

1 PRESTON DuFAUCHARD
California Corporations Commissioner
2 ALAN S. WEINGER
Deputy Commissioner
3 EDWARD KELLY SHINNICK (CA Bar No. 96209)
Corporations Counsel
4 DOUGLAS GOODING (CA Bar No. 83518)
Corporations Counsel
5 71 Stevenson Street, Ste. 2100
6 San Francisco, CA 94105-2980
7 Tel: 415/972-8544
Fax: 415/972-8550

8 Attorneys for the People of the State of California

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SAN FRANCISCO

ENDORSED
FILED
Superior Court of California
County of San Francisco
JAN 21 2011
CLERK OF THE COURT
BY: WESLEY RAMIREZ
Deputy Clerk

12 THE PEOPLE OF THE STATE OF
13 CALIFORNIA, by and through the
14 CALIFORNIA CORPORATIONS
COMMISSIONER,

15 Plaintiff,

16 v.

17 INVESTCO MANAGEMENT &
18 DEVELOPMENT LLC; CHRISTOPHER P.
19 EPSHA; STEVEN G. THOMPSON; BARRY D.
LeBENDIG; DOUGLAS R. HANSON;
20 INVESTCO AV7 LLC; INVESTCO AV8 LLC;
21 INVESTCO AV9 LLC; INVESTCO AV10
22 LLC; INVESTCO AV11 LLC; INVESTCO
AV12 LLC; INVESTCO AV14 LLC;
23 INVESTCO AV15 LLC; INVESTCO AV16
24 LLC; INVESTCO AV17 LLC; INVESTCO
AV18 LLC; INVESTCO AV19 LLC;
25 INVESTCO AV20 LLC; INVESTCO AV21
26 LLC; INVESTCO AV22 LLC; and DOES 1-
100, inclusive,

26 Defendants.

) CASE NO.

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **MOTION FOR PRELIMINARY**
) **INJUNCTION**

) Date:
) Time:
) Judge:
) Dept.:

) Trial Date: None

27 //

1 Defendant Investco Management & Development LLC (“IM&D”) is a California limited
2 liability company formed on February 17, 2006, and at all relevant times had a principal place of
3 business of 2145 19th Avenue, Suite 203, San Francisco, CA 94116. It is engaged in the business of
4 purchasing and managing real property on behalf of limited liability companies. Defendants
5 Christopher P. Epsha (“Christopher Epsha”), Steven G. Thompson (“Steven Thompson”), Barry D.
6 LeBendig (“LeBendig”), and Douglas R. Hanson (“Douglas Hanson”) are each managing members
7 of IM&D and licensed real estate brokers or salespersons.

8 **I. STATEMENT OF FACTS**

9 1. Beginning in June 2006, Defendant Christopher Epsha formed a series of California
10 limited liability companies, starting with Investco AV7 LLC and numbered consecutively up
11 through Investco AV22 LLC (“Investco AV LLCs”), with Defendant IM&D the managing member
12 of each. (Declaration of Kenneth Wu [“Wu Decl.”], par. 4.)

13 2. Beginning in September 29, 2006, through Investco AV LLCs, Defendants offered
14 and sold, in issuer transactions, securities in the form of interests in these Investco AV LLCs to at
15 least 251 investors for at least \$12,283,000. (Wu Decl. par. 4, Exhibit B.)

16 3. Defendants offered and sold these securities to the public at and through trade shows
17 and fairs throughout California and through the internet at website www.imdira.com and
18 www.investcomanagement.com (Declaration of Juan Rodriguez [“Rodriguez Decl.”], par. 4-5;
19 Declaration of Robert Pack [“Pack Decl.”], par. 3-4; Declaration of Jennifer Beesley [“Beesley
20 Decl.”], par. 6-7, Exhibit B; Declaration of Chris Lewis [“Lewis Decl.”], par. 5-10.)

21 4. The offers and sales of these securities were not qualified. (Declaration of Laura
22 Palya [“Palya Decl.”], par. 2.)

23 5. On behalf of the Investco AV LLCs, IM&D filed with the Department of
24 Corporations notices of sales of these securities claiming exemptions from qualification pursuant to
25 either California Corporations Code Section 25102(f) or federal Rule 506, Regulation D (Palya
26 Decl., par. 3), but the Defendants failed to conform to the requirements of these private offering
27 exemptions by engaging in general solicitations. (Rodriguez Decl., par. 4-5; Pack Decl., par. 3-4;
28 Beesley Decl., par. 6-7, Exhibit B; Lewis Decl., par. 5-10.)

1 6. Defendants represented to prospective members of these Investco AV LLCs that their
2 investment funds would be used by IM&D to negotiate and to purchase at a favorable price specific
3 real property in rural Los Angeles County, to manage the property for a period of time in
4 anticipation of appreciation due to projected population growth, and then to sell the property either
5 “as is”, with entitlements for development, or developed. (Rodriguez Decl., par. 5; Pack Decl., par.
6 8; Beesley Decl., par. 7, Exhibit B; Lewis Decl., par. 5, 6, 7, and 10; Wu Decl., par. 5, Exhibit A.)

7 7. Defendants disclosed to prospective investors in the Investco AV LLCs only the
8 compensation IM&D would receive as a manager of an Investco AV LLC, which would include a
9 commission at the time of the purchase of the property, a commission at the time of the eventual sale
10 of the property, management fees over several years, and a share of the profits upon the eventual sale
11 of the property. (Wu Decl., par. 5, Exhibit A; Pack Decl., par. 8.)

12 8. Defendants fraudulently did not disclose to prospective investors in the Investco AV
13 LLCs that for each Investco LLC formed, IM&D had formed and were managers of a corresponding
14 consecutively numbered Landco LLC, specifically Landco AV7 LLC through Landco AV22 LLC;
15 and that (with the exception of real property purchased directly by Investco AV10 LLC and Investco
16 AV11 LLC) for each real property purchased by an Investco LLC, a Landco LLC had first
17 purchased the same real property only weeks or months before at a substantially lower price, and
18 that as the Landco LLC manager, IM&D was receiving additional commissions and fees and
19 substantial profits from the prior purchase and sale of the property to the Investco AV LLC, all of
20 which resulted in a significantly lower value for the interests in the Investco AV LLCs than
21 disclosed to investors. (See Wu Decl., par. 5, Exhibit A, par. 6, Exh. B and par. 7 Exh. C; Rodriguez
22 Decl., par. 9; Pack Decl., par. 8; Lewis Decl. par. 8.)

23 9. On February 18, 2009 the Commissioner issued a Desist and Refrain Order to
24 Defendants IM&D, Christopher Epsha, and Steven Thompson for violations of Corporations Code
25 sections 25110 and 25401, finding that the interests in the Investco AV LLCs were securities that
26 had been offered and sold without qualification or exemption through general solicitations, including
27 solicitations at trade shows and fairs; and finding further that in connection with these offers and
28 sales, IM&D omitted to disclose the following material facts:

1 “a.) For each Investco LLC formed, IM&D had formed and were managers of a
2 corresponding consecutively numbered Landco LLC, specifically Landco AV7 LLC through
3 Landco AV22 LLC;

4 b.) With the exception of real property purchased directly by Investco AV10 LLC and
5 Investco AV11 LLC, for each real property purchased by an Investco LLC, a Landco LLC had
6 first purchased the same property only weeks or months before and at a substantially lower
7 price;

8 c.) Specifically, Investco 12 investors were not told that the real property they purchased
9 from Landco AV12 LLC (“Landco 12”) for \$375,000 (with an escrow closing date of
10 September 17, 2007) had been purchased by Landco 12 for \$207,850 just one month earlier
11 (with an escrow closing date of August 14, 2007), and that IM&D was to receive from the sale
12 of the real property by Landco 12 to Investco 12, 81.9% of the net profit and a total of \$150,000
13 in profit, commissions, and management fees.”

14 Pursuant to Corp. Code section 25532, Defendants IM&D, Christopher Epsha, and Steven
15 Thompson were ordered by the Commissioner to desist and refrain from the further offer or sale of
16 securities, including but not limited to interests in a limited liability company, unless and until
17 qualification had been made or unless exempt, and by means of any material misrepresentation or
18 omission. (Palya Decl., par. 4, Exhibit B.)

19 10. Defendants IM&D, Christopher Epsha, and Steven Thompson requested an
20 administrative hearing to challenge the allegations and findings in the February 18, 2009 Desist and
21 Refrain Order and a hearing was held before an Administrative Law Judge of the Office of
22 Administrative Hearings, State of California, over a three day period on September 29 and 30 and
23 November 4, 2009. The Administrative Law Judge upheld the Desist and Refrain Order in its
24 entirety in a Proposed Decision dated March 8, 2010, which the Commissioner adopted as his
25 Decision on April 6, 2010. (Palya Decl., par. 5, Exhibit C.) A writ was not filed pertaining to that
26 Decision and it is now final.

27 11. Following issuance of the Desist and Refrain Order on February 18, 2009, and in
28 violation of that Order, the Defendants continued to offer and sell unqualified non-exempt securities
at trade shows and fairs and through general solicitations, and continued to misrepresent and omit to
disclose material facts in the offer or sale of these securities, including the February 18, 2009 Desist
and Refrain Order. (Lewis Decl., par. 4-10; Beesley Decl., par. 4-7.) It is unknown at this
preliminary point how many investors or how much money was solicited in violation of the Desist
and Refrain Order and what was represented to investors as to the terms of that Order.

1 **II. ARGUMENT**

2 **A. The Commissioner Has The Authority to Bring This Action to Seek An Injunction**

3 California Corporations Code section 25530 and Government Code section 11180 provide
4 the Commissioner with broad, discretionary authority to bring actions for injunctive and other
5 ancillary relief whenever it appears that any person has engaged in or is about to engage in any act or
6 practice in violation of the Corporate Securities Law. Corp. Code Section 25530(a) provides:

7 “Whenever it appears to the commissioner that any person has engaged or is about to engage
8 in any act or practice constituting a violation of any provision of this division or any rule or
9 order hereunder, the commissioner may in the commissioner’s discretion bring an action in the
10 name of the people of the State of California in the superior court to enjoin the acts or practices
or to enforce compliance with this law or any rule or order hereunder. Upon a proper showing,
a permanent or preliminary injunction, restraining order or writ of mandate shall be granted....”

11 Where, as here, injunctive relief is authorized by statute, Plaintiff need not make a showing
12 of irreparable harm. “The theory is that when a legislative body has authorized the injunctive
13 remedy for the violation of a statute, it has determined as a matter of law that irreparable injury
14 attends the violation of the statute.” (Paul v. Wadler (1962) 209 Cal.App.2d 615, 625.) Moreover,
15 “Where a governmental entity seeking to enjoin the alleged violation of an ordinance which
16 specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on
17 the merits, a rebuttable presumption arises that the potential harm to the public outweighs the
18 potential harm to the defendant.” (IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 72.)

19 As set forth below, it is reasonably probable that the Department will prevail on the merits, as
20 it prevailed on the merits concerning these same facts and issues at a hearing requested by IM&D
21 before the Office of Administrative Hearings that took place over a period of three days in
22 September and November 2009, a Decision that is now final because a writ was not sought. The
23 evidence is overwhelming that the California Securities Law was violated, and that the Defendants
24 violated the Desist and Refrain Order by continuing to solicit investors in their securities offerings at
25 public fairs and shows throughout the state in violation of Corp. Code section 25110, and
26 fraudulently in violation of Corp. Code section 25401.

27 The Declarations accompanying this motion by undercover Department Investigators Chris
28

1 Lewis (regarding solicitations before and after the Administrative Hearing) and Jennifer Beesley
2 (who was solicited as recently as October 2010) show that after the issuance of the Desist and
3 Refrain Order the Defendants have continued to solicit investors for their unqualified securities at
4 fairs and festivals throughout the state and over the internet, and are misrepresenting the Desist and
5 Refrain Order to prospective investors. A preliminary injunction is necessary to prevent Defendants
6 from further violating the Corporations Code.

7 **B. Defendants Made Offers of Unqualified Non-Exempt Securities**

8 Corp. Code section 25110 provides:

9 “It is unlawful for any person to offer or sell in this state any security in an issuer
10 transaction ... unless such sale has been qualified ... or unless such security or transaction is
11 exempted or not subject to qualification under Chapter 1 [commencing with Sec. 25100].”

12 The interests in the Investco AV limited liability companies issued, offered and sold by
13 Defendants are “securities”. Corp. Code section 25019 defines “security” to include “interest in a
14 limited liability company”.

15 Corporations Code section 25017(b) reads: “‘Offer’ or ‘offer to sell’ includes every attempt
16 or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.”

17 Corporations Code section 25110 requires the securities offered and sold in this state be
18 qualified or exempt. The securities sold by Defendants have not been qualified by the Commissioner
19 and no exemption from qualification applies. The burden of proving an exemption is on the
20 Defendants (Corp. Code sec. 25163). The Defendants claim exemptions from qualification under
21 the limited offering exemption of California Corporations Code Section 25102(f), or the
22 substantially similar private offering exemption of federal Rule 506 of Regulation D, but these
23 exemptions are not available when there is a general solicitation, as is the case here where the
24 Defendants have offered and sold unqualified securities like carnival barkers at public fairs and
25 festivals and over the internet, and continue to do so.

26 Regulations governing the federal private offering exemption are found in 17 C.F.R. sections
27 230.501-230.506, generally referred to as “Regulation D”. Section 230.506 (“Rule 506”),
28 incorporates limiting provisions found in Rules 501 and 502 when it states at the outset that “to
qualify for an exemption under this section, offers and sales must satisfy all the terms and conditions

1 of sections 230.501 and 230.502.”

2 17 C.F.R. section 230.502(c) provides in pertinent part as follows:

3 “Limitation on manner of offering. Except as provided in section 230.504(b)(1), neither the
4 issuer nor any person acting on its behalf shall offer or sell the securities by any form of
5 general solicitation or general advertising, including but not limited to, the following:

- 6 (1) Any advertisement, article, notice or other communication, published in any newspaper,
7 magazine, or similar media broadcast over television or radio; and
8 (2) Any seminar or meeting whose attendees have been invited by any general solicitation or
9 general advertising....”

10 Similarly, at Corp. Code sec. 25102(f)(4) California’s limited offering exemption requires
11 that the offer and sale of the security not be “accomplished by the publication of any
12 advertisement....” Cal. Code of Regulations, Title 10, § 260.102.12(j) states, in language in relevant
13 part identical to 17 C.F.R. section 230.502(c) above, that the limited offering exemption does not
14 apply if there is any form of general solicitation or general advertising.

15 Securities Exchange Commission no-action letters may be treated as persuasive on the proper
16 interpretation of the prohibition against general solicitations. (See New York City Employees’
17 Retirement System. v. SEC, 45 F. 3d 7, 13 [2nd Cir. 1994]). Over the past 20 years the SEC has
18 issued No-action letters emphasizing that, to avoid a general solicitation that will vitiate a claimed
19 private offering exemption under Regulation D, there must be a pre-existing and “substantive”
20 relationship between the offeror and the offeree. (SEC Com., No-Action Letter, August 9, 1982,
21 1982 SEC No-Act. LEXIS 2662 [aka Woodtrails No-Action Letter]; see also SEC Com., No-Action
22 Letter, December 3, 1985, 1985 SEC No-Act. LEXIS 2917, [aka Hutton No-Action Letter].) A
23 “substantive” relationship is one that allows the offeror to determine that “each of the proposed
24 offerees currently has such knowledge and experience in financial and business matters that he or
25 she is capable of evaluating the merits and risks of the prospective investment.” (Woodtrails No-
26 Action Letter.)

27 In the Matter of Kenman Corporation, 1985 SEC LEXIS 1717, Kenman claimed its offering
28 was exempt under Rule 506 of Regulation D, because it had mailed invitations to a sales meeting to
persons considered likely to be financially sophisticated, chosen from various lists, including
executive officers of Fortune 500 companies. It was the SEC’s determination that the materials

1 mailed were “prospectuses” and constituted “offers” to sell securities under the Securities Act that
2 must be either registered or exempt. The SEC found that despite Kenman having reason to believe
3 the persons it sent the materials to had some degree of investment sophistication or financial well-
4 being, by sending these materials to persons with whom he had no pre-existing relationship, Kenman
5 engaged in general solicitation that was precluded by Rule 502(c) and was a public offering and not
6 exempt from registration. Citing precedent, the SEC underscored the need for both “the existence
7 and substance of pre-existing relationships between the issuer and those being solicited”.

8 As for the internet solicitation, pursuant to Corp. Code section 25610 the Commissioner
9 Ordered in Release No. 100-C, issued November 5, 1996, that the definition of an “offer” to sell a
10 security is broad enough to include an attempt or offer to dispose of an interest in a security for value
11 that is made on or through the internet, and that prior qualification of that internet offer is required
12 under Section 25110, unless an exemption from qualification exists.

13 The Defendants in our instant case had absolutely no prior relationship, much less prior
14 substantive relationship, with the members of the public visiting the many fairs and festivals, or
15 visiting their website, at which they solicited the sale of their securities. Investor and Declarant Juan
16 Rodriguez had no prior relationship with the Defendants when at the Brentwood Corn Fest in July
17 2007 he approached an IM&D booth and was told about an investment opportunity in real estate in
18 Southern California and was handed an IM&D flyer that talked about real estate investments for an
19 IRA. (Rodriguez Decl., par. 4) Robert Pack had no prior relationship with the Defendants when at
20 the Palo Alto Concourse d’Elegance car show in June 2007 he spoke with Defendant Barry
21 LeBendig at an IM&D booth and was told that IM&D was selling investments in limited liability
22 companies for tax deferred retirement accounts. (Pack Decl., par. 3) Undercover Corporations
23 Investigator and Declarant Chris Lewis (and the undercover persona he presented) had no prior
24 relationship with the Defendants at the California State Fair in Sacramento in August 2009 (after the
25 D&R Order had been issued) when he was told by Investco agents that Investco was offering an
26 opportunity to invest in real estate through limited liability companies managed by Investco. (Lewis
27 Decl., par. 4-10) Undercover Investigator Jennifer Beesley (and the undercover persona she
28 presented) had no prior relationship with the Defendants when she attended The Auburn Home

1 Show at the Gold County Fairgrounds in October 2010 and approached an Investco booth with a
2 sign reading that they rolled over IRAs into Real Estate and was told that Investco offered
3 investment opportunities and was handed a business card and was invited to visit IM&D's website
4 listed on the card. (Beesley Decl., par. 4-7) The website, www.imdira.com is attached as Exhibit B
5 to Jennifer Beesley's Declaration and it is replete with investment solicitations.

6 **C. Defendants Made Material Misrepresentations and Omitted to State Material Facts**

7 Corporations Code section 25401 provides:

8 "It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a
9 security in this state by means of any written or oral communication which includes an untrue
10 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 are made, not misleading."

11 The determination of the "materiality" of the misrepresentation or omission is that which
12 would be considered material to the "reasonable investor." (SEC v. Murphy (1980) 626 F.2d 633,
13 643). The "reasonable investor" standard is an objective standard; therefore, a plaintiff need not
14 prove that any particular investor actually relied on the misrepresentation or omission. (People v.
15 Baumgart (1990) 218 CA3d 1207, citing Bowden v. Robinson (1977) 67 CA3d 705, which held that
16 Sec. 25401 differs from common law negligent misrepresentation in that no reliance is required.)

17 The Defendants' failure to disclose to potential Investco AV LLC investors that a Landco
18 AV LLC managed by IM&D had previously purchased the property at a substantially lower price,
19 and that IM&D as managers of the Landco LLC would be receiving substantial upfront
20 commissions, fees and profits from the sale of the property by the Landco AV LLC to the Investco
21 AV LLC, were certainly material omissions. The Schedule prepared by Department Examiner Ken
22 Wu included in his accompanying Declaration as Exhibit B, shows the repeating presence of the
23 fraud with nearly every property transaction. For example, Landco AV12 LLC, formed and
24 managed by IM&D, paid \$207,850 for real property in August 2007 that it then through IM&D sold
25 to Investco AV12 LLC, formed and managed by IM&D, for \$375,000 just one month later in
26 September 2007. The property must appreciate in value substantially more for Investco AV12 LLC
27 investors to make a profit, if the starting point should have been \$207,850. This should have been
28 disclosed to all Investco AV LLC investors and their failure to do so violated Corp. Code sec. 25401.

1 **D. Defendants Continued to Offer Securities in Violation of the Desist and Refrain Order**

2 Corporations Code section 25532 provides, in pertinent part, as follows:

3 (a) If, in the opinion of the commissioner, (1) the sale of a security is subject to qualification
4 under this law and it is being or has been offered or sold without first being qualified, the
5 commissioner may order the issuer or offeror of the security to desist and refrain from the
6 further offer or sale of the security until qualification has been made under this law

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

7 On February 18, 2009 the Commissioner issued a Desist and Refrain Order to Defendants
8 IM&D, Christopher Epsha, and Steven Thompson for the violations of Corp. Code secs. 25110 and
9 25401, ordering that these Defendants refrain from the further offer or sale of securities, including
10 interests in a limited liability company, unless and until qualification had been made or unless
11 exempt, and by means of misrepresentation or omission of material fact. The Order was upheld by
12 the Office of Administrative Hearings and adopted by the Department; no writ was sought.

13 As shown in the Declarations of Department investigators Chris Lewis and Jennifer Beesley,
14 following issuance of the Desist and Refrain Order, the Defendants continued to offer and sell
15 unqualified nonexempt securities at California fairs and festivals and over the internet, and continued
16 to misrepresent and omit material facts in the offer or sale of securities, including the existence and
17 scope of the Order, in violation of that Order. (Lewis Decl., par. 4-10 and Beesley Decl., par. 4-7.)

18 **III. CONCLUSION**

19 Plaintiff respectfully requests that the Court issue a preliminary injunction enjoining the
20 Defendants from (1) violating Corp. Code sec. 25110; (2) violating Corp. Code sec. 25401; (3)
21 violating the Desist and Refrain Order; (4) disposing of documents of any kind in their possession or
22 control; (5) transferring or otherwise disposing of any real property in the possession or under
23 control without leave of the court, and (6) withdrawing funds from any bank account or disposing of
24 any real or personal property in their possession, custody or control without leave of the court.

25 Dated: January 20, 2011

PRESTON DuFAUCHARD
California Corporations Commissioner

27 By: _____
EDWARD KELLY SHINNICK
28 Attorney for Plaintiff