

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Desist and Refrain
Order

Issued to:

CHOICE EXPLORATION, INC.,
DOUBLE VISION CEDAR CROSSING
#1, JON MARTIN, AND HARRISON
OWENS,

Respondents.

Case No. 23 8696

OAH No. 2008070340

FINAL DECISION AFTER
RECONSIDERATION

PROCEDURAL HISTORY

This matter came for hearing in Sacramento, California before Gary A. Geren, Administrative Law Judge, Office of Administrative Hearings, State of California.

Miranda L. Maison, Senior Corporations Counsel, represented Preston DuFauchard, California Corporations Commissioner.

Joel Held and Laura J. O'Rourke, Attorneys at Law, Baker & McKenzie LLP (Baker & McKenzie), 2300 Trammel Crow Center, 2001 Ross Avenue, Dallas, Texas, 75201 represented respondents Choice Exploration, Inc., (Choice), Double Vision Cedar Crossing #1 (Double Vision), and Jon Martin (Martin) Martin.

Respondent Harrison Owens (Owens) represented himself.

The record was held open until August 11, 2008, to allow the parties to file closing briefs. The briefs were timely received and added to the record. The matter was submitted for decision on August 11, 2008.

The Administrative Law Judge issued a Proposed Decision on September 16, 2008, which was served on all parties by the Department of Corporations (Department) on October 23, 2008, in accordance with Government Code section 11517(c)(1). The Proposed Decision was not adopted as the Decision in this matter.

Pursuant to section 11517(c)(2)(E) of the Government Code, all parties were served on December 23, 2008, with an Order of Rejection of Proposed Decision of the Administrative Law Judge and notified that the case would be

decided by the California Corporations Commissioner upon the record and upon any written argument offered by the parties.

Counsel for Complainant submitted written argument on February 9, 2009. On April 1, 2009, a Final Decision was rendered, to be effective April 30, 2009, based on the existing record and Complainant's February 9, 2009 written argument.

On April 8, 2009, the Department received a letter from counsel for Respondents Choice, Double Vision and Martin requesting the Department reconsider the Final Decision because Respondent Choice, Double Vision and Martin had submitted a written argument on February 9, 2009 to the Department by facsimile. Respondents Choice, Double Vision and Martin had faxed their written argument to the Commissioner at counsel for Complainant's fax number rather than providing the argument to the reviewing division identified in the Order of Rejection of Proposed Decision, and consequently, the final argument failed to be considered prior to the rendering of the Final Decision (see Government Code sections 11425.10(a)(4) and 11425.30). The Department has construed the letter received on April 8, 2009 as a petition for reconsideration under Government Code Section 11521, and mailed a copy of the letter to all parties on April 14, 2009.

On April 27, 2009, the Commissioner granted the petition for reconsideration and vacated the final decision rendered on April 1, 2009. The order granting reconsideration provided that any party seeking to submit additional argument shall make a request within 10 days of the order. No request was received.

This Final Decision after Reconsideration is based on the existing record, Complainant's written argument and Respondents Choice, Double Vision and Martin's written argument. No written argument was received from Respondent Owens. The following shall constitute the Decision of the California Corporations Commissioner in the above-entitled matter.

FACTUAL FINDINGS

The Commissioner makes the following factual findings:

1. At all relevant times, Choice conducted business at 2221 Avenue J, Arlington, Texas, 76006.
2. At all relevant times, Owens represented himself as a "Senior Consultant" of Choice.
3. At all relevant times, Martin was, and continues to be, President of Choice.

4. Beginning in at least May 2008, Owens and Choice offered and/or sold securities in the form of interests or participation in an oil and gas title or lease or in payments out of production under that title or lease.

5. Owens is a full time employee of Choice, paid on commission basis for soliciting investors to participate in Choice's oil and gas drilling projects. His title is "Senior Consultant." In approximately March 2008, Owens began recruiting investors for Choice's Double Vision project. Owen's supervisor at that time was David Gauvey (Gauvey), Director of Marketing of Choice. Gauvey provided Owens with a list of potential investors; the list was known among Choice employees as the "California List," because it listed California residents. Owens used the California list to make "cold calls" to potential investors.

6. On approximately May 19, 2008, Owens placed an unsolicited telephone call to California resident Jon Wroten (Wroten), with whom he or Choice had no prior relationship. How Wroten came to be placed on the list was not explained at hearing; but far from being a potential investor, Wroten happened to be an Examiner for the Department of Corporations (a job akin to that of an investigator). In fact, Wroten received Owen's call while Wroten was sitting at his desk at the Department of Corporations in Sacramento, California.

Owens and Wroten engaged in a conversation. Owens asked Wroten if he was interested in investing in Choice's oil and gas drilling project. Wroten, acting as an undercover Examiner, told Owens that he was interested in perhaps investing. Wroten then provided Owens with an e-mail address so that Wroten could send Owens written investment materials about Choice and the oil and gas drilling project. Later that day, Owens sent Wroten an e-mail message stating, "I know the time you and I spent together will be valuable to you in the future." The written materials Owens attached to the e-mail included three documents: an application to participate as an interest owner in the Double Vision Cedar Crossing LP #1 program entitled, "Application Agreement" (Application Agreement); a Technical Team and Management profile (profile); and a Geological Summary for a Texas drilling project called "Double Vision Prospect, Cedar Crossing LP #1" (Double Vision), detailing the Double Vision project (Geological Report).

7. The documents that Owens e-mailed to Wroten did not include a prospectus, offering circular or private placement memorandum containing material information about the investment offer.

8. The Choice materials provided to Wroten represent that Choice is a "private corporation" with the capacity to "generate a prospect, acquire minerals, engineer and operate the drilling of the well, and disperse production revenue", which would maximize the "ability to produce an enhanced return on investment."

9. The Choice Application Agreement provides that to become an "Interest Owner" or "Participant" in the Double Vision "Program" a capital investment in the amount of \$140,000 per "Unit" is required.

10. The Application Agreement states that Choice "may accept or reject this application." It also states "...the undersigned [Wroten, in this case] acknowledges that: (a) the information received concerning participation in the Units was made only through direct, personal communication between the undersigned and a representative of Choice. Also, "the undersigned warrants and represents that the undersigned is financially able to bear the risk of losing his entire investment." The application requires that an applicant designate the legal title in which they wish to hold their investment (such as, "Individual Ownership," "Tenants in Common," or "Joint Tenants with Right of Survivorship," and the like).

11. The Application Agreement states that the undersigned has received and read a copy of the Confidential Private Placement Memorandum, including all exhibits and supporting documents thereto.

12. The Geological Report contains technical information regarding the Double Vision project. The geological report also contains a page titled, "Oil & Gas Investment Calculator" (calculator). The calculator lists revenues that an investor in Double Vision could expect to receive if the project is successful. Lastly, the geological report contains a section titled, "Tax Considerations," which summarizes tax implications an investor should consider.

13. The Technical Team and Management profile indicates that Jon Martin (Martin) is the President for Choice and provides as follows:

Jon Martin, President, has over 18 years experience in oil and gas operations and exploration. Mr. Martin began his career with Burlington Resources (formerly Meridian Oil Co.) as a Drilling and Production Engineer in the Houston Region. In 1996, Mr. Martin joined Belco Oil and Gas Company as Productions/Operations Manager. In 1998, Mr. Martin was transferred and assumed the responsibilities of Area Manager for the company's Rocky Mountain District. Following the acquisition of Belco by Westport Oil and Gas Company in 2001, Mr. Martin was appointed Area Manager over the Gulf Coast Region. Mr. Martin joined Choice Exploration in August of 2004, and has served as President since July of 2006.

14. The Technical Team and Management profile indicates that Jon Griffin (Griffin) is the vice president of Land and Legal for Choice and provides as follows:

Jon Griffin, VP Land and Legal, has over 22 years experience in oil and gas exploration and production as a

Petroleum Landman. Mr. Griffin began his career with Exxon Company, USA, and then moved to the mineral and landowner part of the oil and gas business when he joined Weyerhaeuser Company in 1983. Since 1997, Mr. Griffin has worked for mid-size independent oil and gas companies, most recently with Westport Oil and Gas Company, L.P. Mr. Griffin has a BA degree from Texas Tech University and a JD from Saint Mary 's University School of Law in San Antonio, Texas. Mr. Griffin has experience in nearly every state west of the Mississippi River, with a recent focus on Texas Gulf Coast and south Texas regions. Mr. Griffin joined the Company in July 2004. He is a member of AAPL, DAPL, HAPL, and the State Bar of Texas.

15. The State Bar of Texas website lists Griffin's membership status as "inactive". On July 14, 2008, the State Bar of Texas certified that Griffin was licensed to practice law in Texas on May 14, 1982 and is an inactive member in good standing with the State Bar of Texas. Griffin does not practice law and does not provide legal counsel to Choice.

16. On November 9, 2005, Choice and Choice's officers and employees, Frank Seidler, David Brooks, David Gauvey and Gary Hixon (Pennsylvania Respondents), received a Summary Order to Cease and Desist issued by the Pennsylvania Securities Commission (Pennsylvania 2005 Order) for violations of the Pennsylvania securities laws.

17. The Pennsylvania Respondents submitted an Offer of Settlement to the Pennsylvania Securities Commissioner without admitting or denying the allegations in the Pennsylvania 2005 Order, for the purpose of settling the proceeding.

18. On May 31, 2006, the Pennsylvania Securities Commission issued an Order (Pennsylvania 2006 Order) accepting an Offer of Settlement submitted by the Pennsylvania Respondents; rescinding the Pennsylvania 2005 Order; ordering the Pennsylvania Respondents to permanently cease and desist from violating the Pennsylvania securities laws; barring the Pennsylvania Respondents from offering or selling securities in Pennsylvania without securities counsel; and ordering Pennsylvania Respondents to pay \$5000 to the Pennsylvania Securities Commission.

19. Choice maintains a private placement memorandum entitled, "Choice Exploration inc. Private Placement Memorandum Double Vision Prospect Cedar Crossing LP #1 Chambers County, Texas" that contains a "Legal Proceedings" section. This section indicates that Choice believes that its offers and sales of interests in similar drilling programs were either not subject to, or exempt from, the registration provisions of both the "Securities Act of 1934 [stet] and relevant State Securities Acts." The document further provides that over the years, however, some state securities agencies have questioned and challenged the validity of those claims. The document describes an Offer Settlement submitted to the State of Pennsylvania in May,

2006, including an Order requiring Choice and other named individuals (but neither Martin nor Owens) to cease and desist from violations of the Pennsylvania Securities Act, an administrative assessment fee of \$5,000, and a bar from offering or selling securities in Pennsylvania for six months unless the respondents retained counsel and made all applicable filings (the Pennsylvania 2006 Order).

20. The private placement memorandum does not mention the November 9, 2005 Summary Order to Cease and Desist issued by the Pennsylvania Securities Commission (the Pennsylvania 2005 Order).

21. Owens did not provide Wroten the Private Placement Memorandum with the package of materials Owens sent Wroten, or at any other time.

22. Owens did not verbally disclose to Wroten any information regarding legal proceedings against Choice by other state securities commissions.

23. Choice did not submit an application for a permit to offer or sell securities in California, and the California Department of Corporations has not issued a permit or other form of qualification authorizing any person to offer or sell oil and gas interests in Double Vision in this state.

24. On May 22, 2008, Wroten received another telephone call from Owens. Owens asked if Wroten had reviewed the written materials. Wroten told Owens that he had, but that he needed more time to consider the materials.

25. On June 4, 2008, the Department of Corporations issued a Desist and Refrain Order (California Order) against Respondents. The Order provides that:

- a. The oil and gas interests that were offered by Owens and Choice are "securities" as that term is defined by California law.
- b. The securities were offered for sale or sold in California in an issuer transaction.
- c. In connection with the offers and/or sales of these securities, Owens and Choice made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. These misrepresentations and/or omissions included, but are not limited to:
 1. Failing to disclose that, in 2005, the Pennsylvania Securities Commission had ordered Choice, Chief Operating Officer David Brooks, and Director of Marketing David A. Gauvey to cease and desist from offering for sale and selling unregistered

securities in Pennsylvania.

2. Making a misleading statement in the Choice management team profile that Jonathan M. Griffin, Choice's Vice President of Land and Legal, is a member of the State Bar of Texas when, in fact, his membership status (Texas Bar No. 08460550) has been inactive since at least 2003.

26. The California Order provides that the California Corporations Commissioner is of the opinion that the interests of participation in an oil or gas title or lease or in payments out of production under that title or lease being sold by Choice Exploration, Inc., Double Vision Cedar Crossing #1, Harrison Owens, and Jon Martin are securities subject to qualification under the California Corporate Securities Law of 1968 and are being or have been offered or sold without first being qualified, and orders Choice Exploration, Inc., Double Vision Cedar Crossing #1, Harrison Owens, and Jon Martin to desist and refrain from the further offer or sale of securities in the State of California, including but not limited to interests or participation in an oil or gas title or lease or in payments out of production under the title or lease, unless and until qualification has been made under said law or unless exempt.

27. The California Order further provides that the California Corporations Commissioner is of the opinion that the securities of Choice Exploration, Inc. were offered or sold in this state by means of written or oral communications which include an untrue statement of a material fact or omitted 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, in violation of Section 25401 of the Corporate Securities Law of 1968, and orders Choice, Double Vision, Owens and Martin to desist and refrain from offering or selling or buying or offering to buy any security in the State of California, including but not limited to interests or participation in an oil and gas title or lease or in payments out of production under that title or lease, 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 light of the circumstances under which they were made, not misleading.

28. The California Order does not mention the Pennsylvania 2006 Order.

LEGAL CONCLUSIONS

1. Corporations Code section 25110 provides that it is unlawful for any person to offer any security in issuer transaction unless the security has been qualified or is exempted.

2. Corporations Code section 25017, subdivision (b), defines an "offer" as follows:

"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.

3. Corporations Code section 25019 includes within the definition of a "security" an offering in the form of a "certificate of interest or participation in oil, gas or mining title or lease."

4. Corporations Code section 25008, subdivision (b), provides that "[A]n offer to sell or to buy is made in this state when the offer originates from the state or is directed by *the offeror to this state...*"

5. Corporations Code section 25010 provides that an "issuer" is "any person who proposes to issue any security."

6. Corporations Code section 25010, subdivision (b), provides:

With respect to certificates of interest or participation in oil, gas or mining titles or leases or in payments out of production under those titles or leases, "issuer" means a person or persons in active control of the exploration or development of the property who sell those interests or participations or payments or any person or persons who subdivide and sells those interests or participations or payments...

Offer of Securities in Violation of Section 25110

7. Based on Factual Findings 1 through 14 and 24, and Legal Conclusions 1 through 6, each of the Respondents offered for sale securities in California in an issuer transaction without having first registered or qualified the securities. Owen's telephone call, e-mail and its attachments sent to Wroten comprised an attempt by Choice to recruit a California resident to be an investor in the Double Vision project.

Wroten's telephone number appeared on a list that was given to Owens by his supervisor, Gauvey, a senior employee of Choice. While Martin argued at hearing that Owens acted outside the scope of his employment at Choice when he contacted Wroten, and therefore, Martin could not be held liable for Owens acts, the evidence set forth at Factual Findings 5 and 7 stand inapposite to this contention. Martin, as Choice's president, cannot separate himself from the acts of Choice's Director of Marketing and sales supervisor (Gauvey) and Choice's senior consultant (Owens) who used the "California List" to contact Wroten and other California residents.

Choice attempted to recruit California investors, including Wroten, by touting Choice's past successes in oil and gas exploration, generally, and by detailing the potential financial and tax benefits of investing in the Double Visions project, specifically. The specificity of the written materials Choice

provided Wroten, as set forth in Factual Findings 6 through 12, provide persuasive evidence that Choice made an "offer," as that term is defined in Legal Conclusion 2.

Material Omission in Violation of Section 25401

8. 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 light of the circumstances under which they were made, not misleading.

9. The standard for "materiality" in California, similar to the federal standard, is whether a "reasonable investor" would consider the misstatement and/or omission significant in making a determination whether to invest. *Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1984) 184 Cal. App. 3d 1520. The federal securities laws defines a "misstatement" as "material" only if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision. *Basic, Inc. v. Levinson* (1988) 485 U.S. 224. Furthermore, under the federal standard an "omission" is "material" only if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available. *Basic, Inc. v. Levinson*, supra, at 231-32.

10. A showing of investor reliance or proof of causation is not necessary to prove a violation under Corporations Code section 25401. *Bowden v. Robinson* (1977) 67 Cal. App. 3d 705, 715.

11. Failure to disclose a state cease and desist order is clearly relevant to a reasonable investor, who is naturally interested in whether management is following the law in marketing securities. *S.E.C. v. Merchant Capital, LLC* (11th Cir. 2007) 483 F.3d 747, 771-772. A reasonable investor making a decision whether or not to invest in Choice would want to know that Choice and two of its controlling officers, Brooks and Gauvey, were involved in another state's cease and desist order. Further, consistent with *Basic, Inc. v. Levinson*, there is a substantial likelihood that the disclosure of the Pennsylvania 2005 Order would have been viewed by a reasonable investor as having significantly altered the total mix of information available when making a decision whether or not to invest in Choice.

12. By failing to disclose the Pennsylvania 2005 Order to Wroten at the time of the offer, Respondents made a material omission in violation of Corporations Code section 25401. Respondents argue that because they settled the matter, the subsequent settlement Order is the only material information required to be disclosed. That might be true if Respondents had discovered their violations of the Pennsylvania securities laws, and self-

reported the violations to the state securities regulator along with a stipulated settlement offer. On the facts presented, however, the Respondents entered the settlement only after the state securities regulator filed its 2005 Cease and Desist Order. The Pennsylvania regulator's rescission of the 2005 Order by the Pennsylvania 2006 Order represents the cumulative effect of the 2005 Order, and cannot be viewed in isolation thereby rendering the Pennsylvania 2005 Order immaterial to a prospective investor. Accordingly, failure to refer to the 2005 Order, either to Wroten or in the Private Placement Memorandum, constitutes the omission of a material fact that any reasonable investor would want to consider before making an investment in Respondents' venture.

Griffin's Texas Bar Status

13. Based on Factual Findings Numbers 14 and 15, and Legal Conclusions Numbers 8 through 11, Respondents did not make an untrue statement of a material fact, or omit to state material facts necessary to make the statements made, in light of the circumstances in which they were made, not misleading, in the Choice management team profile by stating that Jon Griffin, Choice's Vice President of Land and Legal, is a member of the State Bar of Texas. Respondents have established that Jon Griffin is, indeed, a member of the State Bar of Texas, although his status is inactive. The testimony at the hearing established that Jon Griffin does not provide legal counsel to Choice. Consequently, the title of "VP of Land and Legal," as well as the information in the management team profile regarding his juris doctor and membership in the State Bar of Texas may mislead a prospective investor into believing that Jon Griffin engages in the practice of law while employed by Choice.

However, the Desist and Refrain Order only provides that the statement about membership in the State Bar of Texas is materially false or misleading, which was not established in this matter.

ORDER

The Desist and Refrain Order issued on June 6, 2008, by the California Corporations Commissioner against Respondents is affirmed in part and rescinded in part:

1. The Desist and Refrain Order against Respondents for violation of Corporations Code section 25110 is AFFIRMED.
2. The Desist and Refrain Order against Respondents for violation of Corporations Code section 25401 based on a material omission Respondents made for failing to disclose the Pennsylvania Order is AFFIRMED.
3. The Desist and Refrain Order against Respondents for violation of Corporations Code section 25401 based on material misrepresentation

Respondents made related to Griffin's Texas Bar membership status is RESCINDED.

This Decision shall become effective on May 10, 2010.

IT IS SO ORDERED.

DATED: April 8, 2010

PRESTON DuFAUCHARD
CALIFORNIA CORPORATIONS COMMISSIONER