegations are sufficient to show the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Edwards v. Marin Park, Inc.*, 356 F.3d at 1066. The actions of Bishops Hale or Hegstrom in continuing to appoint Arnold as Scoutmaster, and the statements in the Boy Scout Handbook telling Scouts to trust their Scoutmaster, were at best only partially true, and omitted vital information necessary that Plaintiff needed to protect himself. These omissions are fraudulent misrepresentations.

2. Intent.

Under federal pleading standards, intent does not need to be pleaded with specificity. FRCP 9(b). Furthermore, in a constructive fraud case, intent to deceive is not even required. *McGhee v. McGhee*, 353 P.2d 760, 762 (Idaho 1960). To the extent intent is required for the institutional fraud claim, and if factual support of intent is needed here, the membership scandals, public relations concerns illustrated by the "fireman," and the need to protect the reputation of Scouting, discussed above, show several factual bases from which an intent to deceive can be plausibly inferred. *See* Ex. 6 at 61:22–62:18.

3. Fiduciary Relationship.

Although a fiduciary relationship is only one of the three possible bases for a duty to disclose under *Sowards*, Boy Scout Defendants argue that the lack of one should be dispositive. This is not

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Idaho law. Plaintiff has alleged both misleading partial disclosures and withholding information vital to a transaction.[5] However, a fiduciary relationship can be seen here. The relationship between Defendants—who invited a young boy to spend days away from his family, with an unrelated adult man, miles into isolated wilderness—and the then-12 year old Plaintiff certainly would appear to show "a relationship of trust and confidence" that is the actual basis for determining whether a fiduciary relationship exists. *See Hines v. Hines*, 934 P.2d 20, 26 (Idaho 1997). Indeed, as can be seen from the statement itself, the "examples" of Idaho fiduciary relationships listed by Boy Scout Defendants are not exclusive, but the assumption of parental duties ***does*** allege the makings of a "members of the same family" relationship. *Taylor v. McNichols*, 243 P.3d 642, 662 (Idaho 2010).

Other jurisdictions recognize a fiduciary relationship arising from the assumption of *in loco parentis* responsibilities. *E.g. Shin v. Sunriver Preparatory School, Inc.*, 111 P.3d 762, 771–72 (Or. Ct. App. 2005) (special relationship of boarding school based on *in loco parentis*); *M.W. v. Panama Buena Vista Union School Dist.*, 110 Cal. App. 4th 508, 517 (2003) (special relationship of schools based on *in loco parentis*); *Giannone v. Ayne Institute*, 290 F.Supp.2d 553, 567 (E.D. Pa. 2003) (allowing fiduciary duty claim to proceed against wilderness school based in part on *in loco parentis*); *Doe Parents No. 1 v. State, Dept. of Educ.*, 58 P.3d 545, 591 (Hawai'i 2002) (state dept.

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[5] Boy Scout Defendants dismiss the notion that Plaintiff has alleged a transaction. However, Plaintiff alleged that the transaction was for him to "join Scouting in exchange for paying yearly dues and other assorted fees and required purchases." SAC at ¶ 23. *See* BSH at 218 (discussing national organization and funding). Plaintiff did enter into this transaction. SAC at ¶1; Doe Dec. at ¶3. Information about a consistent risk such as molestation by Scoutmasters—known to Defendant BSA but unknowable to Plaintiff—was obviously material to Plaintiff's entering into it. That is fraud. See *Lettunich v. Key Bank Nat'l Ass'n*, 109 P.3d 1104, 1110 (Idaho 2005) (fraud elements are: (1) a statement of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent to induce reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) the hearer's right to rely; and (9) consequent and proximate injury).

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of education has special relationship to students based on *in loco parentis*); *Nova Southeastern Univ., Inc. v. Gross*, 758 So.2d 86, 89 (Fla. 2000) ("the school-minor student special relationship evolved from the *in loco parentis* doctrine"). Additionally, special or fiduciary duties can be based on status "such as parents and children," on custody in which the victim cannot protect himself, or by the voluntary assuming of the duty of a third party to protect the victim. *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007), *citing* RESTATEMENT (SECOND) OF TORTS §§ 314A, 324A (1965). Any of these situations are present when an organization proposes to take a young boy away from his family for days at a time, in the company of unrelated adult men, and Boy Scout Defendants do not show how taking temporary but complete charge of a Scout *in loco parentis* is qualitatively different from the family or student relationship. Plaintiff has alleged a fiduciary relationship here.

CONCLUSION

For the foregoing reasons, Boy Scout Defendants' motion to strike and motion for judgment on the pleadings should be denied.

DATED this 4th day of March, 2011.

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/s/ Kristian Roggendorf

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing: **PLAINTIFF'S RESPONSE TO BOY SCOUT DEFENDANTS' MOTION TO STRIKE, OR ALTERNATIVE MOTION FOR JUDGMENT ON THE PLEADINGS ON NEW FRAUD COUNTS**

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