

BEFORE THE  
DEPARTMENT OF CORPORATIONS  
STATE OF CALIFORNIA

in the Matter of the Desist and Refrain  
Order Issued Against:

DARLENE DANTES and CAPAPIE, Inc.,

Respondents.

Case No. 8371

OAH No.: 2008030939

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated April 14, 2008, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter with the following technical change pursuant to Government Code Section 11517(c)(2)(C)

On page 11, the last paragraph of the LEGAL CONCLUSIONS: delete "8-20" and insert "8-15".

This Decision shall become effective on July 17, 2008.

IT IS SO ORDERED this 16<sup>th</sup> day of July 2008.

CALIFORNIA CORPORATIONS COMMISSIONER

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Preston DuFauchard

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**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 4, 2008, in San Diego, California.

Afsaneh Eghbaldari, Corporations Counsel, represented Preston DuFauchard, California Corporations Commissioner, Department of Corporations, State of California.

Darlene Dantes represented herself and Capapie, Inc., and was present throughout the proceeding.

On April 4, 2008, the matter was submitted.

**FACTUAL FINDINGS**

*The Regulation of the Offer and Sale of Securities*

1. Following the 1929 stock market crash and the onset of the Great Depression, the federal government during the early years of the New Deal entered into the area of securities regulation. The first effort was the Securities Act of 1933, which was quickly followed by the Securities Exchange Act of 1934. Additional federal legislation has followed.

The Securities and Exchange Commission (SEC) enforces the federal securities laws, directly through the Securities and Exchange Act of 1934, and indirectly through its oversight of the National Association of Securities Dealers and several stock exchanges.

2. State securities laws, commonly known as Blue Sky laws, were enacted in all states and regulate the offer and sale of securities not covered by federal law. California's Blue Sky law—known as the Corporate Securities Law of 1968 (the CSL) — is set forth at California Corporations Code section 25000 et seq. The CSL regulates the offer and sale of securities in California and it requires the registration of broker-dealers and stockbrokers doing business in California.

Before a "security"<sup>1</sup> is sold in California, it first must be qualified with the California Department of Corporations unless an exemption exists. Many securities and many security transactions are exempt, or preempted by federal law, from state regulation.<sup>2</sup>

Qualification in California may be accomplished in a number of ways including: (a) Coordination of a security for which a registration statement was filed under the Securities Act of 1933 (Corp. Code, § 25111); or (b) notification that the security (i) is registered under Section 12 of the Securities Exchange Act of 1934 (Corp. Code, § 25111), (ii) was issued by an investment company registered under the Investment Company Act of 1940 (Corp. Code, § 25112), or (iii) was issued by permit (Corp. Code, § 25113).

4. The California Corporations Commissioner has several legal remedies to enforce the CSL. Proscribed conduct may be enjoined by a civil action under Corporations Code section 25530 or by a Desist and Refrain Order under Corporations Code section 25532. Civil penalties may be sought under Corporations Code section 25535. Finally, criminal prosecution may be initiated under Corporations Code section 25540.

5. This matter involves the appeal of a Desist and Refrain Order.

### *The Principals*

6. Darlene Dantes (Dantes) is the President and Treasurer of Capapie, Inc. (Capapie). Dantes attended Arizona State University in the late 1980s.

Capapie, Inc. is an active Nevada corporation, although its right to do business in California was forfeited in December 2006.

7. The "investors" in this matter were Dantes' friends or acquaintances. In many instances, Dantes had a long personal history with these individuals. In other instances,

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<sup>1</sup>California Corporations Code section 25019 sets forth an exhaustive but not all-inclusive definition of what constitutes a "security." Under the Corporate Securities Law of 1968, a "security" includes membership in incorporated or unincorporated associations, whether or not evidenced by a written instrument.

<sup>2</sup>For example, Regulation D private offerings are exempt from registration if there has been full compliance with SEC Rules 501-503. "Covered securities" on the New York Stock Exchange, AMEX and the NASDAQ/National Market, and securities of the same issuer which are equal in rank or senior to such listed securities, are preempted from state regulation by Section 18 of the Securities Act of 1933.

Dantes met with the investor not more than a couple of times. None of the investors were sophisticated, and none had a net worth approaching \$1,000,000.

#### *Overview - the Investment Contracts*

8. As early as 2004, Dantes, sometimes through Capapie and sometimes on her own, offered and sold investment opportunities in California which took the form of investment contracts. A majority of Dantes' offers consisted of a series of verbal promises for which a profitable return was promised. A few of Dantes' offers involved written agreements. The Department of Corporations had not issued a permit or any other form of qualification to Dantes or Capapie authorizing either one of them to offer on sell securities in California at the time of the transactions.

The evidence established several common themes. First, Dantes proposed to improve the investors' credit scores by using the investors' credit cards to establish lines of credit for investments in real estate and other ventures. Dantes promised to pay for the credit she used and to take care of the existing debt until all of the debt was fully repaid. Second, Dantes promised each investor a profit. Third, Dantes assured most of the investors that their investments would be secured by "an actual asset," usually real property to which Dantes held title (in fact, Dantes did not hold title to any real estate). Notwithstanding all of these promises and representations, neither Dantes nor Capapie ever fully paid an investor's total credit card debts. At least one investor, Roberta Fernandez, was forced to go through bankruptcy because of Dantes' failure to pay the credit card debt as promised.

#### *The Watson Transaction*

9. Sandra Watson is a 37-year-old bookkeeper who lives in Los Angeles County. Watson owns a television production company known as "I Wrote That." Watson was and is an inexperienced investor who was making about \$35,000 a year and had a net worth of approximately \$500,000 when she invested with Dantes.

Watson became acquainted with Dantes at an acting class in Burbank both attended in late 1998. In January 2005, Dantes met with Watson at Capapie's offices in Studio City, California, to explore the refinancing of Watson's home to enable Watson to pay off about \$50,000 in credit card debts. During the meeting, Dantes said, "I have a better idea." Dantes proposed to assume Watson's credit card debt, to improve Watson's creditworthiness, to increase Watson's access to additional lines of credit for Watson's personal and business needs, to make investments in real properties and other ventures using Watson's lines of credit, and to ultimately eliminate Watson's credit card debt and provide Watson with a positive income stream. Following this meeting, Watson provided Dantes with access to her credit cards and authorized additional credit cards to be issued to Dantes for Dantes' use.

E-mails from Dantes to Watson from April 2005 through June 2005 confirmed some of the oral agreements Dantes made related to the investment. In April 2005, Watson

obtained a home equity line of credit and wired \$87,000 to Dantes with the understanding that Dantes would use that money to pay off the credit card debt Watson owed. Dantes used some of Watson's credit cards in accordance with the investment agreement, but Watson's credit cards were also used for Dantes' personal purchases, such as purchases at Costco and at the La Piazza restaurant.

The debts on Watson's credit cards grew and were never paid off. Watson ultimately refinanced her home to pay off her credit card debt. Watson retained several of the credit cards; the other credit cards were cancelled by the financial institution issuing them.

While Watson received \$75,000 from Dantes in August 2005 that was used to finance I Wrote That productions, it was not established that the \$75,000 contribution was related to investment agreement or the \$85,000 payment Watson made to Dantes in April 2005.

While the relationship between Dantes and Watson was ongoing, Watson worked part-time for Capapie as a bookkeeper and human resources clerk.

#### *The Fernandez Transaction*

10. Roberta Fernandez is a 67-year-old retiree who lives with her husband, who is also retired. Fernandez and her husband owned a boat building business in the San Francisco Bay Area before they retired. Neither was an experienced investor.

Fernandez met Dantes at the home of Fernandez's daughter in the late 1990s. Thereafter, Dantes provided mortgage refinancing for Fernandez' sister. Fernandez and Dantes kept in touch in the years that followed.

By 2004, Fernandez's sole source of income was a monthly \$644 Social Security payment. Her husband did not receive a pension or social security, but he occasionally drew from the Fernandez's managed stock account which had a value of approximately \$500,000. The Fernandez's also had credit card debts of \$85,000 to \$100,000.

In 2004, Dantes approached Fernandez in Burbank, California, to discuss "a profit-making opportunity." Dantes said she was starting a new business and wanted to use Fernandez as a prototype for her business model. Dantes proposed to take over the Fernandez' credit card debt, use their lines of credit for investment purposes, and create a business that "would return 18 percent to 24 percent on the investment." Dantes promised to pay off all the Fernandez's existing credit card debt. Fernandez provided Capapie with \$65,000 obtained from her credit card lines of credit. She gave Dantes access to her 22 credit cards and she authorized Dantes to obtain additional credit cards in Fernandez's name. Dantes refinanced the credit cards and acquired additional cash. While Dantes made some payments on the credit card balances and provided Fernandez with a few checks, the house of cards ultimately collapsed. Dantes stopped paying credit card balances in November 2006.

Fernandez and her husband's credit card debts were discharged in bankruptcy in December 2007.

*The DenDekker Transaction*

11. Clifford DenDekker met Dantes at Arizona State University in 1989 when they were both members of the ASU Business Club. Dantes was the President. After college, DenDekker and Dantes kept in touch. DenDekker maintained employment selling information technology (IT) equipment to the federal government. He currently makes about \$150,000 per year with bonuses.

In spring 2004, Dantes assisted DenDekker in refinancing his Orange County home. Shortly thereafter, Dantes approached DenDekker and told him that she was pooling investors for the purpose of real estate investments, and that she could provide DenDekker with a profit of two percent per month. While the initial investment was discussed in Hawaii, the investment agreement was finalized in Aliso Viejo, California.

Dantes arranged for DenDekker to receive \$150,000 from a home equity line of credit. DenDekker gave Dantes a \$150,000 payment in September 2004. He also provided Dantes with the right to use his credit cards as a part of the investment agreement in which Dantes promise to use no more than 30 percent of DenDekker's available lines of credit from the credit cards, to invest the capital obtained thereby into real estate investments, to pay off the credit card debts, and to return a profit to DenDekker.

Dantes used credit cards issued to DenDekker for a variety of purposes. For example, in December 2004, Dantes used a Citi credit card to make several personal purchases in Illinois at Sprint PCS, Marshall's, Sangria, Crate & Barrel, Escape Entertainment, and Office Max.

Between March 2005 and June 2006, Dantes made first and second mortgage payments on DenDekker's home. Dantes contacted Keith Cooper, a San Francisco attorney affiliated with Capapie, and started a business known as ZCD for DenDekker. DenDekker spoke with Cooper just one time and he knew virtually nothing about the ZCD's operation.

Dantes stopped making payments on DenDekker's credit cards in 2007, when approximately \$170,000 in credit card debt existed.

*The Weidenmiller, Pellizzaro, D'Aiuto, Rabara, Chopko, and Steffen Transactions*

12. Declarations were introduced under Government Code section 11514 detailing the Weidenmiller, Pellizzaro, D'Aiuto, Rabara, Chopko, and Steffen transactions. The declarations followed a format which stated the date on which the investor met Dantes, Dantes' offer of an "investment opportunity through Capapie, Dantes' offer to improve the

investors' credit scores and to improve and build their credit, and Dantes' promise to provide them with extra income. Each investor authorized Dantes to use his or her credit cards to obtain cash from the line of credit. The investment income was guaranteed by various means, from real estate or film production investments (Weidenmiller), a pool (Pellizzaro), real estate investments (D'Aiuto and Chopko), a promissory note (Rabara), or a simple investment (Steffan). Dantes told all of these investors, except for Rabara, that she held title to several real properties and that their investments were safe. The investors' declarations all stated or suggested that the investor was inexperienced.

In one instance (the Pellizzaro transaction), Dantes and the investor signed a Credit Authorization Agreement that spelled out in considerable detail a portion of what Dantes verbally promised to Pellizzaro and others.

### *Extrajudicial Admissions*

13. In several emails Dante's discussion of a specific investment with a rate of return was clear. For example, in an April 5, 2005 email to Watson, Dantes wrote:

"i would like to immediately -pay all the cards to 0, then rebuild some of the credit. then I will input it into the investment pools(s) for rate of return . . . i will be paying out to you more than the average bear, of course ... do you prefer to put it down on a piece of property and have your name on title for long term growth? or do you want to invest in a business, which of course all gets disclosed to the investor ...."

In a June 5, 2005, email to Watson, Dantes wrote:

"there is no perfect solution to building your credit. there will be times, especially in the first few months of building credit, that I have to act on the lesser of other evils - need to run the inquiries in order to obtain the credit, use the credit up to its allowable limit, let it sit and make money in the investment pool, and then I need to repay the credit cards down, all in order to maintain cash flow . . . the only true solution for both TFB and the creditors to be happy is TIME. I need the use of the available credit to sit long enough to make the money in the pool and to repay the debt (including your original debt) ...."

In an August 27, 2004, email to DenDekker, Dantes wrote:

"also, f.y.i., the 2% return to you monthly is definitely not going to be offered to regular clients ... we can talk more later on if you'd like to see how you can maybe even maximize on the 2% if you waited a longer period of time to get paid out . . . talk to you later, I've got to go rob a bank now . . . ha ha ha, just joshin!"

In a December 6, 2004, e-mail to DenDekker, Dantes warned that there were "some serious red flags, but not the end of the world" and ", . . i want 24%+ so that we can retire

sickly rich. i've got a couple of options that I think you'd be seriously interested in, they all do with my personal real estate holdings ... he who dies with the most toys wins, and our families will die winning ...."

In an e-mail to Rabara (also known as Evangeline Marino), Dantes explained to her client in confidence how she worked. Dantes wrote:

"I am a very savvy business owner and I will do things under the radar, but never illegally.

If the courts ever question us about the Capapie invoices, we can show our business contract and the contract we have with Capapie, Inc. Capapie would undoubtedly be able to provide financial proof of what my (Darlene Dantes, LLC) clients have paid me for real estate, financial and business consultation/expertise."

### *Respondents' Defenses*

14. The facts found above in Factual Findings 9-13 were based on uncontroverted evidence. However, Dantes contested the legal significance of those facts.

Dantes argued the testimony and other evidence established that she had a personal relationship with each of the persons identified as an investor, that she sought to assist her friends to clear up their credit card debts and/or to help them build a business, that she always had authorization to use the credit cards, that the credit cards and funds obtained from them were not used for personal expenses, that any payment received by Dantes was for services she provided in her capacity as a consultant, and that Dantes never intended to involve any of her friends in a securities transaction. Dantes argued that while she did not hold title to any real property in her own name, she had valuable interests in real property in California, Illinois, and Arizona that was in the names of others.

### *Jurisdictional Matters*

15. On February 25, 2008, the Department of Corporations issued a Desist and Refrain Order to Darlene Dantes and Capapie, Inc. for violation of California Corporations Code sections 25110 and 25401. The Order contained findings that Dantes and Capapie offered and sold securities in the form of investment contracts. The Order was issued under the enforcement power granted to the California Corporations Commissioner by Corporations Code section 25532 to prevent the offer or sale of unqualified securities.

The Desist and Refrain Order was served on Dantes and Capapie. Dantes requested a hearing.

On April 4, 2008, the record in the administrative proceeding was opened. Opening statements were given. Sworn testimony and documentary evidence was received. Complainant dismissed those counts contained in the Desist and Refrain Order related to Dantes' failure to disclose certain legal actions that had been filed against her (Paragraph 9, subparagraphs (b) through (e)) and the assertion that those omissions involved untrue statements of material fact. Closing arguments were given, the record was closed, and the matter was submitted.

## LEGAL CONCLUSIONS

### *Relevant Statutory Authority*

1. Corporations Code section 25532 provides in part:

"(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.

(b) If, in the opinion of the commissioner, a person has been or is acting as a broker-dealer or investment adviser, or has been or is engaging in broker-dealer or investment adviser activities, in violation of Section 25210, 25230, or 25230.1, the commissioner may order that person to desist and refrain from the activity until the person has been appropriately licensed or the required filing 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 ...."

2. Corporations Code section 25110 provides:

"It is unlawful for any person to offer or sell in this state any security in an issuer transaction (other than in a transaction subject to Section 25120), whether or not by or through underwriters, unless such sale has been qualified under Section 25111, 25112 or 25113 (and no order under Section 25140 or subdivision (a) of Section 25143 is in effect with respect to such qualification) or unless such security or transaction is exempted or not subject to qualification under Chapter 1 (commencing

with Section 25100) of this part. The offer or sale of such a security in a manner that varies or differs from, exceeds the scope of, or fails to conform with either a material term or material condition of qualification of the offering as set forth in the permit or qualification order, or a material representation as to the manner of offering which is set forth in the application for qualification, shall be an unqualified offer or sale."

3. Corporations Code section 25017 provides:

"(a) 'Sale' or 'sell' includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. 'Sale' or 'sell' includes any exchange of securities and any change in the rights, preferences, privileges, or restrictions of or on outstanding securities.

(b) '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. .."

4. Corporations Code section 25019 provides in part:

"'Security' means . . . membership in an incorporated or unincorporated association . . . participation in any profit-sharing agreement . . . investment contract ... or, in general, any interest or instrument commonly known as a 'security'... All of the foregoing are securities whether or not evidenced by a written document. 'Security' does not include: (1) any beneficial interest in any voluntary inter vivos trust which is not created for the purpose of carrying on any business or solely for the purpose of voting, or (2) any beneficial interest in any testamentary trust, or (3) any insurance or endowment policy or annuity contract under which an insurance company admitted in this state promises to pay a sum of money (whether or not based upon the investment performance of a segregated fund) either in a lump sum or periodically for life or some other specified period, or (4) any franchise subject to registration under the Franchise Investment Law (Division 5 (commencing with Section 31000)), or exempted from registration by Section 31100 or 31101."

5. Corporations Code section 25401 provides:

"It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."

### *General Authority*

6. The offer or sale of securities in California must be qualified with the Commissioner, unless exempt or not subject to qualification. (Corp. Code, § 25110.)

Persons who offer to sell or purchase securities in California must, unless exempt, obtain a certificate as a broker-dealer from the Commissioner. (*Id.*, § 25210, subd. (a).) It is unlawful to offer or sell a security in California by means of any written or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. (*Id.*, § 25401.) The Department of Corporations lacks jurisdiction to act with respect to a transaction or instrument that is not a security.

Corporations Code section 25019 defines "security" by listing transactions and instruments deemed to be securities. The list is "expansive," but is not applied literally. Rather, the California Supreme Court has stated the critical question in resolving whether a transaction comes within the statutory definition of security is whether the transaction falls within the regulatory purpose of the law regardless of whether it involves an instrument which comes within the literal language of the definition. The purpose of the securities laws is "to protect the public against the imposition of unsubstantial, unlawful and fraudulent stock and investment schemes and the securities based thereon."

Among the transactions included within the section 25019 definition of "security" is an investment contract. In determining whether a transaction is an investment contract, California courts have applied, either separately or together, two distinct tests: (1) the "risk capital" test described in *Silver Hills Country Club v. Sobieski* (1961) 55 Cal.2d 811, 815, and (2) the federal test described in *SEC v. W.f. Howey Co.* (1946) 328 U.S. 293, 298-299. A transaction is a security if it satisfies either test.

The 'risk capital' test requires a consideration of the following factors: (1) whether funds are being raised for a business venture or enterprise; (2) whether the transaction is offered indiscriminately to the public at large; (3) whether the investors are substantially powerless to effect the success of the enterprise; and (4) whether the investors' money is substantially at risk because it is inadequately secured.

Under the federal test, an investment contract consists of an investment of money in a common enterprise with the expectation of profits produced by the efforts of others. This test is a "flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." The "touchstone" of the federal test is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." By profits, the courts mean either capital appreciation resulting from the development of the initial investment or a participation in earnings resulting from the use of investors' funds. The constituent parts of the transaction must be considered as a whole in deciding whether it is an investment contract. Form should be disregarded for substance and the emphasis should be on economic reality. The federal test requires that the investor commit his assets to the enterprise in such a manner as to subject himself to financial loss. An investment scheme offering a fixed rate of return can be

an investment contract subject to federal securities regulation (*Reiswig v. Department of Corporations* (2006) 144 Cal.App.4th 327, 333-335.)

7. *People v. Corey* (1995) 35 Cal.App.4th 717 stands *inter alia* for the proposition that in a criminal prosecution for selling an unqualified, unexempt security in violation of Corporations Code section 25110, the element of scienter need not be established.

*Cause Exists to Affirm the Desist and Refrain Order*

8. The preponderance of the evidence supported Findings 1 through 9(a) set forth in the Desist and Refrain order issued against Darlene Dantes and Capapie, Inc.

At least nine persons authorized Dantes to use their credit cards for investment purposes based on Dantes' representations that she would improve their credit scores and that Dantes and/or Capapie would use funds from the credit cards for investment in real estate and other profitable ventures. Dantes' representations created expectations of profit in the investors; otherwise, the investors would not have given Dantes authority to use their credit cards. The investors' fortunes were tied directly to Dantes' and Capapie's financial success or failure. Dantes and Capapie, Inc. engaged in the offer and sale of investment contracts, transactions involving a "security" within the meaning of Corporations Code section 25019.

The investment contracts were not qualified with the Commissioner and were neither exempt nor not subject to qualification in California. Neither Dantes nor Capapie, Inc. obtained a certificate as a broker-dealer from the Commissioner to sell these non-exempt securities.

Dantes and Capapie, Inc. orally offered and sold investment contracts by making untrue statements of material facts, specifically that investor credit funds would be used to purchase investments in real property and other profitable ventures, when that was not the case, and that the investments would be secured by Dantes' actual assets or her interest in real property, when that was not the case. The offer and sale of these investment contracts was in violation of Corporations Code sections 25110 and 25401.

This conclusion is based on Factual Findings 8-20 and on all Legal Conclusions.

ORDER

The Desist and Refrain Order issued to Darlene Dantes and Capapie, Inc., signed on February 25, 2008, finding violations of California Corporations Code sections 25110 and 25401 is affirmed.

DATED: April 14, 2008.

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JAMES AHLER  
Administrative Law Judge  
Office of Administrative Hearings