BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

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| In the Matter of:<br><br>THE COMMISSIONER OF CORPORATIONS[1]<br>OF THE STATE OF CALIFORNIA<br><br>Complainant<br><br>vs.<br><br>ROBYN LEE, JAMES M. CLARK, and<br>WESTERN AMERICA EQUITIES LLC<br><br>Respondents. | OAH No.: 2013120577 |

DECISION

The attached Corrected Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated September 26, 2014, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter.

This Decision shall become effective on **December 26, 2014** .

IT IS SO ORDERED this **26th** day of **November, 2014** .

COMMISSIONER OF BUSINESS OVERSIGHT

***/s/***
Jan Lynn Owen

[1] The Department of Corporations has since become the Department of Business Oversight.

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**CORRECTED PROPOSED DECISION**

Administrative Law Judge Mary-Margaret Anderson, Office of Administrative Hearings, State of California, heard this matter on March 13, and June 18, 2014, in Oakland, California.

Joyce Tsai, Senior Corporations Counsel, represented Complainant Jan Lynn Owen, Commissioner of Business Oversight.

David S. Wakukawa, Attorney at Law, represented Respondent Robyn Lee, who was not present on March 13, but was present on June 18.

Respondent James M. Clark, President, Western America Equities LLC, represented himself and Western America Equities LLC on March 13. Prior to June 18, the matter was settled by Complainant, Clark, and Western America Equities LLC, and the hearing proceeded against Respondent Lee only.

[1] The Department of Corporations has since changed its name to the Department of Business Oversight.

The parties requested to file written closing argument. The briefs were timely filed and marked for the record as follows: Complainant's Closing Brief, Exhibit 7; Respondent Lee's Closing Brief, Exhibit R; and Complainant's Reply Brief, Exhibit 8.

On July 31, 2014, Respondent Lee filed a Motion for Leave to File Sur-Reply or, in the alternative, to Strike New Argument in Complainant's Reply Brief. Also on July 31, 2014, Complainant filed an Opposition. The motion is denied, and neither filing was considered in the issuance of this Proposed Decision.

The record closed on July 28, 2014.

## FACTUAL FINDINGS

1. Complainant Jan Lynn Owen is the Commissioner of Business Oversight. On October 13, 2013, she issued an order to Robyn Lee and to James M. Clark, President, Western America Equities LLC, to desist and refrain from the further offer or sale in the State of California of securities, including but not limited to tenancy in common interests, unless and until qualification has been made under the law or unless exempt.

Respondents Lee, Clark, and Western America Equities LLC, appealed. Prior to the second day of hearing, Complainant and Respondents Clark and Western America Equities LLC, agreed to a settlement, and Respondents Clark and Western America Equities LLC withdrew their appeals of the Desist and Refrain Order. The settlement provided that the Desist and Refrain Order would remain in effect against Respondents Clark and Western America Equities LLC. The hearing continued as to Respondent Lee only.

2. The standard of proof applied in making the factual findings is preponderance of the evidence. The burden of proof is with Complainant, except as concerns assertions that the offer and sale of securities was exempt from qualification. As to the existence of such an exemption, Corporations Code section 25163 places the burden of proof on Respondent.

3. At all relevant times, Respondent Robyn Lee (Respondent) was a registered representative of Independent Financial Group, LLC. Her place of business was 1777 Borel Place, Suite 415, San Mateo, California.

4. Western America Equities LLC (Western America) is a limited liability company that was organized under the laws of the state of Washington on September 2, 2013. Its principal place of business was 11235 S.E. 6th Street, Suite 230, Bellevue, Washington. At all relevant times, James M. Clark (Clark) was the president of Western America.

5. Western America is the manager of WA Gilbert Acquisitions, LLC. WA Gilbert Acquisitions, LLC was the issuer of tenancy in common interests in Gilbert Commerce Center, a multi-tenant office park in Gilbert, Arizona.

6. Beginning in 2008 or earlier, Respondent, Clark, and Western America offered and sold securities in the form of tenancy in common (TIC) interests issued by WA Gilbert Acquisitions, LLC (Gilbert securities). They were offered or sold in California in issuer transactions.

7. The Department of Business Oversight has not issued a permit or other form of qualification authorizing Respondent or Clark to offer and sell the Gilbert securities in California. Thus, it is Respondent's burden to show that any sale of Gilbert securities was exempt from qualification. (Gov. Code, § 25163.)

*Investor Syed Nasser*

8. Syed Nasser is a retired engineer living in Castro Valley. He has owned real property in other states for investment purposes. In 2005, Nasser purchased a TIC interest in real property (DBSI) via a 1031 exchange through broker Kenneth Graham. Graham was at the time a broker with Net Equities, an affiliate of Berthel, Fisher & Company. Respondent worked at Net Equities at the same time.

9. In early 2007, Graham and Respondent switched their registrations as brokers to Independent Financial Group, LLC. Respondent asserts that Graham then left that employment, and that his clients were assigned to her.[2] In connection with the assignment, Respondent reviewed various documents. In 2006 or 2007, Respondent reviewed an account suitability form and other documents concerning Nasser as an investor and in connection with his purchase through Graham of the DBSI investment. The forms describe Nasser as having a net worth of between one million and $4,999,999, and to have 20 years of investment experience in stocks, bonds, and mutual funds. Nasser does not recall whether he filled out the forms himself, but acknowledges that he signed them on November 27, 2005.

10. It was not established in the record who initiated the first contact between Nasser and Respondent, but Respondent believes she reviewed his file in connection with a conversation wherein Nasser expressed interest in purchasing a second TIC interest. Nasser had sold property in North Carolina, and wished to again invest the proceeds via a 1031 exchange. Respondent recalls providing "a lot" of information to Nasser about the Gilbert investment. She believes that he is very intelligent. He was "foreign born," however, and had many questions, including very technical ones. He was provided with a prospectus describing the Gilbert securities, along with other information. Nasser signed various forms. Some of them described it as a private placement, and Nasser signed under the statement "I have not been solicited to make this investment by any advertisement."

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[2] It is not clear when or even if, Graham left the employ of Independent Financial Group. A BrokerCheck report from the FINRA website obtained on January 8, 2014, lists Graham as registered with the company until May 2010, but employed by them "to the present."

11. One of the forms that Nasser signed and gave to Respondent is an Account Application and Agreement on Independent Financial Group letterhead. Nasser's total assets are listed on the form as $1,250,000, and his total liabilities are $422,000. Nasser acknowledged signing the form, and the date next to his signature is February 8, 2008. When Respondent received the form, she was concerned because the Gilbert securities were for accredited investors only; that is, investors with a net worth of over $1 million. She contacted Nasser, and asked him to complete another form "and to really be detailed in it."

12. Nasser subsequently signed another financial statement form. The market value of his house was described as $800,000, as opposed to $500,000. This resulted in a net worth of over one million dollars, which qualified him as an accredited investor. The form reflects the same signature date of February 8, 2008. Nasser claimed that he did not fill out the form, but admitted that he signed it. At Respondent's request, Nasser followed the submission of that form with copies of statements that verify the assets he identified in his financial statements. Respondent testified that she asked for the back-up documents because Nasser did not qualify based on his income; he qualified based on the market value of his home. Respondent had no reason to disbelieve any of the information provided to her by Nasser.

13. In 2007, Respondent invited a list of clients of the firm, including Nasser, to an "Advanced Seminar." The invitees were clients who had previously invested in TIC interests, had attended at least two prior seminars, and were known to be accredited investors. The record does not reveal whether Nasser attended the 2007 seminar.

14. The evidence established that Respondent met with Nasser and his wife on two occasions in their home.

*Other investors*

15. Clark testified that he engaged five broker-dealers to market the Gilbert securities and that ultimately there were a total of 18 investors. He asserted that they all qualified as accredited investors, and his testimony was corroborated by documents describing each investor's financial information. No evidence to the contrary was presented.

## LEGAL CONCLUSIONS

### UNLAWFUL SALE OF SECURITIES

1. It is unlawful in California for any person to offer or sell any security in an issuer transaction unless such sale has been qualified or unless the transaction is exempt. (Corp. Code, § 25110.) California law defines the term "security" broadly. It means "any note; stock; treasury stock; membership in an incorporated or unincorporated association; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or

subscription; transferable share; investment contract; . . . or, in general, any interest or instrument commonly known as a 'security' . . . ." (Corp. Code, § 25019.) The purpose of such a broad definition is "to protect the public against spurious schemes, however ingeniously devised, to attract risk capital." (*Silver Hills Country Club v. Sobieski* (1961) 55 Cal.2d 811, 814.)

2. Respondent solicited capital in exchange for TIC interests in real property by acting as the broker for the Gilbert securities. This constituted the offer and sale of a security and Respondent acknowledges that the sale was not qualified. Respondent contends that the sale was exempt from qualification under Regulation D, Rule 506, of the federal securities law (17 C.F.R. § 230.506), commonly referred to as Rule 506. California law recognizes the Rule 506 exemption. (Corp. Code, § 25102.1) Respondent, however, bears the burden to prove that the Gilbert offering was exempt. (Corp. Code, § 25163.) In order to prove this contention, Respondent must prove that the sale met all of the criteria for exemption.

3. Rule 506 contains many detailed criteria. Complainant alleges that Respondent has failed to satisfy two of the requirements. One requirement is that the security not be sold using a general solicitation. The second is based upon Complainant's conclusion that Nasser was not an accredited investor. There are criteria required where investors are unaccredited, that Complainant asserts Respondent has not demonstrated.

4. The evidence, however, demonstrated that Nasser was an accredited investor. Respondent gathered information from Nasser that she reasonably relied on to show that his net worth was in excess of $1 million. Nasser signed a financial statement attesting to this and supplied Respondent, when requested, financial information to corroborate his representations.

5. Respondent did not prove, however, that the solicitation was not a general solicitation. It is not sufficient to establish that the issuer did not purchase and distribute advertisements to the general public. The Rule 506 exemption applies to limited offers or sales where there was a prior relationship between the issuer or its agents and the purchaser; otherwise, the offer is a general solicitation. The relationship can be between a broker and client, if the prior relationship is sufficiently close.

The requirements set forth in Corporations Code section 25102, subdivision (f)(2), parallel the federal rule. As described by the court in *People v. Simon* (1995) 9 Cal.4th 493, 502, fn. 8, "[T]he relationship must be one of sufficient duration and nature that the offeror of a security has reason to believe the investor is able to assess the issuer's honesty and competence." The test is an objective one, "intended to protect investors by placing on the offeror the burden of establishing that the nature and duration of the relationship is one that would enable a reasonably prudent investor to assess the general business and financial circumstances of the issuer." (*Ibid*.)

Respondent did not establish that she had such a relationship with Nasser. He was a client of another broker in her firm; she inherited him. The record was scant on the first time

they met or even spoke on the telephone. She met with him two times at his home, and gathered information from him. She answered questions that he had, and formed an opinion that he was bright, albeit "foreign born." That was the extent of their relationship.

6. Respondent contends that a "good faith exception" exists and applies to Respondent. No authority was provided that such applies here. It is concluded that Respondents sold unqualified, non-exempt securities in violation of Corporations Code section 25110.

DESIST AND REFRAIN

7. The evidence established that cause exists to affirm the Commissioner's Desist and Refrain Order against Respondent Robyn Lee.

ATTORNEY'S FEES REQUEST

8. Respondent requests an order that Complainant pay her attorney's fees. The authority cited is Government Code section 11455.30, subdivision (a), and accompanying regulations. That section provides for monetary sanctions where fees are incurred "as a result of bad faith actions or tactics that are frivolous." Respondent has not demonstrated bad faith or frivolous tactics. Surprisingly, as grounds, Respondent includes the fact that there were two days of hearing, when one should have sufficed. But a major reason for the second hearing day was that Respondent chose not to attend the first day and that her counsel appeared unprepared. A second day was scheduled to ensure that Respondent received her due process rights. She also asserts surprise about legal positions taken by Complainant, for example, that Respondent bears the burden of proving an exemption. Respondent's ignorance of this straightforward and easily found legal requirement is not grounds for an attorney's fee order. Respondent's request for an order that Complainant pay attorney's fees is denied.

ORDER

The Order to Desist and Refrain, issued by the Commissioner of Corporations on October 23, 2013,[3] is affirmed, and shall remain in effect as to all parties.

DATED: September 26, 2014

_____/s/_____
MARY-MARGARET ANDERSON
Administrative Law Judge
Office of Administrative Hearings

[3] The Order is incorporated in full herein by this reference.

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| In the Matter of:<br><br>THE COMMISSIONER OF CORPORATIONS[1]<br>OF THE STATE OF CALIFORNIA<br>Complainant,<br><br>v.<br><br>ROBYN LEE,<br>JAMES M. CLARK, and<br>WESTERN AMERICA EQUITIES LLC<br>Respondents. | OAH No.: 2013120577<br><br>STAY OF EXPIRATION OF TIME TO ORDER RECONSIDERATION AND EFFECTIVE DATE OF DECISION |

In accordance with Government Code Section 11521, a stay of the expiration of the time period to order reconsideration, and the effective date of the decision in the above-entitled matter, is hereby granted for 10 days. The stay is granted to provide additional time to evaluate a petition for reconsideration submitted by Respondent Robyn Lee and received by the Department of Business Oversight on December 18, 2014, for the purpose of considering the petition. The stay shall expire on midnight of January 4, 2015, and the Commissioner's Decision in the above-entitled matter shall become effective on January 5, 2015, unless reconsideration is granted prior to the expiration of the stay.

DEPARTMENT OF BUSINESS OVERSIGHT

Dated: December 24, 2014

/s/
COLLEEN MONAHAN
Senior Counsel

[1] Operative July 1, 2013, the office of the Commissioner of Corporations was abolished and all powers, duties, responsibilities and functions transferred to the Commissioner of Business Oversight.

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ORDER TO DENY PETITION FOR RECONSIDERATION
(Gov. Code, § 11521(a))

The Commissioner of Business Oversight hereby denies the Petition for Reconsideration In the Matter of THE COMMISSIONER OF CORPORATIONS OF THE STATE OF CALIFORNIA vs. ROBYN LEE, JAMES M. CLARK, and WESTERN AMERICA EQUITIES LLC under the provisions of Government Code section 11521(a). In accordance with the STAY OF EXPIRATION OF TIME TO ORDER RECONSIDERATION AND EFFECTIVE DATE OF DECISION, the Commissioner's Decision in the above-entitled matter shall become effective on January 5, 2015.

Dated: January 2, 2015
Sacramento, California

**/s/**
JAN LYNN OWEN
COMMISSIONER OF BUSINESS OVERSIGHT

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