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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES

11
12 THE PEOPLE OF THE STATE OF
13 CALIFORNIA, by and through the
California Corporations Commissioner,

14 Plaintiff,

15 v.
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19 TONY M. NAVA, JR., as an individual; and
Does 1 through 10, inclusive,

20 Defendants.
21
22

ORIGINAL FILED

AUG 11 2006

LOS ANGELES
SUPERIOR COURT

CASE NO.: BC 356585

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S EX PARTE APPLICATION
FOR TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION

Date of Hearing: August 11, 2006

Time of Hearing: 8:30 a.m.

Judge: Hon. Dzintra Janavs

Dept.: 85

Date Action Filed: August 8, 2006

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1 I. INTRODUCTION

2 Defendant Tony M. Nava, Jr. ("Nava") fraudulently and illegally raised at least \$500,000.00
3 from securities transactions. The California Corporations Commissioner ("Commissioner"), ordered
4 Nava to immediately cease violating the Corporate Securities Law of 1968 (Corporations Code §
5 25000 et seq.). Nava not only ignored the Commissioner's orders, but also added information to an
6 order that falsely stated that the Commissioner had subsequently determined that Nava was no
7 longer subject to the order. Nava then sent this altered document to his previous investors, blatantly
8 attempting to both evade the law and to impede the Commissioner's ongoing investigation.

9 The Commissioner asks the Court to immediately put Nava's outrageous conduct to an end
10 by issuing a temporary restraining order to: 1) enjoin Nava from further violations of the Corporate
11 Securities Law; 2) enjoin Nava from withdrawing from any bank account or disposing of any real or
12 personal property in his possession or control, which property or assets were derived or emanated
13 from directly, or indirectly, the sale and issuance of securities as alleged in this action, without leave
14 of the Court; and 3) to issue an order to show cause for the issuance of a preliminary injunction.

15 II. STATEMENT OF FACTS

16 Beginning in at least March 2002 and continuing thereafter, Nava offered and sold
17 investment contracts referred to as "Investing Agreements," raising at least \$500,000.00 from
18 unsuspecting members of the public. Declarations of William J. Castillo ("Castillo Decl."), ¶¶ 5-9;
19 Ana Hernandez ("Hernandez Decl."), ¶¶ 5-8; Rudy Moreno ("Moreno Decl."), ¶¶ 4-7; Amber Van
20 Osdel ("Van Osdel Decl."), ¶¶ 5-7, 9, filed concurrently herewith and incorporated herein by
21 reference. Nava solicited investments from his fellow Hispanic business associates, friends and
22 acquaintances. Moreno Decl., ¶ 3. Nava also used his fellow Hispanic business associates, friends
23 and acquaintances to solicit other Hispanic investors. Castillo Decl., ¶3; Hernandez Decl., ¶ 3; and
24 Van Osdel Decl., ¶ 3.

25 The purpose of the investment was purportedly to make loans to individuals or businesses in
26 need of money. Castillo Decl., ¶ 4; Hernandez Decl., ¶ 4; Moreno Decl., ¶3. Nava also told
27 investors that they would receive interest on their investments ranging from 10% to 55 %, payable
28 within 10 to 45 business days of the investment. Castillo Decl., ¶¶ 5-9, 11; Hernandez Decl., ¶¶ 5-7;

1 Moreno Decl., ¶¶ 3-7; Van Osdel Decl., ¶¶ 5-7, 9. This projection had no reasonable basis in fact.
2 Most of the investors have not received any of the money owed to them. Castillo Decl, ¶¶ 10-11, 14;
3 Hernandez Decl., ¶¶ 9-11; Moreno Decl., ¶¶ 8-9; Van Osdel Decl., ¶ 10.

4 Nava was not authorized by the Commissioner to offer and/or sell securities in the State of
5 California nor was he exempt from the qualification requirement. Declaration of Rebecca E.
6 Gutierrez (“Gutierrez Decl.”), ¶ 2, Exhibit 9, filed concurrently herewith and incorporated herein by
7 reference.

8 On December 10, 2002, the Commissioner issued a Desist and Refrain Order (“2002 Order”)
9 against defendant Nava and Nava Marketing Corporation directing them to discontinue engaging in
10 the offer and sale of securities in violation of Corporations Code section 25110. Gutierrez Decl., ¶ 2,
11 Exhibit 4. Numerous attempts to personally serve Nava were unsuccessful. Gutierrez Decl., ¶ 2,
12 Exhibits 5-7. Accordingly, the Commissioner was served on behalf of Nava pursuant to section
13 25550, on September 19, 2003. Gutierrez Decl., ¶ 2, Exhibit 8.

14 Notwithstanding the issuance and service of the 2002 Order, Nava continued to illegally offer
15 and sell securities. Castillo Decl., ¶¶ 5-9; Hernandez Decl., ¶¶ 5-8; Moreno Decl., ¶¶ 4-7; Van Osdel
16 Decl., ¶¶ 5-7, 9. Consequently, another Desist and Refrain Order was issued against Nava on March
17 1, 2006, again prohibiting him from offering and selling securities in violation of section 25110.
18 Gutierrez Decl., ¶ 2, Exhibit 1. Nava was personally served with the 2006 Order on March 30, 2006.
19 Gutierrez Decl., ¶ 2, Decl., Exhibit 2.

20 On or about June 14, 2006, the Commissioner received information that Nava had altered and
21 falsified the 2006 Order by adding language that was not in the 2006 Order when it was issued. The
22 added language read as follows: “Action taken against Tony M. Nava, Jr.: All bank accounts be
23 seized until all investigations are conducted. Bank account hold time: Money will be released
24 pending court clearance. March 27, 2006: No fraud found on Tony M. Nava, Jr. (Associates review
25 under court clearance).” In addition, Nava deleted both the issuance date of March 1, 2006 and the
26 name of the Commissioner from the altered and falsified order. Hernandez Decl., Exhibit 5. At
27 least 1 investor received Nava’s false version of the 2006 Order. Hernandez, ¶ 10, Exhibit 5.

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III. ARGUMENT

A. THE COMMISSIONER HAS THE AUTHORITY TO BRING THIS ACTION AND TO SEEK A TEMPORARY RESTRAINING ORDER

Corporations Code section 25530 and California Government Code section 11180 provide the Commissioner with broad, discretionary authority to bring actions for injunctive and other ancillary relief whenever it appears that any person has engaged or is about to engage in any act in violation of California’s Corporate Securities Law.

Corporations Code section 25530,¹ provides, in relevant part:

(a) Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this division or any rule or order hereunder, the commissioner may in the commissioner’s discretion bring an action in the name of the people of the State of California in the superior court to enjoin the acts or practices or to enforce compliance with this law or any rule or order hereunder. Upon a proper showing, a permanent or preliminary injunction, restraining order, . . . or any other ancillary relief may be granted as appropriate.

Nava violated section 25110 by offering and selling unqualified securities to investors residing in the State of California, violated a Desist and Refrain Order issued by the Commissioner, and violated section 25401 by not disclosing the Order and falsely promising returns of 10% to 55% within 10 to 45 business days. Castillo Decl., ¶¶ 5-9; Hernandez Decl., ¶¶ 5-8; Moreno Decl., ¶¶ 4-7; Van Osdel Decl., ¶¶ 5-7, 9. Nava also violated section 25404 by altering and falsifying a Desist and Refrain Order issued by the Commissioner on March 1, 2006. Hernandez Decl., ¶10, Exhibit 5.

A governmental entity seeking to enjoin the alleged violations of a statute, which expressly authorizes injunctive relief to protect the public interest, need not allege or prove equitable considerations, such as inadequacy of legal remedy, or grave or irreparable harm, as a prerequisite to obtaining injunctive relief. (*Porter v. Fisk* (1946) 74 Cal. App. 2d 332, 338; *I.T. Corp. v. County of Imperial* (1983) 35 Cal. 3d 63.) According to the California Supreme Court in *I.T. Corp.*, once a governmental entity establishes a reasonable probability that it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to

¹ All further statutory references are to the Corporations Code unless otherwise indicated.

1 the defendant. (*I.T. Corp., id.* at p. 72.) An injunction under section 25530 may issue even for past
 2 violations of the Corporate Securities Law of 1968 since it is a governmental cause of action to
 3 protect the public interest by enjoining defendants from similar illegal conduct in the future. (*People*
 4 *v. Martinson* (1986) 188 Cal. App. 3d 894, 899.)

5 Defendant Nava undisputedly violated California's Corporate Securities Law. This is ample
 6 authority for the Commissioner to bring this action and for the Court to grant the requested
 7 injunctive relief.

8 **B. DEFENDANT NAVA MADE OFFERS AND SALES OF UNQUALIFIED,**
 9 **NON-EXEMPT SECURITIES IN VIOLATION OF SECTION 25110**

10 Section 25110 provides, in pertinent part, as follows:

11 It is unlawful for any person to offer or sell in this state any security
 12 in an issuer transaction . . . whether or not by or through underwriters,
 13 unless such sale has been qualified . . . or unless such security or
 14 transaction is exempted under Chapter 1 (commencing with Section 25100)
 15 of this part.

14 **1. Investment contracts are securities**

15 Section 25019 sets forth a non-exhaustive list of items that are securities. That list expressly
 16 includes an investment contract.

17 Nava offered and sold investment contracts referred to as "Investing Agreements," totaling at
 18 least \$500,000.00. Castillo Decl., ¶¶ 5-9; Hernandez Decl., ¶¶ 5-8; Moreno Decl., ¶¶ 4-7; Van Osdel
 19 Decl., ¶¶ 5-7, 9. These Investing Agreements are "securities" within the meaning of 25019.

20 **2. Nava "offered and sold" securities "in this State" in "Issuer Transactions"**

21 Section 25017 defines "offer" and "sale." Nava's offers and sales of the investments
 22 described in Section B1 above constitute the offer and sale of securities.

23 **3. The transactions were "in this state"**

24 Nava offered and sold securities "in this state" within the meaning of section 25008. It is
 25 undisputed that Nava is located and conducted the transactions within the state of California and the
 26 purchasers were California residents. Castillo Decl., ¶¶ 4-5; Hernandez Decl., ¶¶ 3-5, 7; Moreno
 27 Decl., ¶ 4; and Van Osdel Decl., ¶¶ 4-5. Securities were offered and sold by Nava in this state and
 28 investor funds were received in this state.

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4. The transactions were “issuer transactions”

The securities offered and sold by Nava were issuer transactions.

Section 25010 defines “issuer” to mean any person who issues or proposes to issue any security.

Rather than defining “issuer transactions” directly, section 25011 defines “nonissuer transaction,” as follows:

Nonissuer transaction means any transaction not directly or indirectly for the benefit of the issuer, A transaction is indirectly for the benefit of the issuer if any portion of the purchase price of any securities involved in the transaction will be received indirectly by the issuer.

Section 25010 read in conjunction with section 25011, helps clarify the definition of an issuer transaction: an “issuer transaction” is any transaction that directly or indirectly benefits the issuer. An “issuer transaction” occurs when the persons or entities controlling a particular investment directly or indirectly receive some of the purchase price. (*People v. Robert Francis Cory* (1995) 35 Cal. App. 4th 717, 731 n. 18.)

In this case, Nava was the “issuer” of the securities. Nava received the investor funds allegedly to loan to individuals or businesses in need of money. Nava was in the business of making loans to these individuals or businesses in need of money. Castillo Decl., ¶¶ 4-9; Hernandez Decl., ¶¶ 4-6; Moreno Decl., ¶¶ 3-7; and Van Osdel Decl., ¶¶ 4-7.

5. The securities offered and sold by Nava were neither qualified nor exempt

The Commissioner has not issued a permit or other form of qualification authorizing the offer and sale of the securities referred to herein in the state of California. Gutierrez Decl., ¶ 2, Exhibit 9. The securities were not exempt from the requirement of section 25110.

Accordingly, Nava offered and sold unqualified securities in issuer transactions in violation of section 25110.

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1 **C. NAVA MADE UNTRUE STATEMENTS OF AND/OR OMITTED TO STATE**
 2 **MATERIAL FACTS TO INVESTORS IN VIOLATION OF SECTION 25401**

3 Nava misrepresented and/or omitted to state material facts in the offers and sales of securities
 4 referred to herein.

5 Section 25401 states, in relevant part:

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

11 This section differs from common law fraud in that the party accused, in a civil or
 12 administrative action, of misrepresentation or omission need not be shown to have acted
 13 intentionally. *Bowden v. Robinson* (1977) 67 Cal. App. 3d 705, 714-715. No showing is needed of
 14 investor reliance or causation. *Lynch v. Cook* (1983) 148 Cal. App. 3d 1072, 1087-1088.

15 The California Supreme Court in *People v. Simon* (1995) 9 Cal. 4th 493 stated:

16 “An enforcement action by the commissioner to enjoin future sales by means of
 17 false or misleading statements are designed to protect the public. (Citations omitted).
 18 For that reason, it is irrelevant that the defendant knows that the statements or
 19 omissions are false or misleading. In light of the language of section 25401,
 20 it is reasonable to conclude that the Legislature did not intend to permit members
 21 of the public to be harmed by such sales simply because the offeror was unaware
 22 that his or her sales pitch was misleading.” (*Id.* at pp. 515-516.)

23 All that must be shown is that the misrepresentation or omission is of a material fact, and that
 24 the misrepresentation or omission makes the solicitation misleading. *Lynch v. Cook, supra*, 148 Cal.
 25 App. 3d at 1088. In interpreting Section 25401, the court in *Insurance Underwriters Clearing*
 26 *House, Inc. v. Natomas Co.* (1984) 184 Cal. App. 3d 1520, held that “a fact is material if there is a
 27 substantial likelihood that, under all the circumstances, a reasonable investor would consider it
 28 important in reaching an investment decision.” (*Id.* at p.1526.)

 In this case, the misrepresentation and/or omission of material facts include, but are not
 necessarily limited to, Nava’s representations to investors that: 1) they would receive their money
 back, usually within 10 to 45 business days from the date of investment, 2) with interest ranging
 from 10% to 55%. Castillo Decl., ¶¶ 5-9, 11; Hernandez Decl., ¶¶ 5-7; Moreno Decl., ¶¶ 3-7; Van
 Osdel Decl., ¶¶ 5-7, 9. These statements had no reasonable basis in fact. Most of the investors have

1 not gotten any of their money back, including interest on their investments. Castillo Decl., ¶ 14;
2 Hernandez Decl., ¶¶ 9-11; Moreno Decl., ¶¶ 8-9; Van Osdel Decl., ¶ 10. Nava also failed to disclose
3 to the investors that he was the subject of a Desist and Refrain Order issued by the Commissioner on
4 December 10, 2002, prohibiting him and his company, Nava Marketing Corporation, from offering
5 and selling unqualified securities in the state of California.

6 The rate of return is a factor that a reasonable investor would consider in determining
7 whether or not to invest in a particular investment. In addition, a due date of an investment is also
8 important in that certain plans or events may be contingent upon the maturity of an investment.
9 Accordingly, the misrepresentation of how much the investment would earn and when it was due is a
10 material fact in violation of section 25401.

11 Also, it is evident that a reasonable investor would want to know that the person they are
12 investing their money with had been a subject of a Desist and Refrain Order by the State of
13 California for the same or similar activities that they are currently involved in. Even if the prior
14 order had nothing to do with the current offering, a reasonable investor would likely want to know
15 the character of the person they are dealing with. Accordingly, Nava was required to disclose the
16 Desist and Refrain Order issued on December 10, 2002 to the investors.

17 **D. NAVA VIOLATED THE DESIST AND REFRAIN ORDER ISSUED BY THE**
18 **COMMISSIONER.**

19 Section 25530(a) authorizes the Commissioner to bring an action against any person who has
20 violated any order issued by the Commissioner. Section 25530(a) further provides that “upon a
21 proper showing, permanent or preliminary injunction, restraining order, . . . or any other ancillary
22 relief may be granted as appropriate.”

23 On December 10, 2002, the Commissioner issued a Desist and Refrain Order against
24 defendant Nava and Nava Marketing Corporation for offering and selling unqualified, non-exempt
25 securities. The Desist and Refrain Order explicitly prohibited Nava from offering and selling
26 securities, unless qualified or exempt. Gutierrez Decl., ¶ 2, Exhibit 4. Numerous attempts to
27 personally serve Nava were unsuccessful. Gutierrez Decl., ¶ 2, Exhibits 5-7. Accordingly, the order
28 was served on the Commissioner on behalf of Nava, on September 19, 2003, pursuant to section

1 25550. Gutierrez Decl., ¶ 2, Exhibit 8.

2 Notwithstanding the issuance and service of the 2002 Order, Nava continued to illegally offer
3 and sell securities totaling at least \$490,000.00, from March 2004 continuing through at least
4 January 2006. Castillo Decl., ¶¶ 5-9; Hernandez Decl., ¶¶ 5-8; Moreno Decl., ¶¶ 4-7; Van Osdel
5 Decl., ¶¶ 5-7, 9. As a result, Nava violated the Desist and Refrain Order issued by the
6 Commissioner on December 10, 2002 and he should be enjoined from violating such order.

7 **E. NAVA ALTERED AND FALSIFIED A DESIST AND REFRAIN ORDER**
8 **ISSUED BY THE COMMISSIONER**

9 Nava knowingly altered and falsified a Desist and Refrain Order issued by the
10 Commissioner.

11 Section 25404 provides, as follows:

12 It is unlawful for any person to knowingly alter, destroy, mutilate, conceal,
13 cover up, falsify, or make a false entry in any record, document, or tangible
14 object with the intent to impede, obstruct, or influence the administration or
enforcement of this division.

15 On March 1, 2006, the Commissioner issued and subsequently served a Desist and Refrain
16 Order against Nava, directing him to immediately desist and refrain from offering and selling
17 unqualified securities in the State of California, unless and until he applied for and secured from the
18 Commissioner a qualification authorizing him to offer and sell securities or unless he is exempted
19 from the provisions of section 25110. Gutierrez Decl., ¶ 2, Exhibit 1.

20 In a letter to the Department dated April 6, 2006, Nava claimed to have stopped conducting
21 business after receipt of the March 1, 2006 Order. Gutierrez Decl., ¶ 2, Exhibit 3. However, on or
22 about June 14, 2006, the Commissioner discovered that Nava had altered and falsified the March 1,
23 2006 Order. Nava added language to this order that wasn't in the order when it was first issued. The
24 added language read as follows: "Action taken against Tony M. Nava, Jr.: All bank accounts be
25 seized until all investigations are conducted. Bank account hold time: Money will be released
26 pending court clearance. March 27, 2006: No fraud found on Tony M. Nava, Jr. (Associates review
27 under court clearance)." In addition, the issuance date of March 1, 2006 and the name of the
28 Commissioner were deleted. Hernandez Decl., ¶ 10, Exhibit 5. At least 1 investor received the

1 altered and falsified order from Nava, sometime in May 2006. Hernandez Decl., ¶ 10. None of the
2 statements in the language added by Nava are true.

3 By sending investors this altered and falsified order, Nava was attempting to suppress any
4 suspicion of his illegal activities and to contain the investors' dissatisfaction in not getting their
5 money back. Nava is impeding the administration and enforcement of the Corporate Securities Law
6 of 1968 by sending this altered and falsified order because this may deter current and prospective
7 investors from reporting complaints about Nava. It may also discourage investors from cooperating
8 with the Department's ongoing investigation. Without cooperation of the investors, the Department
9 would not be able to pursue further action against Nava.

10 Nava knowingly altered and falsified a Desist and Refrain Order issued by Commissioner on
11 March 1, 2006, in violation of section 25404. Therefore, this Court should enjoined Nava from
12 violating section 25404.

13 IV. THE POTENTIAL DANGER TO THE PUBLIC JUSTIFIES THE EX PARTE
14 ISSUANCE OF A TEMPORARY RESTRAINING ORDER

15 One of the Legislature's main purposes in enacting California's Corporate Securities Law is
16 to protect the public against the imposition of unsubstantial, unlawful and fraudulent stock and
17 investment schemes and the securities based thereon, *People v. Syde* (1951) 37 Cal.2d 765, 766 and
18 to promote full and fair disclosure of all information necessary to make informed and intelligent
19 investment decisions. *People v. Park* (1978) 87 Cal.App.3d 550, 565.

20 Section 25530(a), in fact, authorizes the Commissioner to bring an action against any person
21 who has violated any provision of the Corporate Securities Law or any rule or order issued
22 thereunder. Moreover, injunctive relief may be granted to enforce compliance with the law.

23 If Nava is allowed to continue to blatantly ignore the Commissioners orders by illegally and
24 fraudulently offering and selling securities, the public is placed at an unreasonable risk. Nava has
25 already shown his contempt for the law by adding false information on the March 2006 Order and
26 then distributing the altered document to his previous investors. Nava's offer and sale of unqualified
27 securities and misrepresentation and/or omission of material facts in connection with the sale of such
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1 securities is exactly the risk of harm that California's Corporate Securities Law was put in place to
2 guard against.

3 The Court has the power to grant the relief prayed for and the protection of the public and the
4 investors from further action by Nava makes such action an immediate necessity before more
5 investors are harmed. The court's order of immediate, ex-parte relief is proper, necessary and should
6 be granted.

7 V. CONCLUSION

8 The evidence filed herein shows that Nava has violated the California Corporate Securities
9 Law of 1968, by offering and selling unqualified, non-exempt, securities, by misrepresenting and/or
10 omitting to state a material fact in connection with the offer and sale of securities, by violating a
11 Desist and Refrain Order issued by the Commissioner, and by altering and falsifying an order issued
12 by the Commissioner. The insidious course of conduct by Nava presents a perfect example of the
13 evils the legislature sought to prevent in enacting the protection of the California Corporate
14 Securities Law of 1968. The public is at risk as long as Nava continues to entice them with his
15 elaborate schemes of riches.

16 Based on these points and authorities, and the declarations filed herewith, it is respectfully
17 requested the court issue a temporary restraining order enjoining Nava from: 1) violating
18 Corporations Code sections, 25110, 25401, 25404 and from violating the Desist and Refrain Orders
19 issued by the Commissioner; 2) from withdrawing from any bank account or disposing of any real or
20 personal property in his possession or control, which property or assets were derived or emanated
21 from directly, or indirectly, the sale and issuance of securities as alleged in this action, without leave
22 of the Court; and 3) and to issue an Order to Show Cause regarding the issuance of a preliminary
23 injunction.

24 Dated: August 09, 2006
25 Los Angeles, California

PRESTON DuFAUCHARD
California Corporations Commissioner

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By: _____
MARLOU de LUNA
Senior Corporations Counsel
Attorney for Plaintiff