

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer**

Civil Action No. 09-cv-00320-PAB-KMT

JOHN CHAU, individually and on behalf of all others similarly situated,

Plaintiff,

v.

INTREPID POTASH, INC.,
ROBERT P. JORNAYVAZ, III, and
PATRICK L. AVERY,

Defendants.

Civil Action No. 09-cv-00520-PAB-BNB

JOHN A. ARNONE, on behalf of all others similarly situated,

Plaintiff,

v.

INTREPID POTASH, INC.,
ROBERT P. JORNAYVAZ, III,
PATRICK L. AVERY,
HUGH E. HARVEY, JR.,
TERRY CONSIDINE,
J. LANDIS MARTIN,
BARTH E. WHITMAN,
GOLDMAN, SACHS & CO,
MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED,
MORGAN STANLEY & CO., INCORPORATED,
RBC CAPITAL MARKETS CORPORATION, and
BMO CAPITAL MARKETS CORP.,

Defendants.

Civil Action No. 09-cv-00547-CMA-MJW

DARRELL GERLACH, individually and on behalf of all others similarly situated,

Plaintiff,

v.

INTREPID POTASH, INC.,
ROBERT P. JORNAYVAZ, III, and
PATRICK L. AVERY,

Defendants.

ORDER CONSOLIDATING CASES AND STAYING OTHER MATTERS

This securities fraud class action is before the Court on defendants Intrepid Potash, Inc. and Robert P. Jornayvaz III's Motion to Dismiss [Docket No. 11]; Plaintiff's Motion to Stay Consideration of Defendants' Motion to Dismiss Or, in the Alternative, for an Extension of Time to Respond to the Pending Motion to Dismiss [Docket No. 12]; defendant Patrick L. Avery's Motion to Dismiss/Joinder in Intrepid Potash, Inc. and Robert P. Jornayvaz III's Motion to Dismiss [Docket No. 18]; and Intrepid Potash, Inc., Robert P. Jornayvaz III, and Patrick J. Avery's Motion to Consolidate and Set Expedited Dismissal Hearing [Docket No. 16].

I. CONSOLIDATION

"If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions" Fed. R. Civ. P. 42(a)(2); see D.C.COLO.LCivR 42.1. Pursuant to Local Rule 42.1, the judge assigned to the lowest numbered case decides whether consolidation is warranted.

Currently, there are three pending securities fraud class actions against Intrepid Potash and affiliated parties in this district: *Chau v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00320-PAB-KMT); *Arnone v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00520-PAB-BNB); and *Gerlach v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00547-CMA-MJW). All three cases involve the same putative class and involve the same discrete question: whether the alleged misreporting of Mr. Avery's educational credentials amounted to a violation of federal securities law.

The present case is the lowest numbered of the three. None of the parties in any of the cases objects to consolidation. Therefore, because the cases involve common questions of law and fact, *Chau v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00320-PAB-KMT), *Arnone v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00520-PAB-BNB), and *Gerlach v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00547-CMA-MJW) shall be consolidated into a single action. The case shall proceed under the caption "*In re Intrepid Potash, Inc. Securities Litigation*" and case number 09-cv-00320-PAB-KMT. Magistrate Judge Kathleen M. Tafoya shall be the Magistrate Judge for all matters going forward. All future filings, including motions for lead plaintiff, shall be made under the consolidated caption and case number, and in the docket for case 09-cv-00320-PAB-KMT.

B. MOTION TO DISMISS

Defendants have filed two motions to dismiss in the present action: Intrepid Potash and defendant Jornayvaz jointly filed the first [Docket No. 11]; and defendant Avery filed a separate motion to dismiss which also sought to join the

Intrepid/Jornayvaz motion to dismiss [Docket No. 18]. Prior to the filing of Mr. Avery's motion to dismiss, plaintiff Chau requested that the Court stay briefing of the Intrepid/Jornayvaz motion to dismiss until the Court has ruled on consolidation and has appointed a lead plaintiff and counsel under the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 77z-1 (2006). Defendants asked the Court to allow briefing of the Intrepid/Jornayvaz motion to dismiss to proceed concurrently with any motions for appointment of a lead plaintiff. Defendants also ask the Court to order the plaintiffs in the *Arnone* and *Gerlach* cases to respond to the motion to dismiss in the *Chau* action.

Irrespective of whether, as defendants contend, the Court has the power to entertain the motions to dismiss prior to the appointment of a lead plaintiff under the PSLRA, such a tack is not prudent here. I find the interests of efficiency and the orderly administration of this case militate in favor of postponing the motions to dismiss.

The PSLRA requires that the Court consider lead plaintiff motions and appoint a lead plaintiff no later than 90 days after published notice of the case or, if any party seeks consolidation, then as soon as practicable after deciding the consolidation issue. 15 U.S.C. § 77z-1(a)(3)(B)(i)-(ii) (2006). In this case, plaintiff Chau reports that lead plaintiff motions are due by the end of the day on April 20, 2009. The 90-day deadline by which the PSLRA requires the lead plaintiff decision to be made appears to be May 20, 2009. Thus, if the Court were to allow briefing of the motions to dismiss to proceed simultaneously with the lead plaintiff motions, the chances of conflict would be significant.

III. CONCLUSION

Therefore, it is

ORDERED that defendants Intrepid Potash, Inc., Robert P. Jornayvaz III, and Patrick J. Avery's Motion to Consolidate and Set Expedited Dismissal Hearing [Docket No. 16] is GRANTED in part and DENIED in part. *Chau v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00320-PAB-KMT), *Arnone v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00520-PAB-BNB), and *Gerlach v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00547-CMA-MJW) shall be consolidated for all purposes into a single action and assigned to Judge Philip A. Brimmer. All future filings shall be captioned "*In re Intrepid Potash, Inc. Securities Litigation*" and shall be made only in the docket for case 09-cv-00320-PAB-KMT. Defendants' request for an expedited dismissal hearing is denied. It is further

ORDERED that Civil Action Nos. 09-cv-00520 and 09-cv-00547 shall be referred to Magistrate Judge Kathleen M. Tafoya, the magistrate judge currently assigned to the lowest numbered case. The scheduling conference before Magistrate Judge Tafoya, currently set for May 28, 2008, will remain in place and all parties in this consolidated action shall participate pursuant to Magistrate Judge Tafoya's March 23, 2009 Minute Order and all other relevant orders. It is further

ORDERED that plaintiff's motion to stay the motion to dismiss or in the alternative for an extension of time [Docket No. 12] is GRANTED in part and DENIED in part. Defendants Intrepid Potash and Robert P. Jornayvaz III's motion to dismiss [Docket No. 11] is STAYED pending the appointment of lead plaintiff and the filing of a consolidated complaint. Defendant Patrick Avery's motion to dismiss [Docket No. 18]

is likewise STAYED. If necessary, defendants may re-file their motions to dismiss after a consolidated complaint has been filed. It is further

ORDERED that all deadlines in *Arnone v. Intrepid Potash, Inc., et al.* (Case No. 09-cv-00520-PAB-BNB) and *Gerlach v. Intrepid Potash, Inc., et al.*, Case No. (09-cv-00547-CMA-MJW) are vacated. The complaints in those two cases are held in abeyance pending a determination of lead plaintiff and the filing of a consolidated complaint in the consolidated matter, and defendants need not answer, move, or otherwise plead in response to the complaints. It is further

ORDERED that all future pleadings and other papers in this consolidated action shall be captioned as shown below:

Civil Action No. 09-cv-00320-PAB-KMT

(Consolidated with Civil Action Nos. 09-cv-00520-PAB-KMT, and 09-cv-00547-PAB-KMT)

In re INTREPID POTASH, INC. SECURITIES LITIGATION

DATED April 1, 2009.

BY THE COURT:

s/Philip A. Brimmer

PHILIP A. BRIMMER
United States District Judge