BEFORE THE

DEPARTMENT OF CORPORATIONS

STATE OF CALIFORNIA

In the Matter of the DESIST and REFRAIN ORDER Issued to: CLARISSA JACOBSON, SPUNKY GIRL PRODUCTIONS and HIGH MAINTENANCE, Respondents.	Case No.: 007-0012 OAH No.: L2006040382

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated June 22, 2006, is hereby adopted in its entirety by the California Corporations Commissioner as his Decision in the above-entitled matter.

This Decision shall become effective on AUGUST 22, 2006.

IT IS SO ORDERED this 21st day of AUGUST 2006.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

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In the Matter of the DESIST AND REFRAIN ORDER **Issued to:** **CLARISSA JACOBSON, SPUNKY GIRL PRODUCTIONS and HIGH MAINTENANCE,** **Respondents.**	**Case No. 007-0012** **OAH No. L2006040382**

PROPOSED DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on April 26, 2006, in Los Angeles, California. Complainant was represented by Mary Ann Clark, Corporations Counsel. Clarissa Jacobson, Spunky Girl Productions and High Maintenance (collectively Respondents), were represented by Ellin Davtyan, attorney at law. Clarissa Jacobson was present at the administrative hearing.

Oral and documentary evidence was received and argument was heard. The record was left open to allow the parties to file closing and reply briefs. Closing briefs were timely filed. Respondents filed a reply brief, but Complainant did not. Complainant's closing brief was marked as Complainant's Exhibit 13. Respondents' closing brief and notice of errata were collectively marked as Respondents' Exhibit X. Respondents' reply brief was marked as Respondents' Exhibit Y.[1] Respondents' Exhibits X and Y contained attachments identified as Exhibits A through O. Some of these exhibits were duplicative of official exhibits admitted at the hearing, and some exhibits were supplementary to the official exhibits. Given that no additional exhibits were ordered to be submitted, none of the attachments to Respondents' Exhibits X and Y were admitted into evidence. Complainant's Exhibit 12 and Respondents' Exhibits X and Y were lodged, but not admitted as evidence. On May 25, 2006, the record was closed and the matter was submitted for decision.

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[1] Respondents' closing and reply briefs, and notice of errata, were filed by Peggy Roman-Jacobson, attorney at law.

FACTUAL FINDINGS

1. Clarissa Jacobson (Jacobson) wrote a script entitled "High Maintenance." She tried to find a producer for the film, but was unable to do so. Consequently, she decided to attempt to produce the film herself.

2. Jacobson created websites, www.highmaintnenacethemovie.com and www.girlscantoo.com, to advertise her film.

3. The highmaintenancethemovie.com website and girlscantoo.com websites offered to give contributors of varying levels of money (from $5 to $2,500) various levels of benefits, including producer credit and parts in the film. In order to "get [their] name[s] on the credits of this movie," the website visitors were instructed to click the "Be a Producer" link. The highmaintenancethemovie.com website directed "accredited investors," and the girslcantoo.com website directed "active investors," to "check out the Surfview site." The highmaintenancethemovie.com website also informed "accredited investors" that a business plan was available.

4a. In October of 2005, Jacobson paid an outside website, Surfview Entertainment, to market her film. The Surfview website listed "High Maintenance" as a project "seeking active investors" and presented a link that directed the viewer to special High Maintenance web pages on the Surfview website. The Surfview website indicated on one of the "High Maintenance" information pages: "Now Financing. Budget $250,000. Business Plan Available to Active Investors." Under this information, Jacobson was listed as the producer and person to contact. The "High Maintenance" website was listed as one of the methods through which to contact Jacobson.

4b. Under the Surfview budget information was the following statement:

> Nothing contained on this web page should be construed to be a sale or offer for sale of securities or any ownership interest in High Maintenance. The information regarding High Maintenance is not intended for residents of any state or territory of the United States in which the language may be deemed an offer under it's (sic) securities laws.

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5a. On December 6, 2005, Jon Wroten (Wroten), an examiner for the Department of Corporations (Department), contacted Jacobson in an undercover capacity at the email address posted on the Surview website.[2] Wroten's December 6, 2005 email stated:

> I am interested in investing in the production of the movie high maintence (sic). It sounds like a good plot. Could you please send me information about the size of the investment required, the estimated returns I could expect, and a business plan.
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> I have funds available immediately, and need to place them shortly for tax purposes.

5b. Wroten's email indicated his street address to be in Sacramento, California.

6. On December 7, 2005, Jacobson responded to Wroten's email with an email stating:

> Thank you for your interest. However, I would need you to fill out a qualified investor questionnaire before we could proceed. There are security laws that need to be adhered to.

7. On the same day, Wroten replied, requesting that Jacobson "forward whatever you need completed."

8. On December 7, 2005, Jacobson emailed to Wroten a form entitled "Accredited Investor Representation"[3] and informed Wroten in her accompanying email:

> Here is a qualified investor form. I would like to know how you found out about the investment as there is no advertisement for the movie offering investment. I'm pretty wary, because there are undercover regulators out there. . . .

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[2] Wroten used the assumed name "John Fox."

[3] The term "Accredited Investor" describes a person who comes within one of several categories of an "accredited investor" set forth in Rule 501, subdivision (a), of Regulation D (17 C.F.R. §230.501, subd. (a).), adopted by the United States Securities and Exchange Commission, or who the issuer reasonably believes comes within one of the categories, at the time of the sale of the securities to that person. Having income over $200,000 in each of the two years preceding an investment or having a net worth of $1,000,000 qualifies a person as an "accredited investor." (See, 17 C.F.R. §230.501, subd. (a)(5) and (6).)

9. In her correspondence with Wroten, Jacobson never asked Wroten if he had any experience or knowledge in the film industry.

10. The "Accredited Investor Representation" form that Jacobson sent to Wroten identified her as president of Spunky Girl Productions, and identified Spunky Girl Productions and as the "Issuer" of the securities.

11. Jacobson never qualified High Maintenance with the Department, nor did she file a notice of exemption.

12. On January 4, 2006, a Desist and Refrain Order was signed by Alan S. Weinger, Acting Deputy Commissioner for the Department, on behalf of Wayne Strumpfer, Acting California Corporations Commissioner.

13. The Desist and Refrain Order was directed to Jacobson, Spunky Girl Productions and High Maintenance at 2127 ½ Vine Street, Los Angeles, California 90068.

14. The Desist and Refrain Order stated:

> 1. At all relevant times, Spunky Girl Productions, is an entity with an address of P.O. Box 3328, Hollywood, California 90078 and 2127 1/2 Vine Street, Los Angeles, California 90068. Spunky Girl Productions' stated purpose is to make the movie High Maintenance.
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> 2. At all relevant times, High Maintenance is a movie production created by Spunky Girl Productions and operating a website at www.highmaintenancethemovie.com.
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> 3. At all relevant times, Clarissa Jacobson is an individual with an address of P.O. Box 3328, Hollywood, California 90078 and 2127 1/2 Vine Street, Los Angeles, California 90068. Respondent Jacobson is the contact person for High Maintenance and Spunky Girl Productions.
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> 4. Beginning in or about September 2005 to the present, Clarissa Jacobson, Spunky Girl Productions and High Maintenance offered or sold securities in the State of California in the form of investment contracts in High Maintenance, in a public offering on the websites www.highmaintenancethemovie.com and www.surfview.com.
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> 5. The Department of Corporations has not issued a permit or other form of qualification authorizing any person to offer and sell these securities in this state.
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> Based upon the foregoing findings, the California Corporations Commissioner is of the opinion that the investment contracts in High

Maintenance are securities subject to qualification under the California Corporate Securities Law of 1968 and are being or have been offered or sold without being qualified in violation of Corporations Code section 25110. Pursuant to section 25532 of the Corporate Securities Law of 1968, Clarissa Jacobson, Spunky Girl Productions and High Maintenance are hereby ordered to desist and refrain from the further offer or sale in the State of California of securities, including but not limited to investment contracts in High Maintenance, unless and until qualification has been made under the law.

This Order is necessary, in the public interest, for the protection of investors and consistent with the purposes, policies and provisions of the Corporate Securities Law of 1968.

15. Personal service of the Desist and Refrain Order on Jacobson at the Vine Street address was attempted on January 9, 2006, but was unsuccessful.

16. After January 9, 2006, Jacobson discovered the Desist and Refrain Order on the Department's website and contacted Wroten by email on January 11, 2006, indicating that she had seen the order. Thereafter, discussions transpired between Jacobson and Department counsel regarding the Desist and Refrain Order. In March of 2006, Jacobson asserted to Department counsel her desire to have a hearing on the order.

17. On March 28, 2006, Jacobson was served with the Desist and Refrain Order by certified mail. On April 13, 2006, Jacobson and Spunky Girl Productions submitted a written request for a hearing.

18. Jacobson maintained that she had designed her website postings seeking "active investors" based upon the advice of counsel and upon research she conducted regarding how to finance a film.

LEGAL CONCLUSIONS

1. The preponderance of the evidence established good cause to affirm the Desist and Refrain Order issued against Clarissa Jacobson, Spunky Girl Productions and High Maintenance for their website offerings to sell securities in the form of investment contracts in High Maintenance in the State of California without prior qualification. This conclusion is based on Factual Findings 1 through 11and on the analysis set forth in Legal Conclusions 2 through 7, below.

2. Corporations Code section 25110 states, "It is unlawful for any person to offer or sell in this state any security in an issuer transaction . . . unless such a sale has been qualified . . . unless such security or transaction is exempted." To establish violation of Corporations Code section 25110, Complainant must prove five elements: (A) there was an offer to sell a security; (B) the offer involved a security; (C) the offer occurred in California;

(D) the offer is linked to an issuer transaction; and (E) the offer was not qualified with the Department. As set forth below, Complainant has established these five elements and has proven that Respondents violated section 25110 of the Corporations Code by offering an unqualified, non-exempt security to California investors.

3(A). Respondents Made an Offer to Sell a Security. Corporations Code section 25017, subdivision (b), states that "'Offer' or 'offer to sell' includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value. . ." This definition includes the solicitation of an offer to buy a security or an interest in a security for value that is made on or through the Internet. The websites surfview.com, girlscantoo.com and highmaintenancethemovie.com contained solicitations of an offer to buy a security interest in the movie "High Maintenance." The websites mentioned that the movie was seeking investors and directed interested persons to visit the Surfview website and to contact Jacobson. The Surfview website presented a link for "projects seeking active investors," and that link directed the viewer to a special High Maintenance web page that stated the budget of the film was $250,000 and that a business plan was available. The wording on these websites constituted a solicitation of an offer to buy a security interest in the movie. Based on the definition of "offer," Respondents' website postings constituted offers within the meaning of Corporations Code section 25017, subdivision (b).

3(B)(1). The Offer Involved a Security. In *Moreland v. Department of Corporations* (1987) 194 Cal.App.3d 506, the Court held:

> What constitutes a security is a question of fact to be decided on a case-by-case basis. [Citation.] . . . [T]he determination of whether an instrument is a security is made only after reviewing the facts and circumstances surrounding the transactions and considering the regulatory purpose of the Corporate Securities Law. [Citation.] The purpose of the law is 'to protect the public against spurious schemes, however ingeniously devised, to attract risk capital.' [Citation.].

(*Id.* at 512.)

3(B)(2). The objectives of the securities law have been found to include preventing serious abuses in the capital-raising market (See, *United Housing Foundation v. Forman* (1975) 421 U.S. 837, 849), protecting the public "against the imposition of insubstantial, unlawful and fraudulent stock and investment schemes [citations] and [promoting] full disclosure of all information that is necessary to make informed and intelligent investment decisions." (*People v. Park* (1978) 87 Cal.App.3d 550, 565.) In recognition of "the virtually limitless scope of human ingenuity, especially in the creation of 'countless and variable schemes devised by those who seek the use of the money of others on the promise of profits,' [citing *S.E.C. v. W.J. Howey Co.* (1946) 328 U.S. 293, 299]," the term 'security' is interpreted broadly. (*Reves v. Ernst & Young* (1990) 494 U.S. 56, 60-61.)

3(B)(3). In the case at hand, Respondents offered investment in the movie "High Maintenance." Such investment in a movie is an investment contract, and investment contracts fall within the definition of a "security." Under Corporations Code section 25019, the definition of "security" includes investment contracts.

3(B)(4). The Court in *People v. Park, supra*, stated:

> Under widely accepted judicial interpretation and definition, an investment contract for the purposes of securities laws means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party [Citing, inter alia, *S.E.C. v. W.J. Howey Co.* (1946) 328 U.S. 293, 298-299]. . . . "The most essential consistency in the cases which have considered the meaning of 'investment contract' is *the emphasis on whether or not the investor has substantial power to affect the success of the enterprise*. When his success requires professional or managerial skill on his part, and he has authority corresponding with his responsibility, his investment is not a security within the meaning of the securities act. *When he is relatively uninformed and unskilled and then turns over his money to others, essentially depending upon their representations and their honesty and skill in managing it, the transaction is an investment contract.* [Citation omitted.] [Emphasis added by the *Park* Court.]

(87 Cal.App.3d 550, 563.)

3(B)(5). Under the *Howey* test, noted by the *Park* Court, there are several elements which must be met for a contract, transaction or scheme to be an "investment contract" which falls within the definition of a security. There must be: (a) an investment of money; (b) in a common enterprise; (c) with an expectation of profit; (d) to come solely from the efforts of others. (*S.E.C. v. W.J. Howey Co.* (1946) 328 U.S. 293, 298-299.) Investments in "High Maintenance" meet all of the *Howey* elements and are therefore investment contracts falling within the definition of "security," as follows:

(a) *Investment of Money*: Here, Respondents were seeking an investment of money for profit-making purposes. Jacobson testified that she was using the Internet postings to raise money for her film project. She also sent Wroten an "accredited investor form," exploring a potential investment of money on his part.

(b) *In a Common Enterprise*: "A common enterprise is one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties." (*S.E.C. v. Glenn W. Turner Enter.* (1973) 474 F.2d 476, 482, n.7.) "Where an investor's avoidance of loss depends on the promoter's 'sound management and continued solvency,' a common enterprise exists. (*S.E.C. v. Eurobond Exchange Ltd.* (1994) 13 F.3d 1334, citing *United States v. Carman* (1978) 577

F.2d 556, 563.) In this case, investors' fortunes would be interwoven with, and dependent on, Respondents' efforts and success in the film production process. Investors' avoidance of loss would depend on Respondents' sound management. Consequently, the common enterprise element is satisfied.

(c) *With an Expectation of Profit*: Respondents were seeking "active investors" to finance their film. The advertisement on the Surfview website offered to make available a business plan to "active investors" and implied that monies invested were to receive a return on the investment.

(d) *To Come Solely from the Efforts of Others*: Respondents argued that the offering was not a security because they only sought "active investors." This argument was not convincing. In this case, there is no evidence that Respondents were seeking skilled investors who had knowledge and experience in the film industry or who would share management of the film production process. Jacobson admitted that she had been advised that an "active investor" was defined as a person with knowledge and experience in the film industry. However, Jacobson never attempted to determine whether Wroten had any experience or knowledge in the film industry, and the accredited investor form she sent to him did not inquire about his experience in the film industry. Furthermore, it appears that Jacobson used the term "active investors" in the offering because she was advised to phrase her offering in that manner to avoid regulatory action.

3(C). The Offer Occurred in California. Corporations Code section 25008, subdivision (b), states that "[a]n offer to sell or to buy is made in this state when the offer originates from this state or is directed by the offeror to this state. . . ." Respondents' offer reached Californians such as Wroten who could log onto any of the three websites, and is therefore directed to Californians. Additionally, Respondent Jacobson is based in California, so the offers on the girlscantoo.com and highmaintenancethemovie.com websites originated in this state.

3(D). The Offer is Linked to an Issuer Transaction. Corporations Code section 25010 states that an "issuer is any person who proposed to issue any security." Jacobson and Spunky Girl Productions are the "issuers" because they proposed to issue to investors securities in the form of investment contracts in "High Maintenance." Additionally, the accredited investor form that Jacobson sent to Wroten refers to Spunky Girl Productions as the "Issuer."

3(E). The Offer Was Not Qualified with the Department. Corporations Code section 25110 requires that, prior to an offer or sale, securities must be qualified with the Department. The offering of security interests in "High Maintenance" was never qualified with the Department.

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4. No Exemption was Proven. Respondents argued that the securities offered were exempt from qualification. The burden of proving that a security or transaction is exempt from qualification rests with the persons claiming the exemption. Respondents failed to present evidence that their offer fell within any exemption, and therefore failed to meet their burden.

5. Respondent's Disclaimer Does Not Eliminate the Violation. Respondents argued that the disclaimer on the Surfview website protects them from liability. This argument was not persuasive. Despite the disclaimer, Respondents violated section 25110 of the Corporations Code by offering an unqualified, non-exempt security to California investors.

6(A). Reliance on Legal Advice Is Not a Valid Defense. Jacobson asserted that she reasonably relied on the advice of counsel in formulating her web postings. California courts have held that mistake of law based on advice of counsel is not a defense to violations which do not require specific intent. (*People v. Vineberg* (1981) 125 Cal.App.3d 127, 136-137; *People v. Aresen* (1949) 91 Cal.App.2d 26, 35; *People v. McCalla* (1923) 63 Cal.App. 783, 793 (reliance on advice of counsel that an instrument is not a security may not be considered as a factor in determination of guilt), overruled on other grounds in *People v. Elliot* (1960) 54 Cal.2d 498.) However, the California Supreme Court recently held:

> a seller who believes reasonably and in good faith that a security is exempt is not guilty of the crime of unlawful sale of an unregistered security. As in other similar cases, the severity of the penalties attached to this crime persuades us that the Legislature did not mean to impose criminal liability on defendants who lacked guilty knowledge of facts essential to make the conduct criminal.

(*People v. Salas* (2006) 37 Cal.4th 967, 972.)[4]

6(B). The *Salas* holding is not applicable to the administrative case at hand. The *Salas* case involved a criminal prosecution pursuant to Corporations Code section 25540, subdivision (a), for violation of section 25110. The case at hand, unlike *Salas*, involves a Desist and Refrain Order issued pursuant to Corporations Code section 25532 for violation of section 25110. The operative statute in *Salas*, Corporations Code Section 25540, subdivision (a), provides for criminal prosecution and penalties if a person "willfully violates any provision of this division." In this case, Section 25532 does not impose criminal liability and does not contain a provision requiring the Commissioner to prove a willful violation before ordering a person to desist and refrain from specified activity. While the *Salas* Court determined that the Legislature intended to impose severe criminal penalties only on

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[4] The Court further stated that, "in this context guilty knowledge is not an element of the crime," and that "a defendant's reasonable good faith belief that a security is exempt from registration is an affirmative defense on which the defense bears the initial burden of proof." (37 Cal.4th 967, 972.)

defendants who had "guilty knowledge," there was no evidence to establish that the Legislature intended such a "guilty knowledge" requirement in order for the Commissioner to issue a Desist and Refrain Order. Therefore, Jacobson's assertion that she relied on advice of counsel is not a valid defense to the Desist and Refrain Order issued in this case.

7(A). Respondents argued that the Desist and Refrain Order was not properly served and that it should be dissolved, because it was "obtained in violation of law." This assertion is incorrect.

7(B). Corporations Code section 25532, subdivision (d), provides:

> If, after an order has been served . . . , a request for hearing is filed in writing within 30 days of the date of service of the order by the person to whom the order was directed, a hearing shall be held in accordance with the provisions of the Administrative Procedure Act . . .

7(C). Section 25532 does not specify the means for service. Service of the Desist and Refrain Order by certified mail is sufficient to satisfy the service requirements of the statute; personal service is not required.

7(D). Respondents were properly served with the Desist and Refrain Order on March 28, 2006, and thereafter they requested and received a hearing. The Desist and Refrain Order was not "obtained in violation of law."

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Desist and Refrain Order, signed on January 4, 2006, issued against Clarissa Jacobson, Spunky Girl Productions and High Maintenance, is affirmed.

DATED: June 22, 2006

JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings