

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of:

THE COMMISSIONER OF BUSINESS
OVERSIGHT OF THE STATE OF
CALIFORNIA,

Complainant,

v.

ZENAIDA C. SPRADLIN,

Respondent.

Case No.: 12096

OAH No.: 2013090955

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated February 24, 2014, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter with technical and minor changes on the attached Errata Sheet pursuant to Government Code Section 11517(c)(2)(C).

This Decision shall become effective on April 26, 2014.

IT IS SO ORDERED this 27th day of March, 2014.

COMMISSONER OF BUSINESS OVERSIGHT

/s/

Jan Lynn Owen

STATE OF CALIFORNIA
DEPARTMENT OF BUSINESS OVERSIGHT

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PROPOSED DECISION

This matter came on regularly for hearing before Felix W. Loya, Administrative Law Judge of the Office of Administrative Hearings, in Los Angeles, California, on January 29, 2014. Joyce Tsai, Senior Corporations Counsel, represented the Department of Business Oversight (department). Respondent Zenaida C. Spradlin (respondent) appeared and was represented at the hearing by counsel, Anoush Sarkisyan, Esq. and Ani Arevedo, Esq.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision. The Administrative Law Judge makes the following factual findings, legal conclusions and order:

FACTUAL FINDINGS

Jurisdiction and Parties

1. On August 14, 2013, Jan Lynn Owen (complainant), in her official capacity as the Commissioner of Business Oversight of the State of California, signed the Statement in Support of Order Levying Administrative Penalties Pursuant to Corporations Code Section 25252; Claim for Ancillary Relief Pursuant to Corporations Code Section 25254; and Desist and Refrain Order (the Statement). The Statement was served on respondent on September 12, 2013.

2. On September 26, 2013, respondent filed a Notice of Defense. The instant hearing ensued. Jurisdiction exists in this proceeding.

Violation of Corporations Code Section 25110

3. On July 21, 2009, respondent was issued a Desist and Refrain Order (the 2009 Desist and Refrain Order) alleging that respondent and others violated Corporations Code section 25110¹ by offering and selling unqualified, non-exempt securities and by making misrepresentations or omissions of material fact in connection with the offer and sale of securities. On June 1, 2010, a hearing was held before Administrative Law Judge Julie Cabos-Owen on the 2009 Desist and Refrain Order. Respondent testified at the hearing. The Administrative Law Judge issued a Proposed Decision affirming the 2009 Desist and Refrain Order. On September 15, 2010, Preston DuFauchard, in his official capacity as Commissioner of the Department of Corporations for the State of California, the predecessor to the department, issued a Decision adopting the Proposed Decision. On September 16, 2010, the Decision on the 2009 Desist and Refrain Order became final.

4. On December 11, 2011, after the Decision on the 2009 Desist and Refrain Order became final, respondent offered and sold a California resident (resident) an oral and written investment contract for \$25,000. The written portion of the investment contract provided that respondent would pay the \$25,000 investment principal back to resident by December 11, 2012. The oral portion of the investment contract provided that respondent would pay resident at least a 10 percent return on resident's investment in one year. Respondent provided the written portion of the investment contract at the request of resident, who works as a firefighter and is not a sophisticated investor. Respondent promised to replace the written portion of the investment contract with additional documents specifying the terms of the investment, including the guaranteed 10 percent return on resident's investment. Respondent never supplied additional documents for the investment to resident, despite resident's repeated requests for such documents. Respondent told resident that she was part of a group that had investments in real estate located in Arizona and that the group was turning a profit on the real estate investments. Respondent refused to tell resident the name of the group unless he invested. However, even after resident invested, respondent did not tell resident the name of the purported group. Resident had no control over how or where the \$25,000 was actually invested and relied entirely on respondent's honesty and skill in managing the investment.

5. Respondent did not pay resident \$25,000 by December 11, 2012. Respondent did not pay resident 10 percent on resident's \$25,000 investment by December 11, 2012. As of the date of the hearing, respondent had not repaid resident the \$25,000 investment principal and had not paid resident any return or interest at all on the \$25,000 investment.

¹ All further references to the Corporations Code are cited by section number.

6. The investment contract was not qualified by the department. Respondent was not authorized by the department to offer or sell the investment contract. No evidence was presented that the investment contract was exempt from qualification.

Violation of Section 25401

7. On December 11, 2011, when respondent offered resident the oral and written investment contract for \$25,000, respondent did not tell resident that respondent had been named in and served with the 2009 Desist and Refrain Order. Resident would not have purchased the investment contract had he known respondent was subject to the 2009 Desist and Refrain Order.

8. Respondent's testimony was evasive, inconsistent and not credible. Respondent testified that resident loaned her the \$25,000 because respondent was in financial distress. Subsequently, respondent testified that resident gave her the \$25,000 for safekeeping because resident did not want his wife to have access to the money. Respondent did not explain the discrepancies between those two statements. Respondent testified that she holds degrees in accounting and business administration, had taught accounting and business courses at local colleges, and had provided resident with consulting services for his finances. Notwithstanding such education and experience, respondent denied, in her testimony, knowing what "mutual funds" were.

LEGAL CONCLUSIONS

1. Cause exists to find that respondent's offer and sale of an investment contract to resident violated section 25110,² which prohibits the offer and sale of unqualified and non-exempt securities in California. (Factual Findings 3 through 6.) A security includes an investment contract. (§ 25019.³) An "investment contract" has been defined, for the purposes of securities laws, as: "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 [citations omitted]. . . . '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 he is relatively uninformed and unskilled and then turns over his money to others, essentially*

² 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 . . . or unless such security or transaction is exempted."

³ Section 25019 defines "security" as including "investment contract."

depending upon their representations and their honesty and skill in managing it, the transaction is an investment contract.” *People v. Park* (1978) 87 Cal.App.3d 550, 563, (quoting *Securities & Exch. Com’n v. Glenn W. Turner Enter., Inc.* (D.Ore. 1972) 348 F.Supp. 766, 775; emphasis added by *Park* court). An “offer” includes “every attempt or offer to dispose of, or solicitation of an offer to buy, a security . . . for value.” (§ 25017, subd. (b).) A “sale” or “sell” includes “every contract of sale of, contract to sell, or disposition of, a security . . . for value.” (§ 25017, subd. (a).) The contract, transaction or scheme that resident bought from respondent was an investment contract that respondent offered and sold to resident. (Factual Findings 3 through 6.) The investment contract was a security that was not qualified with the department. (Factual Finding 6.) The burden of proving that a security or transaction is exempt rests with the person claiming the exemption. (§ 25163.) Respondent did not present any evidence that the investment contract she offered and sold to resident fell within any exemption. (Factual Finding 6.)

2. Cause exists to find that respondent’s offer and sale of an investment contract to resident without disclosing to resident that she had been named in and was served with the 2009 Desist and Refrain Order violated section 25401,⁴ which prohibits the offer and or sale of securities in California by means of written or oral communications that omit material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. (Factual Findings 3 through 7 and Legal Conclusion 1.) “[A] fact is material if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision.” (*Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1986) 184 Cal.App.3d 1520, 1526.” *People v. Butler* (2012) 212 Cal.App.4th 404, 421. (Factual Findings 3 through 7 and Legal Conclusion 1.) Respondent’s failure to disclose to resident the existence of the 2009 Desist and Refrain Order before offering and selling the investment contract to resident was the omission of a material fact necessary in order to make the statements she made to resident about the investment contract, in light of the circumstances under which such statements were made, not misleading. (Factual Findings 3 through 7 and Legal Conclusion 1.)

3. Cause exists to find that administrative penalties should be imposed on respondent for willful violations of sections 25110 and 25401 pursuant to section 25252.⁵

⁴ Section 25401 provides in pertinent part:

“It is unlawful for any person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to do any of the following:

[¶] ... [¶]

“(b) Make an untrue statement of material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading.”

⁵ Section 25252 provides in pertinent part:

“Willfulness” has been defined as “‘guilty knowledge,’ not just intent to do the proscribed act.” *People v. Butler* (2012) 212 Cal.App.4th 404, 416 (citing *People v. Salas* (2006) 37 Cal.4th 967, 975-981). Respondent knew of the 2009 Desist and Refrain Order but offered and sold the investment contract to resident anyway, thereby committing a willful violation of section 25110. (Factual Findings 3 through 6 and Legal Conclusion 1.) In the course of offering and selling the investment contract to resident, respondent did not tell resident of the existence of the 2009 Desist and Refrain Order that had been served on her and was binding on her at the time, thereby committing a willful violation of section 25401. (Factual Findings 3 through 7 and Legal Conclusions 1 and 2.)

4. Cause exists to find that ancillary relief on behalf of resident should be imposed on respondent pursuant to section 25254,⁶ subdivision (a). It is in the public interest to include ancillary relief for restitution on behalf of resident who was injured by respondent’s acts, in violation of sections 25110 and 25401, as respondent has not repaid resident’s \$25,000 investment or otherwise honored the terms of the investment contract. (Factual Findings 3 through 7 and Legal Conclusions 1 and 2.)

“The commissioner may, after appropriate notice and opportunity for hearing, by orders, levy administrative penalties as follows:

“(a) Any person subject to this division, other than a broker-dealer or investment adviser, who willfully violates any provision of this division, or who willfully violates any rule or order adopted or issued pursuant to this division, is liable for administrative penalties of not more than one thousand dollars (\$1,000) for the first violation, and not more than two thousand five hundred dollars (\$2,500) for each subsequent violation.”

⁶ Section 25254 provides in pertinent part as follows:

“(a) If the commissioner determines it is in the public interest, the commissioner may include in any administrative action brought under this part a claim for ancillary relief, including, but not limited to, a claim for restitution or disgorgement or damages on behalf of the persons injured by the act or practice constituting the subject matter of the action, and the administrative law judge shall have jurisdiction to award additional relief.

“(b) In an administrative action brought under this part, the commissioner is entitled to recover costs, which in the discretion of the administrative law judge may include an amount representing reasonable attorney’s fees and investigative expenses for the services rendered, for deposit into the State Corporations Fund for the use of the Department of Corporations.”

5. Cause does not exist to award to the department a recovery of costs or attorney's fees and investigative expenses for the services rendered by the department pursuant to section 25254, subdivision (b), as no evidence was proffered to establish the costs or attorney's fees incurred by the department.

6. Cause exists to issue a Desist and Refrain Order against respondent pursuant to section 25532⁷ to desist and refrain from the further offer or sale in the State of California of securities, including but not limited to investment contracts, unless and until qualification has been made under the law of California or unless exempt. (Factual Findings 3 through 6 and Legal Conclusion 1.)

7. Cause exists to affirm the Desist and Refrain Order issued against respondent in the Statement signed by complainant on August 14, 2013 pursuant to section 25532 to desist and refrain from offering and selling securities, including but not limited to investment contracts, 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. (Factual Findings 3 through 7 and Legal Conclusions 1 and 2.)

ORDER

1. Respondent Zenaida C. Spradlin is ordered to pay to the department the total sum of \$2,000, as administrative penalties pursuant to section 25252, consisting of \$1,000 for a willful violation of section 25110, and \$1,000 for a willful violation of section 25401.

2. Respondent Zenaida C. Spradlin is ordered, pursuant to section 25254, to pay resident, within 30 days of the date the department's decision in this matter is final, full restitution of resident's investment principal in the amount of \$25,000 and the legal rate of 10 percent simple interest per year from December 11, 2011 to the date of payment in full.

⁷ Section 25532 provides in pertinent part as follows:

“(a) If, in the opinion of the commissioner, (1) 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 the further offer or sale of the security until qualification has been made under this law.

[¶] . . . [¶]

“(c) If, in the opinion of the commissioner, a person has violated or is violating Section 25401, the commissioner may order that person to desist and refrain from the violation.”

3. The department is denied its request for recovery of attorney's fees and costs for this proceeding.

4. The Desist and Refrain Order, signed on August 14, 2013, issued against Zenaida C. Spradlin, is affirmed.

DATED: February 24, 2014

FELIX W. LOYA
Administrative Law Judge
Office of Administrative Hearings

ERRATA SHEET

(Changes to Proposed Decision – Zenaida C. Spradlin)

- 1) On page 1 of the Proposed Decision, paragraph 1 of the Factual Findings, lines 1 and 2, delete “Jan Lynn Owen (complainant), in her official capacity as the Commissioner of Business Oversight of the State of California” and insert “Mary Ann Smith, Deputy Commissioner for the department”.
- 2) On page 1 of the Proposed Decision, paragraph 1 of the Factual Findings, line 5, after “(the Statement)” insert “, on behalf of Jan Lynn Owen (complainant), in her official capacity as the Commissioner of Business Oversight, Department of Business Oversight, State of California”.
- 3) On page 4 of the Proposed Decision, paragraph 2 of the Legal Conclusions, lines 10 and 11, delete “(Factual Findings 3 through 7 and Legal Conclusion 1.)”.
- 4) On page 6 of the Proposed Decision, paragraph 7 of the Legal Conclusions, line 2, delete “by complainant”.