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Attorneys for Petitioners
Choice Exploration, Inc.
and Jon Martin

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CHOICE EXPLORATION, INC., and JON MARTIN,

Petitioners,

v.

CALIFORNIA CORPORATIONS COMMISSIONER and CALIFORNIA DEPARTMENT OF CORPORATIONS,

Respondents.

Case No. 34-2010-80000565
Unlimited Civil Case

Case Assigned to Dept 19
The Honorable Patrick Marlette - PROCEEDING FOR WRIT OF MANDATE and/or PROHIBITION

NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART PETITIONERS' PETITION FOR WRIT OF ADMINISTRATIVE MANDATE

[Code Civ. Proc. § 1094.5]

Date: October 1, 2010
Time: 11:00 a.m.
Dept: 19

SFODMS/6611442.1

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 22, 2010, the Court filed the attached **Order Granting in Part and Denying in Part Petitioners' Petition for Writ of Administrative Mandate**.

A true and correct copy of this Order, executed by the Honorable Patrick Marlette, is attached hereto and incorporated herein as **Exhibit 1.**

Respectfully submitted,

Dated: October 26, 2010

BAKER & McKENZIE LLP
Bruce H. Jackson
Irene V. Gutierrez

BAKER & McKENZIE LLP
Joel Held (Pro Hac Vice Admitted)
Laura J. O'Rourke (Pro Hac Vice Admitted)

By:_____
Irene V. Gutierrez
Attorneys for Petitioners
Choice Exploration, Inc.,
and Jon Martin

Baker & McKenzie LLP
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+1 415 576 3000

PROOF OF SERVICE

I, Barbara Loeb, declare: I am employed in the City and County of San Francisco, California. I am over the age of 18 years and not a party to the within action. My business address is Two Embarcadero Center, Suite 1100, San Francisco, CA 94111.

On **October 26, 2010**, I served the attached:

NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART PETITIONERS' PETITION FOR WRIT OF ADMINISTRATIVE MANDATE

on the following, by forwarding true and correct copies thereof, addressed as follows:

Miranda L. Maison, Esq. Senior Corporations Counsel California Department of Corporations 1515 K Street, Suite 200 Sacramento, California 95814-4052 Tel No.: 916.445.7205 Fax No.: 916.445.6985	Counsel for Respondent California Department of Corporations; and Respondent California Corporations Commissioner

☒ **(BY PERSONAL SERVICE)** I caused each such envelope to be delivered by hand to the addressee(s) noted above.

And on

Mr. Harrison Owens 14867 Kennedy Lane Coden, AL 36523	Third-Party (Courtesy Copy)

☒ **(BY U.S. MAIL)** I placed such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at BAKER & McKENZIE LLP, San Francisco, California, following ordinary business practices. I am readily familiar with the practice of BAKER & McKENZIE LLP for collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on **October 26, 2010**.

Barbara Loeb

Bruce H. Jackson, State Bar No. 98118
bruce.jackson@bakermckenzie.com
Irene V. Gutierrez, State Bar No. 252927
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and Jon Martin

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Attorneys for Petitioners
Choice Exploration, Inc.
and Jon Martin

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CHOICE EXPLORATION, INC., and JON MARTIN,

Petitioners,

v.

CALIFORNIA CORPORATIONS COMMISSIONER and CALIFORNIA DEPARTMENT OF CORPORATIONS,

Respondents.

Case No. 34-2010-80000565
Unlimited Civil Case

Case Assigned to Dept 19
The Honorable Patrick Marlette -
PROCEEDING FOR WRIT OF MANDATE and/or PROHIBITION

[PROPOSED]
ORDER GRANTING IN PART AND DENYING IN PART PETITIONERS' PETITION FOR WRIT OF ADMINISTRATIVE MANDATE

[Code Civ. Proc. § 1094.5]

Date: October 1, 2010
Time: 11:00 a.m.
Dept: 19

The Petition of Choice Exploration, Inc. and Jon Martin ("Petitioners") for issuance of writ of administrative mandate ("the Petition") came on regularly for hearing **October 1, 2010 at 11:00 a.m.** before The Honorable Patrick Marlette, in Department 19, of the above-entitled Court.

No appearances were made on behalf of Petitioners, or on behalf of Respondents the California Corporations Commissioner and California Department of Corporations ("Respondents").

The Petition was submitted for decision.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that:

Upon consideration of all the papers in support of, and opposition and reply to such Petition, and all pleadings on file, and for **GOOD CAUSE APPEARING,** the Court orders as follows:

In accordance with this Court's Minute Order dated October 1, 2010, the Petition for issuance of writ of administrative mandate is granted in part and denied in part. A true and correct copy of the Court's Minute Order dated October 1, 2010 is incorporated herein and attached hereto as **Exhibit 1.**

IT IS SO ORDERED.

Dated: _____

_____
The Honorable Patrick Marlette
Judge of the Superior Court

Baker & McKenzie LLP
Two Embarcadero Center
11th Floor
San Francisco, CA 94111
+1 415 576 3000

EXHIBIT 1

Baker & McKenzie LLP
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San Francisco, CA 94111
+1 415 576 3000

PROOF OF SERVICE

I, Barbara Loeb, declare: I am employed in the City and County of San Francisco, California. I am over the age of 18 years and not a party to the within action. My business address is Two Embarcadero Center, Suite 1100, San Francisco, CA 94111.

On October 11, 2010, I served the attached:

[PROPOSED] ORDER GRANTING IN PART AND DENYING IN PART PETITIONERS' PETITION FOR WRIT OF ADMINISTRATIVE MANDATE

on the following, by forwarding true and correct copies thereof, addressed as follows:

Miranda L. Maison, Esq. Senior Corporations Counsel California Department of Corporations 1515 K Street, Suite 200 Sacramento, California 95814-4052 Tel No.: 916.445.7205 Fax No.: 916.445.6985	Counsel for Respondent California Department of Corporations; and Respondent California Corporations Commissioner
Mr. Harrison Owens 14867 Kennedy Lane Coden, AL 36523	Third-Party

☒ **(BY U.S. MAIL)** I placed such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at BAKER & McKENZIE LLP, San Francisco, California, following ordinary business practices. I am readily familiar with the practice of BAKER & McKENZIE LLP for collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on October 11, 2010.

_____

Barbara Loeb

Baker & McKenzie LLP
Two Embarcadero Center
11th Floor
San Francisco, CA 94111
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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 10/01/2010 TIME: 11:00:00 AM DEPT: 19

JUDICIAL OFFICER PRESIDING: Patrick Marlette
CLERK: D. Rios
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2010-80000565-CU-WM-GDS** CASE INIT.DATE: 06/08/2010
CASE TITLE: **Choice Exploration Inc vs. California Corporations Commissioner**
CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,5567412

EVENT TYPE: Petition for Writ of Mandate - Writ of Mandate
MOVING PARTY: Choice Exploration Inc
CAUSAL DOCUMENT/DATE FILED: Notice of Hearing, 08/17/2010

APPEARANCES

The above entitled cause came on this date for Hearing on the Petition for Writ of Mandate. Neither party telephoned to request argument in this case, nor did they appear at the time of the hearing. The matter is deemed submitted on the tentative decision.

The Court affirmed the tentative decision as posted in the Court's web site, a copy of which is attached hereto and incorporated in this minute order, and adopted it as the Court's ruling in this case.

CHOICE EXPLORATION, INC., and JON MARTIN v. CALIFORNIA CORPORATIONS COMMISSIONER, et al., Case No. 2010 – 80000565:

The following shall constitute the Court's tentative ruling on the petition for writ of mandate, set for hearing in Department 19 on Friday, October 1, 2010. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the Clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the Clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

Introduction and Factual Background

This is a proceeding under Code of Civil Procedure section 1094.5 in which petitioners seek review of respondent's decision, entered after an evidentiary hearing, upholding a Desist and Refrain Order ("D/R Order") based on findings that petitioners violated Corporations Code sections 25110 and 25401.[1]

Corporations Code section 25110 provides, in pertinent part: "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...".

Corporations 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."

Corporations Code section 25532 permits the Commissioner of the Department of Corporations to issue a D/R Order if, in his or her opinion, there has been a violation of either Sections 25110 or 25401. Section 25532(d) further provides that the person to whom a D/R Order is directed is entitled to request an administrative evidentiary hearing on the Order.

In this case, on June 6, 2008, respondent Department of Corporations issued the D/R Order to petitioners Choice Exploration and Martin (the president of Choice Exploration), along with another business entity, Double Vision Cedar Crossing #1, and an individual employed by Choice Exploration, Senior Consultant Harrison Owens.[2]

The D/R Order alleged that Owens, on behalf of Choice Exploration, had placed an unsolicited telephone call to a California resident during May, 2008, and, during the call, had solicited an investment in an oil drilling project in Texas managed by Choice Exploration under the name of "Double Vision Cedar Crossing #1". Owens followed up on the call by sending a message to the e-mail address he had received from the California resident with several attachments, including a geologic report for the Double Vision drilling project, a Choice Exploration management team profile, and a subscription agreement.

The D/R Order stated that, based on the facts recited in the Order, "...the California Corporations Commissioner is of the opinion that the interests or participation in an oil or gas lease or title or in payments out of production under that title or lease being sold by Choice Exploration, Inc., Double Vision Cedar Crossing #1, Harrison Owens, and Jon Martin are securities subject to qualification under the California Corporate Securities Law of 1968 and are being or have been offered or sold without first being qualified."[3]

The D/R Order further stated that, in connection with the offers and/or sales of these securities, Owens and Choice Exploration "...made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."[4]

The misrepresentations and/or omissions were described as follows:

"a. Failing to disclose that, in 2005, the Pennsylvania Securities Commission had ordered Choice, Chief Operating Officer David Brooks, and Director of Marketing David A. Gauvey to cease and desist from offering for sale and selling unregistered securities in Pennsylvania.

"b. Making a misleading statement in the Choice management team profile that Jonathan M. Griffin, Choice's Vice President of Land and Legal, is a member of the State Bar of Texas when, in fact, his membership status...has been inactive since at least 2003."[5]

The D/R Order found that the misrepresentations and/or omissions violated Section 25401 of the Corporate Securities Law of 1968.[6]

Based on the findings that the parties named in the order had violated California securities laws, the D/R Order directed them "...to desist and refrain from the further offer or sale of securities in the State of California...unless and until qualification has been made under [those laws] or unless exempt"[7], and "to desist and refrain from offering or selling or buying or offering to buy any security in the State of California...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."[8]

On July 11, 2008, respondent Department of Corporations served a Notice of Administrative Hearing on petitioners setting an evidentiary hearing on the matters set forth in the D/R Order for July 21-22, 2008.[9]

An evidentiary hearing was held before Administrative Law Judge Gary A. Geren on July 21, 2008. ALJ Geren heard testimony by witnesses on behalf of petitioners and respondent and received documentary evidence.[10]

On September 16, 2008, ALJ Geren issued a Proposed Decision that affirmed the D/R Order with regard to the Section 25110 violation, but rescinded the D/R Order with regard to the Section 25401 violations.[11]

On December 22, 2008, respondent Department of Corporations issued an "Order of Rejection of Proposed Decision" pursuant to Government Code section 11517(c)(2)(E).[12] The Order stated that the rejection of the proposed decision was based on the following issue: "Whether or not [the] failure to disclose the Pennsylvania Desist and Refrain Order...was a material omission or misrepresentation of Section 25401 of the California Corporations Code."[13]

The parties were permitted to, and did, submit written argument.

On April 1, 2009, respondent Department of Corporations issued its Final Decision and Order.[14] The decision erroneously noted that Choice Exploration and Jon Martin had not submitted written arguments.[15] As a result of this error, respondent subsequently ordered the original final decision to be vacated and granted a petition for reconsideration, with reconsideration to be conducted by the Commissioner of Corporations on the existing record, including the written argument previously submitted by Choice Exploration and Jon Martin.[16]

Summary of Respondents' Decision

On April 8, 2010, respondent Department of Corporations issued its Final Decision After Reconsideration.[17] The decision affirmed the D/R Order with regard to the violation of Corporations Code section 25110, and affirmed the D/R Order with regard to the violation of Corporations Code section 25410 based on failure to disclose the 2005 Pennsylvania Desist and Refrain Order. The decision rescinded the D/R order with regard to second violation of Section 25410, regarding Jon Griffin's Texas State Bar membership status.[18]

In the decision, respondent Commissioner of Corporations made the following factual findings, which are

relevant to the issues raised by the petition:

"1. At all relevant times, Choice conducted business at 2221 Avenue J, Arlington, Texas, 76006.

"2. At all relevant times, Owens represented himself as a 'Senior Consultant' of Choice.

"3. At all relevant times, Martin was, and continues to be, President of Choice.

"4. Beginning in at least May 2008, Owens and Choice offered and/or sold securities in the form of interests or participation in an oil and gas title or lease or in payments out of production under that title or lease.

"5. Owens is a full time employee of Choice, paid on commission basis for soliciting investors to participate in Choice's oil and gas drilling projects. His title is 'Senior Consultant'. In approximately March 2008, Owens began recruiting investors for Choice's Double Vision project. Owens' supervisor at that time was David Gauvey (Gauvey), Director of Marketing of Choice. Gauvey provided Owens with a list of potential investors; the list was known among Choice employees as the 'California List', because it listed California residents. Owens used the California list to make 'cold calls' to potential investors.

"6. On approximately May 19, 2008, Owens placed an unsolicited telephone call to California resident Jon Wroten (Wroten), with whom he or Choice had no prior relationship. How Wroten came to be placed on the list was not explained at the hearing; but far from being a potential investor, Wroten happened to be an Examiner for the Department of Corporations (a job akin to that of an investigator). In fact, Wroten received Owens' call while Wroten was sitting at his desk at the Department of Corporations in Sacramento, California.

"Owens and Wroten engaged in a conversation. Owens asked Wroten if he was interested in investing in Choice's oil and gas drilling project. Wroten, acting as an undercover Examiner, told Owens that he was interested in perhaps investing. Wroten then provided Owens with an e-mail address so that Wroten could send Owens investment materials about Choice and the oil and gas drilling project. Later that day, Owens sent Wroten an e-mail message stating, 'I know the time you and I spent together will be valuable to you in the future.' The written materials Owens attached to the e-mail included three documents: an application to participate as an interest owner in the Double Vision Cedar Crossing LP #1 program entitled, 'Application Agreement' (Application Agreement); a Technical Team and Management profile (profile); and a Geological Summary for a Texas drilling project called 'Double Vision Prospect, Cedar Crossing LP #1' (Double Vision), detailing the Double Vision project (Geological Report).

"7. The documents that Owens e-mailed to Wroten did not include a prospectus, offering circular or private placement memorandum containing material information about the investment offer.

"8. The Choice material provided to Wroten represent that Choice is a 'private corporation' with the capacity to 'generate a prospect, acquire minerals, engineer and operate the drilling of the well, and disperse production revenue', which would maximize the 'ability to produce an enhanced return on investment.'

"9. The Choice Application Agreement provides that to become an 'Interest Owner' or 'Participant' in the Double Vision 'Program' a capital investment in the amount of $140,000 per 'Unit' is required.

"10. The Application Agreement states that Choice 'may accept or reject this application'. It also states

'...the undersigned [Wroten, in this case] acknowledges that: (a) the information received concerning participation in the Units was made only through direct, personal communication between the undersigned and a representative of Choice.' Also, 'the undersigned warrants and represents that the undersigned is financially able to bear the risk of losing his entire investment.' The application requires that an applicant designate the legal title in which they wish to hold their investment (such as, 'Individual Ownership,' 'Tenants in Common,' or 'Joint Tenants with Right of Survivorship,' and the like).

"11. The Application Agreement states that the undersigned has received and read a copy of the Confidential Private Placement Memorandum, including all exhibits and supporting documents thereto.

"12. The Geological Report contains technical information regarding the Double Vision project. The geological report also contains a page titled 'Oil and Gas Investment Calculator' (calculator). The calculator lists revenues that an investor in Double Vision could expect to receive if the project is successful. Lastly, the geological report contains a section titled, 'Tax Considerations,' which summarizes tax implications an investor should consider.

"[...]

"16. On November 9, 2005, Choice and Choice's officers and employees, Frank Seidler, David Brooks, David Gauvey and Gary Hixon (Pennsylvania Respondents), received a Summary Order to Cease and Desist issued by the Pennsylvania Securities Commission (Pennsylvania 2005 Order) for violations of the Pennsylvania securities laws.

"17. The Pennsylvania Respondents submitted an Offer of Settlement to the Pennsylvania Securities Commissioner without admitted or denying the allegations in the Pennsylvania 2005 Order, for the purpose of settling the proceeding.

"18. On May 31, 2006, the Pennsylvania Securities Commission issued an Order (Pennsylvania 2006 Order) accepting an Offer of Settlement submitted by the Pennsylvania Respondents; rescinding the Pennsylvania 2005 Order; ordering the Pennsylvania Respondents to permanently cease and desist from violating the Pennsylvania securities laws; barring the Pennsylvania Respondents from offering or selling securities in Pennsylvania without securities counsel; and ordering Pennsylvania Respondents to pay $5000 to the Pennsylvania Securities Commission.

"19. Choice maintains a private placement memorandum entitled, 'Choice Exploration Inc. Private Placement Memorandum Double Vision Prospect Cedar Crossing LP #1 Chambers County, Texas' that contains a 'Legal Proceedings' section. This section indicates that Choice believes that its offers and sales of interests in similar drilling programs were either not subject to, or exempt from, the registration provisions of both the 'Securities Act of 1934 and relevant State Securities Acts.' The document further provides that over the years, however, some state securities agencies have questioned and challenged the validity of those claims. The document describes an Offer Settlement [sic] submitted to the State of Pennsylvania in May, 2006, including an Order requiring Choice and other named individuals (but neither Martin nor Owens) to cease and desist from violations of the Pennsylvania Securities Act, an administrative assessment fee of $5,000, and a bar from offering or selling securities in Pennsylvania for six months unless the respondents retained counsel and made all applicable filings (the Pennsylvania 2006 Order).

"20. The private placement memorandum does not mention the November 9, 2005 Summary Order to Cease and Desist issued by the Pennsylvania Securities Commission (the Pennsylvania 2005 Order).

"21. Owens did not provide Wroten the Private Placement Memorandum with the package of materials Owens sent Wroten, or at any other time.

"22. Owens did not verbally disclose to Wroten any information regarding legal proceedings against Choice by other state securities commissions.

"23. Choice did not submit an application for a permit to offer or sell securities in California, and the California Department of Corporations has not issued a permit or other form of qualification authorizing any person to offer or sell oil and gas interests in Double Vision in this state."[19]

Based upon these factual findings, respondent reached the following legal conclusions:

"Offer of Securities in Violation of Section 25110

"7. [E]ach of the Respondents offered for sale securities in California in an issuer transaction without having first registered or qualified the securities. Owen's [sic] telephone call, e-mail and its attachments sent to Wroten comprised an attempt by Choice to recruit a California resident to be an investor in the Double Vision project.

"Wroten's telephone number appeared on a list that was given to Owens by his supervisor, Gauvey, a senior employee of Choice. While Martin argued at hearing that Owens acted outside the scope of his employment at Choice when he contacted Wroten, and therefore, Martin could not be held liable for Owens [sic] acts, the evidence set forth at Factual Findings 5 and 7 stand inapposite to this contention. Martin, as Choice's president, cannot separate himself from the acts of Choice's Director of Marketing and sales supervisor (Gauvey) and Choice's senior consultant (Owens) who used the 'California List' to contact Wroten and other California residents.

"Choice attempted to recruit California investors, including Wroten, by touting Choice's past successes in oil and gas exploration, generally, and by detailing the potential financial and tax benefits of investing in the Double Visions [sic] project, specifically. The specificity of the written materials Choice provided Wroten, as set forth in Factual Findings 6 through 12, provide persuasive evidence that Choice made an 'offer,' as that term is defined in [Corporations Code section 25017(b)].

"Material Omission in Violation of Section 25041

"[...]

"11. Failure to disclose a state cease and desist order is clearly relevant to a reasonable investor, who is naturally interested in whether management is following the law in marketing securities. [Citation omitted.] A reasonable investor making a decision whether or not to invest in Choice would want to know that Choice and two of its controlling officers, Brooks and Gauvey, were involved in another state's cease and desist order. Further, consistent with [federal case law], there is a substantial likelihood that the disclosure of the Pennsylvania 2005 Order would have been viewed by a reasonable investor as having significantly altered the total mix of information available when making a decision whether or not to invest in Choice.

"12. By failing to disclose the Pennsylvania 2005 Order to Wroten at the time of the offer, Respondents made a material omission in violation of Corporations Code section 25401. Respondents argue that

because they settled the matter, the subsequent settlement Order is the only material information required to be disclosed. That might be true if Respondents had discovered their violations of the Pennsylvania securities laws, and self-reported the violations to the state securities regulator along with a stipulated settlement offer. On the facts presented, however, the Respondents entered [into] the settlement only after the state securities regulator filed its 2005 Cease and Desist Order. The Pennsylvania regulator's rescission of the 2005 Order by the Pennsylvania 2006 Order represents the cumulative effect of the 2005 Order, and cannot be viewed in isolation thereby rendering the Pennsylvania 2005 Order immaterial to a prospective investor. Accordingly, failure to refer to the 2005 Order, either to Wroten or in the Private Placement Memorandum, constitutes the omission of a material fact that any reasonable investor would want to consider before making an investment in Respondents' venture."[20]

Summary of Petitioners' Contentions in This Proceeding

Petitioners Choice Exploration and Jon Martin filed their petition for writ of mandate on June 9, 2010. Double Vision Cedar Crossing #1 and Harrison Owens, who were named in the D/R Order and who participated in the administrative hearing on this matter, are not petitioners in this action.[21]

Petitioners make the following contentions in this action:

1. Petitioners did not make an offer to sell securities within the meaning of Corporations Code sections 25110 and 25017(b).

2. The 2005 Pennsylvania Order was not a material fact necessary in order to make the statements made regarding the security, in light of the circumstances under which they were made, not misleading, and respondents did not make findings of any statements that were rendered misleading by the failure to disclose that Order.

3. Respondents violated Jon Martin's due process rights by failing to give him proper notice of any allegations that could result in the imposition of vicarious liability on him for the acts of others.

4. The final order exceeded respondents' jurisdiction by going beyond the security at issue.

Standard of Review

In this case, the issues presented by the petition are primarily issues of law, in that they involve the question of whether respondents proceeded in the manner required by law, and require the application of statutes to facts (such as whether there was an offer as a matter of law, whether the 2005 Pennsylvania Order was a material fact, and whether respondents gave proper notice of the charges against Jon Martin) that are not disputed in the sense that they are not the subject of conflicting evidence in the record. The Court therefore has applied the independent judgment standard of review to this matter. (See, *McIntosh v. Aubry* (1993) 14 Cal. App. 4th 1576, 1584.)

At the same time, in exercising its independent judgment, the court must afford a strong presumption of correctness regarding the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence. (See, *Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 816.)

Did Petitioners Make an Offer to Sell Securities in California?

Petitioners contend that no offer was made in this case, because the conversation between Owens and Wroten, and the follow-up e-mail to Wroten with information about the Double Vision project, amounted to nothing more than preliminary business conversations about the concept of oil and gas investments in general. Petitioners further contend that these conversations never proceeded to the stage of an actual offer, because Owens did not send Wroten the Private Placement Memorandum for the project, without which no offer could be made.[22]

These contentions are not persuasive. Corporations Code section 25017(b) defines an "offer" or "offer to sell" as including "...every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value."

Here, notwithstanding the fact that Owens did not send Wroten the Private Placement Memorandum, the telephone conversation and follow-up e-mail message constituted an "attempt...to dispose of" and a "solicitation of an offer to buy" a security.

Wroten testified that Owens telephoned and told him that Choice Exploration was involved in oil and gas exploration, and asked if Wroten was interested in investing in oil and gas. When Wroten said that he was, Owens told him that he had an opportunity and would forward him information by e-mail.[23] Owens' testimony did not fundamentally contradict Wroten's description of their contact, although Owens stated that they discussed a strategy of diversifying into five separate projects instead of all into one, and denied that he specifically mentioned the Double Vision program.[24]

In any event, Owens followed up by sending Wroten an e-mail message, dated May 19, 2008, that stated: "I know the time you and I spent together will be valuable to you in the future. Please find attached my contact information along with proprietary information on our next project of the year. [...] I welcome the opportunity to advise you on future O & G investments. In the meantime, contact me with any questions."[25]

Attached to the e-mail was specific information regarding the Double Vision project (which included an "Oil and Gas Investment Calculator" and a description of "Tax Considerations")[26] and an Application Agreement specifically for the Double Vision project.[27]

By asking whether Wroten was interested in investing in oil and gas, telling him that an opportunity to do so was available, and sending Wroten specific information and an application for the Double Vision program (including projections regarding the financial benefits of investing in the project), Owens was doing more than engaging in general discussion about possible future investments. He was providing specific information designed to lead to Wroten's investment in the Double Vision program.

The fact that Owens sent Wroten an application and information specific to the Double Vision program is of significant weight in finding that Owens' activities amounted to an "offer" within the meaning of Section 25017(b). By sending that information, Owens was attempting to interest Wroten in investing in that particular project, i.e., he was soliciting an offer to buy the security. The fact that Owens did not send Wroten the Private Placement Memorandum is of no real consequence. Even though the Application Agreement required Wroten to acknowledge that he had received and read the Private Placement Memorandum before his application could be accepted[28], the solicitation of an offer to buy already had been made.[29]

Having exercised its independent judgment on the evidence in the record and on issues of law, the

Court finds that the weight of the evidence supports respondents' finding that petitioners offered to sell a security in an issuer transaction without qualifying the sale in violation of Corporations Code section 25110. The petition for writ of mandate on this issue is therefore denied.

Was the 2005 Pennsylvania Order a "Material Fact" for Disclosure Purposes?

It is undisputed that petitioners did not disclose the 2005 Pennsylvania Order to Wroten either verbally or in writing. Petitioners contend that the Order was not a "material fact" within the meaning of Corporations Code section 25401, because the Order had been rescinded and replaced by a subsequent order, and because the subsequent order was disclosed in the Private Placement Memorandum.

The Private Placement Memorandum for the Double Vision program, which Wroten never received or saw, but which petitioners introduced into evidence at the administrative hearing, contained the following disclosure regarding the 2006 Pennsylvania Order, under the heading "Legal Proceedings":

"Choice was formed in 1997 and has been engaged in the oil and gas business since that time and during that time, has sponsored oil and gas drilling ventures similar to this program. In connection with the offer and sale of interests in other drilling programs, Choice believes that such offers and sales were either not subject to or exempt from securities regulation provisions of both the Securities Act of 1934, as amended, and relevant State Securities Acts. Over the years, however, some state securities agencies have questioned and challenged the validity of those claims. The following is a history of state proceedings against Choice.

"In May 2006, Seidler Investment Group (formerly known as Choice Explorations, Inc.), Frank Seidler, David Brooks, David Gauvey, and Gary Hixon ('Respondents') submitted an Offer of Settlement, including Findings of Fact, Conclusions of Law and Order, with the State of Pennsylvania. The Order requires the Respondents to cease and desist from violations of the Pennsylvania Securities Act; bars the Respondents from offering or selling securities in the State of Pennsylvania for a period of six months, unless they make applicable filings with the Pennsylvania Securities Commission or obtain an opinion of counsel that such filings are not required; orders payment by the Respondents of a $5,000 administrative assessment to the Commonwealth of Pennsylvania; and requires the Respondents to comply with the Pennsylvania Securities Act and Regulations. Respondents voluntarily entered into the Offer of Settlement, including the Findings of Fact, Conclusions of Law and Order, without admitting or denying the allegations included in said Findings of Fact and Conclusions of Law, solely for the purpose of settling the matter without the need for protracted, expensive litigation of the matter."[30]

Respondent's decision summarized the standard for "materiality" in the Legal Conclusions section of the final decision. Because the parties do not differ significantly as to the applicability of this standard, the Court adopts respondent's discussion of the standard here:

"9. The standard for 'materiality' in California, similar to the federal standard, is whether a 'reasonable investor' would consider the misstatement and/or omission significant in making a determination whether to invest. *Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1984) 184 Cal. App. 3rd 1520. The federal securities laws defines [sic] a 'misstatement' as 'material' only if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision. *Basic, Inc. v. Levinson* (1988) 485 U.S. 224. Furthermore, under the federal standard an 'omission' is material only if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information

available. *Basic, Inc. v. Levinson*, supra, at 231-32.

"10. A showing of investor reliance or proof of causation is not necessary to prove a violation under Corporations code section 25401. *Bowden v. Robinson* (1977) 67 Cal. App. 3rd 705, 715.

"11. Failure to disclose a state cease and desist order is clearly relevant to a reasonable investor, who is naturally interested in whether management is following the law in marketing securities. *S.E.C. v. Merchant Capital, LLC* (11th Cir. 2007) 483 F. 3rd 747, 771-772."[31]

In this case, the Court finds that the 2005 Pennsylvania Order was not a "material fact" within the meaning of Corporations Code section 25401 and the legal standard described above, because that order involved charges and findings against the named parties that were dropped as the result of the settlement leading to the 2006 Order, and which were therefore not part of the final order.

The 2005 Pennsylvania Order, which was entitled "Summary Order to Cease and Desist"[32], was similar in nature to the California D/R Order issued by respondents in this case, in that it essentially was a statement of charges against the named parties, on which those named parties were entitled to request a speedy administrative hearing.

The 2005 Pennsylvania Order charged Choice Exploration and certain named individual officers and employees, Frank Seidler, David Brooks, David Gauvey and Gary Hixon, with selling securities in Pennsylvania (specifically, interests in an oil drilling project in Texas) which were not registered or exempt under Pennsylvania law.[33]

The 2005 Pennsylvania Order also charged the named parties with mailing offering materials for the project to a Pennsylvania resident that failed to disclose material facts regarding prior action by the Texas Securities Board against Seidler, and by the Wisconsin Department of Financial Institutions against Gauvey, based on offering oil, gas and mineral leases, or working interests in an oil and gas well venture, without being registered or licensed by those states.[34]

The 2006 Pennsylvania Order, however, only contained the findings regarding selling unregistered and non-exempt securities in Pennsylvania, and dropped any findings regarding failure to disclose material facts involving action by other states' regulatory agencies.[35] Why those findings were omitted from the final order is not clear from the record, but what is clear is that the Pennsylvania Securities Commission formally rescinded the 2005 Order (albeit "prospectively").[36] The non-disclosure findings therefore never became the subject of any final administrative action in Pennsylvania.

Given these facts, respondents' conclusion that the 2005 Order is material because "[t]he Pennsylvania regulator's rescission of the 2005 Order by the Pennsylvania 2006 Order represents the cumulative effect of the 2005 Order, and cannot be viewed in isolation thereby rendering the Pennsylvania 2005 Order immaterial to a prospective investor", is not persuasive. While a reasonable investor certainly can be assumed to be interested in final administrative action taken against a seller of securities in another state as part of the "total mix of information" to be considered in deciding whether to invest, it is far less clear that the same reasonable investor would be interested in preliminary administrative action on charges that ultimately are dropped from a final order.

Indeed, as petitioners suggest, disclosure of charges that do not ripen into final administrative action may itself be misleading, as would be the case if petitioners were required to disclose the charge originally made in this case relating to the Texas State Bar status of Jon Griffin, which was included in

the original D/R Order but which was not upheld after a full administrative hearing. Respondents have not demonstrated that it should make a difference whether charges are dropped as the result of a hearing or as the result of a settlement. In either case, the relevant fact is that such charges did not become the basis for final administrative action, and therefore are not "material" as a matter of law.

The Court accordingly finds that respondents' decision affirming the D/R Order with regard to violation of Corporations Code section 24501 based on a material omission (failing to disclose the 2005 Pennsylvania Order) is unsupported as a matter of law and must be overturned.[37] The petition for writ of mandate on this issue is therefore granted.

Was Petitioner Martin Properly Made Subject to the D/R Order?

With regard to Martin's liability for the violation of Corporations Code section 25110, respondents' final decision established such liability on the basis that Martin was the president of Choice Explorations, Inc., and, as such, "...cannot separate himself from the acts of Choice's Director of Marketing and sales supervisor (Gauvey) and Choice's senior consultant (Owens) who used the 'California list' to contact Wroten and other California residents."[38] In essence, this is a finding that Martin knew that Choice Exploration was offering interests in the Double Vision program to potential investors in California through a list of telephone numbers "known among Choice employees as the 'California list'", and, as president of the company, was in control of such activity.[39]

Martin contends that this finding must be overturned because his due process rights were violated. Specifically, he contends that he was not given proper notice in the D/R Order, which functioned as the accusation in this case, that he could be exposed to liability on a vicarious basis.

Martin's contention is not persuasive, because the record demonstrates that he received adequate notice of the charges against him for purposes of fulfilling due process requirements.

As the court recognized in *Smith v. State Board of Pharmacy* (1995) 37 Cal. App. 4th 229, in administrative proceedings, Government Code section 11503 establishes the constitutionally required notice to the accused of the standards by which his conduct is to be measured, as follows:

"The accusation...shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense."

Under this standard, "[a]dministrative proceedings are not bound by strict rules of pleading. So long as the respondent is informed of the substance of the charge and afforded the basic, appropriate elements of due process, he cannot complain of a variance between administrative pleadings and proof." (See, *Stearns v. Fair Employment Practice Commission* (1971) 6 Cal. 3rd 205, 213.)

In this case, the factual allegations of the D/R Order, read in conjunction with applicable provisions of California law, gave notice to Martin that he could be held liable for violation of Corporations Code section 25110 based on his position as president of Choice Exploration and his knowledge of the acts of others under his control in actually offering an unqualified and nonexempt security for sale in California.

The D/R Order clearly alleged that Martin was the president of Choice Exploration, Inc., and that an employee of Choice, Owens, had offered to sell an unqualified and nonexempt security to a California resident by means of the telephone contact list known to employees of the company as "the California list".

Corporations Code section 25403(a) provides: "Every person who with knowledge directly or indirectly controls or induces any person to violate any provision of this division or any rule or order thereunder shall be deemed to be in violation of that provision, rule, or order to the same extent as the controlled and induced person."

Taken together, the factual allegations and the law gave Martin notice, in ordinary and concise language, that his liability would not be based on his own acts, but on acts of a Choice employee under his control. Martin was thus informed of the substance of the charge, and provided the opportunity to prepare his defense. Thereafter, he was afforded the basic, appropriate elements of due process: the right to request a hearing on the charges and to present evidence on his behalf.

This case is significantly different from *Smith v. State Board of Pharmacy, supra,* 37 Cal. App. 4th 229, upon which Martin principally relies. In *Smith,* there was a significant difference between the way the charges were stated in the accusation and the theory on which the disciplinary order was upheld. As the court described in that case, the accusation's exclusive use of the active voice to describe the accused pharmacist's actions strongly conveyed the message that he stood charged with personally dispensing excessive amounts of controlled substances to a pharmacy customer, and gave him no notice that the Board would rely on a negligent supervision theory to uphold the charges. Indeed, the Court noted that the Board actually shifted the theory of its case during trial, when it became evident that the evidence would not sustain the direct dispensing charges.

Here, by contrast, the language of the D/R Order with regard to Martin's potential liability did not mislead him as to the theory of the case; nor did respondents change their theory of the case to fit the evidence.

The Court therefore finds that Martin was not deprived of due process through a failure to give him notice of the charges against him, or the potential basis of liability. The Court further finds that respondent's decision regarding Martin's liability for violation of Corporations Code section 25110 is supported by the weight of the evidence, in that it is a reasonable inference that he was aware of Owens' activities in offering the Double Vision security for sale in California based on his position as president of the company and knowledge within the company of the "California list". The petition for writ of mandate on this issue is therefore denied.

Do the Terms of the D/R Order Exceed Respondents' Statutory Authority?

Petitioners' final substantive contention is that the D/R Order, as affirmed in respondent's final decision, exceeds respondents' statutory authority because it extends beyond a prohibition on offering the security at issue in this case and constitutes a general prohibition on selling any securities in California. In essence, petitioners argue, respondents' order amounts to a general injunction against them doing business legally in California.

This contention is unpersuasive, because the D/R Order addresses the specific violation at issue, and, beyond that, does no more than order petitioners to comply with the law.

Corporations Code section 25532(a) provides the authority for the D/R Order, providing:

"If, in the opinion of the commissioner...the sale of a security is subject to qualification under this law and it is being or has been offered or sold without first being qualified, the commissioner may order the issuer or offeror of the security to desist and refrain from further offer or sale of **the security** until

qualification has been made under this law [...]." (Emphasis supplied.)

Petitioners contend that the use of words "the security" in the statute signals that the D/R Order may only restrain the offering of the security at issue in the enforcement action, which in this case is the security related to the Double Vision project.

Here, the D/R Order orders the petitioners "...to desist and refrain from the further offer or sale of securities in the State of California, including but not limited to interests or participation in an oil or gas tile or lease or in payments out of production under that title or lease, unless and until qualification has been made under said law or unless exempt."[40]

Here, the D/R Order tells petitioners not to offer securities that are unqualified and non-exempt. Because the Double Vision security involved in this case was unqualified and non-exempt, the D/R Order applies directly to that security. Beyond that, the D/R Order is not a general injunction or prohibition against petitioners legally offering securities for sale in California; it is only a prohibition against petitioners offering unqualified and non-exempt securities, which is no more than California law requires of them. The Court accordingly concludes that the D/R Order does not exceed the authority granted to respondents in Corporations Code section 25532(a).

Petitioners' Claim for Attorney's Fees

Petitioners have made a request for an award of attorney's fees pursuant to Government Code section 800 in connection with their challenge to respondents' finding under Corporations Code section 25401. Although a request for fees normally would be addressed in a separate, post-hearing motion as provided in the Rules of Court, both parties have briefed the issue of whether petitioner is entitled to fees under the statute. The Court therefore will address the issue in this ruling.

Government Code section 800 authorizes an award of fees to a prevailing petitioner challenging an administrative determination where "...it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity...". The statute provides for a maximum award of $7,500.

Because petitioners have prevailed in overturning the portion of the decision finding against them under Corporations Code section 25401, they would be entitled to an award of fees under Section 800 if they can demonstrate that that portion of the decision was the result of "arbitrary or capricious action or conduct".

As stated in *Reis v. Biggs Unified School District* (2005) 126 Cal. App. 4th 809, 823, arbitrary or capricious conduct encompasses conduct that is not supported by a fair or substantial reason, a stubborn insistence on following unauthorized conduct, or a bad faith legal dispute, and fees may not be awarded under Section 800 simply because an administrative action was erroneous, even if it was clearly erroneous.

The Court finds that petitioner is not entitled to an award of attorney's fees under Section 800, because respondents' conduct was not arbitrary or capricious under the standard described above. Respondents may have erred in finding that the 2005 Pennsylvania Order was material for purposes of Corporations Code section 25401, but were not without a fair and substantial reason for doing so. The "reasonable investor" standard is inherently imprecise and its application depends upon the exercise of legal judgment in which reasonable minds might well reach different results. It is not unfair or unreasonable to

believe that a preliminary administrative enforcement taken against a seller of securities could be of concern to a reasonable investor, even if such action had been rescinded and replaced by a subsequent order. Nothing in this case indicates that respondents' position on the matter was one held in bad faith.

Moreover, the fact that the Pennsylvania matter was settled, rather than litigated, lent a certain ambiguity to the proceedings, specifically, regarding whether the charges based on other states' actions were dropped from the final order because they were not true or could not be proven (like the charge regarding Jon Griffin here), or whether, even though true, they were simply dropped to avoid the time and expense of a full administrative hearing. Under those circumstances, the Court does not find that respondents' decision was arbitrary or capricious.

Petitioners' request for an award of attorney's fees pursuant to Government Code section 800 is therefore denied.

Conclusion

The petition for writ of mandate is granted solely as to respondents' decision finding against petitioners under Corporations Code section 25401. In all other respects, the petition for writ of mandate is denied. Petitioners' request for an award of attorney's fees pursuant to Government Code section 800 is denied.

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In the event that this tentative ruling becomes the final ruling of the Court, the final ruling will be confirmed by minute order, and counsel for petitioners is directed to prepare the order, judgment and writ of mandate in accordance with the final ruling under the procedure set forth in Rule of Court 3.1312.

/n

[1] The Court sustains petitioners' objection to amended opposition brief filed by respondents on September 28, 2010, after petitioners had filed their reply brief. The amended opposition contains a statement that the pleading had been "..amended solely in format to effect compliance with California Rules of Court, Rule 1.200. No wording, argument or substantive changes have been made to the original document filed on September 10, 2010." (See, Amended Opposition, page 1, footnote 1.) This is not strictly accurate. Respondents did not merely correct the format of citations to cases and other authorities, as provided in the cited rule, but also added citations to the administrative record that had not been included in the original opposition. The Court has elected to disregard the late-filed amended opposition brief.

[2] See, Administrative Record ("A.R."), pp. 248-250.

[3] See, A.R., pp. 249:27-250:3.

[4] See, A.R., p. 249:17-19.

[5] See, A.R., p. 249:21-26.

[6] See, A.R., p. 250:9-14.

[7] See, A.R., p. 250:4-8.

[8] See, A.R., p. 250:14-20.

[9] See, A.R., pp. 251-254.

[10] The transcript of the hearing is found at A.R., pp. 490-723, and the documentary exhibits are found at A.R., pp. 257-473.

[11] See, A.R., pp. 3-11.

[12] See, A.R., pp. 25-26.

[13] See, A.R., pp.25:26-26:2.
[14] See, A.R., pp. 110-116.
[15] See, A.R., p. 111.
[16] See, A.R., p. 215.
[17] See, A.R., pp. 223-235.
[18] See, A.R., p. 235. The allegation regarding Jon Griffin's Texas State Bar membership status is no longer part of this case.
[19] See, A.R., pp. 225-229.
[20] See, A.R., pp. 232-234.
[21] Owens represented himself in the administrative proceedings.
[22] Petitioners do not contend that they were not offering a "security in an issuer transaction" under Corporations Code section 25110, or that the security was either qualified or exempt from qualification as provided by law.
[23] See, A.R., pp. 514-518.
[24] See, A.R., pp. 636-640.
[25] See, A.R., p. 416.
[26] See, A.R., pp. 418-433.
[27] See, A.R., pp. 435-437.
[28] See, A.R., p. 435, paragraphs 3 and 7.
[29] The Court gives little weight to the testimony of Martin (A.R., p. 616) and Owens (A.R., p. 640) that no offer could be made without providing the potential investor with the Private Placement Memorandum, since that testimony expresses what is, in effect, a legal conclusion.
[30] See, A.R., p. 260.
[31] See, A.R., p. 233.
[32] See, A.R., pp. 396-402.
[33] See, A.R., p. 399.
[34] See, A.R., p. 398.
[35] See, A.R., pp. 402-410.
[36] See, A.R., pp. 408, paragraph 2; 411-412.
[37] In making this ruling, the Court is aware that the evidence does not demonstrate that petitioners disclosed the 2006 Pennsylvania Order to Wroten at the time of the offer, or at any time thereafter. Respondents did not charge petitioners with failing to disclose the 2006 Pennsylvania Order, however, and the decision did not affirm the D/R Order on that basis. Also, in light of this ruling, it is unnecessary to address petitioners' contention that respondents failed to make the findings required to bridge the "analytic gap" between the evidence and the ultimate decision on this issue.
[38] See, A.R., p. 232. In light of the Court's ruling that respondents' decision regarding the violation of Corporations Code section 25401 cannot be sustained, this ruling does not address any issues regarding Martin's individual liability for that alleged violation.
[39] See, A.R., p. 225. Given this finding, the Court rejects Martin's contention that respondents made no findings that would support the decision against him on this issue.
[40] See, A.R., p. 250.