

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain Order
Issued to:

OAH No. 2016020993

JALAPENOS LEADERSHIP INDUSTRIES, LLC
AND KENNETH PORTER,

Respondent.

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated November 17, 2016, is hereby adopted by the Department of Business Oversight as its Decision in the above-entitled matter.

This Decision shall become effective on March 19, 2017.

IT IS SO ORDERED this 17 day of February 2017.

S
JAN LYNN OWEN
Commissioner of Business Oversight

BEFORE THE
DEPARTMENT OF BUSINESS OVERSIGHT
OF THE STATE OF CALIFORNIA

in the Matter of:

THE COMMISSIONER OF BUSINESS
OVERSIGHT OF THE STATE OF
CALIFORNIA,

OAH No. 2016020998

Complainant,

vs.

JALAPENOS LEADERSHIP
INDUSTRIES, L.L.C., and KENNETH
WESLEY PORTER.

Respondents.

PROPOSED DECISION

Karl S. Engeman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on October 25, 2016.

Marisa Urteaga-Watkins, Counsel, represented complainant Mary Ann Smith, Deputy Commissioner, Enforcement Division, Department of Business Oversight (Department).

There was no appearance by either respondent Jalapenos Leadership Industries, L.L.C, or respondent Kenneth Wesley Porter.

Respondent Kenneth Wesley Porter filed a Notice of Defense on or about January 6, 2016, and respondents were properly served with a Notice of Hearing. Their failure to appear constitutes a default pursuant to Government Code section 11520. Complainant's counsel opted to present evidence and the issuance of a Proposed Decision. Evidence was received and the matter was submitted on October 25, 2016.

FACTUAL FINDINGS

1. On December 4, 2015, complainant Mary Ann Smith filed a Desist and Refrain Order and Order for Ancillary Relief for alleged violations of Corporations Code sections 25110 and 25401. Respondents were ordered to desist and refrain from the further offer or sale in California of securities in the form of investment agreements and promissory notes, unless and until qualification has been made under applicable law or unless exempt. Respondents were also ordered to desist and refrain from such transactions by means of written or oral communications which include untrue statements of material fact or omissions of material facts. Complaint also included an Order for Ancillary Relief in the form of restitution to the one investor offered and sold securities in violation of Corporations Code sections 25110 and 25401. The amount of restitution is \$55,000 plus interest at the legal rate accumulated from the first day that investor "J.C." tendered the investment principal to respondents on February 26, 2013.

2. On December 4, 2015, complainant also filed and served a Statement in Support of Order Levying Administrative Penalties Pursuant to Corporations Code section 25252. The Order seeks a total of \$6,000 in administrative penalties from respondents for the alleged violations in the Desist and Refrain Order referenced above.

3. As noted above, respondent Kenneth Wesley Porter filed a timely Notice of Defense, effectively appealing complainant's orders,

+. At all relevant times, respondent Jalapenos Leadership Industries, L.L.C., (respondent JLI) was a limited liability company with a primary place of business located at 1015 Amador Street, Suite 4624, Vallejo, California, 94590.

5. At all relevant times, respondent Kenneth Wesley Porter (respondent Porter) was the managing member and a representative of respondent JLI. Respondent Porter's primary place of business was the same as respondent JLI's place of business.

6. Beginning in February of 2013, respondents offered and sold investment agreements and promissory notes relating to real estate investments to at least one California investor. On February 26, 2013, investor J.C., a resident of Sacramento, California, paid respondents capital to invest. The terms of the investment were as follows: J.C. paid to respondents a capital investment amount of \$35,000 for the purpose of investing in the purchase of at least one foreclosed or distressed real estate parcel, in exchange for a profit on capital invested. J.C. was to receive profits between five percent to fifty percent of any net profits made from the resale of the distressed or foreclosed investment properties.

7. Respondent offered and sold the above-described securities in issuer transactions. The Department has not issued a permit or other form of qualification authorizing any person to offer and sell these securities in the form of investment agreements and promissory notes relating to real estate investments in California.

8. Respondents made misrepresentations of material fact in connection with the offer and sale of these securities. More specifically, respondents misrepresented to investor J.C. that she would receive a profitable return of her investment. Respondents also misrepresented to investor J.C. that she would, at a minimum, receive her initial principal investment back at the termination of the investment. J.C.'s initial investment was \$55,000 tendered to respondents on February 26, 2013. J.C. had not received any of her initial investment as of the date of the hearing in this matter, despite her repeated requests to respondents for return of her initial investment.

9. J.C. testified during the administrative hearing and provided more details about her dealings with respondents. On January 10, 2012, J.C.'s mother died and left her an inheritance. J.C. had no investment experience when she met respondent Porter in a social context in or about May of 2012. There was some discussion of investments and the two exchanged telephone numbers. Approximately six months later, J.C. emailed respondent Porter inquiring about profitable investment opportunities relating to "flipping" distressed homes. Respondent Porter sent J.C. a PowerPoint presentation describing his organization, respondent JLI. Printed versions of the presentation slides were received in evidence which describe the benefits of private investments in distressed real estate purchased as rental units. The listed minimum investment for a first mortgage participation was \$50,000. In subsequent conversations, respondent Porter represented to J.C. that she could expect a 50 percent profit or receive back all of her investment at the end of the investment "term."

10. On February 21, 2013, respondent Porter signed a Promissory Note for \$55,000 payable to J.C. The promissory note recited that, "All principal and share of profits shall become due and payable upon the earlier of (1) the resale of the Property by the undersigned, or (2) One (1) year from date hereof." The note referenced a "Short-Term Funding Agreement" between the parties. That document was signed by respondent Porter on the same date and by J.C. on February 24, 2013. The Agreement includes that on or before March 1, 2013, J.C. would wire transfer \$50,000 to respondents to fund the investment. Respondent Porter, in turn, promised to pay J.C. her investment of \$55,000 plus 50 percent of the net profits from the sale of investment properties. J.C. explained that the \$55,000 included \$5,090 that respondent Porter represented was a "bonus" added to the amount J.C. actually paid respondents.

11. On February 26, 2013, J.C.'s bank wire-transferred \$50,000 to a checking account designated by respondent Porter. On the date that the transfer was made, the account balance was approximately \$100. Complainant produced the bank records for the account which were received in evidence. From the date of the wire transfer to August 30, 2013, when the checking account was essentially depleted, there is no banking entry suggesting any expenditure for the purchase of real estate. Many of the withdrawals recorded appear to relate to respondent Porter's personal expenses such as groceries. The overwhelming majority of listed withdrawals relate to ATM withdrawals by respondent Porter at an Indian gaming casino in San Pablo, California.

12. J.C. made repeated demands for return of her investment principal to no avail. She retained legal counsel and obtained a default judgment against respondents from the Superior Court of the County of Solano for \$55,000 plus pre judgment interest of \$5,530.60 and an additional \$4,075 in attorney's fees She has yet to collect any of these amounts from respondents.

13. J.C. lost a significant portion of her mother's inheritance as a result of her investment with respondents. The circumstances relating to the above-described events cause her considerable stress and exacerbated the grief that she was experiencing from her mother's death. The depression she suffered affected her college work and her grades fell. Her social life was adversely affected as well, and she no longer trusts other people.

LEGAL CONCLUSIONS

1. Corporations Code section 25110 reads:

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.

2. Corporations Code section 25401 reads:

It 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 that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading.

3. Corporations Code section 25532, subdivision (a), (c) and (e), reads:

(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.

[1] ... [10]

(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.

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

4. Corporations Code section 25252, subdivision (a), reads:

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

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

S. Respondents violated Corporations Code section 25110 in that they offered and sold securities to J.C. in the State of California without qualifying the sale pursuant to pertinent sections of the Corporations Code as set forth in Factual Findings 6 and 7. Respondents are thereby subject to a Desist and Refrain Order issued by the Commissioner of the Department in accordance with Corporations Code section 25532, subdivision (a).

6. Respondents violated Corporations Code section 25401 in that they offered and sold securities to J.C. in the State of California by means of written and oral communications that included untrue statements of material fact as set forth in Factual Findings 6 through 12. Respondents are thereby subject to a Desist and Refrain Order issued by the Commissioner of the Department in accordance with Corporations Code section 25532, subdivision (c).

7. J.C. is entitled to the ancillary relief ordered by the Commissioner pursuant to Corporations Code section 25532, subdivision (e). The Commissioner ordered respondents to pay J.C. \$55,000 plus interest at the legal rate from February 26, 2013, the day that J.C. paid \$50,000 to respondents and was credited with a \$5,060 bonus in accordance with the terms of her agreements with respondents. This restitution order comports with the public interest and reflects the loss to J.C. by reason of respondents' inappropriate and illegal conduct.

8. Respondents willfully violated Corporations Code sections 25110 and 25401 and are thereby subject to the Commissioner's imposition of administrative penalties of \$1,000 for the first violation and \$2,500 for each subsequent violation pursuant to Corporations Code section 25252, subdivision (a). The Commissioner's order imposing administrative penalties in this matter assessed a \$1,000 penalty for the sale of unqualified securities to J.C., \$2,500 for misrepresenting to J.C. that she would receive a profitable return on her investment, and an additional \$2,560 for misrepresenting to J.C. that she would, at a minimum, receive back her initial investment of \$55,060. The second and third violations are essentially duplicative. Therefore, the administrative penalties are reduced to \$3,500.

ORDER

1. The Commissioner's Desist and Refrain Order is affirmed in all respects.
2. Respondents shall pay J.C. the amount of \$55,000 plus interest at the legal rate from February 26, 2013, until payment is made. The payment shall be made to J.C. within 10 days of the date that the decision in this matter becomes final.

3. The Commissioner's Order Levying Administrative Penalties is affirmed, except the total amount of administrative penalties is reduced from \$6,000 to \$3,500.

Dated: November 17, 2016

KARL S. ENGEMAN
Administrative Law Judge
Office of Administrative Hearings