

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of:

THE COMMISSIONER OF BUSINESS
OVERSIGHT,

Complainant,

v.

SAMIR NASHED ABADIR, AAA
DEVELOPMENT, INC., AAA DEVELOPMENT
TEAM, AAA REALTY & MORTGAGE TEAM,
AAA MORTGAGE TEAM, AAA EXPRESS
FUNDING, INC., SO CAL REALTY, SOUTHERN
CALIFORNI REALTY & MORTGAGE,

Respondents.

OAH No. 2017040198

In the Matter of:

THE COMMISSIONER OF BUSINESS
OVERSIGHT,

Complainant,

v.

CHRISTIAN SAMIR ABADIR,

Respondent.


OAH No. 2017051821

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated December 28, 2017, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter.

This Decision shall become effective on April 5, 2018.

IT IS SO ORDERED this 6th day of March, 2018.


JAN LYNN OWEN
Commissioner of Business Oversight

ERRATA SHEET

(Changes to Proposed Decision –Abadir, Samir Nashed, et al.)

- 1) On page 4 of the Proposed Decision, Paragraph Number 1 of the Factual Findings, line 3, delete “2500” and insert instead “25000”.
- 2) On page 9 of the Proposed Decision, Paragraph Number 22 of the Factual Findings, lines 5 and 8, delete “AAA Team Development” and insert instead “AAA Development Team”.
- 3) On page 20 of the Proposed Decision, Paragraph Number 15 of the Factual Findings, line 3, delete “Securities Act” and insert instead “Corporate Securities Law”.

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PROPOSED DECISION

Administrative Law Judge (ALJ) Cindy F. Forman of the Office of Administrative Hearings (OAH) heard this matter on September 18, 2017, in Los Angeles, California.

Vanessa T. Lu, Counsel, and Alex M. Calero, Senior Counsel, Department of Business Oversight (Department), represented Jan Lynn Owen, the Commissioner of Business Oversight (Commissioner).

Respondent Samir Nashed Abadir (Samir) represented himself.

Respondent Christian Samir Abadir (Christian) represented himself as well as respondents So Cal Realty and Southern California Realty & Mortgage (collectively, So Cal Realty).

No appearances were made on behalf of respondents AAA Development, Inc., AAA Development Team, AAA Realty & Mortgage Team, AAA Mortgage Team, and AAA Express Funding, Inc.

Procedural Matters

Prior to the hearing, the Commissioner filed an Opening Brief, which the ALJ marked as Exhibit 7 at the hearing.

Oral and documentary evidence was received at the hearing. The Commissioner also presented Complainant's Request for Official Notice (marked as Exhibit 24), requesting under Government Code section 11515, Evidence Code section 452, subdivisions (c), (d), (h), and Evidence Code section 453 that the ALJ take official notice of exhibits 8, 9, 10, 11, 12, 13, and 14. The request was granted, and official notice was taken of those exhibits.

The ALJ held the record open until September 22, 2017, to allow Samir to file documents relating to certain hearing testimony, including documents reflecting certain civil proceedings in the Superior Court of California, Riverside County. The ALJ also held the record open until November 17, 2017, to allow the parties to submit closing briefs. Samir did not submit any documents on or before the September 22, 2017 deadline.

On September 25, 2017, the Commissioner requested the ALJ to take official notice of two documents, neither of which had been submitted or referred to at the hearing: (1) the Third Amended Information, filed in the matter of *The People of the State of California v. Christian Samir Abadir*, case number RIF143161, and (2) a certified copy of an amended felony abstract of judgement and case print (felony abstract documents) prepared in connection with the same matter. Samir and Christian each filed objections to the Commissioner's request based on relevance, timeliness, and prejudice. In an order dated October 6, 2017, the ALJ denied the Commissioner's request to take official notice of the Third Amended Information but granted the Commissioner's request to take official notice of

the felony abstract documents, which were marked as Exhibit 21. The October 6 Order also directed respondents to submit any evidence refuting or relating to Exhibit 21 by October 23, 2017, and extended the time for the parties to submit closing briefs until December 1, 2017.

On October 17, 2017, Samir filed and served the following three documents, which he described as “evidence to corroborate testimony”: (1) the first page of a Standard Multi-Tenant Office Lease, dated December 23, 2008, stating that So Cal Realty was the lessee’s broker and Samir was the guarantor; (2) a copy of an email dated August 2, 2005, from Karen Henderson of AAA Realty & Mortgage to an individual with an email address of ben3r@aol.com; and (3) three pages of emails dated between March 28, 2010, and March 30, 2010, regarding a third party loan pre-qualification. None of the three documents addressed Exhibit 21. The Commissioner objected to the admission of the documents into evidence on the grounds of timeliness, relevance, lack of foundation and authentication, and hearsay. The Commissioner’s objections are sustained. The documents were filed almost a month after they were ordered to be filed with OAH, and Samir failed to provide any explanation for his delay. The documents therefore have not been admitted into evidence and are not considered in this Proposed Decision.

The Commissioner timely filed her initial closing brief, marked as Exhibit 22. In her brief, the Commissioner withdrew her request to uphold the Desist and Refrain Order, which is the basis of this proceeding, against respondents AAA Mortgage Team, AAA Realty & Mortgage Team, and AAA Express Funding, Inc.

Christian and Samir each timely filed their closing briefs, marked as Exhibits G and H, respectively. The Commissioner timely filed her rebuttal closing brief, marked as Exhibit 23. The record was closed and the matter deemed submitted for decision on December 1, 2017.

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FACTUAL FINDINGS

1. The Commissioner, in her official capacity, issued a Desist and Refrain Order (Order) on August 19, 2016, finding that respondents had violated the Corporate Securities Law of 1968 (Securities Law), Corporations Code¹ section 2500 et seq.

2. On October 14, 2016, Samir timely requested a hearing and waived his right to have the matter heard within 15 business days, pursuant to section 25532, subdivision (f). On April 6, 2017, Christian joined Samir's request for a hearing.² None of the other respondents requested a hearing in response to the Order.³

3. The Order stems from a 2016 complaint by S.B.N.⁴ regarding two payments totaling \$400,000 he made in the summer of 2005 in connection with a real estate development opportunity to build a 30 to 40 unit housing development in Murrieta, California (Murrieta project). According to the Commissioner, S.B.N. was one of many investors Appearing Respondents had solicited to invest in the project. In exchange for his payments, S.B.N. received two promissory notes (collectively, Notes) from Samir, the terms of which were amended and extended in a third promissory note (Extension) but never fully

¹ Unless otherwise stated, all further statutory references are to the Corporations Code.

² After Samir filed his request for a hearing, OAH assigned case number 2017040198 to the matter, naming Samir and the other individuals and entities identified in the Order, including Christian, as respondents. When Christian submitted his own hearing request, OAH created a separate matter, case number 2017051821, in which Christian was named as the only respondent. The two matters were consolidated for hearing purposes on August 11, 2017, in response to a motion filed by the Commissioner. At the hearing, however, Christian appeared not only on behalf of himself but also as the sole proprietor of respondents So Cal Realty and Southern California Realty & Mortgage, both of which were named in case number 2017040198. All briefing by the Department since the hearing has been consolidated under case number 2017040198. Accordingly, in the interests of efficiency and economy, the Proposed Decision applies to and will be filed in both cases.

³ Under section 25532, subdivision (f), the Order is deemed final and not subject to review by any court or agency with respect to those respondents who failed to file a written request for a hearing within 30 days from the date of service of the Order. Thus, although the Commissioner requested in her closing briefs that the ALJ uphold the Order against respondents Samir, Christian, AAA Development Inc., AAA Development Team, Inc., So Cal Realty and Southern California Realty & Mortgage, the Proposed Decision addresses the enforceability of the Order against only those respondents who appeared at the hearing, i.e., Samir, Christian, So Cal Realty and Southern California Realty & Mortgage (Appearing Respondents).

⁴ Initials are used to protect the privacy of the complaining party.

realized. The Order alleged the Notes and Extension provided to S.B.N. and other Murrieta project investors constituted securities, which respondents were not qualified or authorized by the State to either offer or sell. The Order also alleged that respondents made false and misleading representations and omissions regarding the nature and safety Murrieta project investment opportunity. Based on the Commissioner's findings, respondents were directed to cease their activities.

4. None of the respondents were qualified or authorized to offer or to sell any securities in connection with the Murrieta project.

5. Appearing Respondents disputed the factual allegations underlying the Order. Samir asserted that the Notes and Extension were not securities but unsecured personal loans. Appearing Respondents also asserted that they did not make any materially misleading misrepresentations or omissions in connection with the sale or issuance of the Notes or Extension.

The Parties to the Transactions at Issue

6. Samir has held a California real estate broker license for more than 15 years; his real estate salesperson license was issued more than 25 years ago. He also possesses a mortgage loan originator endorsement. In 2002, Samir had more than 10 real estate and mortgage loan offices through Orange and San Diego Counties. In the past, he has held a California insurance license and several other licenses to sell investments to the public. None of Samir's licenses have ever been disciplined.

7. During the summer of 2005, when the subject transactions are alleged to have occurred, Samir considered himself to be Chief Executive Officer (CEO) of respondent AAA Development Team, a California corporation located in Temecula, California. AAA Development Team was the corporate entity responsible for developing and selling the Murrieta project.

8. On December 6, 1996, Samir filed for bankruptcy under Chapter 7 in United States District Court, Central District of California, case no 96-16761. The bankruptcy was discharged on March 2, 1997. (Exh. 8 at DBO0089.) No evidence was introduced regarding the circumstances relating to the 1996 bankruptcy.

9. Christian is Samir's son. During the relevant time period, Christian was a California-licensed real estate broker and sole proprietor of respondents So Cal Realty and Southern California Realty & Mortgage. Both entities ceased conducting business as of December 31, 2008. Christian no longer holds a real estate broker's license; he currently earns his living remodeling homes.

10. On August 27, 2014, a jury in Superior Court of California, County of Riverside, case number A25129881, found Christian guilty of committing two felonies, Penal Code section 451, subdivision (b) (arson of an inhabited structure), and section 550,

subdivision (a) (insurance fraud), and two misdemeanors, section 453, subdivision (a) (possession of an incendiary device), and section 148, subdivision (a) (obstruction of a peace officer), based on incidents occurring on March 31, and April 1, 2008. (Exh. 21.) The circumstances of Christian's arrest or criminal conviction were not made known at the hearing.

11. During the relevant time period, S.B.N. was a mechanical engineer employed by the Los Angeles Department of Water and Power; he was not an accredited investor. He owned at least two homes, both of which were located in Corona, California. Prior to the summer of 2005, S.B.N. did not have any relationship, business or otherwise, with any of the respondents. S.B.N. became a licensed real estate salesperson in July of 2006.

The Notes and Extension

12. The author of the Notes and Extension that form the basis of the Order was not established by the evidence. S.B.N. and Appearing Respondents each denied preparing the documents.

13. The Notes and Extension contained similar language. The first note, entitled "Promissory Note" (Note 1), was executed on July 8, 2005, and stated, in relevant part, as follows⁵:

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to [S.B.N.] the principal sum of *Three Hundred and Fifty Thousand Dollars (\$350,000)* at the rate of a *Forty Percent (40%) total return*, both principal and interest amounting to *Four Hundred and Ninety Thousand Dollars (\$490,000)* and payable in lawful money in the United States of America.... The principal and interest shall be due and payable as follows:

The principal and interest amounting to Four Hundred and Ninety Thousand Dollars (\$490,000) shall be returned to [S.B.N.] on the date of the completion of the Single Family Residence Community on Los Alamos Way in Murrieta, California, and being developed, constructed and marketed by Samir Abadir, an individual and the Chief Executive Officer for AAA Development Team, Inc.

⁵ Italics and underscoring appear in the original.

If not sooner paid, meaning that the Development for the Community situated on Los Alamos Way is not completed, the entire remaining indebtedness shall be due and payable in full on:

No later than two years from the date of the execution of this note.

Additionally, the following provision shall apply:

Samir Abadir shall be solely and wholly responsible for the entire monthly sum of the Interest Only mortgage payment, for the Single Family Residence situated on 7436 Four Winds Court and located in Corona, California, amounting to One Thousand Five Hundred and Twelve U.S. dollars and ninety-five cents (\$1,512.95). This responsibility shall cease when Samir Abadir returns the principal and interest amounting to Four Hundred and Ninety Thousand U.S. Dollars to [S.B.N]., no later than two years from the execution of this Promissory Note.

[¶] ... [¶]

This Note is irrevocably given and secured by Samir Abadir, an individual and Chief Executive Officer of AAA Development Team Inc. The principal amount of Three Hundred and Fifty Thousand U.S. Dollars is irrevocably loaned and made payable to Samir Abadir by [S.B.N.], an individual and silent investor.

(Exh. 15.)

14. The signature box of Note 1 identified Samir as CEO of respondent AAA Development, Inc., and S.B.N. as "Silent Investor." No corporate records were provided at the hearing evidencing that Samir was CEO of AAA Development, Inc. at the time of the execution of Note 1. The corporate records supplied by the Department indicate that AAA Development, Inc. is a California corporation located in Camarillo, California; the records do not identify Samir as the CEO or as any other officer. (Exh. 10.) AAA Development, Inc. also appears to have no relationship to respondent AAA Development Team, referenced in the contents of Note 1. (Exh. 10.) While the corporate documents reflect that Samir was an officer of AAA Development Team in the summer of 2005, it was not established that he was its CEO or had any authority to bind the company at the time.⁶

⁶ Respondent AAA Development Team was a California corporation formed on February 10, 2004. (Exh. 12.) As of January 2005, Samir and three other individuals owned equal shares in AAA Development Team. (Exh. 11 at DBO0175.) On May 18, 2005, two of the shareholders (Nader Ibrahim and Nagui Ibrahim) filed a Certificate of Amendment of Articles of Incorporation naming them as President and Secretary of the company

15. On August 16, 2005, Samir and S.B.N. executed a second promissory note also entitled "Promissory Note" (Note 2) on essentially the same terms as Note 1. (Exh. 16.) As in Note 1, the principal and interest at 40 percent were to be paid back in full either on the date of the completion of the Murrieta project or no later than two years from the date of execution of Note 2, whichever occurred first. Samir also agreed to pay, in the interim, another \$373.75 per month of the mortgage interest for the same residence noted in Note 1, i.e., the 7436 Four Winds Court, Corona residence (Corona residence). Samir and S.B.N. executed Note 2 in the same capacities as they had executed Note 1.⁷

16. S.B.N., in exchange for the Notes, made two separate payments of \$350,000 and \$50,000 that were deposited into a bank account held by respondent AAA Development Team. The purpose of the funds was not established; Samir and S.B.N. offered conflicting and uncorroborated testimony as to how the funds were used.

17. The Notes and Extension did not provide S.B.N. with any ownership interest in the Murrieta project. Nor did the Notes and Extension afford S.B.N. any opportunity to control, manage, or participate in any decisions relating to the Murrieta project. S.B.N. did not play any active role in the development or sale of the Murrieta project.

18. Samir paid the mortgage interest on the Corona residence, as required by the terms of the Notes, for one year. In the summer of 2007, when the Notes were soon to become due, Samir notified S.B.N. he was unable to satisfy the Notes' repayment terms because of problems with the Murrieta project. As a result, on July 30, 2007, S.B.N. and Samir executed the Extension, wherein Samir agreed to repay the principal sum of \$400,000 (the combined principal amounts set forth in Notes 1 and 2) at the rate of a 20 percent annual return, for a total of \$691,200. (Exh. 17.) The money was to be paid on the date of the completion of the Murrieta project or on July 31, 2008, whichever occurred first. In the interim, Samir agreed to pay the monthly mortgage interest on the Corona residence in the amount of \$2,501 per month.

19. Samir was personally responsible for repayment of the Notes and Extension as well as for payment of S.B.N.'s mortgage interest. Samir's repayment obligations were not contingent on completion of the Murrieta project. Both S.B.N. and Samir viewed Samir's

respectively. (*Id.* at DBO0189.) Samir testified that the changes were done without his knowledge and the shareholders had forged his consent. AAA Development Team was suspended by the California Franchise Tax Board on April 2, 2012, for failure to pay taxes. (Exh. 12.)

⁷ Two copies of Note 2 were admitted into evidence; the copies were the same except for differences in Samir's signature. (Exh. 16.) No explanation was provided for the signature discrepancy. Samir did not dispute that the signatures either belonged to or were authorized by him.

obligation to pay S.B.N.'s mortgage interest while the principal and interest were outstanding to be a material condition of the Notes and Extension.

20. Neither the Notes nor Extension were secured by any collateral. No evidence was introduced at the hearing as to Samir's financial wherewithal to pay the Notes or Extension at the time they were executed. The Notes and Extension did not disclose that Samir had filed for Chapter 7 bankruptcy nine years earlier.

21. No evidence was introduced at the hearing establishing that Appearing Respondents offered financial instruments with terms similar to those provided in the Notes and Extension to any other individual or entity.

22. Sometime in 2006, Samir filed a lawsuit in the Superior Court of California, Riverside County, against the other three AAA Development Team shareholders after they forced him out of the Murrieta project. Although Samir informed S.B.N. that his \$400,000 payment might be at risk because of the litigation, S.B.N. did not intervene in the lawsuit. During the lawsuit, the court froze the AAA Team Development bank account that contained S.B.N.'s funds. Samir ultimately lost the lawsuit, his investment in the Murrieta project, and any interest in AAA Development Team. According to Samir, he therefore was unable to access S.B.N.'s funds and the funds remained in AAA Team Development's coffers.

23. Samir did not have sufficient personal funds to repay S.B.N. because of the legal fees he incurred in the litigation and other investment losses, and he defaulted on the Notes and Extension. On April 21, 2011, Samir filed for bankruptcy under Chapter 7, case no. 6:11-bk-23485-SC, listing his unsecured obligation to S.B.N. (although in the amount of \$5,000). On August 18, 2011, the United States Bankruptcy Court, Central District of California, discharged Samir's debts existing on the date of his filing, including his debt to S.B.N. (Exhs. 8 & 9.)

24. Neither Christian nor So Cal Realty had any obligations under the Notes or Extension. Nor did the evidence establish that Christian had any employment or contractual relationship with either AAA Development Team or Samir during the relevant time period. In addition, no evidence was introduced at the hearing demonstrating that Christian or So Cal Realty played any role in developing or marketing the Murrieta project or received any compensation with respect to the project.

25. Other than the first year of mortgage payments, S.B.N. never received repayment of the principal and interest as promised in the Notes. The Murrieta project was never built. There was no evidence that S.B.N. sought redress against Appearing Respondents or respondents AAA Development Team or AAA Development, Inc. in the courts or elsewhere.

Credibility and Other Evidentiary Issues

26. The evidence regarding the particulars of the negotiations leading up to the execution of the Notes and Extension was conflicting and, for the most part, unreliable. The subject events occurred more than 12 years ago,⁸ the testimony of each witness was incomplete and inconsistent, and the written corroborating evidence was ambiguous and lacking.

27(a). S.B.N. testified he contacted Christian to assist with refinancing his home mortgage after learning about the Murrieta project from a relative. According to S.B.N., during his meeting with Christian, Christian explained the details of the Murrieta project, the nature of his father's involvement, and the expected profits on any investment made by S.B.N. S.B.N. further testified that at the same meeting Christian suggested that he could refinance his home and use those funds for investment. S.B.N. recalled that Christian told him the investment was safe and that he could double his money in less than two years. Based on those representations, S.B.N. testified that he agreed to provide funds to Samir by refinancing his home. He testified that he endorsed the checks he received from the refinancing over to Samir and gave those checks to Christian. Christian, in turn, provided the Notes for him to sign.

27(b). S.B.N. pointed to handwritten notes, admitted as Exhibit 18, as support for this testimony. According to S.B.N., Christian provided the handwritten notes to him during their meeting, and S.B.N. claimed that the notes recited the terms of the investment and described the timeline of the Murrieta project. While the handwritten notes appear to describe the expected progress of the Murrieta project and contain a number of calculations, the notes do not reflect any promises or representations or understandings by the parties.

27(c). S.B.N. also testified that he did not meet Samir until July 2007, two years after the execution of the Notes, when he and Samir executed the Extension. According to S.B.N., the meeting in July 2007 was the first time he had any discussions with Samir about the Murrieta project.

⁸ Courts in California and the federal Ninth Circuit have repeatedly recognized that testimony becomes less reliable over the passage of much less than 12 years. (See, e.g., *Adams v. Roses* (1986) 183 Cal.App.3d 498, 506 [where the passage of time in issue was two years and seven months: "the memories of witnesses fade with the passage of time"]; *People v. Riegler* (1984) 159 Cal.App.3d 1061, 1068 [where the passage of time was seven years: "[w]itnesses' recollections become dimmed by the passage of time"]; *Natural Resources, Inc. v. Wineberg* (9th Cir. 1965) 349 F.2d 685, 692 [where the passage of time was four years: "the fact cannot be denied that memory tends to dim, recollection to grow faint, and impressions to vanish, with the passage of time"]; *General Acc. Fire & Life Assur. Corp. v. Prosser* (D. Alaska 1965) 239 F.Supp. 735, 739 [where the passage of time was two years: "[i]t is a matter of common knowledge that memory dims with the passage of time and that the strength of memory of an event is ordinarily in proportion to its recency"].)

27(d). S.B.N.'s testimony regarding the roles of Samir and Christian were contradicted in part by an email he wrote to the Department in February 2016. (Exh. A.) In the email, S.B.N. stated that he handed Samir, not Christian, two checks totaling \$400,000. He further stated that it was Samir who brought the check for \$350,000 to S.B.N.'s house, made S.B.N. sign the check, and said that the "\$50,000 loan was being processed separately." S.B.N. also wrote that the \$50,000 check "was given to Samir Abadir in a same manner in a parking lot somewhere in Santa Ana." (*Ibid.*) When the discrepancies between his testimony and the email were pointed out to him at the hearing, S.B.N. explained that he did not mean he literally handed the checks to Samir but that he handed them to "Samir's side," meaning he gave the Notes to Christian to give to Samir. He did not address his statement about delivering the \$50,000 check to Samir in a parking lot.

27(e). S.B.N.'s testimony was also contradicted by evidence establishing that the refinancing of S.B.N.'s property was not completed until at least one week before the execution of Note 1. (Exh. B.) Thus, the funds S.B.N. obtained from the refinancing could not have been paid in exchange for Note 1.

28(a). Christian disputed much of S.B.N.'s testimony. According to Christian, while he might have mentioned the Murrieta project to S.B.N. and his father's involvement, he did not provide any details or make any representations about the project, did not solicit S.B.N. or anyone else's involvement in the project, and was not involved in the exchange of the Notes or checks between S.B.N. and Samir. Christian also denied preparing any written notes for S.B.N., and testified that the handwritten notes S.B.N. claimed he wrote were not his. He testified that S.B.N. approached Samir directly and discussed the Murrieta project with Samir. Christian further testified that his interactions with S.B.N. were limited to assisting with the refinancing of S.B.N.'s home, and that he had no dealings with S.B.N. after the refinancing was complete.

28(b). The veracity of Christian's testimony is questionable in light of his criminal convictions for insurance fraud and arson, both crimes of moral turpitude. (See *People v. Miles* (1985) 172 Cal.App.3d 474, 482 [arson involves "an intent 'to do evil' or in other words, moral turpitude"]; *Sampson v. State Bar* (1974) 12 Cal.3d 70, 83 [insurance fraud involves "an act of dishonesty and moral turpitude"].) In addition, Christian's attempt to minimize the importance of his role in the transactions is not persuasive. Contrary to his testimony, Christian's involvement was integral to the execution of the Notes. Christian, at a minimum, provided the initial impetus for S.B.N. to contact Samir, and Christian explained to him the parameters of the contemplated transactions. Christian's denial that he did not write the handwritten notes also cannot be credited; the notes were provided by S.B.N., who testified the handwriting was not his or his wife's. No basis was provided to question S.B.N.'s assertion, and Christian was the only other active participant in the meeting regarding the Murrieta project.

29(a). Samir also disputed S.B.N.'s version of events. He testified that S.B.N. approached him because S.B.N. wanted to invest in the Murrieta project to provide

retirement income. According to Samir, S.B.N. proposed the terms of the Notes, signed the Notes and Extension at Samir's offices, and then accompanied Samir to the bank each time to deposit the checks into the AAA Development Team bank account. Samir asserted that a bank would not honor an escrow check counter-signed by a third party; therefore, S.B.N. had to be present at the bank when the checks were deposited.

29(b). Samir's testimony also had gaps and inconsistencies. He did not explain how S.B.N. learned of the Murrieta project. He also claimed that the Extension was notarized and executed in January of 2008, although the executed Extension admitted into evidence did not reflect any notary seal and stated it was signed on July 31, 2007.

30. In light of the internal inconsistencies in the testimony and the passage of time, the Commissioner did not establish that testimony of S.B.N.'s recollection of what transpired in connection with the Notes and Extension was more credible than Samir's recollection.

The Commissioner's Allegations

31. The Commissioner alleged that Appearing Respondents solicited individuals to invest in the Murrieta project. Specifically, the Commissioner alleged that Appearing Respondents met with investors to discuss the investment opportunities in the Murrieta project, Christian and So Cal Realty took investors to vacant land in Murrieta and identified the land used for the Murrieta project, and Samir and AAA Development reviewed plat maps and blueprints for the Murrieta project with investors in Temecula, California. (Order, ¶¶ 1-6.)

32(a). The Commissioner established that Christian and So Cal Realty met with S.B.N. to discuss the Murrieta project. The evidence was insufficient, however, to establish that Appearing Respondents solicited any other individuals or entities to invest in the Murrieta project. No evidence was introduced showing that Appearing Respondents created or disseminated to the public any advertising, brochures, prospectuses or written materials about the Murrieta project. Nor was any evidence introduced demonstrating that Appearing Respondents had a website or controlled a website that contained any reference to the Murrieta project. The Commissioner also did not adduce any testimony from any individual other than S.B.N. who had been allegedly solicited by Appearing Respondents to provide funds for the Murrieta project.

32(b). The Commissioner pointed to S.B.N.'s testimony that he learned about the Murrieta project and Christian's involvement from a relative and to Christian's acknowledgement that he may have mentioned the Murrieta project to others as support for her claim that Christian and So Cal Realty solicited members of the public to invest in the Murrieta project. Neither S.B.N.'s testimony nor Christian's acknowledgement supports the Commissioner's claim. S.B.N. acknowledged he was not present during any conversation between Appearing Respondents and his relative; thus it is unknown what was said during the conversation about the Murrieta project or whether the relative was a prospective investor. Likewise, Christian's acknowledgement that he may have discussed the project

with others does not establish that either the conversation was a solicitation for investment or the participants in the conversation were potential investors.

33. In the Order, the Commissioner identified six separate misrepresentations of material fact or omissions of material facts allegedly made by Appearing Respondents in connection with the offer or sale of the Notes and Extension: (1) respondents' promise that S.B.N. would receive his principal investment and interest at the end of the term of the Notes and Extension; (2) respondents' promise that S.B.N. would receive substantial profits upon the completion of the Murrieta project; (3) respondents' promise to S.B.N. that the investment opportunity was safe and did not have any risks; (4) respondents' promise that Samir would pay the monthly interest-only mortgage payment of the Corona residence; (5) respondents' promise to S.B.N. that the Notes and Extension were secured by the land beneath the Murrieta project; and (6) respondents' failure to disclose to investors that Samir filed twice for Chapter 7 bankruptcy on December 6, 1999.

34(a). The Commissioner established that Samir, by signing the Notes and the Extension, misrepresented that S.B.N. would receive his principal investment and interest at the time the Notes and Extension became due, after either completion of the Murrieta project or two years, whichever came first as set forth in the Notes, or one year later, as set forth in the Extension. Notwithstanding Samir's representation, S.B.N. never received repayment of his principal investment and interest. Samir's representation was material in convincing S.B.N. to invest in the Murrieta project.

34(b). The Commissioner did not establish that Christian or So Cal Realty misrepresented the timing of the repayment of S.B.N.'s principal and interest. The Commissioner's reliance on the testimony of S.B.N. and certain handwritten notes (Exh. 18) to support the allegation is misplaced. While Christian and S.B.N. had conversations about the investment, as noted in Factual Findings 26 and 27, S.B.N.'s recollection of what was specifically stated in his conversation with Christian was not reliable. In addition, although the notes reflect a notation of "2 years," no reliable evidence was introduced as to whether the notation reflected a promised term of repayment.

35(a). The Commissioner established that Samir, by executing the Notes and Extension, misrepresented to S.B.N. that he would receive substantial profits (i.e., interest of 40 percent) upon completion of the Murrieta project. Notwithstanding Samir's representation, S.B.N. never received 40 percent interest on the funds he provided Samir. Samir's representation was material in convincing S.B.N. to invest in the Murrieta project.

35(b). The Commissioner established that Christian and So Cal Realty misrepresented to S.B.N. that he would receive substantial profits upon completion of the Murrieta project. Under either S.B.N. or Samir's version of events, it is reasonable to conclude that it was Christian's representation of substantial profits that was the impetus for S.B.N. to execute the Notes or contact Samir. The reference to "40% return" on the handwritten notes supports the conclusion that a substantial return was discussed. (Exh. 18 at DBO0007.)

36(a). To support its allegation that respondents misrepresented to S.B.N. that the Murrieta project was safe and did not have any risks, the Commissioner points to two statements. The first was allegedly made by Samir, who informed S.B.N. "Real estate is the safest investment. There is no [sic] much that can go wrong." The second was allegedly made by Christian, who informed S.B.N.: "I can double your money in two years." (Exh. 1 at DBO00207.)

36(b). The Commissioner did not establish that Samir's alleged statement constituted a misrepresentation. The statement makes no representation about the safety of investing in the Murrieta project or guarantees that any investment would be wholly without risk. Rather, the statement speaks to the general safety of investing in real estate and acknowledges that there is at least a small risk that a real estate investment can go awry.

36(c). The Commissioner did not establish that Christian made the statement regarding doubling S.B.N.'s money in two years. Christian's alleged statement was not memorialized, and S.B.N.'s recollection of statements made by Christian in the meeting is not reliable. (See Factual Findings 26 and 27.)

37(a). The Commissioner established that Samir misrepresented, by signing the Notes and the Extension, that he would pay the monthly interest-only mortgage payment of the Corona residence until repayment of S.B.N.'s principal and interest. Samir's representation was material in convincing S.B.N. to invest in the Murrieta project.

37(b). The Commissioner did not establish that Christian or So Cal Realty made any misrepresentations regarding Samir's payment of the mortgage interest on the Corona residence. While Christian and S.B.N. had conversations about the investment and S.B.N.'s payments, the handwritten notes do not reflect any promise regarding payment of the Corona residence mortgage interest, and no evidence was adduced that Christian had any role in drafting the Notes and Extension, which reflected the misrepresentation. In addition, as noted in Factual Findings 26 and 27, S.B.N.'s recollection of what was specifically stated in his conversation with Christian was not reliable.

38. The Commissioner did not establish that Appearing Respondents made any misrepresentations regarding any collateral provided for the Notes and Extension. The Notes and Extension do not state that they are secured by any collateral, and the handwritten notes do not appear to address the issue. S.B.N. testified that he did not have any conversation with Samir prior to signing the Notes, and his recollection of his conversations with Christian is unreliable. In addition, Samir maintained at the hearing that he never considered the Notes and Extension to be secured by collateral.

39. The Commissioner established that Appearing Respondents failed to disclose to S.B.N. that Samir had filed for bankruptcy on December 6, 1999. As Samir was personally responsible for repayment of S.B.N.'s money, the failure to disclose Samir's 1999 filing was material in convincing S.B.N. to invest in the Murrieta project. No evidence was presented

to support the Commissioner's allegation that Samir had filed for a second bankruptcy on that same day.

LEGAL CONCLUSIONS

Legal standards

1. The Commissioner issued the Order pursuant to the authority found in section 25532, which 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 or (2) the sale of a security is subject to the requirements of Section 25100.1, 25101.1, or 25102.1 and the security is being or has been offered or sold without first meeting the requirements of those sections, the commissioner may order the issuer or offeror of that security to desist and refrain from the further offer or sale of the security until those requirements have been met.

[¶] . . . [¶]

(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.

[¶] . . . [¶]

(f) If, after an order has been served under subdivision (a), (b), (c), or (d), 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 provisions of the Administrative Procedure Act

If that person fails to file a written request for a hearing within 30 days from the date of service of the order, the order shall be deemed a final order of the commissioner and is not subject to review by any court or agency, notwithstanding Section 25609.

2. The Commissioner's power to issue a Desist and Refrain Order is not limited by the statute of limitations. The Commissioner is authorized to issue a Desist and Refrain Order for past violations of the law, regardless of whether such violations are continuing. (§ 25532, subds. (a) and (c).)

3. Section 25110 states that 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." To establish a violation of section 25110, the Commissioner must demonstrate an offer or sale occurred in California as part of an issuer transaction that involved a security and the offer was not qualified with the Department.

4. Section 25401 provides that "[i]t is unlawful for any person to offer or sell a security in this state, or to 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 the statements were made, not misleading." A fact is "material" if a reasonable investor would consider it significant in making his or her decision to invest. (*Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1986) 184 Cal.App.3d 1520, 1526.) Section 25401 is a strict liability offense in an administrative action; the Commissioner is not required to prove scienter, reliance or causation. (*People v. Simon* (1995) 9 Cal.4th 493, 515-516; *Lynch v. Cook* (1983) 148 Cal.App.3d 1072, 1087-1088.)

5. Under Evidence Code section 500, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Thus, the Commissioner has the burden to establish the facts that warranted issuance of the Order. (§ 25532; Evid. Code, § 500.) The standard of proof is preponderance of the evidence in this instance, as no statute or case law requires a higher burden. (Evid. Code, § 115.) As explained below, the Commissioner failed to prove by a preponderance of evidence that Appearing Respondents violated sections 25110 and 25401.

6. It is incumbent to determine whether the Notes and Extension constitute a security before determining whether Appearing Defendants violated Sections 25110 and 25401. Section 25019 defines "[s]ecurity" by listing transactions and instruments deemed to be securities, including "any note; stock; . . . evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; . . . investment contract; . . . or in general any interest or instrument commonly known as a "security." This list is considered to be "expansive," but is not applied literally. (*People v. Figueroa* (1986) 41 Cal.3d 714, 734.)

7. "[I]t plainly was not the legislative intent that 'every' note or evidence of indebtedness, regardless of its nature and of the circumstances surrounding its execution, should be considered as included within the meaning and purpose of the act. [Citations.]" (*Leyva v. Superior Court* (1985) 164 Cal.App.3d 462, 470.) The determination of whether an instrument is a security within the meaning of the Corporations Code "is a question to be determined in each case. In arriving at a determination, the courts have been mindful that the general purpose of the law is to protect the public against the imposition of unsubstantial,

unlawful and fraudulent stock and investment schemes and the securities based thereon. [Citation.]” (*Figueroa, supra*, 41 Cal.3d at p 736.) The substance of the transaction, not its form, is determinative. (*Id.* at p. 735.)

8. California courts have relied on two distinct tests in evaluating whether an instrument is a security: the risk capital test and the federal or *Howey* test, which was formulated by the United States Supreme Court. (*S.E.C. v. W.J. Howey Co.* (1946) 328 U.S. 293 (*Howey*).) A transaction is a security if it satisfies either test. (*People v. Black* (2017) 8 Cal.App.5th 889, 900, *review denied* (May 24, 2017).)

9. The risk capital test describes “an attempt by an issuer to raise funds for a business venture or enterprise; an indiscriminate offering to the public at large where the persons solicited are selected at random; a passive position of the part of the investor; and the conduct of the enterprise by the issuer with other people’s money. [Citation.]” (*Silver Hills Country Club v. Sobieski* (1961) 55 Cal.2d 811, 815.) The Commissioner did not establish that Appearing Respondents offered the Notes and Extension to the public at large; the Notes and Extension therefore cannot be considered securities under the risk capital test. (Factual Finding 31.)

9. The Commissioner contends that the Notes and Extension are “investment contracts” and therefore securities under the federal *Howey* test. According to the *Howey* test, an investment contract is a security if it is part of a scheme in which individuals are “led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves.” (*S.E.C. v. W.J. Howey*, 328 U.S. at p. 298 [sale of units in a citrus grove development coupled with service contract constituted an investment contract because it promised the share of profits of an enterprise managed by others].) A common enterprise may be established by showing that the fortunes of the investors are linked with those of the promoters; thus, “a common enterprise exists if a direct correlation has been established between success or failure of [the promoter’s] efforts and success or failure of the investment. [Citations.]” (*S.E.C. v. Eurobond Exchange, Ltd.* (9th Cir. 1994) 13 F.3d 1334, 1339.)

10. The Notes and Extension display certain characteristics of an “investment contract” under the *Howey* test insofar as S.B.N. agreed to put his money toward the Murrieta project and the Notes provide for a 40 percent return in part presumably as a result of Samir’s efforts. (Factual Findings 13 through 16.) However, the Notes and Extension fail other aspects of the *Howey* test because they do not involve a common enterprise in which S.B.N.’s success is wholly dependent on the success of the Murrieta project. (Factual Findings 13 through 19.) Under the express terms of the Notes and Extension, S.B.N. was to be paid irrespective of whether the Murrieta project was completed or sold. In addition, Samir agreed to pay S.B.N.’s mortgage interest obligations on property owned by S.B.N. until the debt was repaid. And as set forth in Factual Finding 19, it was Samir’s assets, not solely those of AAA Investment Team, Inc., that were at risk. (See *People v. Davenport* (1939) 13 Cal.2d 681, 690 [contract in which the “alleged purchaser of the ‘security’ . . . had

a right to be paid whether the business prospered or not” was not a security.]) Accordingly, the Notes and Extension cannot be considered securities under *Howey*.

11(a). The analysis and holding of the recent case of *People v. Black* is determinative here. In *Black*, the court ruled that a promissory note given by Black in connection with a real estate opportunity that contained language similar to that found in the Notes and the Extension was not a security. The note at issue in *Black* promised to repay the lender (Knarr) his principal plus interest, the calculation of which depended upon the success of the investment. If the real estate was sold, Knarr’s interest would be a fixed percentage of the net profits from the sale. If the real estate was developed, Knarr would receive two of the lots. However, in the event the real estate was neither sold nor developed, Knarr’s principal plus interest at the rate of 10 percent would become due and payable at Knarr’s election. In addition, Black agreed that his separate property was bound and resort could be made to his separate property for payment and enforcement of the note. (*People v. Black, supra*, 8 Cal.App.5th at p. 892.) Ultimately, Knarr demanded payment on the note, but Black did not have sufficient personal collateral to repay the principal or interest.

11(b). The *Black* court found that the promissory note, because of the clause permitting repayment at Knarr’s election, was a unique, personally negotiated agreement in which Knarr’s repayment was not contingent on the success of the enterprise. Nothing in the note required Black to develop or purchase real estate. Because the promissory note provided for repayment regardless of the success of the deal, the *Black* court found that the note contained “an element of redress that would be unlikely to ‘fall within ‘the ordinary concept of a security.’ [Citations.]” (*People v. Black, supra*, 8 Cal.App.5th at p. 906.)

11(c). The facts here are similar to those in *Black*. S.B.N. likewise had the right to repayment regardless of the success or failure of the Murrieta project. Although repayment was not at S.B.N.’s election, it was at a fixed date (two years) not contingent on whether the project succeeded. In addition, because Samir was personally liable on the Notes and Extension, S.B.N. had the right to seek repayment from him. Samir also was obligated to make mortgage interest payments on property owned by S.B.N while the Notes and Extension were outstanding. Thus, Samir’s obligation to repay S.B.N. was not dependent on the status of the Murrieta project but was absolute, making the transaction a loan and not a security.

12(a). The Commissioner attempts to distinguish *Black* on a number of grounds. None of her arguments is persuasive.

12(b). The Commissioner argues that *Black* is distinguishable because the promissory notes that were issued in *Black* resulted from a one-to-one transaction while respondents “discussed the investment opportunity with multiple – not just one – potential investors.” (Exh. 22 at p. 7.) However, as set forth in Factual Finding 32, the Commissioner did not establish that Appearing Respondents discussed the Murrieta project as an investment opportunity with anyone other than S.B.N. Moreover, the terms set forth in the Notes and

Extension, like those found in the *Black* note, were personal and unique to S.B.N. and unlikely to be offered to any other investor. (Factual Findings 13 through 21.)

12(c). The Commissioner argues that, unlike the lender in *Black*, S.B.N. was unsophisticated, without investment experience, and did not have a substantive, pre-existing relationship with Samir, Christian or So Cal Realty. She also argues that S.B.N., unlike the lender in *Black*, was a passive investor who had no control over the management or operation of the Murrieta project. The holding in *Black*, however, was not dependent on Knarr's sophistication, his prior relationship with Black or his weekly discussions with Black. The decision rested solely on the terms of the note itself.

12(d). The Commissioner argues that S.B.N., unlike the investor in *Black*, reasonably expected the Notes and Extension to be securities. However, the Commissioner does not point to any evidence that would support that expectation. As set forth in Factual Finding 32, S.B.N. did not receive a prospectus or any other document evidencing that an investment in the Murrieta project or the Notes could be publicly traded. There was insufficient evidence to establish that Appearing Respondents solicited others besides S.B.N. to invest in the Murrieta project. The reference to S.B.N. as a "silent investor" in the Notes and Extension and the witnesses' description of the project as an "investment" are not sufficient to transform the Notes and the Extension into securities. (*People v. Figueroa*, *supra*, 41 Cal.3d 714 [form of the document and the written terms contained therein do not dictate whether an instrument is a security].)

12(e). The Commissioner argues that *Black* found that the promissory note was not a security because Black offered a "personal guaranty as collateral for the lender's funds" and therefore repayment was not contingent on Black's buying or developing property. (Exh. 22 at p. 9.) While Black's promise to bind his own funds was a factor in determining whether the note was a security, it was not conclusive, particularly given that Black did not have adequate funds to repay the amount owed. What convinced the *Black* court that the note was not a security was Black's express promise to repay the principal and a fixed rate of interest regardless of whether the property was developed or sold. (*People v. Black*, *supra*, 8 Cal.App.5th at p. 902 ["Knarr agreed that his 'repayment was not contingent on Mr. Black buying property or developing property' because of term (c) of the promissory note."].)

12(f). The Notes and Extension not only provided for repayment independent of the success of the Murrieta project, but also provided that Samir, like Black, was personally liable for the repayment. (Factual Findings 13 through 19.) The Notes and Extension were "given and secured by Samir Abadir, an individual," and Samir was "severally" liable for the amounts S.B.N. paid and "solely and wholly responsible" for making the mortgage payments on the Corona residence. (Factual Finding 19.) Samir also made clear at the hearing that he believed himself liable for the amounts owed, and he listed the debt on his Chapter 7 bankruptcy filing.

13. The cases cited by the Department in support of its position that the Notes and Extension constitute securities do not address the situation presented here, i.e., an

individually negotiated agreement which provides a repayment option that is not contingent on the success of the enterprise. Instead, the Department has relied on inapposite cases in which the investment scheme at issue offered a common investment to numerous investors. (*S.E.C. v. W.J. Howey*, *supra*, 328 U.S.293 [42 persons purchased interests in a citrus grove]; *Koch v. Hankins* (9th Cir. 1991) 928 F.2d 1471 [160 investors involved in 35 different general partnerships regarding jojoba production]; *S.E.C. v. Eurobond Exchange, Ltd.* (9th Cir. 1994) 13 F.3d 1334 [at least 26 investors in Eurobond program]; *People ex rel. Bender v. Wind River Mining Project* (1990) 219 Cal.App.3d 1390 [public offering of gold production and gold delivery certificates]; *People ex rel. DuFauchard v. O'Neal* (2009) 179 Cal.App.4th 1494 [“several individuals” invested in development of alternative medical device]; *People v. Figueroa*, *supra*, 41 Cal.3d 714 [publicly advertised investment in solar energy business]; *People v. Graham* (1985) 163 Cal.App.3d 1159 [brochure and promotional scheme to recruit others to invest in limited partnership]; *People v. Simon* (1995) 9 Cal.4th 493 [investment by 870 people in real property partnerships].)

14. Case law makes clear that financial instruments like the Notes and Extension cannot be considered securities. (See *Marine Bank v. Weaver* (1982) 455 U.S. 551, 560 [“negotiated one-on-one” agreement between two parties, that is not ordinarily considered to be a security and that was never designed to be publicly traded, is not a security]; *Mace Neufeld Productions, Inc. v. Orion Pictures Corp.* (9th Cir. 1988) 860 F.2d 944, 947 [federal securities laws not “intended to extend to ordinary, individually negotiated private commercial loan transactions”]; *People v. Black*, *supra*, 8 Cal.App.5th at p. 906 [“individually negotiated, one-on-one transaction” with no indication that arrangement with lender could have been traded publicly does not constitute a security].)

15. Accordingly, as set forth in Factual Findings 1 through 39 and Legal Conclusions 1 through 14, the Commissioner has not proven by a preponderance of the evidence that the Notes and Extension constitute securities as defined by the Securities Act. The Notes and Extension were individually negotiated financial documents that contained repayment terms independent of the success of the Murrieta project. Accordingly, the Commissioner has not established that Appearing Respondents violated sections 25110 and 25401, and the Order is rescinded with respect to them.

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ORDER

The Desist and Refrain Order issued to respondents Samir Abadir, Christian Abadir, So Cal Realty and Southern California Realty & Mortgage is rescinded.

DATED: December 28, 2017

DocuSigned by:
Cindy F. Forman
CINDY F. FORMAN
Administrative Law Judge
Office of Administrative Hearings