

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain Order
Against:

ALFREDO GONZALEZ,

Respondent.

Case No. 88326

OAH No.: L2008010169

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated February 19, 2008, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter.

This Decision shall become effective on May 13, 2008.

IT IS SO ORDERED this 12th day of May 2008.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

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PROPOSED DECISION

This matter was heard on January 22, 2008, by Chris Ruiz, Administrative Law Judge, Office of Administrative Hearings, State of California.

Respondent Alfredo Gonzalez (Respondent or Gonzalez) was present and was represented by John Griener, Esq.

Complainant, Preston DuFauchard, California Corporations Commissioner (Commissioner), was represented by Joyce Tsai, Corporations Counsel.

Oral and documentary evidence was presented and the matter was argued at hearing. The record was left open until February 4, 2008, in order for the parties to submit closing briefs. Complainant's brief was received and marked as exhibit 17. Respondent's brief was received and marked as exhibit E. The matter was submitted for decision on February 4, 2008.

FACTUAL FINDINGS

Jurisdiction

1. On November 29, 2007, the Commissioner issued a Desist and Refrain Order (Order) to Respondent under California Corporations Code¹ sections 25532, 25110, and 25401. The Order was also issued to two other individuals and one corporation. However, only Respondent requested an immediate hearing. Therefore, this decision only determines whether or not the Order should be upheld as to Respondent.

¹ All further statutory references are to the California Corporations Code, unless otherwise stated.

2. The Order directed Respondent to refrain from making unlawful offers or sales of securities in the State of California. The Commissioner is responsible for administering the provisions of the "Corporate Securities Law" as stated in Code section 25000 et seq.

3. On December 27, 2007, Respondent submitted a written request for an administrative hearing.

4. The Order contends that Respondent offered and sold securities on two specific occasions. First, the Order contends that Respondent sold securities in the form of an investment contract and, in exchange for an investment of \$175,000, promised that the investor would become the owner of an undeveloped plot of land that could be developed and sold for a profit. The Order also contends that Respondent promised the investor that plans had been submitted although Respondent had not submitted any plans. Second, the Order contends that Respondent sold securities in the form of an investment contract for \$60,000 and promised that the investor would obtain an interest in real property and receive principal and interest on his investment. Each of these contentions will be discussed below.

The \$175, 000 transaction

5. Respondent is a licensed real estate agent. In November 2004, Respondent helped Javier Ordaz and Joaquin Moreno purchase an undeveloped plot of land located at 4263 Barryknoll Drive. The seller was Rose Garden Financial Group, Inc., and Mr. Moreno took title in his name. The escrow purchase price was \$150,000. Respondent did not formally represent either party in the real estate transaction in his capacity as a real estate agent, but Respondent acted as an intermediary. There was no written investment contract between Respondent and Mr. Moreno and Mr. Ordaz. The only documents were those normally involved in a real estate transaction. Respondent helped Mr. Ordaz and Mr. Moreno secure a loan and Respondent assisted with some of the paperwork involved in the loan process. Respondent was paid \$28,000 outside of escrow, but it was not established whether or not this money was passed to the seller outside of escrow or kept by Respondent. It was established that Respondent told the buyers that building plans were almost complete, which was true. Respondent submitted building plans, but those plans were not approved and permits were not issued. It was not established that Respondent submitted plans that he knew would not be approved. Mr. Moreno later hired an engineer to correct the plans so that he could build. To date, there are no approved plans. The reason why Mr. Moreno has been unable to obtain approved plans was not established. While it was established that Respondent did tell the buyers that he would help them purchase and develop the real property, it was not established that he alone was going to handle all aspects of the transaction. In fact, Mr. Moreno took title in his name (and therefore had and has legal control of the property), and Mr. Moreno attempted to correct the existing plans. It was not established that Respondent was going to share in the profits had the land been profitably developed.

The \$60,000 transaction

6. Mr. Moreno later loaned Respondent \$60,000 dollars with which Respondent was going to invest in real estate. Mr. Moreno expected to be repaid regardless of whether Respondent's investment was successful, and the investment was solely Respondent's venture. Respondent promised to pay Mr. Moreno interest on the loan. There was no written investment contract. Respondent repaid only \$40,000 to Mr. Moreno. It was established that this transaction was a personal loan between two individuals and not the sale of a security.

Respondent's Contentions

7. Respondent did not testify at hearing. His counsel argued that these two transactions consisted of a real estate transaction that did not turn out as the parties desired and a personal loan.

LEGAL CONCLUSIONS AND DISCUSSION

1. Code section 25401 provides:

It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

2. Code section 25110 provides, in relevant part, as follows:

It is unlawful for any person to offer or sell in this state any security in an issuer transaction . . . unless such sale has been qualified under section 25111, 25112 or 25113 . . . or unless such security or transaction is exempted or not subject to qualification under Chapter 1 (Commencing with Section 25 100) of this part

3. The Commissioner did not issue a permit or other form of qualification authorizing the offer and sale of securities by Respondent.

4. Code section 25109 defines the word "security" as follows:

"Security" means any note; stock; treasury stock; membership in an incorporated or unincorporated association; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; viatical settlement contract or a fractionalized

or pooled interest therein; life settlement contract or a fractionalized or pooled interest therein; voting trust certificate; certificate of deposit for a security; interest in a limited liability company and any class or series of those interests (including any fractional or other interest in that interest), except a membership interest in a limited liability company in which the person claiming this exception can prove that all of the members are actively engaged in the management of the limited liability company; provided that evidence that members vote or have the right to vote, or the right to information concerning the business and affairs of the limited liability company, or the right to participate in management, shall not establish, without more, that all members are actively engaged in the management of the limited liability company; certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under that title or lease; put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof); or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; any beneficial interest or other security issued in connection with a funded employees' pension, profit sharing, stock bonus, or similar benefit plan; or, in general, any interest or instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. All of the foregoing are securities whether or not evidenced by a written document. "Security" does not include: (1) any beneficial interest in any voluntary inter vivos trust which is not created for the purpose of carrying on any business or solely for the purpose of voting, or (2) any beneficial interest in any testamentary trust, or (3) any insurance or endowment policy or annuity contract under which an insurance company admitted in this state promises to pay a sum of money (whether or not based upon the investment performance of a segregated fund) either in a lump sum or periodically for life or some other specified period, or (4) any franchise subject to registration under the Franchise Investment Law (Division 5 (commencing with Section 31000)), or exempted from registration by Section 31100 or 31101.

5. a. Cause does not exist to uphold the Order under Code sections 25532 and 25110 because Respondent did not offer or sell any security. While a security offered in the form of an investment contract may be oral (Code § 25019), under *Securities and Exchange Commission v. W.J. Howey Co.*, (1946) 328 U.S. 293, an investment contract requires an investment, a common enterprise, and an expectation of profits solely from the efforts of others.

b. In the \$175,000 transaction, there was an investment. However, it was not established that there was a common enterprise because the investors' fortunes were not linked to those of Respondent's. (*Securities Exchange Commission v. R.G. Reynolds Enters.*,

Inc (9th Cir. 1991) 952 F.2d 1125, 1130.) There was no evidence presented that Respondent would ultimately shared in any potential profits after the land was developed. Therefore, while Respondent was helping the buyers, ultimately the buyers' profit or loss was theirs alone. Lastly, the buyers did not reasonably have an expectation of profits solely based on Respondent's efforts. It was not established that Respondent told the buyers that he alone would handle all aspects of the purchase and development of the land. It was only established that Respondent offered to assist the buyers in this endeavor. This was not a case where the investors gave Respondent money and he said he would invest it and make a profit. Here, Mr. Moreno took title to the property and he was and is the legal owner. Mr. Moreno did not have to rely on Respondent. He could have obtained proper plans, which he attempted to do, and he could have developed the property.

c. In the \$60,000 transaction, there was no investment contract or sale of a security. Rather, there was a personal loan between two individuals. (Factual Findings 1-7.)

6. Cause does not exist to uphold the Order under sections 25532 and 25401 because of Respondent did not make misstatements and omissions of material facts in connection with the sale of a security. (Factual Findings 1-7; Legal Conclusion 5.)

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The appeal of Respondent Alfredo Gonzalez is sustained. The Cease and Desist Order issued to Respondent Alfredo Gonzalez is rescinded.

DATED: February 19, 2008.

CHRIS RUIZ
Administrative Law Judge
Office of Administrative Hearings